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**Introduction.**

Let it be accepted, at least for the purposes of present argument *de bene esse*, but that the laws in this land be made in Parliament, or more correctly by the constitutional form, by the Queen in Parliament – or at the least, and with deference to the modern abundance and profusion of subordinate and even subsidiary forms of legislation, by authority of, and under the superintendence and supervision of the same. Including, therefore, most especially the Public Law – meaning thereby that law created principally for the benefit of, and more especially for the safeguarding of the most important rights of, all of her Majesty’s loyal subjects (sometimes referred to somewhat nebulously as “citizens”) together, equally and without distinction.

Let it be further accepted, again for the purposes of present argument, that it is the duty and function of the Royal courts of Justice, *inter alia*, to enforce that Public law (today as ably aided, albeit perhaps only as a side-wind, by our administrative tribunal system). That is, in the sense of their undertaking proceedings to place on trial those accused of breaching the said laws – and upon finding them guilty or liable as the case may be – of dispensing such punishment and of ordering such compensation for injury *etc.*, as in their wisdom they deem the interests of public justice demand.

So then that there be no doubt about the matter here in issue, let us be clear, for what we are concerned with by this question is in truth no less a thing than “the ownership of” that English Public Law, by which I mean nothing less than who (if anyone) stands according to our constitutional forms, in the incalculably all powerful position as between on the one hand Parliament, the lawmaker, and on the other the Royal Courts, the law enforcer, as nothing less than the Royal Gatekeeper – or perhaps more accurately as Royal Bouncer. The state official, or as styled in our system Officer of the Crown, in whom the Courts recognise alone possession of the exclusive and ultimate right to control, especially in the sense of invoke, the enforcement of that public law – which is to say in the outcome the upholding of that law – whether that be in fact as, typically the case a part of the criminal law, or on rare occasion, just the civil law.

In short, it comes to this, is simple access to justice for the benefit of the commonwealth of the people in this Realm, and in the interests of the public good, something which the public enjoy “as of right” (something which a true “citizen” might surely expect) ; or instead, is it rather something that is – down unto this very day – yet controlled by, and at the absolute and unfettered discretion of, this most omnipotent singular state official ? Even, unto the point that he (or she) need never give any reasons whatever, either for permitting or refusing such access – and neither may the Courts question their true motives for the same.

Asserting that, if explanation or justification for such a consequential, crucial and final determination of the public’s inability to so obtain simple justice is unavoidably called for, in any particular instance, then that is not properly a matter for the impartial judicial examination and learned enquiry of a court of law, but rather for the partisan political bear-pit and cacophonous farrago of Parliament instead.

**The various ‘keys’ carried by the Royal Gatekeeper**

It is, perchance, convenient to commence my analysis of this issue by first listing the various ways and means, whereby the Attorney-General has either been granted or by convention has assumed, the power to control public access to the Royal Courts in the field of prosecution for criminal offences. The following instances are not necessarily exhaustive , but certainly cover the main instruments whereby his (or her) will be done.

**(A) Specific statutory provision for the A-G’s consent**

**to the institution of proceedings for an offence.**

There are in fact not an inconsiderable number of provisions whereby the specific consent of the Attorney-General (though not necessarily exclusively) is required by statute and in advance, for the “institution of proceedings” for an offence or offences created under or by that Act. In general these provisions affect areas where it is said that issues of public policy, national security or relations with other countries maybe impinged upon by decisions as to whether or not to prosecute. However, the list of statutes in truth goes well beyond even these nebulous limits. As of 1998 a total of no less than 67 examples were listed at Appendix A (Part I) as appended to the Law Commission Report (LC 255) – “Consents to Prosecutions” (“the Law Commission Report 1998”) – which shall be dealt with in greater depth below.

 **(B) Enter a Writ of *Nolle Prosequi***(“No Prosecution”) :

A *nolle prosequi* in criminal proceedings is an undertaking entered into on record by leave of the Attorney-General, to forbear to continue proceedings wholly or partially. This can be done at any time after the bill of indictment is signed and before final judgment: *Dunn* (1843)**[[1]](#footnote-1).** The effect is as complete as it is quite straightforward – any prosecution in relation to which it applies it stopped thereby and forthwith.

