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Abuse of Power Prohibition in Government Actions

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Abstract

Abuse of power (*malwewenang*) is a form of misconduct by officials or government bodies in carrying out their entrusted duties. The administrative law approach to abuse of power categorizes it as a prohibition that must not be violated. Every authority is limited by its substance, location (*locus*), and time (*tempus*). Therefore, abuse of power can take the form of *onbevoegdheid ratio materiae*, *onbevoegdheid ratio loci*, and *onbevoegdheid ratio temporis*. Any action taken by an official or government body beyond these boundaries constitutes a deviation and falls into the category of legal violations. This is in line with the principle of legality in government actions. Competence and procedure form the foundation for formal legality. Based on formal legality, the principle of *presumption instal causa* is established.

Keywords: Abuse of power, Government Action

Introduction

The authority of administrative bodies is generally primarily limited by the specified area or domain, whether determined by the legislature or by the power that establishes other administrative bodies. If an administrative body does not respect the boundaries of competence set by the Constitution or by law, it is referred to in French terminology as "*excès de pouvoir*" or in Latin terminology as "*ultra vires*." *Excès de pouvoi*r and *ultra vires* are forms of abuse of power that are prohibited and must not be committed by administrative bodies.

Competence (Dutch: *bevoegdheid*) in Constitutional Law and Administrative Law is always described as legal power (*rechtsmacht/jurisdiction*). The concept of competence in public law is thus related to power (Maarseveen, 1985; Hadjon, 1997). Authority as a public law concept consists of at least three components: the influence component, the legal basis component, and the legal conformity component (Maarseveen, 1985). The influence component means that the use of authority is intended to control the behaviour of legal subjects. The legal

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basis component means the authority must always be traceable to its legal foundation. The legal conformity component implies the existence of competence standards, which are general standards (for all types of competence) and specific standards (for certain types of competence).

In a contrary sense, "malwewenang" (abuse of power) is a deviation from the authority that should be exercised, where such competence is established in the Constitution or laws. abuse of power falls into the category of actions prohibited by law (illegal), especially when carried out by trusted public officials. This implies that an administrative body has taken actions and made decisions that are beyond its authority, or perhaps has the authority but exercises it improperly. Actions taken and decisions made by an administrative body based on the proper legal foundation are considered *intra vires* (within official limits). Conversely, if such actions and decisions are taken without legal basis, they are considered *ultra vires* (beyond the limits of competence). *Intra vires* actions are deemed lawful, while *ultra vires* actions are considered unlawful.

A simple form of "malwewenang" is exceeding authority/beyond the limits of authority (excès de pouvoir / ultra vires). In such cases, the administrative body has taken actions and issued decisions beyond its authority. Administrative bodies often find it impossible to exercise all their authority independently. Most legal systems recognize that delegating part of their authority to lower hierarchical administrative bodies is permissible.

Excès de pouvoir or *ultra vires* in administrative law can be viewed narrowly and broadly. In a narrow sense, *excès de pouvoir* or *ultra vires* applies when an administrative body lacks substantive competence to take actions and make decisions or when such actions are procedurally defective. In a broad sense, *excès de pouvoir* or *ultra vires* applies when there is unreasonable use of competence or bad faith, failure to exercise administrative discretion or the irrational and improper application of discretionary powers.

Based on Wade et al. (1997), *ultra vires* doctrine is not limited to cases of exceeding competence; it also encompasses abuse of power, such as when something is conducted unjustly, for the incorrect reasons, or with the wrong procedures. These circumstances have the same consequences. Improper motives or procedural missteps render administrative actions as illegal as exceeding competence.

As a valuable part of the administrative, judicial framework, *ultra vires* law has evolved into a powerful legal instrument for the courts to control abuses of executive or legislative power that lead to arbitrariness and injustice, violating the rights of citizens (Sarma, B.C., 2009; Mughal, M.A., 2011).

Judicial review is the ultimate mechanism courts use to hold public bodies

accountable for their actions and decisions. The purpose of judicial review is to ensure that public bodies act under the law. It is common for judicial review to be based on substantive and procedural concepts of "malwewenang" (abuse of power), where the former arises when an administrative body makes a decision or takes action that is not legally permitted, thus acting beyond its authority. The latter arises when an administrative body needs to follow appropriate procedures in its decision-making process.

