THE DEVELOPMENTS IN THE ROLE OF THE DOCTRINE OF *ULTRA VIRES* IN CENTRAL-LOCAL RELATIONS : AN ANALYSIS

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Half a century ago, Sir Ivor Jennings, in one of his lectures on Local Government in the Modern Constitution stated :

> "Under the British Constitution as now we know it, local authorities have close relations with three sets of other authorities. In the first place they are subject to the administrative jurisdiction of certain government departments. In the second place they are subject to a general legislative control by Parliament. And thirdly, they are kept within the limits of their jurisdiction by proceedings taken in the courts of law."[1]

The legislative power of the local authorities is limited and their actions are circumscribed by statute. The only actions that the local government institutions can lawfully do are those that are *intra vires* a properly construed statute. Hence, it could be argued that as the constructionists of the statute are the courts, they have the responsibility to prohibit certain local action or provide redress to those who claim to have been affected by *ultra vires* decisions.[2] Discussing the judicial interpretation 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.[3] According to his view :

> "If the application (of the doctrine of *ultra vires*) becomes too lax local authorities will enjoy a wider power than Parliament intended they should have and if it were relaxed altogether their freedom of action would become absolute and their exercise of power would be quite arbitrary. . . . If on the other hand the application becomes too strict, local authorities will enjoy a narrower power than Parliament intended they should have; and ultimately they would exercise no independent power at all. Then local government would be transformed into the local

1. Sir Ivor Jennings, *Local Government in the Modern Constitution,* Charles Knight and Co. Ltd., 1931, p. 1
2. Michael Elliott, *The role of law in central-local relations,* S.S.R.C., 1981, p. 31
3. Keith Davies, *Local Government Law,* Butterworths, London, 1983, p. 62

arm of Central Government administration if it did not wither away completely."[4]

Thus, it could be said that the 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 the local authorities. Hence, it could be essential to safeguard the interests of local authorities from unnecessary interference by the Central Government. As Lord Denning, 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."[5]

Accordingly, an attempt will be made in this article to analyse the development in the role of the doctrine of *ultra vires* in central-local relations. For this purpose, it is proposed to examine first the legal status of local authorities as corporations, followed by an examination of the application of the doctrine of *ultra vires* and the developments in this respect.

I. The legal status of local authorities

The Municipal Councils Ordinance states :

> "Every Municipal Council shall be a corporation with perpetual succession and a common seal and shall have power, subject to this 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 this Ordinance."[6]

The Urban Councils, Town Councils, Village Councils and the Development Councils are established by similar provisions under the respective Ordinances.[7] This indicates that the local authorities in Sri Lanka are corporate bodies with the common characteristics of

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4. *ibid.*
5. *R. v Secretary for the Environment, ex-parte Norwich City Council* [1982] Q.B. 808, at p. 824
6. Municipal Councils Ordinance, section 34(1)
7. Urban Councils Ordinance, section 31, Town Councils Ordinance, section 30, Village Councils Ordinance, section 28, Development Councils Act, section 2(2)a

corporations which also could be identified as a common feature of the legal status even of the English local authorities.[8] 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.[9] The chartered corporations, which were created under the royal prerogative were not bound by the doctrine of *ultra vires.*[10] Nevertheless, this difference between statutory and chartered corporations is not important in England today, as all the local government institutions in England are now statutory corporations, bound by the doctrine of *ultra vires.* According to Kyd, a corporation is

> "a collection of many individuals united into 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."[11]

Therefore, it is apparent that the legal status of local authorities as corporations has granted the opportunity of questioning any of their decisions. "The feature of local government law" said Buxton, "which overshadows all others is that local authorities 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. . . . "[12]

Moreover, it is also to be noted that this principle is applied on a similar basis in Sri Lanka. For instance, in *Carimjee Jafferjee and others* v *The Municipal Council of Colombo*[13], 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

8. C.A. Cross, *Principles of Local Government Law*, Sixth Edition, Sweet and Maxwell, 1981, p.2, J.F. Garner, *Administrative Law*, Fifth Edition, Butterworths, London, 1979, p.390
9. J.F. Garner, *op. cit.*, p. 330
10. *ibid.*
11. Kyd on Corporations, p. 13
12. R. Buxton, *Local Government*, Second Edition, Penguin Education, 1973, p. 98
13. Balasingham Reports, p. 75

as contained in the Municipal Corporations Ordinance from which they derive their existence and such acts are injurious to the interests of any rate-payer or tax-payer such tax-payer or rate-payer has the right to the protection of our local courts by injunction or other appropriate relief."[14]

Consequently, it is significant that according to the Municipal, Urban, Town and Village Councils Ordinances and the Development Councils Act, a statutory body cannot act outside the ambit of the statute which created it.[15] The powers of a statutory body, as to their actions were clearly emphasised by Lord Watson in his speech in *Baroness Wenlock v River Dee Co.*[16] :

"Whenever a corporation is created by Act of Parliament, with reference to the purposes of the Act, and solely with a view to carrying these purposes into execution, I am of 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 reasonable implication from its provisions."[17]

Accordingly, an 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.[18] On such an occasion the courts may decide that the particular action is *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 the judiciary in central-local relations.

