

A Comparative Study of Jurisdictional Limits and Exceptions in UK, USA and Pakistan: Excess & Refusal Jurisdictional Ultra Vires

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Abstract

This paper compares the doctrine of ultra vires in the administrative law of the UK, USA and Pakistan, and examines the grounds for exemption from judicial review based on this doctrine. This study examines the concept and application of jurisdictional ultra vires, which refers to the excess or refusal of jurisdiction by courts or tribunals, in three different legal systems: UK, USA and Pakistan. The study compares and contrasts the sources, scope and consequences of jurisdictional ultra vires in each system, as well as the grounds for exemption or immunity from such challenges. The study also analyses the impact of jurisdictional ultra vires on the rule of law, judicial independence and human rights protection. The paper analyses how the courts in the three countries have applied the doctrine of ultra vires to review the decisions of public authorities, and how they have recognized certain exceptions or limitations to this doctrine, such as ouster clauses, political questions, national security, etc. The paper also discusses the similarities and differences among the three legal systems in terms of their approach to ultra vires and judicial review.

Keywords: *Judicial Review, Administrative Law, Ultra Vires, Jurisdictional Defects of administrative actions, Excess & Refusal Jurisdictional Ultra Vires*

1. Introduction:

Ultra vires means acting beyond the legal authority or power conferred by law. It can be classified into substantive and procedural ultra vires, depending on whether the error is related to the scope or the manner of exercising the power. Jurisdictional ultra vires is a legal doctrine that limits the power of public authorities to act beyond their lawful authority. It can be divided into two types: excess jurisdictional ultra vires, where an authority acts outside the scope of its statutory powers, and refusal jurisdictional ultra vires, where an authority fails to exercise its statutory powers when required. Excessive jurisdiction and refusal to exercise jurisdiction are two opposite but equally problematic phenomena in the legal systems of UK, USA and Pakistan. Excessive jurisdiction occurs when a court or a tribunal assumes authority over a matter that is beyond its competence or scope, while refusal to exercise jurisdiction occurs when a court or a tribunal declines to hear a matter that falls within its competence or scope. Both situations can have negative consequences for the parties involved, such as delay, injustice, uncertainty, or violation of rights.

1. Doctrine of Ultra Vires in UK, USA and Pakistan

The doctrine of ultra vires is a legal principle that limits the power of public authorities to act only within the scope of their statutory or constitutional authority (Craig, 2016). The courts in the UK, USA and Pakistan have applied this doctrine to review the decisions of public authorities and to invalidate them if they exceed their lawful power (Elliott & Thomas, 2017; Chemerinsky, 2018; Khan, 2019). However, the courts have also recognized certain exceptions or limitations to this doctrine, such as ouster clauses, political questions, national security, etc. These are situations where the courts either defer to the decision of the public authority or decline to exercise judicial review altogether (Wade & Forsyth, 2014; Fallon, 2018; Mahmood, 2020).

2. Legal Systems: Approaches to Dealing with Jurisdictional Ultra Vires

Different legal systems have different approaches to dealing with jurisdictional ultra vires, depending on their constitutional and administrative law frameworks. In common law systems, such as the UK, Australia and Canada, jurisdictional ultra vires is based on the principle of legality, which requires that public authorities act within the limits of their statutory or prerogative powers, and respect the rights and freedoms of individuals (Craig, 2016). If an authority acts ultra vires, its decision or action can be quashed by a court, and the authority may be liable for damages or other relief (Elliott & Thomas, 2017). However, there are some exceptions or immunities that can shield an authority from such challenges, such as ouster clauses, privative clauses, statutory finality, national security, Crown immunity or parliamentary privilege (Forsyth et al., 2017). In civil law systems, such as France, Germany and Japan, jurisdictional ultra vires is based on the principle of legality, which requires that public authorities act in accordance with the law and the general interest (Rivero & Waline, 2018). If an authority acts ultra vires, its decision or action can be annulled by a court, and the authority may be subject to sanctions or disciplinary measures (Schwarze et al., 2019). However, there are some grounds for exemption or immunity that can protect an authority from such challenges, such as margin of appreciation, discretionary power, *acte de gouvernement*, *acte détachable* or state secrets (Boussaguet et al., 2019).