The central issue in the use of competence by government bodies is legality. The scope of legality in governmental actions includes competence, procedure, and substance. In exercising its authority, every administrative body ideally must respect the boundaries that separate its domain from that of other administrative bodies. These boundaries are established based on territorial jurisdiction (*ratione loci*), under the subject matter (*ratione materiae*), and based on appropriate time (*ratione temporis*).

Therefore, every competence/authority is limited by subject matter (substance), space (territory: *locus*), and time (*tempus*). Actions taken outside these boundaries are considered unauthorized actions (*onbevoegdheid*). This forms the scope of legality in governmental actions. Hence, unauthorized actions can be *onbevoegdheid ratio materiae*, *onbevoegdheid ratio loci*, and *onbevoegdheid ratio temporis*. Authority and procedure constitute the foundation of formal legality. Based on formal legality, the principle of p*raesumptio iustae causa* was established (Hadjon, 2012).

Research Method

This research was juridical normative (doctrinal) using secondary legal sources (literature). The approach employed was a conceptual approach based on views and doctrines developed within the law field (Marzuki, 2014). The analysis was conducted in a descriptive qualitative manner and is narrative in form, utilizing non-statistical linguistic argumentation.

Result and Discussion

i. The Meaning of Competence

The abuse of power in this research refers to administrative bodies' misuse of authority/competence. It falls into the category of actions prohibited by law (illegal), mainly when carried out by trusted public officials. This includes the concepts of *excès de pouvoir* or *ultra vires.*

The term "*mal*" originates from the Latin word "*malum*" (noun), which means evil. Its plural form, "*mala*", refers to violations of rights or laws: evil or wrong (https://www.merriam-webster.com/dictionary/malum). Etymologically,

the Latin root "*mal*" means terrible (https://membean.com/roots/mal-bad/). Latin has greatly affected Romance languages with the root word "*mal*"; in Spanish, the words are "*malo*" and "*mala*," and in French, it is "*mal*." All these terms point to the concept of "*malfeasance*," which is wrongdoing due to one's office or position. Additionally, the word "*wewenang*" (Dutch: bevoegd; English: competence) refers to the right to make independent decisions regarding the execution of a task in a particular situation. Thus, "*malwewenang*" means the right to make independent decisions regarding executing a task in a specific situation in a wrong manner.

ii. *Ultra Vires (Excès de Pouvoir)* in the Anglo-Saxon Legal System

In the mid-19th century, the doctrine of *ultra vires* became a means to ensure that executive bodies/administrative bodies (especially local government) acted within their powers/authorities. Courts have the power to review the exercise of such powers/authority to ensure that decision-makers have not exceeded their limits or if they have not abused their authority and acted ultra vires (Jones, 2001). The use of governmental authority, including *ultra vires*, is a controversial action for the annulment of an administrative decision based on violations of legal rules. This is open-ended and ensures compliance with general principles of law and respect for the principle of legality.

One method of classification to use the doctrine of *ultra vires* as a basis for judicial review is the occurrence of a breach of procedural justice rules, lack of power/authority/competence, deficiencies or exceeding jurisdiction, non-compliance with legal procedural requirements, or manifest unreasonableness (Jones, 2001).

The principle of *ultra vires* is based on the assumption that judicial review is legitimized by the rationale that courts apply the intentions of the legislature. Parliament finds it necessary to grant powers to ministers, administrative bodies, local governments, etc. These powers will always be subject to certain conditions contained within the legislation. The function of the courts is to supervise the boundaries set by Parliament. The *ultra vires* principle is used to achieve this goal in two related ways (Craig, 1998).

In a narrow sense, it captures the idea that the relevant body must have the legal capacity to act concerning the intended topic (for example, a body authorized by Parliament to address employment issues must not take jurisdiction over non-employment matters). In a broader sense, the *ultra vires* principle is used as a means to impose several constraints on how the powers/authority given to the body have been exercised (in this case, it must comply with fair procedural rules, must pursue appropriate and proper objectives, must not act unreasonably, etc.).