II. The doctrine of *ultra vires*

The Redcliffe-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

14. *ibid.*,p. 76
15. *Suriyawansa* v *The Local Government Service Commission* (1947) 48 N.L.R. 433
16. (1885) 10 Appeal Cases 354
17. *ibid.*, at p. 362
18. *ibid.*, p. 433

> with individual and public rights. In this country their freedom is limited by the doctrine of *ultra vires*; in 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 the public interest; it cannot embark on it without the authority of an Act of Parliament."[19]

This reveals that the local authorities are liable to directions of special statutory authority for their each and every act, through the application of the doctrine of *ultra vires*, and that at any time the doctrine of *ultra vires* may be invoked against the local authority.[20] However, as pointed out by Lord Selborne in *Attorney General v Great Western Railway:*[21]

> "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 legislature has authorised ought not (unless expressly prohibited) to be held by judicial construction, to be *ultra vires*."[22]

Accordingly, it could be argued that, the constructionists of the statute are the courts; therefore, the courts will on occasion be able to prohibit certain local action or provide redress to those who claim to have been affected by *ultra vires* decisions.[23]

The applicability of the doctrine of *ultra vires* in England as well as in Sri Lanka dates from the nineteenth century. In England the doctrine has been prominently mentioned in *Colman* v *Eastern Counties Railway Company*[24] in 1840 and in *East Anglian Railway Company* v *Eastern Counties Railway Company*[25] in 1851. The English case law which was a confusion with regard to this principle was settled by the House of Lords decision in *Ashbury Railway Carriage and Iron Company* v *Riche.*[26] It was held in this case that where there is

19. Report of the Redcliff-Maud Committee, pp. 69–70
20. *ibid.*
21. (1880) 5 Appeal Cases 473
22. *ibid.*, at p. 478
23. Michael Elliott, *op. cit.*, p. 63
24. 10. Beav. 1.16,16 L.J.Ch. 73
25. 11 C.B. 775; 21 L.J.C.P. 23
26. (1875) 7 H.L. 653

an Act of Parliament creating a corporation for a particular purpose and giving it powers for that purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited.

In *Ashbury Railway Carriage Company* v *Riche*[27], the Company was incorporated under the Companies Act, 1862, to make, sell or lend on hire all kinds of railway plant. The Company entered into a contract to construct a railway line. It was held that this act of the Company in entering into the 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 contains in it both that which is affirmative and that which is negative. It states affirmatively the ambit and the extent of the vitality and power which by law is given to the incorporation, 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 corporate life for any other purpose than that which is so specified."[28]

Furthermore, this jurisdiction was extended to local authorities. For instance, in *London County Council* v *Attorney General*[29] it was held that Municipal Corporations could not carry out objects not authorized by the Municipal Corporations Act, 1882.

The doctrine of *ultra vires* was applicable to consider the validity of an action taken by a local authority in Ceylon in 1882.[30] Consequently, it is apparent that the doctrine of *ultra vires* has been applicable for a long period in England as well as in Sri Lanka. Although the principles according to which the courts are prepared to apply the doctrine of *ultra vires* and review the exercise of the administrative, judicial or legislative acts of an administrative agency may be classified into a number of categories, attention of this discussion will be focused mainly with regard to the principles of substantial and procedural *ultra vires,* as these demonstrate the recent tendency to widen the approach of the doctrine of *ultra vires.* Hence, at the outset, it is intended to analyse the applicability of the doctrine of *ultra vires* on substantial grounds followed by an examination of procedural *ultra vires.*

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27. *ibid.*
28. *ibid.*, at p. 670
29. [1902] A.C. 165
30. *Gunawardene* v *Manikkunambi Seda* (1882) 5 S.C.C. 22

i. Application of the doctrine of *ultra vires*: 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 Councils 'purport to legislate outside the purview of their proper authority'[31] then the by-laws will consequently lack validity. For example, according to Professor G. L. Peiris :

> "One of the primary aims of administrative law is to ensure that 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 a remedy in the courts. The doctrine relating to *ultra vires* however, has a 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 matters and within certain limits, may purport to legislate outside the purview of its proper authority. In these circumstances, the local authority acts in excess of its vires or authority and its acts consequently lack validity."[32]