 **(C) Have an Informant labelled a “Vexatious Litigant”.**

Para.2.18 of the Law Commission Report 1998, describes the power of the High Court, on the instigation of the Attorney-General, as follows:

 “Under section 42 of the Supreme Court Act 19813 and on the application of the Attorney-General, the High Court may make a “criminal proceedings order” against a person if it is satisfied that he or she has “habitually and persistently and without reasonable ground … instituted vexatious prosecutions (whether against the same person or different persons)”. A “criminal proceedings order” declares

the person to be a vexatious litigant and prevents the person bringing further proceedings without leave of the High Court. If the court is satisfied that the person is a vexatious litigant in both civil and criminal proceedings, it may make an “all proceedings order” as a result of which that person is prevented from bringing both criminal and civil proceedings without leave of the High Court. “.

This is the singular instance of an example where the Attorney-General is not able to act so as to quash or prevent access to justice by himself alone; but rather where he can do so only by invoking the exercise of a specific statutory jurisdiction granted by Parliament to the High Court instead.

**(D) Direct the Director of Public Prosecutions.**

The Prosecution of Offences Act (“PoA”), 1985 provides :

 **“3 Functions of the Director**

(1) The Director shall discharge his functions under this or any other enactment *under the superintendence of the Attorney General*.

**….**

**6 Prosecutions instituted and conducted otherwise than by service**

(1) Subject to subsection (2) below, nothing in this Part shall preclude any person from instituting any criminal proceedings or conducting any criminal proceedings to which the Director’s duty to take over the conduct of proceedings does not apply.

(2) Where criminal proceedings are instituted in circumstances in which the

Director is not under a duty to take over their conduct, *he may nevertheless do so at any stage*.”

(Emphasis added)

Where the Director of Public Prosecutions (“the DPP”) does so take over the conduct of proceedings in a criminal prosecution, albeit where those proceedings were commenced by a so-called “private-individual” instead, he may thereafter then either

 (a) formally discontinuing them under section 23(3) of the POA 1985, or

(b) withdraw the information upon which the case was instituted[[2]](#footnote-2), or simply

(c) in the alternative offer no evidence[[3]](#footnote-3).

The question then becomes to what extent does the Attorney-General’s statutory power of *“superintendence*” over the functions of the DPP, thereby permit him or her to either directly, or at least albeit indirectly but in effect, direct the DPP to take over the conduct of a particular case, for the specific purpose of exercising any of the functions under (a) to (c) above and which would equally then have the ultimate effect of again “killing” that criminal prosecution.

Until relatively quite recently, it was seriously doubted whether the mere “*superintendence*” provisions of s.3(1) PoA 1985, as above, reached so far as to thereby actually permit or authorise the A-G to specifically “direct” the DPP, in any particular instance or individual case, to exercise his powers so as to quash or terminate a particular prosecution. Equally, there was a live issue as to the extent to which the replacement of the pre-existing custom and common-law conventions, by the PoA 1985, may have altered the position as previously practised[[4]](#footnote-4).

However, perhaps somewhat ironically, as a result of certain Parliamentary criticisms and observations (as I shall come on to deal with in greater detail later) that the relationship between the “Law Officers” (meaning thereby the A-G and the S-G together) and the “Directors” (meaning thereby the DPP, the Director of the Serious Fraud Office and the Director of the Revenue and Customs Prosecutions Office) was somewhat nebulous and lacking clarity and public accountability – these Officers have now got together and produced a so-called “Protocol between the Attorney-General and the Prosecuting Departments” (July 2009) Paragraph 4(b)1 of which states as follows:

“The one exceptional category of case in which the Attorney General will consider the possibility that she or he may **direct** that a prosecution is not started or not continued (or, in the case of the SFO, that an investigation is not to take place or not to continue) is where the Attorney General is satisfied that it is necessary to do so for the purpose of safeguarding national security.” **[[5]](#footnote-5).**

(Emphasis added)