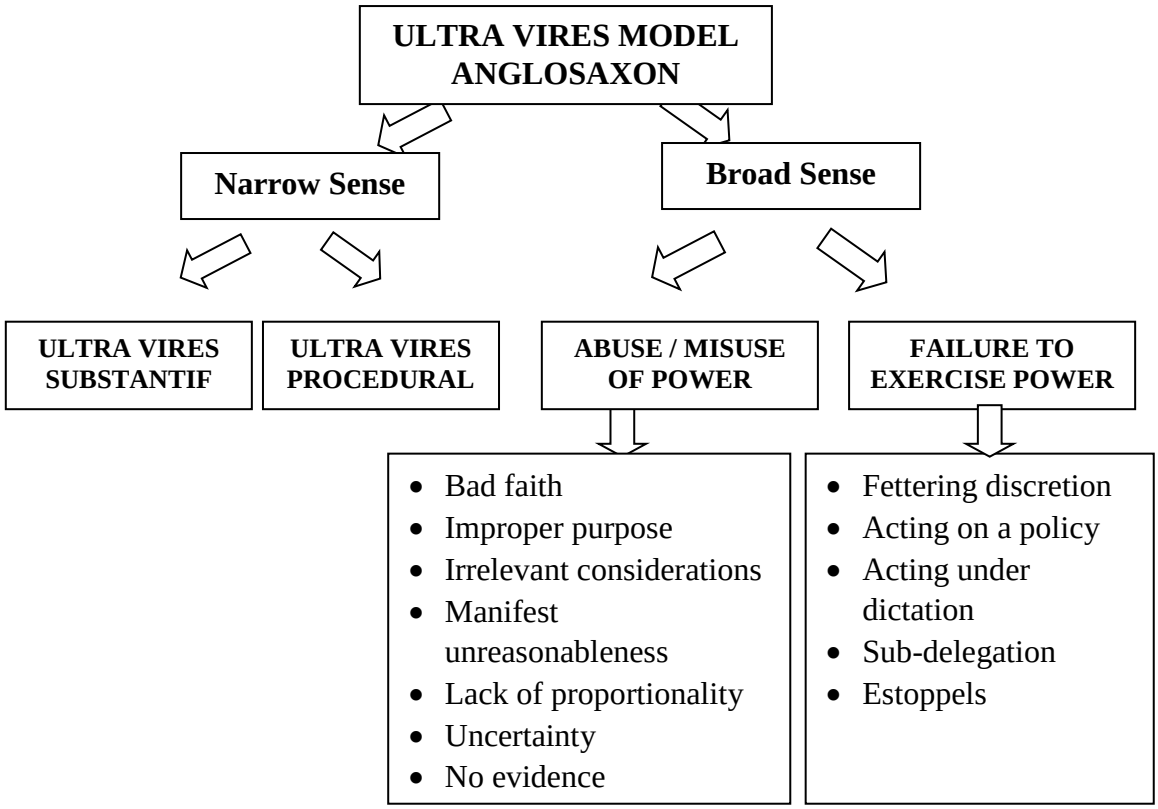
In the Anglo-Saxon model, the *ultra vires* doctrine has two branches (Jones, 2001), namely: a) simple (or narrow) *ultra vires (ultra vires* in the simple sense or the narrow sense); b) extended (or broad) *ultra vires (ultra vires* in the expanded sense or the broad sense). In *ultra vires* in the narrow sense, a legal rule can be declared invalid if: 1). intends to address some issues beyond the scope of possible authority; or 2). deals with a matter within the scope of possible authority but exceeds the limits of specified competence.

In the narrow sense, ultra vires have two branches: a) *substantive ultra vires* - including so-called implied ultra vires and b) procedural ultra vires. Furthermore, ultra vires in the broad sense (broad ultra vires) also has two branches, namely:

a) Abuse of power, which includes (1) bad faith, (2) improper purpose, (3) irrelevant considerations, (4) manifest unreasonableness, (5) lack of proportionality, (6) uncertainty, and (7) no evidence.

b) Failure to exercise power, which includes: (1) fettering discretion; (2) acting on a policy; (3) acting under dictation; (4) sub-delegation; and (5) *estoppel* (waiver – not implementing the contents of the agreement because it is not clear enough).