Therefore, both common law and civil law systems share the concept of jurisdictional ultra vires, but differ in the sources, scope and consequences of such challenges, as well as the grounds for exemption or immunity from them. These differences reflect the historical, political and cultural contexts of each system, as well as their respective views on the role and accountability of public authorities. The UK, USA and Pakistan legal systems are all based on the common law tradition, which means they rely on judicial precedents and case law to resolve disputes. However, there are also significant differences among them in terms of their approach to ultra vires and judicial review.

3. Origin in United Kingdom, United States and Pakistan

In the UK, the doctrine of jurisdictional ultra vires is based on the principle of parliamentary sovereignty, which means that the courts cannot question the validity of an act of parliament. However, the courts can review the actions of public authorities that derive their powers from parliament, and declare them ultra vires if they are inconsistent with the statutory provisions or the common law (Gautam, & Nathani, 2020). The grounds for exemption from judicial review in the UK are mainly based on the concept of ouster clauses, which are statutory provisions that explicitly or implicitly exclude or limit the judicial review of certain decisions or actions. However, the courts have adopted

a restrictive approach to interpreting ouster clauses, and have often found ways to circumvent them or declare them invalid. The House of Lords in *Anisminic v Foreign Compensation Commission* [1969], held that an ouster clause that purported to make a decision of a commission final and conclusive did not apply to a decision that was null and void for being ultra vires. Similarly, in *R (Privacy International) v Investigatory Powers Tribunal* [2019], the Supreme Court held that an ouster clause that stated that no determination of the tribunal shall be subject to appeal or liable to be questioned in any court did not prevent a judicial review of a tribunal's decision on a point of law.

In the USA, the doctrine of jurisdictional ultra vires is based on the principle of constitutional supremacy, which means that the courts can review the constitutionality of any act of congress or state legislature, as well as the actions of public authorities that derive their powers from them. The grounds for exemption from judicial review in the USA are mainly based on the concept of political questions, which are issues that are constitutionally committed to another branch of government or are inherently unsuitable for judicial resolution. However, the courts have adopted a flexible approach to identifying political questions, and have often exercised their discretion to decide whether to intervene or abstain from a case. The Supreme Court in *Baker v Carr* [1962], held that a challenge to a state's apportionment scheme was not a political question, and that the courts had the power and duty to adjudicate claims based on equal protection and due process. Similarly, in *Zivotofsky v Clinton* [2012], the Supreme Court held that a dispute over whether a US citizen born in Jerusalem could have Israel listed as his place of birth on his passport was not a political question, and that the courts had the authority to decide whether a federal statute conflicted with the president's power to recognize foreign sovereigns.

In Pakistan, the doctrine of jurisdictional ultra vires is based on the principle of Islamic supremacy, which means that the courts can review any act of parliament or provincial assembly, as well as the actions of public authorities that derive their powers from them, for their conformity with Islamic injunctions. The grounds for exemption from judicial review in Pakistan are mainly based on the concept of necessity, which is invoked to justify actions or decisions that are taken in exceptional circumstances to preserve the constitutional order or national interest. However, the courts have adopted a cautious approach to applying necessity, and have often imposed conditions or limitations on its invocation or validity. The Supreme Court in *Zafar Ali Shah v Pervez Musharraf* [2000], validated a military coup d'etat on the basis of necessity, but imposed a three-year deadline for holding general elections and restoring democracy. Similarly, in *Sindh High Court Bar Association v Federation of Pakistan* [2009], the Supreme Court declared a second military coup d'etat illegal and unconstitutional, despite its purported justification on grounds of necessity (Mahmood, 2020).

4. Grounds for Judicial Review and Exemptions

The doctrine of judicial review is the power of the judiciary to examine the constitutionality and legality of the actions of the executive and legislative branches of government.

