

INTRODUCTION TO ADMINISTRATIVE LAW

TOPIC 3: JUDICIAL REVIEW

Lesson 3.3 Substantive Ultra Vires



Lesson 3.3: Learning Outcomes

- At the end of this topic, students should be able to:
 - Define substantive ultra vires.
 - Demonstrate the basic knowledge of substantive ultra vires.
 - Develop communication, verbal and written skills, which play an important part in administrative law.
 - Describe about substantive ultra vires.

Introduction

- An action is ultra vires if it goes outside this limit of the power given to it.
- 2 types of ultra vires doctrine:
 - Substantive ultra vires
 - Procedural ultra vires



Substantive Ultra Vires

- Substantive ultra vires means that the rule making authority has **no substantive power** under the empowering act to make rules in question.



Substantive Ultra Vires

- The Courts have the jurisdiction to review a subsidiary legislation on the ground of substantive ultra vires and declare it invalid.
- This is called **judicial review** of subsidiary legislation.



Substantive Ultra Vires

- Doctrine of **presumptive validity**:
 - A subsidiary legislation is presumed to be valid and binding on whom it applies until a court of competent jurisdiction declares it invalid.
 - The presumption of validity can be rebutted only by clear and convincing proof.



Grounds for substantive ultra vires

1. The enabling Act is unconstitutional
2. The subsidiary legislation is unconstitutional
3. The subsidiary legislation is inconsistent with parent Act
4. The subsidiary legislation is to be used for improper purpose
5. The unreasonableness of subsidiary legislation
6. The subsidiary legislation is not proportionate
7. The subsidiary legislation is uncertain

1. The enabling Act is unconstitutional

- In Malaysia, the Federal Constitution is the highest/ supreme law of the land.
- Thus, all laws that do not follow the Constitution can be declared invalid.
- When the enabling/ parent Act is invalid, the subsidiary legislation will also be invalid.
- E.g. S 118(5) Road Traffic Ordinance 1958 gives preference to Malay applicants = contravene equality clause (Article 8 Federal Constitution)

1. The enabling Act is unconstitutional

- Grounds for unconstitutionality:
 - Breach of liberty of person (Article 5 Federal Constitution)
 - Equality (Article 8)
 - Freedom of speech, assembly and association (Article 10)
 - Freedom of religion (Article 11)
 - Rights of education (Article 12)
 - Right of property (Article 13)



2. The subsidiary legislation is unconstitutional

- This refers to a situation where the parent/ enabling Act is constitutional, but the subsidiary legislation is unconstitutional.
- When the subsidiary legislation is unconstitutional, it is invalid.
- However, it not affect the constitutionality of the parent Act.
- E.g. The invalidity of Emergency (Security Cases) Regulations 1975 [subsidiary legislation] does not affect the validity of Emergency (Essential Powers) Act 1964 [parent Act]

3. The subsidiary legislation is inconsistent with parent Act

- Subsidiary legislation is valid when it is not consistent with the parent Act.
- E.g. Rantau election – The requirement of pass to enter nomination center is not consistent with the election law.



3. The subsidiary legislation is inconsistent with parent Act

- Situations where subsidiary legislation is not consistent with parent Act:
 - Subsidiary legislation is made in excess of power given by the parent Act
 - Subsidiary legislation is in conflict with the provision of the parent Act
 - Subsidiary legislation does not follow procedures required by the parent Act

4. Subsidiary legislation is to be used for improper purpose

- The power to make subsidiary legislation must be exercised for the proper purpose intended by the Parliament.
- The subsidiary legislation must be made for the purpose set out in the enabling Act.
- If the subsidiary legislation is for purpose other than intended by the parent Act, it is invalid.



5. Unreasonableness of subsidiary legislation

- A subsidiary legislation may be declared to be invalid on the ground of unreasonableness if it leads to manifest arbitrariness, injustice or partiality.
- Unreasonableness refers to a situation whereby if it is so unreasonable that no reasonable person acting reasonably could have made it.

6. Subsidiary legislation is not proportionate

- Proportionality refers to examining whether a valid connection exist between a legislative or executive action and the purported source of authority for the action.
- There must be proportionality between object or purpose and the means adopted to achieve it.
- The test of proportionality looks into whether the subsidiary legislation exceeds what is reasonably proportionate to the object and purpose of the parent Act.

7. Subsidiary legislation is uncertain

- A subsidiary legislation must be reasonably certain: it is capable of sensible or ascertainable meaning.
- It cannot be vague, unclear and ambiguous.
- Doctrine of severability:
 - If only a provision is uncertain, then the court will impugn (strike off) that provision alone, without affecting the validity of the other provisions in the subsidiary legislation.
 - If the whole subsidiary legislation is uncertain, all of it can be impugned.