If described in a structured manner, then the doctrine of ultra vires in the Anglo-Saxon legal system is as follows:



When formulated, the principle of ultra vires provides the judicial basis for intervention and establishes its limits. Judicial intervention is further substantiated by the idea that it aims to ensure that governmental bodies remain within the area assigned to them by Parliament. The rule of ultra vires also affects the boundaries of judicial review. Suppose an administrative body operates within its assigned jurisdiction. In that case, it is prima facie within the first line of scrutiny in carrying out its tasks entrusted to it by the legislature and, therefore, not contrary to the will of Parliament. Control over how government bodies exercise their powers must be framed within the mindset of those bodies. Courts should not supplant the judgments of government bodies. Control over how discretionary powers are exercised, especially justified by reference to legislative intent, implies that Parliament did not intend for government bodies to make decisions based on irrelevant considerations or inappropriate purposes.

iii. Excès de Pouvoir (Ultra Vires) In the French Continental Legal System

In France, the act of *excès de pouvoir* (exceeding the limits of competence/power) is a controversial action for the annulment of an administrative decision based on a violation of the rule of law (Gérard Cornu, 2005). The challenge of resolving excès de pouvoir has increased in recent decades, at least in countries with the most complex legal structures. This increase is due to several reasons:

a) The actions of the administrative body have rapidly developed: some traditional tasks, such as policing or teaching, have become much more demanding;
b) New tasks such as welfare or urban planning have emerged;
c) Guarantees given to citizens have been significantly strengthened; and
d) Due to advancements in general education and under the influence of various protest movements, citizens are increasingly determined to defend their rights, if necessary, through legal action.

The conditions for implementing an act by a government body that exceeds its competence/power (*excès de pouvoir*) relate to: first, the nature of the disputed action, and second, the applicant's interest in initiating the process. The means to challenge *excès de pouvoir* against a government action are only available for a certain period, after which it is impossible to appeal. Action must be taken within two months after publication (in the case of regulations) or notification (in the case of individual decisions). However, there are many adjustments to the two-month rule, including the possibility for the complainant/applicant to file an administrative appeal before the competent body by requesting it to reconsider its

decision or a hierarchical appeal to a higher body than the administrative subject. The government body has two months to respond to this request. If there is an unfavourable response or no response from the government body, the litigation period (filing a lawsuit in court) starts again for two months.

The resolution for *excès de pouvoir* is mainly open to the parties involved, although the status of a citizen is sufficient for carrying it out, as this is not an "*actio popularis*." To be admissible, it must be justified by an actionable interest, which is quite liberally construed and broadly understood as case law.

In France, the means of recourse that can be used to support a lawsuit against an act of a government body that constitutes *excès de pouvoir* are:

1). ***Moyens d'illégalité externe*** (External illegality means) refers to methods or suggestions derived from the implementation of actions, which include:

a) *incompétence de l'auteur de l'acte (*lack of authority of the subject- government body), which can be material, territorial, or temporal*;"*

b) *vice de forme (dont le défaut de motivation*) - "defect (including lack of motivation)";

c) *vice de procedure* (procedural defects);

d) *vice dans la composition d'un organisme dont l'avis à recueillir est obligatoire*. (defects in the composition of the organization whose opinions must be incorporated).

2). ***Moyens d'illégalité interne*** (Ways/Means of internal illegality) are means of internal legality that are taken based on bad characteristics related to the content to the substance of the action, which includes :

a) *violation directe de la règle de droit:* (direct violation of the rule of law);

b) *erreur de fait : pour qu'un acte soit légal il faut que les faits sur lesquels il est fondé existent.* (mistake of fact: for an action to be legal, the underlying facts must exist.);