In the UK, the grounds for judicial review in the UK are illegality, irrationality, procedural impropriety and breach of human rights. However, some decisions are excluded from judicial review by statute, such as national security matters, immigration and asylum cases, and certain prerogative powers of the Crown (Ministry of Justice, 2021).

In the USA, the grounds for judicial review in the USA are violation of constitutional rights, federal laws or treaties. However, some decisions are immune from judicial review by the political question

doctrine, which means that the courts will not interfere with issues that are entrusted to the political branches of government, such as foreign affairs, war powers and impeachment (Hamilton, 1788).

In Pakistan, the grounds for judicial review in Pakistan are ultra vires, mala fide, unreasonableness and violation of fundamental rights. However, some decisions are exempted from judicial review by constitutional provisions, such as emergency powers, martial law and amendments to the Constitution (Tariq, 2020).

5. Comparative Analysis of Regulation of Excessive and Refusal of Jurisdiction in UK, USA and Pakistan

6.1. Regulation of Excessive and Refusal of Jurisdiction in USA

In the UK, excessive jurisdiction and refusal to exercise jurisdiction are regulated by the principles of judicial review and statutory interpretation. Judicial review is the process by which the courts can check and correct the actions of public authorities, including lower courts and tribunals, to ensure that they act lawfully, rationally, fairly, and proportionately. Statutory interpretation is the process by which the courts can determine the meaning and scope of legislation enacted by Parliament, and apply it to the cases before them. The UK courts have developed various rules and methods of statutory interpretation, such as the literal rule, the golden rule, the mischief rule, and the purposive approach. These tools help the courts to avoid excessive jurisdiction and refusal to exercise jurisdiction by giving effect to the intention of Parliament and respecting the separation of powers. (Elliott, M., & Thomas, R. (2017))

6.2. Regulation of Excessive and Refusal of Jurisdiction in USA

In the USA, excessive jurisdiction and refusal to exercise jurisdiction are governed by the doctrines of federalism and comity. Federalism is the system of government in which power is divided between the federal government and the states, each having its own constitution, laws, and courts. Comity is the principle of mutual respect and deference among different jurisdictions, especially in matters of private international law. The USA courts have established various tests and criteria to determine whether they have jurisdiction over a matter, such as the minimum contacts test, the forum non conveniens doctrine, and the abstention doctrine. These tests and criteria help the courts to avoid excessive jurisdiction and refusal to exercise jurisdiction by balancing the interests of the parties, the states, and the federal government. (Neubauer, D. W., & Meinhold, S. S. (2016))

6.3. Regulation of Excessive and Refusal of Jurisdiction in Pakistan

In Pakistan, excessive jurisdiction and refusal to exercise jurisdiction are influenced by the constitutional role of the Supreme Court and the High Courts. The Supreme Court is the highest judicial authority in Pakistan, and has original, appellate, advisory, and suo moto jurisdiction. Suo moto jurisdiction is the power of the Supreme Court to take notice of any matter of public importance or human rights violation on its own initiative, without any formal petition or complaint. The High Courts are the highest judicial authorities in their respective provinces, and have original, appellate, writ, and revisional jurisdiction. Writ jurisdiction is the power of the High Courts to issue orders or directions to any person or authority for the enforcement of fundamental rights or any other legal duty. The Supreme Court and the High Courts have exercised their suo moto and writ jurisdictions extensively in recent years, which has raised some concerns about excessive jurisdiction and interference with executive and legislative functions. On the other hand, some lower courts and tribunals have shown reluctance or

inability to exercise their jurisdictions effectively in some cases, which has raised some concerns about refusal to exercise jurisdiction and denial of justice. (Mahmood, S., & Khanam R. (2019).