Accordingly, this reveals to us not only (a) that the A-G does indeed consider he has the specific power to “direct” the DPP (or indeed any other Prosecutorial Director) in relation to the exercise of their powers in a case not specifically subject to the Law Officer’s statutory consent instead ; but equally it tells us (b) in which specific area of government policy or administration he is most concerned that uncontrolled access to criminal justice needs his personal brand of restriction. Comforting to know that Cmdr Bond’s “licence to kill” remains in safe hands *!*

This then represents the principal means whereby the Attorney-General in practice has an exclusive control over the access to the Courts, by the public in order to seek justice in the Criminal and Public Law spheres. By means of one or other of these controls the Attorney-General can in effect predetermine the prospects for any possibility of any prosecution, as sought by any person in the Realm, ever reaching adjudication by a court of law. Finally, there is yet a fifth category of control which applies specifically in relation to those that would invoke remedies under the civil law, most especially injunctive relief, in order to enforce provisions under the criminal law that were otherwise in danger of being ignored or flouted.

 **(E) Refuse consent to acting as nominal Plaintiff in a “*Relator”* Acton.**

Para.3.6 of the Law Commission Report 1998, offers the following explanation of the purpose fulfilled by the common law convention of a “*relator*” action, as follows:

 “The relator action is a device by which the Crown’s procedural privileges have been made available to private plaintiffs. Although a private individual will have standing to restrain a breach of public law where the interference with the public right involves some interference with private rights (or, perhaps, where that individual is threatened with special damage over and above that which the wrong inflicts on the rest of the public), I n all other cases only the Attorney-General can institute proceedings to vindicate public rights. The Attorney-General can act independently, but in practice he or she usually acts at the relation (that is, at the instance) of a private individual. A court can always hear cases brought at the instance of the Attorney-General, because the Crown will always have standing for this purpose, whereas a private plaintiff might be refused relief on the ground that he or she had no more interest in the matter than any other member of the public. A relator action may be brought against a public authority that is acting, or threatening to act*, ultra vires*. Equally it may be brought against any private individual or body committing a public nuisance or otherwise violating public law.”

It is in relation to this last matter, of a relator action, where the remedies available under the civil law are invoked instead in aid of enforcing the criminal law, which was at issue in the leading case of *Gouriet v Union of Post Office Workers* [1977][[6]](#footnote-6) .

**The Caselaw**

***Gouriet’s Case***

***Gouriet v Union of Post Office Workers* [1977] 1 AllER 696 (CA)**

The events which gave rise to this most notorious litigation really begin at 9 o’clock on the evening of Thursday, 13 January 1977 in front of the television set in an unassuming domestic residence in Watchet, Somerset. There one John Prendergast Gouriet was watching the nightly news from the BBC, when he saw an announcement that the National Executive Committee of the Union of Post Office Workers had that morning decided to declare a complete postal, parcel and telegram boycott on all communications as between the United Kingdom and the Republic of South Africa, for one week commencing the following Monday. This was in response to a call for ‘international solidarity ‘by the International Confederation of Free Trades Unions in support of a boycott of South Africa, and in political opposition to the South African government policy of internal domestic black and white “apartheid”.

The announcement was followed by an interview with Mr Tom Jackson, General Secretary of the Union, who when it was put to him that his Union’s proposed action was in fact not merely unlawful, but in fact a crime, responded that *“the matter had never been tested in the courts, and that the laws relating to it dated from the time of Queen Anne and were more appropriate for dealing with ‘highwaymen and foot pads*”. This news was followed the following morning by a similar pronouncement from the national executive of the Post Office Engineering Union (“POEU”), to the effect that the boycott would be extended so as also to include all telephone and telegraph communications., except where “life and death” was at stake.

Mr Gouriet was the Secretary of the ‘Freedom Association’, generally considered a right-wing pressure group, opposed to trade unionism politically, and in particular to the exertion of militant trade union power. The following morning saw him visiting his lawyers in town to discover what he could do, as an outraged English subject of the Queen, as he saw matters, to prevent this proposed manifest affront to the legal rights and freedoms of the public to communicate freely with persons in South Africa.