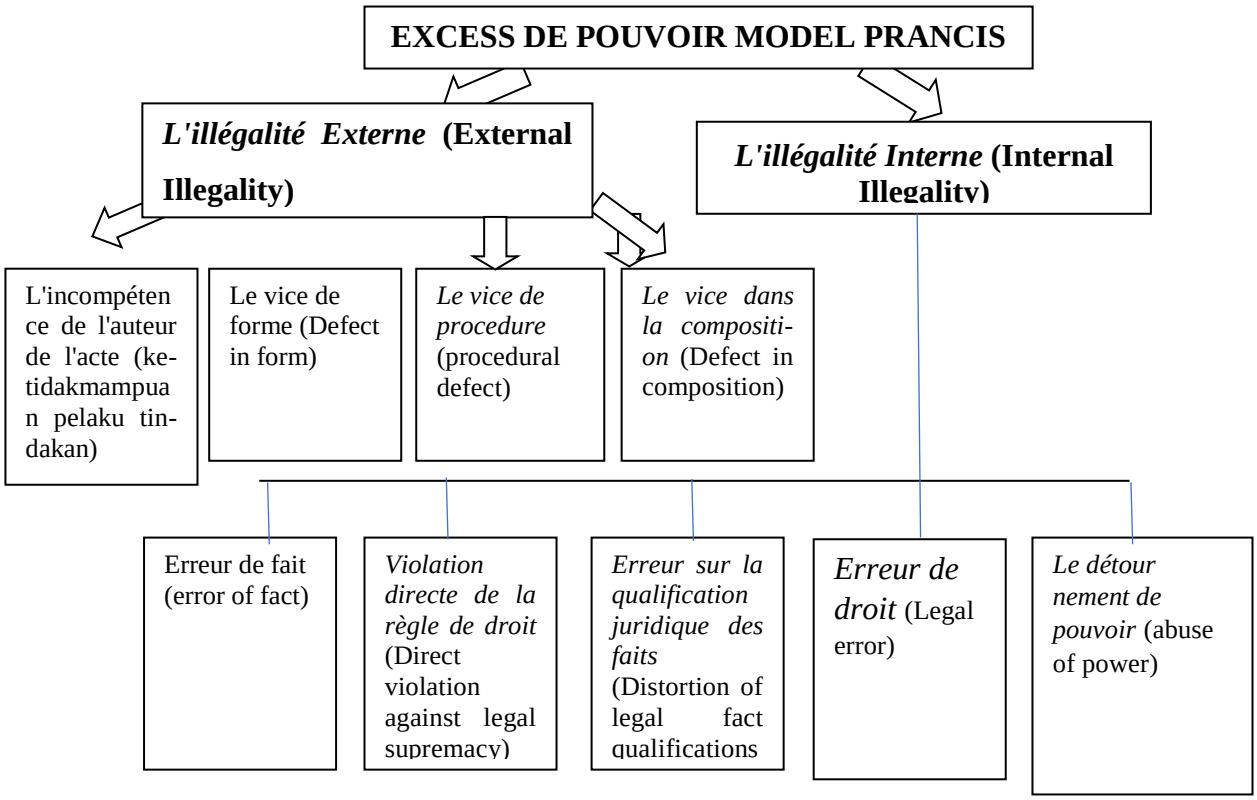
c) *erreur sur la qualification juridique des faits* (errors in the characterization/qualification of legal facts);

d) *erreur de droit : substitution des moyens par la decision* (legal error: replacement of petition with decision);

e) *le détournement de pouvoir* (abuse of power), used by the administrative body in decision-making competence for purposes other than those for which the authority was granted. There are 3 variants of détournement *de pouvoir*, namely":

(1) L'administration vise un but complètement étranger à l'intérêt général, comme un but personnel (The administrative body aims to achieve goals that are entirely

apart from the public interest, and as personal objectives);
(2) L'administration agit dans un intérêt général mais différent de celui qu'elle est habilitée à poursuivre (The administrative body acts in the public interest but in a manner different from what is permitted to be carried out);
(3) *Détournement de procédure: situation où l'administration met en place une procédure à la place d'une autre non pas en vertu d'une exigence légale mais uniquement dans le but de se procurer un avantage* (Procedural abuse: a situation in which the administrative body implements procedures not based on legal requirements but solely for the purpose of obtaining benefits).
If described in a framework, the doctrine of excès de pouvoir (ultra vires) in the Continental legal system, especially in France, can be summarized as follows:



Conclusion

The standard for assessing the use of competence by administrative bodies should rely on more than formal legality, based on the principle of *praesumptio iustae causa*/ *vermoeden van rechtmatigheid*. It states that every action and decision an administrative body makes should be deemed valid until annulled. Abuse of power (*Malwewenang*), as a form of deviation in the exercise of authority by officials or administrative bodies, constitutes a violation and is

prohibited by law. Assessment of abuse of power should also be based on aspects of rationality, proportionality, and appropriateness according to the principles of good governance. The prohibition of government actions in the form *of excès de pouvoir (ultra vires)*, both in the Anglo-Saxon legal system (England, USA, Australia, etc.) and in the Continental legal system, especially France, also includes the prohibition of abuse of power (*detournement de pouvoir*).

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