Moreover, in England the celebrated judgment of Lord Russell, C.J., in *Kruse* v *Johnson*[33], 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 into court.[34] In *Kruse* v *Johnson,* the Kent County Council claiming to act under their statutory powers made the following by-law:

> "No person shall sound or play upon any musical or noisy instrument or sing in any public place or highway within fifty 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."[35]

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31. Professor G.L. Peiris, *Essays on Administrative Law,* Lake House Investments Ltd., 1980, p. 311
32. *ibid.*
33. [1898] 2 Q.B. 91
34. *ibid.*, at p. 98
35. *ibid.*, at p. 92

In this case it was proved that the appellant had violated this by-law by singing hymns within fifty yards of a dwelling house without taking any notice when requested to desist. On behalf of the appellant it was contended that the by-law was invalid on the ground that it was unreasonable. Lord Russell of Killowen, C.J., in a judgment of the Divisional Court, held that the by-law was valid. With regard to this decision, Lord Russell, C.J., pointed out :

> "Section 16 of the Local Government Act 1888 provides that a County Council shall have the same power of making by-laws in relation to their county as the Council of a borough have in relation to their borough. . . . What are the checks or safeguards under which this very wide authority of making by-laws is exercisible. The same section 23 further provides that no by-law can be made unless two-thirds 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 into force until the expiration of forty days after a copy sealed with the corporate seal has been sent to the Secretary of 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-law or such part, shall not come into force, and the Queen may within the forty days enlarge the time within the by-law shall not come into force." [36]

Furthermore, Lord Russell, 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 judgement as to what are the by-laws which to them seem proper to be made for good rule and government in their own localities, that power is accompanied by certain safeguards.[37] As, for example, Lord Russell, C.J., pointed out that there must be antecedent publication of the by-law with a view of eliciting the public opinion of the locality upon it and that such by-laws will not have force until after they have been forwarded to the Secretary of State. Firstly, the Queen with the advice of her Privy Council, may dissallow the by-law wholly or in part and may enlarge the suspensory period before it comes into operation.[38]

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36. *ibid.*, pp 97–98
37. *ibid.*, p. 98
38. *ibid.*

Moreover, Lord Russell, C.J., after discussing all these safe-guards, stated :

> "I agree that the presence of these safe-guards in no way relieves the court of the responsibility of inquiring into the validity of by-laws where they are brought in question or in any way affects the authority of the court in the determination of their validity or invalidity."[39]

While the approach of the English courts in questioning a local authority by-law remains 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 has diversified from a narrow sense of applicability to a wider approach.

According to section 267 of the Municipal Councils Ordinance:[40]

> "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 this Ordinance."[41]

The Urban Councils, Town Councils, Village Councils and Development Councils also have similar powers according to the relevant statutes.[42] Similar to English experience even in Sri Lanka, the local authorities are to follow the procedure set down in the respective Ordinances, for the purpose of making by-laws. Correspondingly the Municipal Councils Ordinance provides:

> "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 this Ordinance."[43]

Furthermore,

> "No by-law shall have effect until it has been approved by the Minister, confirmed by the Senate and the House of Representa-

39. *ibid.*
40. Municipal Councils Ordinance, No. 29 of 1947
41. *ibid.*, section 267
42. Urban Councils Ordinance, section 153(1), Town Councils Ordinance, section 152(1), Village Councils Ordinance, section 42, Development Councils Act, section 69
43. Municipal Councils Ordinance, section 267(1)

> tives 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 herein enacted."[44]

However, there are no provisions in any of the Municipal, Urban, Town and Village Councils Ordinances and in the Development Councils Act regarding the powers of the courts to question the validity of a local authority by-law.[45] Hence, most of the early Sri Lankan decisions, were of the erroneous opinion that it was not competent to a court to entertain the question of the validity of a by-law.[46] This fact was taken into consideration and was confirmed in *Sourjah* v *Hadjiar*[47], when the question of the validity of a by-law came before the courts. Lascelles, C.J., held that it was not competent to a court to entertain the question of the validity of a by-law after it had been passed with the formalities required by section 109 of the Municipal Councils Ordinance of 1910.[48] Accordingly, Lascelles, C. J., said:

> "Several grounds have been taken in the appeal against the conviction of the accused. The first, which was principally pressed is that the by-law is *ultra vires.* It was an objection that might perhaps have had some force if the matter had not been disposed of in principle by a previous decision of the court in *La Brooy* v *Marikar.*[49] It was there held that it was not competent to a court to entertain the question of the validity of a by-law after it had been passed with the formalities required by section 109 of the Municipal Councils Ordinance of 1910. By that section it is provided that after the by-laws have been approved of by the Governor in Executive Council they are as legally valid, effectual and binding as if they had been enacted in the Ordinance."[50]