The following morning his lawyers will presumably have informed him (it is to be hoped) that were he to await the beginning of the boycott the following week, so that an actual act or acts of specific interference, as in delay of the post, had occurred, he would then be at liberty to lay an information before any local magistrate having territorial jurisdiction, for an offence under s.58 of the Post Office Act 1953 (an Act of Parliament considerably more contemporary than the reign of Queen Anne *!* ), and which made it an offence for any person to wilfully detain or delay any postal packet, thereby seeking to commence a so-called private prosecution. However, if it were his aim instead (which it was) to seek to initiate preventative action, whereby the Union’s entire proposed boycott could be barred in advance, his options were more limited.

In short, an injunction (at civil law) was his best chance – subject, *inter alia*, to the difficulty that if he issued a writ in his own name, then he would normally have to demonstrate that he would expect to suffer some special or peculiar damage or harm, by the proposed action, over and above that experienced by any other ordinary subject of the Realm. If, however, his ambition was (as indeed it was) to act as a champion of the people, but not as claiming any special or peculiar rights more than any other – then his only available remedy, in practice, was to apply instead to the Attorney-General for his permission to lend his name to a, so-called, “relator” action in the High Court. In the event, such an application was immediately drawn up and submitted to the Attorney-General’s Chambers by lunchtime that same day, with the request that it be treated as a matter of the utmost urgency.

In the event, the Attorney-General treated the matter with seemingly astonishing expediency, and by 3:32pm that same afternoon he had replied in writing to the effect that having considered all the circumstances *“including the public interest* “ he had come to the conclusion that he would not give his consent. Things then moved at a truly rapid pace, for a High Court litigation, and by 3:50 pm solicitors acting for Mr.Gouriet had issued a writ in his own name and counsel was then already appearing on his behalf before Stoker J. in chambers to apply for his injunction. Stoker J., while expressing great sympathy for Mr. Gouriet’s case, nonetheless felt prevented, by the Attorney-General’s refusal to act as nominal plaintiff in a ‘relator-action’, to himself grant the injunctive relief sought instead.

However, in the circumstances exceptional leave was given for an appeal directly to the full Court of Appeal to be heard as soon as the following day – Saturday, 15 January, 1977***!*** In the event, this court, comprising in no less than the President of the Court (the Master of the Rolls), Lord Denning himself, sitting together with their Lords Justices of Appeal, Lawton and Ormrod, upon hearing counsel for the Plaintiff and the Defendant trade union only, but not from the Attorney-General, decided to issue an interim-injunction, prohibiting the boycott from starting, until 10:30 am the following Tuesday, 18th January, at which time a full hearing was then commenced, including hearing representations directly from the Attorney-General, Sir Samuel Silkin QC, in person.

Judgement was then handed down the following Thursday week, 27th January. Let me be clear that I am no signed up member of the Lord Denning as the “great maverick” fan club – and there are literally dozens of instances of his judgements which I have found to be both technically unsound and constitutionally offensive; but in this particular instance, I submit that there is no doubt but that the “great maverick” found himself here speaking on the side of the angels of the “rule of law”. The following is from his judgement commencing at p.715*b* in the All England Report ([1977] 1 AllER 696), as follows:

 “In doing his duty, the Attorney-General should not allow himself to be influenced by the merits or demerits of the particular relator ; because it is not his interests which are in question, but those of the public at large: see *Attorney-General v.Logan.* The relator maybe acting as a member of a pressure group, of whom he disapproves, but that is immaterial. If there is a public interest which is sufficiently serious as to need protection, the Attorney-General should give his consent.

No doubt the Attorney-General may consider what his predecessors have done in similar cases. He may consider, too, the repercussions that may follow on his decision. On this he may consult his colleagues in the government who may be better informed than he. They may have confidential information of which he ought to be aware. But he must not let the decision be directed by them. He must make up his mind himself, remembering, however, that he must rigorously exclude any advantage or disadvantage that may assist or beset his own political party as a result of his decision. This may be difficult for him to do, especially because he is, as he told us, a ‘political animal’. But still he must do it.

**….**

The Attorney-General tells us that, when he refuses his consent, his refusal is final. It cannot be overridden by the courts. He is answerable to Parliament, and to Parliament alone. He declines even to give his reasons for his refusal.