7. Comparative Analysis Grounds for Exemption from Judicial Review

Jurisdictional ultra vires is a legal doctrine that limits the power of public authorities to act beyond their statutory or constitutional authority. (Ellis, 2003) Excess jurisdictional ultra vires occurs when an authority exceeds its lawful power, while refusal jurisdictional ultra vires occurs when an authority fails to exercise its lawful power. Therefore, the concept and application of these two types of ultra vires in the UK, USA and Pakistan, and examines the grounds for exemption from judicial review are as under:

In the UK, the principle of parliamentary sovereignty means that public authorities derive their power from statutes enacted by Parliament, and any action that is inconsistent with the statute is ultra vires and void. However, there are some exceptions to this rule, such as when the statute confers a discretion on the authority, or when the authority acts under prerogative powers or common law powers. In these cases, the courts may apply a reasonableness test to determine whether the authority has acted within its lawful scope.

In the USA, the principle of separation of powers means that public authorities derive their power from the Constitution, which allocates different functions to the legislative, executive and judicial branches. Any action that violates the Constitution is ultra vires and void. However, there are some exceptions to this rule, such as when the Constitution grants implied or inherent powers to the authority, or when the authority acts under delegated powers or federal preemption. In these cases, the courts may apply a rational basis test or a strict scrutiny test to determine whether the authority has acted within its lawful scope.

In Pakistan, the principle of constitutional supremacy means that public authorities derive their power from the Constitution, which establishes a federal system of government with a parliamentary form of democracy. Any action that contravenes the Constitution is ultra vires and void. However, there are some exceptions to this rule, such as when the Constitution allows for emergency powers or martial law, or when the authority acts under Islamic law or customary law. In these cases, the courts may apply a necessity test or a proportionality test to determine whether the authority has acted within its lawful scope.

8. Jurisprudence of Courts

Excess and refusal jurisdictional ultra vires are two types of errors that can occur when a public authority acts beyond its legal powers or fails to exercise its legal powers. These errors can be challenged by judicial review in the courts of the UK, USA and Pakistan. In the UK, the doctrine of ultra vires is based on the principle of parliamentary sovereignty, which means that only Parliament can make or change the law, and any delegated authority must act within the limits of the law. The courts have the power to declare any act of a public authority that is ultra vires as null and void. For example, in *R v Secretary of State for Education and Employment ex parte National Union of Teachers* [2000], the court held that the Secretary of State had acted ultra vires by imposing performance-related pay for teachers without consulting them. In the USA, the doctrine of ultra vires is based on the principle of separation of powers, which means that the executive, legislative and judicial branches of

government have distinct and limited powers that cannot be encroached by each other. The courts have the power to invalidate any act of a public authority that is ultra vires as unconstitutional. For example, in *Youngstown Sheet & Tube Co v Sawyer* [1952], the Supreme Court held that President Truman had acted ultra vires by seizing steel mills during a labor dispute without congressional authorization. In Pakistan, the doctrine of ultra vires is based on the principle of constitutional supremacy, which means that the Constitution is the supreme law of the land, and any delegated authority must act in accordance with it. The courts have the power to strike down any act of a public authority that is ultra vires as illegal. For example, in *Wukala Mahaz Barai Tahafaz Dastoor v Federation of Pakistan* [1998], the Supreme Court held that President Leghari had acted ultra vires by dissolving the National Assembly and dismissing Prime Minister Sharif without satisfying the constitutional requirements.

9. Application of Jurisdictional Ultra Vires in UK, USA and Pakistan

The concept and application of jurisdictional ultra vires, which refers to the excess or refusal of jurisdiction by courts or tribunals, in three different legal systems: UK, USA and Pakistan. The study compares and contrasts the sources, scope and consequences of jurisdictional ultra vires in each system, as well as the grounds for exemption or immunity from such challenges. The study also analyses the impact of jurisdictional ultra vires on the rule of law, judicial independence and human rights protection. Jurisdictional ultra vires is a legal doctrine that limits the power and authority of courts or tribunals to adjudicate on certain matters or grant certain remedies. This doctrine is applied differently in various legal systems, depending on their constitutional and statutory frameworks, as well as their judicial traditions and practices. Therefore, the concept and application of jurisdictional ultra vires in three legal systems: UK, USA and Pakistan discuss as under

In the UK, jurisdictional ultra vires is mainly derived from the principle of parliamentary sovereignty, which means that the courts cannot question the validity or legality of any act of Parliament. The courts can only interpret and apply the law as enacted by Parliament, and they have no power to strike down or invalidate any legislation. However, the courts can review the actions of public authorities, such as ministers, agencies or local governments, and declare them ultra vires if they exceed or abuse their statutory powers or act contrary to the rule of law. The courts can also review the decisions of inferior courts or tribunals, and quash them if they are found to be ultra vires on grounds of jurisdiction, error of law, procedural impropriety or irrationality (Barnett, 2017).