The decision in *La Brooy* v *Marikar,* in which it was decided that a local authority by-law could not be questioned by the courts, had

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44. *ibid.,* sections 268 (1) and (2)
45. M.C. Or., ss. 267–276, U.C. Or., ss. 153–158, T.C. Or. ss 152–156, V.C. Or., ss. 42–44. D.C. Act ss. 69–70
46. (1914) 18 N.L.R. 31
47. *ibid.*
48. *ibid.*
49. (1907) 2 A.C.R. 63
50. (1914) 18 N.L.R. 31

followed the judgment in *The Chartered Institute of Patent Agents* v *Lockwood.*[51] According to Hutchinson, C.J., in *La Brooy's* case:

> "... in an English case, *Institute of Chartered Patent Agents* v *Lockwood,* three of the judges expressed an opinion... that an enactment in an English act, substantially to the same effect as that in section 6 of our Ordinance, had the effect of giving the force of law to a by-law so that it could not be questioned by the courts."[52]

In *Lockwood's* case the House of Lords had to construe sub-section 4 and 5 of section 101 of the Patents, Designs and Trade Marks Act, 1833. Sub-section 4 of section 101 read as follows :

> "Any rules made in pursuance of this section shall be laid before both Houses of Parliament."

Sub-section 5 of section 101 was to the effect that :

> "If either House of Parliament, within the next forty days after any rules have been laid before such house, resolve that such rules or any of them ought to be annulled, the same shall after the date of such resolution be of no effect."

It was held by the House of Lords that the rules having been laid before both Houses of Parliament for forty days without being annulled were 'of the same effect as if they were contained in the' statute and as long as they remained in force it was not competent to question their authority.

However, it should be noted that, in Lockwood's case the arguments were based mainly on the question whether the provision of a statute which stated that the regulations approved shall be as valid and effectual as though it were herein enacted could be scrutinized by the courts. Nevertheless, it could be mentioned that, Lord Morris, dissented from the majority view presented by Lord Herschel and shared by Lord Watson and Lord Russell of Killowen. According to Lord Morris :

> "I am of opinion that it is not only competent for the courts of justice to consider, but that it is their duty to consider, whether

51. (1894) A.C. 347
52. (1907) 2 A.C.R. 63, at p. 67

> the rules are *ultra vires;* that there is no power delegated by the Legislature to the Board of Trade to make any general rules which. . . are to be considered intra vires provided they are laid before both Houses of Parliament, and provided that nobody has taken the trouble either to read them or to make any motion upon the subject."[53]

A number of decisions besides *Sourjah* v *Hadjiar* and *La Brooy* v *Marikar* had followed the decision of the *Institute of Patents Agents* v *Lockwood.* In a series of early cases,[54] it has been held that the validity of by-laws that have been passed through the process prescribed in sub-section 4 of section 109 cannot be questioned. In *Seyappa Chetty* v *Municipal Council, Kandy,*[55] the question was, as to the right of the Municipal Council of Kandy to fix meters on water pipes for the purpose of regulating the supply of water to private houses and to cut off the water supply when the householder fails to pay for water supplied in excess of a certain fixed quantity.[56] The Council claimed the right under its by-law No. 173. The by-law gave the power to the Chairman of the Council, where default was made by a householder in the payment of any money due for water supplied, to turn off his supply of water.[57] In deciding that this particular by-law of the Kandy municipality was not *ultra vires,* Pereira, J., stated that, 'this court has held that the validity of by-laws that have passed through the process prescribed in sub-section 4 of section 109 cannot be questioned.'[58]

The decision in *Nicholas* v *Happawana Terunnanse,*[59] an early case decided in 1897, was the first to take a wider approach as to the power of the courts in questioning the validity of local authority by-laws, although this was not followed by later cases until 1951. Hence, it must be noted that even in this case no principles governing the ability of the courts to question the by-laws of local authorities were discussed. In this case the question was the validity of a by-law of the Galle municipality which was in the following terms:

> "If any fruit tree or any part of a tree within the limits of the municipality be deemed by the Council to be likely to fall