This is, to my mind, a direct challenge to the rule of law. Let me take some instances; only hypothetical of course, but to test this claim of his. Suppose that he refuses consent for corrupt motives, or in bad faith. The Attorney-General went so far as to say that even this could not be questioned. This is an extreme hypothesis which can be put on one side. But take a lesser hypothesis. Suppose that he refuses consent for party political reasons, and not in the interests of the public at large. Is he then to be answerable to Parliament alone? Where he would, perchance, be supported by his own political party? Or, even a still lesser hypothesis. Suppose he refuses consent because he considered that the information was laid by a pressure group, of which he disapproved; but yet it was a matter which ought to be taken up in the interests of the public at large. When his refusal then be justifiable? In all these cases he would be failing in his duty, as I have earlier stated it. Does it mean then that nothing can be done about it? But no one can come to the courts and inform us of it? I should have thought that, in order to dispel suspicion, he could come and tell us what his reasons were, or, at least outline them without disclosing anything confidential or secret. But that he declines to do.

These instances are, of course, entirely hypothetical. I would not suggest for one moment that they existed here. But the possibility of them convinces me that his discretion to refuse is not absolute or unfettered. It can be reviewed by the courts if he takes into account matters which he ought not to take into account, or fails to take into account matters which ought to be taken into account, then his decision can be overridden by the courts. Not directly, but indirectly. If he misdirect himself in coming to his decision, the court can say: ‘very well then. If you do not give your consent, or your reasons, we will hear that complaint of this citizen without it.’

I add here, therefore, to the declaration which I made when the late Mr McWhirter came to us ([1993] 1 AllER689 @ 698). I repeat it now:

“…. I am of opinion that, in the last resort, if the Attorney-General refuses leave in a proper case, or improperly or unreasonably delays in giving leave, or his machinery works too slowly, then a member of the public, who has a sufficient interest, can apply to the court itself. He can apply for a declaration, and, in a proper case, for an injunction, joining the Attorney-General, if need be, as defendant

… I regard it as a matter of high constitutional principle that, if there is good ground for supposing that the government department or a public authority [or, I will now add, a trade union] is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of her Majesty’s subjects, then in the last resort, any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced.”

**….**

What then does it all come to? If the contention of the Attorney-General is correct, it means that he is the final arbiter whether the law should be enforced or not. If he does not act himself – or refuses to give his consent to his name being used – that the law will not be enforced. If one Attorney-General after another does this, if each in his turn declines to take action against those who break the law, then the law becomes a dead letter. It may be that each Attorney-General would have good reason of his own for not intervening. He may fear the repercussions if he lends weight of his authority to proceedings against the infringers. But as one like situation follows another – as it does here – it means that a powerful trade union will feel that it can repeat its performance with impunity. It will be above the law. That cannot be.

**….**

Mercifully our Constitution has, I believe, provided a remedy. It is what I have said already. If the Attorney-General refuses to give his consent to the enforcement of the criminal law, then any citizen in the land can come to the courts and ask that the law be enforced. This is an essential safeguard; for were it not so, the Attorney-General could, by his veto, saying ‘I do not consent’, make the criminal law of no effect. Confronted with a powerful subject whom he feared to offend, he could refuse consent time and time again. Then that subject could disregard the law with impunity. It would indeed be above the law. This cannot be permitted. To every subject in this land, no matter how powerful, I would use Thomas Fuller’s words over 300 years ago:’ Be you never so high, the law is above you’.”

This judgement came as nothing less than a calamity to those at the very cream of the British Establishment, who had happily conducted themselves for the previous 350 or so years, in the comforting knowledge that, so long as they continued to enjoy the “confidence” of the Apparatchiks, at the very top of the executive government machine, that which we style as “the Crown” (most especially, of course, the Prime Minister and the Attorney-General), they need not concern themselves overmuch in the running of their affairs, as to whether their conduct would technically bring them into breach of the public law – most especially, of course, the criminal law – since, so long as they could rely on the Attorney-General to consider it as being “*not in the public interest*” to apply it to them, their liability to prosecution under it, would always remain nothing more than hypothetical.

