

# **MLL324 – Exam Notes**

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## Topic 2 – Sources and Standing for Judicial Review

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### **Review v Appeals**

**Note:** When talking about review/appeal to another executive body, no real difference.

**When talking about a court:**

- (a) Review – only refers to judicial review
- (b) Appeal – No common law right to appeal.
  - “As of right” v “special leave”
  - Appeal de novo (can cover facts) v legal appeal

### **Legality v Merits**

**Legality:** Is this decision made pursuant to law? (Questions of law)

**Merits:** Is this a good decision? (Questions of fact)

### **Separation of Powers**

#### **Federal Level**

1. Courts cannot exercise Non-Judicial Power (*Boilermakers*)
2. Non- Courts cannot exercise judicial power (*Wheat case*)

**State Level:** Courts cannot be given powers that impairs their institutional integrity (*Kable*)

### **Pros and Cons of Judicial Review**

**Question:** Why should it be the courts that decide issues of the legality of other branches of government?

**Note:** Judicial Review tends to be more controversial in countries with a bill of rights.

#### **Judicial Review**

Marbury v Madison (US case): Do you expect the parliament to regulate themselves?

Hamilton: The executive has force, the judiciary do not.

- Undemocratic: Judges are not elected by the people.
- Inefficiency: May cause unwarranted delays.
- Deference : The executive are the experts in their area, so unless there is a very strong indication they've made a legal mistake, we should defer to their expertise.

## **Steps for Judicial Review**

1. Identify jurisdiction and source of JR;
2. Make sure you have standing;
3. Identify legal error;
4. Ensure no limitations;
5. Identify remedy

## **Sources of Judicial Review**

1. Common Law
2. Constitutional
3. Statutory

## **Common Law**

- Prerogative writs and equitable remedies (*Prerogative writs*)
- Jurisdictional error needs to be shown.
- Exception to B: certiorari on the face of the record.

**Writ:** Written order/instruction.

**Prerogative writ:** Writs by the court attributed to the royal prerogative of the King.

- *Certiorari:* Quashing an unlawful an unlawful decision
- *Mandamus:* Order an official to exercise some power.
- *Prohibition:* Prohibit an official from exercise some power

## **Equitable Remedies (from equity)**

**Injunction:** Forces a person to take action or refrain from doing so.

**Declaration:** A statement about the lawfulness of a decision. No binding force.

## **Jurisdiction Error**

1. Defining JE
2. Problems with JE
3. How to identify JE?

## Definition of Jurisdictional Error

**Aala:** “There is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do.”

- **Example:** A local council is given the power by legislation to decide what kind of dogs can enter a local park. For other animals, that is left to the parliament. The local council makes rules about cats.

**Kirk:** “It is neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error”

- “First, an inferior court falls into jurisdictional error “if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist”
- ‘Secondly, ... jurisdictional error “is at its most obvious where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of entertaining a matter or making a decision or order of a kind which wholly or partly lies outside the theoretical limits of its functions and powers’

**Example:** Statute stipulates that immigration department can cancel visas if a person is a danger to society.

- Decision maker cancels person B’s visa because B likes wearing crocs.
- Decision maker cancels person B’s visa because B watches violent movies.

## Non-Jurisdiction (Legal) Error

**Aala:** Incorrectly deciding something which the decision maker is authorised to decide is an error within jurisdiction. (This is sometimes described as authority to go wrong, that is, to decide matters within jurisdiction incorrectly)

- **Note:** Power versus how you exercise that power.

**Kirk:** “As Professor Sawyer wrote... the English common law courts sought to control inferior courts ... Yet at the same time “it [was] usually desired, for reasons of expediency, to give the inferior decision some degree of finality”.

## Problems with Jurisdictional Error

**Kirk:** “[the term jurisdictional] is almost entirely functional: it is used to validate review when review is felt to be necessary... If it is understood that the word ‘jurisdiction’ is not a metaphysical absolute but simply expresses the gravity of the error, it would seem that this is a concept for which we must have a word and for which use of the hallowed word is justified”.

**Aala:** “The difficulty of drawing a bright line between jurisdictional error and error in the exercise of jurisdiction should not be permitted, however, to obscure the difference that is illustrated by considering clear cases of each species of law”.

**Note:** JE is a problematic concept – “twilight does not invalidate the distinction between night and day” (Aala).

### **How to identify Jurisdictional Error?**

**Project Blue Sky:** A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. ... In determining the question of purpose, regard must be had to “the language of the relevant provision and the scope and object of the whole statute.

### **Exception to Jurisdictional Error – Certiorari on the Face of the Record**

**Ex Parte Shaw:** “What, then, is the record? It has been said to consist of all those documents which are kept by the tribunal for a permanent memorial and testimony of their proceedings.

- Following these cases [from the King’s Bench], I think the record must contain at least the document which initiates the proceedings; the pleadings, if any; and the adjudication; but not the evidence, nor the reasons”

**Section 10:** Any statement by a tribunal or inferior court whether made orally or in writing, and whether or not made pursuant to a request or order under section 8, of its reasons for a decision shall be taken to form part of the decision and accordingly to be incorporated in the record.

### **Common Law Jurisdictional Error**

#### **General:**

- You can get Prerogative Writs or Equitable remedies.
- For equitable remedies no need for JE.

#### **For Prerogative Writs:**

- Need to show JE.
- B. Exception to A is if looking for certiorari and the error is on the face of the record.

### **Constitutional Judicial Review**

**Section 75: (iii)** in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;  
**(v)** in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;

**Note:** Constitutional writs are not prerogative writs.