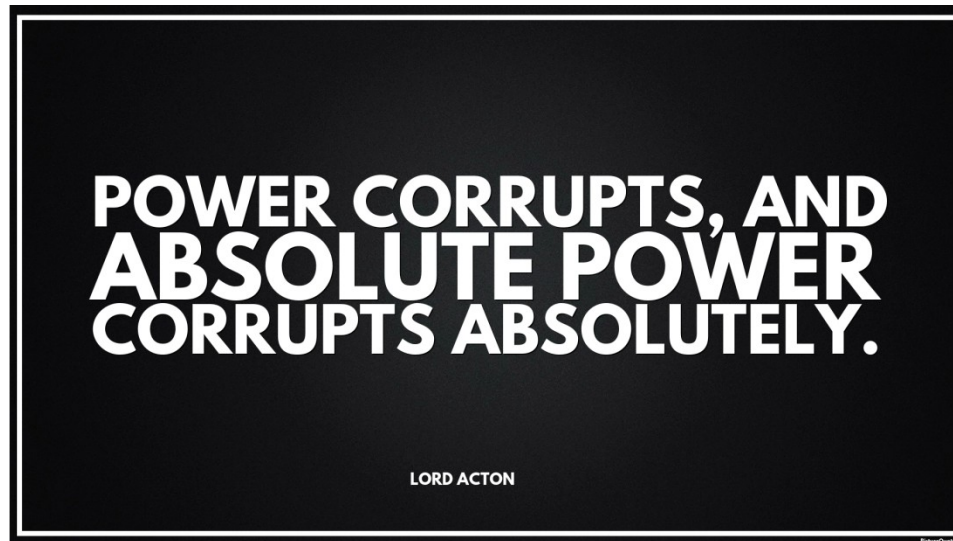
Substantive ultra vires in the context of exercise of power

- Primarily, the exercise of power of the administrative agency may be challenged on the grounds of substantive ultra vires when there are:
 - a. Errors of law
 - b. Abuse of discretion
 - c. Fettering of discretion
 - d. Violation of rights



a. Errors of law

- Error of law refers to the mistake in applying legal principles to the case at hand.
- An act/ decision of an administrative agency can be declared invalid by the court on the ground of error of law.



a. Errors of law

- Specific instances of errors of law:
 - i. Misinterpretation of a statute/ legal document
 - ii. Asking and answering the wrong legal question
 - iii. Taking irrelevant considerations into account when applying law into the fact
 - iv. Failing to take relevant considerations into account when applying law into the fact
 - v. Admitting inadmissible evidence
 - vi. Rejecting admissible and relevant evidence
 - vii. Exercising discretion on the basis of incorrect legal principles
 - viii. Giving inadequate reasons for decision
 - ix. Misdirecting the burden and standard of proof
 - x. Reaching a conclusion without evidence
 - xi. Failing to review credibility of witnesses

b. Abuse of discretion

- Discretion for the purpose of judicial review refers to the decision making authority's right to choose a particular course of action over others.
- The essence of discretion is the right to choose.
- Examples of terms that denote discretion:
 - “if he has reasonable grounds to believe”
 - “if he is satisfied”
 - “if he is of the opinion”
- However, there is no unfettered (unlimited) discretion. Discretion is subject to judicial review.

b. Abuse of discretion

- Situations where there is abuse of discretion:
 - Discretion is not used for the purposes it is intended for
 - The agency takes into account irrelevant considerations/ does not take into account relevant considerations
 - The agency had acted unreasonably
 - The agency did not provide reasons for decision
 - Bad faith (mala fide)

c. Fettering of discretion

- Fettering of discretion occurs when, rather than exercising its discretion to decide the individual matter before it, an administrative body binds itself to policy or to the views of others.
- E.g. when the government enter into contract with a private entity or company, the government fetters its power/discretion to the company.
- E.g. Registrar of Births and Death refuse to register birth of a child on the ground he is illegitimate and should not bear the name of the biological father, by following *fatwa* (Islamic ruling).

d. Violation of rights

- An act is substantive ultra vires if it violates the human rights/fundamental liberties protected by the Federal Constitution.
- Rights:
 - Breach of liberty of person (Article 5 Federal Constitution)
 - Equality (Article 8)
 - Freedom of speech, assembly and association (Article 10)
 - Freedom of religion (Article 11)
 - Rights of education (Article 12)
 - Right of property (Article 13)
 - Citizenship (Part III)
 - Special privileges of Malays & Bumiputera (Article 153)

d. Violation of rights

- E.g. Noorfadilla bt Ahmad Saikin v Chayed bin Basirun & Ors [2012] 1 MLJ 832
 - Refusal to employ a woman for untrained relief teacher post on the grounds of pregnancy alone is a form of gender discrimination.
 - The act and circular is unconstitutional under Article 8 of the Federal Constitution.



THANK YOU.