53. *Institute of Patents Agents* v *Lockwood* (1894) A.C. 347, at p. 365
54. *La Brooy* v *Ismail* 1 C.L.R. 9, *Colombo Municipal Council* v *Uduma Lebbe* 1 A.C.R.33, *Muturaman* v *Municipal Council, Kandy* C,L.R. 49, *Seyappa Chetty* v *Municipal Council, Kandy* (1913) 17 N.L.R. 195
55. (1913) 17 N.L.R. 195
56. *ibid.*, at p. 196
57. *ibid.*
58. *ibid.*
59. (1897) 2 N.L.R. 346

upon any house or building or to endanger the occupiers thereof, or if the same may be near any road or street and likely to affect the safety of passengers going along or using such road or street it shall be lawful for the Municipal Council to cause notice in writing to be given to the occupier of the ground upon which the tree stands to remove the said fruit, limb or tree and if such owner or occupier do not begin to take down the same within twenty-four hours after such notice and complete the work with due diligence the Council shall cause the work to be done."[60]

In this case the accused was found guilty of obstructing two officers of the municipality while they were engaged in their duty under the authority of the above by-law. The officers had come to cut down a coconut tree which grew on his premises and which threatened to fall on a house in the next garden. The two lands were private premises over which the public had no right of way.[61] In deciding that a by-law authorizing the Municipal Council to cut down trees overhanging, and likely to prove dangerous to private property is *ultra vires* and that a person who resists a municipal officer in the execution of such a by-law is therefore not liable to conviction, Withers, J., stated :

"There is always a clear line between what concerns individuals and what concerns the public. The Ordinance sanctions the entrance on private grounds of municipal officers, but in every case with the object of conserving the public good or preventing harm of any sort from affecting the public. If the municipality step into prevent my tree falling on my neighbour's house in the next garden it may step into prevent my own tree falling on my own house or to prevent some accident to myself from the ruinous condition of my own home. Legislature aimed to protect one person from the consequence of what may be a nuisance on the part of his neighbour, but which does not affect or concern the general public in the least degree was not intended, I imagine by the Municipal Councils Ordinance. The person who is threatened by his neighbour's overhanging tree has a simple remedy in his own hands. Hence, in my opinion that part of by-law in question which results to overhanging trees in purely private places is invalid."[62]

60. By-law No. 2 of Chapter xxiv of the Galle municipality
61. (1897) 2 N.L.R., at p. 346
62. *ibid.*, at p. 347, Professor G.L. Peiris, *op. cit.*, pp. 311–312

Some years later, in 1951, in *Gunasekera* v *The Municipal Revenue Inspector,*[63] it was held *obiter,* that 'a by-law purporting to have been passed by a local authority and approved and confirmed under section 268 of the Municipal Councils Ordinance can, nevertheless, be held by a court to be *ultra vires* if it was passed in excess of the authority of the local authority.[64] In this case Gratiaen, J. made a comment with reference to the provisions of section 268, which emphasized the fact that the Sri Lankan courts were gradually following a wider approach in questioning the validity of local authority by-laws. According to Gratiaen, J. :

> "It does not seem to me that the provisions of section 268(2) are wide enough to withdraw altogether the jurisdiction of a court to declare *ultra vires* a by-law which has been passed in excess of the authority of a local authority. Section 268(2) certainly introduces an additional safeguard by postponing the operation of a by-law until it has been approved by the appropriate minister and confirmed by Parliament. But the co-existence of parliamentary and judicial control of delegated legislation are not incongruous. According to section 268(2) the notification of such approval and confirmation gives validity to the by-law only if it has in the first instance been passed *intra vires* the local authority and not otherwise. A by-law that is from its inception *ultra vires* cannot thereafter obtain what has been described as the 'high water-mark of inviolability' which attaches to a parliamentary enactment. If it were intended that the mere confirmation however perfunctory of a by-law passed in excess of a council's authority should thereby convert it into something possessing the force of inviolable law, the withdrawal of the jurisdiction of the courts could have been expressed in less uncertain terms."[65]

The comments of Gratiaen, J. in *Gunasekera* v *Municipal Revenue Inspector,* although *obiter,* could be regarded as a landmark in respect of the role of the doctrine of *ultra vires* in central-local relations. Since the decision of *Gunasekera* v *The Municipal Revenue Inspector* the courts have been inclined to adopt the wider approach as to their ability to question the validity of local authority by-laws. For instance, in *Fernando* v *Ratnayake,*[66] De Kretser, J. stated :

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63. (1951) 53 N.L.R. 229
64. *ibid.*
65. *ibid.,* at p. 234, Professor G. L. Peiris, *op. cit.,* pp 313–314, 329
66. (1973) 75 N.L.R. 543.