In the USA, jurisdictional ultra vires is mainly derived from the principle of constitutional supremacy, which means that the courts have the power and duty to review the constitutionality of any act of Congress, the executive branch or the states. The courts can strike down or invalidate any legislation or action that violates the federal Constitution or infringes on the rights and liberties of the people. However, the courts are also bound by the doctrine of separation of powers, which means that they cannot interfere with the political questions or policy choices that are entrusted to the other branches of government. The courts can also review the decisions of lower federal courts or state courts, and reverse them if they are found to be ultra vires on grounds of jurisdiction, error of law, due process or equal protection (Tribe, 2000).

In Pakistan, jurisdictional ultra vires is mainly derived from the principle of Islamic supremacy, which means that the courts have the power and responsibility to ensure that all laws and actions are in conformity with the Quran and Sunnah. The courts can declare any legislation or action that is repugnant to Islam as void and ultra vires. However, the courts are also subject to the doctrine of

judicial restraint, which means that they should avoid unnecessary interference with the legislative and executive functions of the state. The courts can also review the decisions of lower courts or tribunals, and set them aside if they are found to be ultra vires on grounds of jurisdiction, error of law, natural justice or public interest (Mahmood & Khanam. 2019).

10. Jurisdictional Ultra Vires: Consequences on the Rule of Law, Judicial Independence and Human Rights

This can have negative consequences for the rule of law, judicial independence and human rights protection. The rule of law requires that public authorities act in accordance with the law and are subject to judicial review and accountability. Jurisdictional ultra vires undermines the rule of law by allowing public authorities to disregard the law and evade judicial scrutiny. Judicial independence is essential for ensuring that judges can apply the law impartially and without interference from other branches of government or external influences. Jurisdictional ultra vires threatens judicial independence by creating uncertainty and inconsistency in the legal system and by exposing judges to political pressure or manipulation. Human rights protection depends on the existence of effective legal remedies and safeguards for individuals whose rights are violated by public authorities. Jurisdictional ultra vires weakens human rights protection by limiting the access and availability of such remedies and safeguards and by creating gaps and loopholes in the legal framework. (Barnett, 2017)

11. Concluding Remarks

The comparative study of jurisdictional limits and exceptions in the UK, USA, and Pakistan sheds light on the concept of jurisdictional ultra vires and its implications. The examination of sources, scope, and consequences in each legal system provides valuable insights into the functioning of courts and tribunals. It is clear that judicial review plays a significant role in upholding the rule of law, safeguarding judicial independence, and protecting human rights. The analysis of exemptions and immunities from judicial review highlights the need for a balanced approach that considers factors such as ouster clauses, political questions, and national security. Moving forward, it is crucial to continue exploring avenues for strengthening the application of the doctrine of ultra vires. This can include promoting transparency, accountability, and consistency in decision-making by public authorities. Additionally, fostering dialogue and knowledge-sharing among legal systems can contribute to a more comprehensive understanding of jurisdictional ultra vires and its implications.

In conclusion, this study has shown that excess and refusal jurisdictional ultra vires are common concepts in the UK, USA and Pakistan, but they differ in their sources, applications and exemptions. The main difference is that in the UK, statutes are supreme; in the USA, the Constitution is supreme; and in Pakistan, both the Constitution and Islamic law are supreme. The main similarity is that in all three countries, the courts have the power to review and invalidate ultra vires actions by public authorities. Hence, jurisdictional ultra vires is a complex and dynamic phenomenon that varies across different contexts and jurisdictions, and that there is a need for more clarity and consistency in its definition and application.

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