***Gouriet v Union of Post Office Workers et al* [1978] AC 435 (HL)**

Although, leave was granted for appeal to their Lordships’ House, frustratingly for the technical breadth of that appeal, by the last day of the Court of Appeal hearing, doubtless having heard the scepticism expressed by Lord Denning’s brethren Lawton and Ormrod L.J.’s on the subject, Mr.Gouriet made the tactical decision to withdraw his action against the Attorney-General directly, by way of a direct challenge to his refusal to grant his consent to a ‘relator’ action ; and instead relied solely on the fact that this refusal did not, however, bar Mr.Gouriet from proceeding in his own right instead. Lord Wilberforce, giving the lead Opinion in the House, put it thus (@ p.475 in the AC Report), as follows :

“1. There is now no longer a claim that the Attorney-General’s refusal of consent to relator proceedings was improper or that it can be reviewed by the court. This issue, originally presented as one of Breadth constitutional importance, has disappeared from the case. The importance remains, but the issue has vanished. The Attorney-General’s decision is accepted as, in the courts, unassailable. The prerogatives of his office are no longer attacked. All that Mr. Gouriet now claims is that the refusal of the Attorney-General to act does not bar him from acting. The Attorney-General and the unions contend that it does.”

Nonetheless, their Lordships Committee, seeing the opportunity, albeit *obiter,* to put this ‘troublesome’ Master of the Rolls in his place, and to well and truly put the lid on this disconcerting and revolutionary ‘rule of law’ nonsense, concerning the alleged reviewability by the courts of the Attorney-General’s procedural powers, seized the opportunity provided gleefully and with both hands. Lord Wilberforce setting the ball rolling (@p.482) as follows:

“The Attorney-General’s right to seek, in the civil courts, anticipatory prevention of a breach of the law, is a part or aspect of his general power to enforce, in the public interest, public rights. The distinction between public rights, which the Attorney-General can and the individual (absent special interest) cannot seek to enforce, and private rights, is fundamental in our law. To break it, as the plaintiff’s counsel frankly invited us to do, is not a development of the law, but a destruction of one of its pilllars. Nor, in my opinion, at least in this particular field, would removal of the distinction be desirable. More than in any other field of public rights, the decision to be taken before embarking on a claim for injunctive relief, involving as it does the interests of the public over a broad horizon, is a decision which the Attorney-General alone is suited to make: see *Attorney-General v. Bastow* [1957] 1 Q.B. 514.

This brings me to the second argument. Surely, it is said, since the whole matter is discretionary it can be left to the court. The court can prevent vexatious or frivolous, or multiple actions: the court is not obliged to grant an injunction: leave it in the court’s hands. I cannot accept this either. The decisions to be made as to the public interest are not such as courts are fitted or equipped to make. The very fact, that, as the present case very well shows, decisions are of the type to attract political criticism and controversy, shows that they are outside the range of discretionary problems which the courts can resolve. Judges are equipped to find legal rights and administer, on well-known principles, discretionary remedies. These matters are widely outside those areas.”

Next, Viscount Dilhorne - nee Sir Reginald Manningham-Buller PC, himself a former Attorney-General (1954-62) (bottom of p.487) as follows:

“The Attorney-General has many powers and duties. He may stop any prosecution on indictment by entering a *nolle prosequi*. He merely has to sign a piece of paper saying that he does not wish the prosecution to continue. He need not give any reasons. He can direct the institution of a prosecution and direct the Director of Public Prosecutions to take over the conduct of any criminal proceedings and he may tell him to offer no evidence. In the exercise of these powers he is not subject to direction by his ministerial colleagues or to control and supervision by the courts.

**[488] …**

**…** in my opinion the view that refusal of consent to a relator action is an exception to the general rule and is subject to review by the courts must be rejected. It is because I think it undesirable that any judicial observations suggesting that the exercise by the Attorney-General of these functions and duties is subject to control, supervision and review by the courts should be left unanswered that I have ventured to make these observations.”