> "In my opinion the comments of Gratiaen, J., which were *obiter* in *Gunasekera* v *The Municipal Revenue Inspector,* clearly state what I think is the true legal position in reference to by-laws vis-a-vis the provisions of section 268. It is therefore open to me to consider whether or not that position of by-law 47 which relates to overhanging trees in purely private places is invalid. It appears to me that this position of by-law 47 is invalid."[67]

In this case the question arose again whether by-law 47 of the Colombo Municipal Council, which authorizes the Colombo municipality to cut down trees overhanging and likely to prove dangerous to private premises, was *ultra vires.* The by-law provides :

> "When any tree or branch or fruit of a tree within the limits of the municipality shall be deemed by the Chairman to be likely to fall upon any house or building and injure the occupiers thereof or whenever the same shall overhang any street, it shall be lawful for the municipality to cut down the said tree or branch."[68]

In this case, the tree that the accused was required to remove stood on the boundary of her premises and leaned into the adjoining garden where there was a house. The officer who gave evidence said that the tree leaned at an angle about forty-five degrees and in his opinion the roots were weak and the tree threatened to fall on the adjoining house if there was a heavy wind. It was held in this case, that by-law 47 of the Colombo Municipal Council which authorized the Municipal Council to cut down trees overhanging and likely to prove dangerous to purely private premises is *ultra vires.*

Accordingly, it is conspicuous that, although the Municipal, Urban, Town and Village Councils Ordinances and the Development Councils Act empower the local authorities to make by-laws from time to time and, when made to revoke them, yet the courts have the power to control the local authority by-laws by means of examining their validity and, if the local authorities have exceeded their powers then to invalidate the by-laws. This emphasizes the fact that the courts have the ultimate authority to confirm the validity of a local authority by-law and that this power is carried out according to the provisions of the doctrine of *ultra vires.* However, according to the English experience,

67. *ibid.*, p. 546, Professor G. L. Peiris, *op.cit.*, p. 314
68. *ibid.*

it is clear that certain factors are taken into consideration in this respect. Especially, in accordance with the decision in *Kruse* v *Johnson,*[69] a court may invalidate a by-law on the ground of unreasonableness. According to Lord Russell, C.J. :

> "... when the court is called upon to consider the by-laws of public representative bodies clothed with the ample authority accompanied by the checks and safeguards which have been mentioned, I think the consideration of such by-laws ought to be approached from a different stand point. They ought to be supported if possible. They ought to be as has been said 'benevolently' interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered. This involves the introduction of no new canon of construction. But further looking to the character of the body legislating under the delegated authority of Parliament, to the subject-matter of such legislation and to the nature and extent of the authority given to deal with matters which concern them and in the manner which to them shall seem, ... I think courts of justice ought to be slow to condemn as invalid any by-law, so made under such conditions, on the ground of supposed unreasonableness."[70]

This signifies the fact that the courts have no unlimited powers to examine the validity of local authority by-laws. Hence, it is clear that this enables the judiciary to take a reasonable opinion of a by-law in question. In Sri Lanka, as has been discussed already, the courts may question and invalidate local authority by-laws on the ground that the local authorities have acted beyond their power in making the respective by-laws. However, as has been pointed out already, it is clear that the powers of the judiciary in controlling the local authorities by means of questioning the validity of their by-laws have expanded during recent times. This fact is significant, not only with regard to the rules under the doctrine of substantive *ultra vires,* but also with regard to procedural *ultra vires,* to which we now turn.

ii. Application of the doctrine of *ultra vires:* procedural *ultra vires*

As discussed already, it is clear that the local authorities have no power to purport to legislate outside the scope of their proper

69. (1898) 2 Q.B. 91
70. *ibid.,* at p. 99

authority. Similarly, the local authorities also have no power to carry out any of the duties in a manner different from that which the legislation has prescribed. According to Sir Ivor Jennings :

> "An act of a local authority may be *ultra vires* not only if it does not belong to the class of acts which the local authority is empowered to do, but also if it is done in a manner different from that prescribed by the legislation in question."[71]

This emphasizes the fact that local authorities will have to comply with the rules laid down by the legislation so that their acts be *intra vires*. Thus, it could be argued that by means of these limitations of power, local authority functions are kept under control.

However, with regard to the attitude of the courts in this respect, it could be said that, according to the Sri Lankan experience until recent times the courts have been very reluctant to decide that a local authority action is *ultra vires* even if it has not followed the procedure laid down in the expected Ordinances. On the other hand, the case law remains silent with regard to instances where the local authorities have exercised their powers in an erroneous form. A comparative analysis of the English and the past and present Sri Lankan experience is essential at this juncture, as this will demonstrate, on the one hand, the inadequacies and weaknesses and the narrow approach of the Supreme Court and, on the other hand, the present trend in widening the applicability of the doctrine of *ultra vires*.

