2. **Jurisdiction**: review for error of law, control of fact finding, and ouster of judicial review


**Theories of Justification**

⇒ **Collateral Fact Doctrine (CFD):**

Until recently the most widely accepted theoretical explanation of which issues should be held to go to jurisdiction:

1.) **Preliminary Questions & Merits:**
   - A decision is correct if it is made by the person within the legal system to whose opinion on the existence of fact or law will be given by the executive.
   - A tribunal is given power on the existence of certain conditions. There are certain preliminary questions it must answer before it can proceed to merits, e.g. whether the tribunal was properly constituted & whether the case was of a kind referred to in the statute. These can involve fact, law or discretion.
   - T must make an initial determination on these matters, but its decision is not conclusive → if the reviewing court thinks contrary, the conclusion reached by the tribunal will be void.

2.) **Ambit of Preliminary Question:**
   - F(a, b, c, d) = furnished tenancy.
   - Position will often be more complex → common for a statute to say if X1, X2, X3 exist than the tribunal may do Y (Xs = shorthand descriptions presuming the existence of elements in the bracket.)
   - Doctrine seeks to distinguish those elements within the bracket which could be regarded as conditioning the power of the tribunal to go on & consider the merits themselves. Fundamental problem is that in an everyday sense all elements relating to the Xs could be said to contain jurisdiction → but if this was the case in the legal sense, the dividing line between review & appeal would disappear.
   - Diplock LJ’s solution = a distinction: a misconstruction of the enabling statute describing the kind of case into which T was meant to inquire = jurisdiction, but misconstruing a statutory description of the situation = an error within jurisdiction.

Problem = impossibility to draw the line with any accuracy → definition of ‘kind’ or type’ is inevitably comprised of descriptions within the statute of the ‘situation’ which the tribunal has to determine → if one was asked to produce a summary of the kind of case into which the tribunal was intended to inquire, one would do so by looking at the situations which the tribunal had to determine as mentioned in the statute.

⇒ **Limited Review**: (Gordon)
1.) Relative rather than absolute facts:
   − Any tribunal might make a mistake in a finding → no Ts are infallible. But so long as T decides the question properly assigned to it by law, its relative opinion will bind, subject to appeal. Jurisdiction must involve the power to make a wrong as well as a correct decision.

2.) The limits:
   − Determined not by the truth or falsehood of its findings, but by their scope & nature. Sufficient that the charge was laid in the correct form, thus jurisdiction was determined at the start, not the conclusion of the inquiry.

Gordon didn’t like collateral fact theory because:
1.) Every Act of P says that if a certain state of facts exists then the T may do a certain thing; those facts were always for the relative decision of T.
2.) Unrealistic to divide matters into preliminary & essential → all elements within the statement ‘if X’ in some way condition the jurisdiction to do Y.
3.) Impossible to reconcile cases on CFT → no reason could be found as to why the courts called a fact preliminary in one case but not in another.

⇒ Criticisms of G’s theory:
   1.) May be hard to decide when an inquiry commences or that limited review is unacceptable on policy grounds.
   2.) G seeks to avoid the pitfalls of the CFD by erecting a brick wall between furnished tenancy & bracket → court not allowed to peer inside at the meanings assigned to the elements inside the bracket except to find a non-jurisdictional error. Element of circularity: presumes that the subject-matter is properly before the tribunal, a presumption which can only be made if subject-matter is defined purely in terms of furnished tenancy & itself. Whether this assumption is properly made depends upon one’s conception of meaning & on questionable premises concerning legislative intent.
3.) Thesis is based on questionable assumption concerning legislative intent → doubtful whether one can assume that the legislature always intended T to be the arbiter as to what the contents of the bracket ought to be.

⇒ Extensive Review: The Academic Argument (Gould)

1.) Preliminary Questions & Substance:
   − Ts have two questions to answer:
     − 1.) preliminary question of whether it was asked to answer a question it was empowered to answer → could not be decided finally itself. A logically necessary precondition to the exercise of jurisdiction: because it is logically prior, could not itself be part of the exercise of jurisdiction.
     − 2.) Substance of the matter or merits for T itself.
   − So far G has provided a restatement of CFT, but then seeks to provide a logical answer to the previously unsolved question → what matters are collateral and which are prelim?