Next, Lord Edmund-Davies, (bottom of p.505), as follows:

“One prefatory topic can, despite its basic importance, be disposed of with comparative brevity. It raises the question whether the courts are at liberty to inquire into the manner in which an Attorney-General has responded to an application to consent to a relator action being brought, and it will be recalled that in the instant case Mr. Gouriet originally claimed (but later revoked) his request for a declaration that the Attorney-General *“… in refusing his consent … acted improperly and wrongfully exercised his discretion.”* Lawton and Ormrod L.JJ. held that the court had no right to inquire into such matter and at some stage Mr. Gouriet conceded this. Lord Denning M.R., on the other hand, concurred only where the Attorney-General had consented. But he held [1977] Q.B. 729, 758, that where, as here, consent is refused it is competent to the court to inquire into the acceptability of the Attorney-General’s decision. But the legal position is otherwise, and it is difficult to understand what possible basis there can be for holding that the courts cannot investigate the propriety of the Attorney-General’s saying “Yes,” but that they are free to scrutinise and adjudicate upon the propriety of his saying “No.” And the point was long ago authoritatively dealt with in *London County Council v. Attorney-General* [1902] A.C. 165, where Lord Halsbury L.C. repudiated, at pp. 168-169:

“the suggestion that the courts have any power over the jurisdiction of the Attorney-General when he is suing on behalf of a relator in a [\*506] matter in which he is the only person who has to decide,” and added: “It may well be that it is true that the Attorney-General ought not to put into operation the whole machinery of the first law officer of the Crown in order to bring into court some trifling matter. But if he did, it would not go to his jurisdiction; it would go, I think, to the conduct of his office, and it might be made, perhaps in Parliament, the subject of adverse comment; but what right has a court of law to intervene? If there is excess of power claimed by a particular public body, and it is a matter that concerns the public, it seems to me that it is for the Attorney-General and not for the courts *to determine whether he ought to initiate litigation in that respect or not* … the initiation of the litigation, and the determination of the question whether it is a proper case for the Attorney-General to proceed in, is a matter entirely beyond the jurisdiction of this or any other court. It is a question which the law of this country has made to reside exclusively in the Attorney-General.”

Lord Denning M.R. was unfortunately mistaken in his view that Lord Halsbury L.C. had in mind only cases where the Attorney-General had granted consent, as the italicised words show. Nor is this the only decision on the matter, for, in relation to the closely analogous topic of the refusal of the Attorney-General’s fiat to prosecute in criminal matters Lord Campbell C.J. held in *Ex parte Newton*, 4 E. & B, 869, which was cited to the Court of Appeal, that the courts have no jurisdiction to review the Attorney-General’s decision.”

Then, finally, Lord Fraser of Tullybelton (@ top p.524), as follows:

 “ Enforcement of the criminal law is of course a very important public interest, but it is not the only one, and may not always be the predominant one. There may be even more important reasons of public policy why such procedure should not be taken at a particular moment, and it must be proper for the Attorney-General (acting of course not for party political advantage) to have regard to them. He may have information that there is a good prospect of averting the threatened illegal conduct by negotiation. Or he may know that the time would be particularly inopportune for a confrontation. Or he may regard it as essential to leave the way clear for subsequent prosecution before a jury. The information before him may be confidential and, even if it is not, it may not be widely available to the public. For reasons of that sort I would be against stretching the law to allow a member of the public to launch preventive proceedings without the consent of the Attorney-General. If the Attorney-General were to commit a serious error of judgment by withholding consent to relator proceedings in a case where he ought to have given it, the remedy must in my opinion lie in the political field by enforcing his responsibility to Parliament and not in the legal field through the courts. That is appropriate because his error would not be an error of law but would be one of political judgment, using the expression of course not in a party sense but in the sense of weighing the relative importance of different aspects of the public interest. Such matters are not appropriate for decision in the courts.”