A comparative study of the applicability of the doctrine of *ultra vires* in England and in Sri Lanka reveals that in Sri Lanka the application of this doctrine has been very limited. According to the English experience, it is clear that the doctrine of procedural *ultra vires* has been applicable on numerous occasions to quash local authority decisions. Thus, in England the decisions of local authorities in connection with the rents to be charged for flats,[72] or taking action for slum clearance[73] or compulsory purchase orders[74] have been held to be void because the local authority had not initially followed the correct procedure laid down by the respective statutes. However, according

71. Sir Ivor Jennings, *Principles of Local Government Law*, Second Edition, University of London Press, 1939, p. 140.
72. *R* v *Paddington and St. Marylebone Rent Tribunal, ex-parte Bell* 1949 1 A.E.R. 720, *R* v *Barnet and Camden Rent Tribunal, ex-parte Frey Investments Ltd.*, 1972 1 A.E.R. 1185
73. *Rayner* v *Stephney Corporation* 1911 2 Ch. 312
74. *Burgess* v *Jarvis and Seven Oaks U.D.C.* 1952 1 A.E.R. 592.

to an analysis of the local authority case law in connection with the applicability of the procedural *ultra vires* it is significant that in Sri Lanka this principle has been applied mostly to discuss the validity of local authority contracts. Moreover, prior to 1967 the courts were of the erroneous opinion that the local authority contracts were valid although they had not complied with the necessary requirements. Under the Municipal Councils Ordinance in Sri Lanka :

> "The Commissioner may on behalf of the Council enter into any contract for the execution or performance of any work or service or for the supply of any articles or materials, involving an estimated expenditure of not more than one thousand five hundred rupees, if the contract will not or is not expected to endure for more than one year and the necessary funds have been provided for the same in a sanctioned budget or by supplementary budget."[75]

Nonetheless, the Ordinance further states :

> "Any contract for the execution or performance of any work or service or for the supply of any article or materials for a Municipal Council which involves an estimated expenditure of more than one thousand five hundred rupees,[76] or which will or is expected to endure for more than one year, shall if entered into in Ceylon, be reduced to writing, and signed by the Mayor and the Commissioner on behalf of the Council, and, in addition to such other matters as may be deemed necessary for inclusion in any such contract, shall specify —
>
> a) the work or services to be executed or performed or the articles or materials to be supplied;
> b) the price or rate to be paid for the work, service, articles or materials;
> (c) the time or times within which the work or service is to be completed or the articles or materials are to be supplied; and
> (d) any penalty or penalties to be imposed in case of breach ."[77]

Thus, it is apparent that if the contract is for over one thousand five hundred rupees, it is essential that the contract should be in writing,

75. Municipal Councils Ordinance, section 227
76. *ibid.*
77. *ibid.*, section 228

and be duly signed for the agreement to be effective. However, in *S.H. Peiris and another* v *The Municipal Council, Galle*[78] it was held on appeal that, in construing the provision of sections 227, 228 and 229 of the Municipal Councils Ordinance, there is nothing to suggest that contracts not under seal involving sums over Rupees 1500/- are illegal. In this case, a firm of architects were engaged by the defendants to construct a building. The contract, although it involved an estimated expenditure of more than Rupees 1500/-, was not contained in an instrument under the seal of the Council as required by the provisions of section 228 of the Municipal Councils Ordinance. The plaintiffs, however, performed their part of the contract and handed over the building to the defendant. They sought in the present action to recover the sum of Rupees 30,380/40, which they claimed was the unpaid balance, out of a sum of Rupees 84,380/40 due to them as remuneration for the work done by them as architects. The trial judge dismissed the action on the ground that the contract was void as it was not under seal. Under these circumstances, it is clear that the contract between the firm of architects and the Municipal Council was void, as the agreement was not properly construed according to the requirements of the Municipal Council Ordinance, precisely, section 228. Also, it is obvious that a contract which was made contrary to the procedure laid down in the statute cannot be valid. Hence, it is clear that the contract between the two parties was *ultra vires* the Municipal Councils Ordinance and on these points, the decision of Tambiah and Abeysundera, JJ., on appeal could be criticized. Moreover, this decision signifies the narrow approach of the courts with regard to the applicability of the doctrine of procedural *ultra vires*.

However, the decision of H.N.G. Fernando, C.J., in *Municipal Council of Jaffna* v *Dodwell and Company,*[79] which came within the course of four years after the decision of Tambiah and Abeysundera, JJ., in *Peiris* v *The Municipal Council, Galle,* signifies, on one hand, the narrow and incorrect approach of Tambiah and Abeysundera, JJ., in applying the principles of the doctrine of procedural *ultra vires* and, on the other hand, the present trend in extending the applicability of this doctrine.

In *Municipal Council of Jaffna* v *Dodwell and Company* an action was brought for the recovery of a sum of Rupees 13,935/50, alleged to be the price of goods sold and delivered upon certain contracts of sale; the defendants, Jaffna Municipal Council, pleaded that the alleged

78. (1963) 65 N.L.R. 555
79. (1967) 74 N.L.R. 25

contracts were void and/or unenforceable because they did not comply with the requirements of sections 228 and 229 of the Municipal Councils Ordinance, in that they were not embodied in writing and were not duly signed, sealed or sanctioned. In his judgment H.N.G. Fernando, C.J., with Alles, J., agreeing stated :

> "I must add that I do not concur in the opinion which perhaps influenced the decision in *Peiris* v *Municipal Council, Galle,* namely that it could be travesty of justice to deny some relief to a plaintiff whose claim against a Municipal Council is based on a contract not under seal. The requirement of the seal being one imposed by Statute, a person who acts on the faith of such a contract has only himself to blame for ignoring the law."[80]

Concluding remarks

Discussing the doctrine of *ultra vires* and its application to local government authorities, Cross had mentioned :

> "The doctrine of *ultra vires* has so stamped itself upon the administration that there is a tendency to think that the present structural and managerial pattern is unchangeable unless the law is changed. This is not always so or necessarily so. Within the present legal framework there is undoubtedly scope for experiment and change in committee organization and departmental structure."[81]

This seems to be an accurate statement with regard to the present situation of the system of local government in Sri Lanka. The local authorities are created statutorily and the Central Government has the power to control their activities, executively, financially and judicially. Although there is sufficient ground to argue that central control over local authority functions is not really essential, it is also apparent that Parliament should have supervisory power over the local councils for a country to have a well organized system of local government. As Professor G.L. Peiris, with regard to subordinate legislation, observed :

> "Although subordinate legislation is indispensable in a modern social and political context, the doctrine relating to the

80. *ibid.*, p.33
81. C.A. Cross, *Principles of Local Government Law,* Fourth Edition, Sweet and Maxwell, London, 1971, p.18.

> sovereignty of Parliament requires that the supreme law-making power should belong to Parliament alone. Thus, officials and bodies participating in the process of subordinate law-making must necessarily function under the control and supervision of Parliament."[82]

Similarly, it could be said that central control over local authorities is acceptable subject to necessary limitations.

Out of the above mentioned three forms of local authority controls, the judiciary plays an important role and, as has been discussed this could be carried out through the application of the doctrine of *ultra vires.* Consequently, it is apparent that the doctrine of *ultra vires* has the power to restrict the activities of a local authority, as any action of a local government institution could be declared as void, if it is not in a position to produce statutory justification for its action. This emphasizes the important role which has been attributed to the doctrine of *ultra vires.* Moreover, as has been discussed already, it is apparent that during recent years the judiciary has taken a wider approach with regard to the application of the doctrine of *ultra vires.* This will essentially pave the way for 'experiment and change in committee organization" which will in turn be favourable for the introduction of Pradeshiya Sabhas to the local government structure. Several reasons could be pointed out in favour of this argument. For instance, according to Tony Byrne:

> ". . . many of the services for which local authorities are responsible are national in character and need therefore to be sustained at some minimum standard at least. Secondly, in the interests of social justice the Government will try to secure equality of standards and the avoidance of disparities. Besides, many local needs-traffic, fire safety, building controls, food safety, children's services etc. — are common throughout the country. Thirdly, Councils are substantial spenders and taxers and they control too many of the nation's resources to be left alone by the Central Government, which is generally held responsible for the management of the economy as a whole."[83]

Furthermore, it could be pointed out that unlike the executive and financial controls, judicial control could be justified on the ground

82. Professor G.L. Peiris, *op.cit.,* p. 355
83. Tony Byrne, *Local Government in Britain,* Penguin Education, 3rd edition, 1985, p.224

that it is impartial and not tied to policy matters.[84] Discussing this factor, Tony Byrne said :

> ". . . it helps to secure public confidence that bias and corruption are not present in the administration of local government business. Such suspicions may linger where administrative control alone is involved."[85]

Accordingly two important factors could be put forward as the conclusion of this analysis: firstly, it is apparent that during recent times the Sri Lankan courts have widened the application of the doctrine of *ultra vires.* Secondly, it could be said that as a result of this approach the doctrine of *ultra vires* could be utilized to strengthen the relationship not only between the Central Government and the present local government authorities of the country, but also, between the centre and the proposed Pradeshiya Sabhas which will handle more authority and carry out a number of important functions. Moreover, this present approach will also pave the way to bridge the gap between the centre and the locality.

On these grounds, the wider approach adopted by the Sri Lankan courts, in relation to the doctrine of *ultra vires,* since the decision in *Gunasekera* v *Municipal Revenue Inspector* could be greatly appreciated.

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84. *ibid.*
85. *ibid.*