Before passing on completely from this most noteworthy series of Lords Opinions, however, it is interesting to recall that Lord Diplock, who alone among the Committee’s membership had least to say on the topic of the “*asserted non-reviewability*” of the Attorney-General’s prosecutorial and procedural powers; nevertheless, had something a little comforting, to those of us who still cling to the notion of the importance of the independence of the ’rule of law’ rubric, in relation to the continuing importance and recognition of the ‘right’ in an ordinary person to launch a private prosecution, per (@ p.497-498) :

“The ordinary way of enforcing criminal law is by punishing the offender after he has acted in breach of it. Commission of the crime precedes the invocation of the aid of a court of criminal jurisdiction by a prosecutor. The functions of the court whose aid is then invoked are restricted to (1) determining (by verdict of a jury in indictable cases) whether the accused is guilty of the offence that he is charged with having committed and, (2) if he is found guilty, decreeing what punishment may be inflicted on him by the executive authority. In English public law every citizen still has the right, as he once had a duty (though of imperfect obligation), to invoke the [\*498] aid of courts of criminal jurisdiction for the enforcement of the criminal law by this procedure. It is a right which nowadays seldom needs to be exercised by an ordinary member of the public, for since the formation of regular police forces charged with the duty in public law to prevent and detect crime and to bring criminals to justice, and the creation in 1879 of the office of Director of Public Prosecutions, the need for prosecutions to be undertaken (and paid for) by private individuals has largely disappeared; but it still exists and is a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of those authorities to prosecute offenders against the criminal law.”

**Is there a distinction as between a prosecutorial procedural *fiat***

**derived from the Common Law, as against one disclosed by Statute?**

Whilst *Gouriet’s* case undoubtedly remains the ‘lead’ authority on the general proposition for the non-reviewability of the Attorney-General’s procedural powers, nonetheless given that their Lordships’ opinions were of necessity strictly *obiter*, it is then especially important to also cite subsequent authority, where that view has been adopted and endorsed in subsequent case law. Also of particular importance, is to ascertain whether any distinction has been drawn, as between a prosecutorial procedural power derived from the prerogative (as discerned at common law) such as in the case (as with *Gouriet’s Case*) of the Attorney-General’s powers in a ‘*relator action’* , as against the case where his powers are clearly set out in statute, instead, such as where the A-G’s consent to institute criminal proceedings is required.

***CCSU v. the Minister for the Civil Service* [1983] (the GCHQ case)**

In beginning the examination of the case-law authority in this field it is simply unavoidable other than to start with the seminal decision in *Council of Civil Service Unions v the Minister for the Civil Service* [1983] [UKHL 6](http://www.bailii.org/uk/cases/UKHL/1983/6.html), [1985] AC 374 (also known as the *GCHQ case*), and in order to appreciate the nuances in the alteration that occurred in the common law, as a result of this authority, it will be necessary to examine it in some depth. The factual matrix of the case is generally very well known and needs little exposition by me – the Prime Minister of the day, Mrs Thatcher, acting in her capacity as Minister for the Civil Service, and in the exercise of her prerogative powers over the civil service, as opposed to any statutory authority, determined that the trades-union affiliation of the civil service staff working at the British Government signals-intelligence facility at Cheltenham, Gloucestershire and known as the Government Communications Headquarters (GCHQ), should be disbanded in the asserted or claimed interests of “national security”. What is more that she would forego the customary and legitimate expectation of the extant trade-union representatives to be consulted about the matter in advance. The union Association involved, the CCSU, sought judicial review of her decision on the basis that she had simply ignored their legitimate expectation to reasonable consultation.

Whilst each of their Lordships speeches in this most notorious case authority is doubtless worthy of its own detailed exposition and analysis, in the interests of space and given this is somewhat of a side-wind to the precise issue subject of my current essay, I will choose to concentrate on the speech of Lord Diplock, with whose positive perspective on the constitutional significance of the “right to bring a private prosecution” we left the case of *Gouriet* above, and whose speech here is generally regarded as the wellspring of the new perception brought about by this authority. The following is from his speech wherein he begins by setting out his now notorious “three heads” for judicial review, at [1984] 3 All ER 935 at 950, as follows:

 “My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today
when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." **…**

By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable. **….**

By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd, v. Wednesbury Corporation [[1948] 1 K.B. 223](http://www.bailii.org/ew/cases/EWCA/Civ/1947/1.html)). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. **….**

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to
judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all.”

Having thus set out and to some degree defined his now notorious “three heads” of judicial review, Lord Diplock next moves to examine the scope for judicial review, with respect to each head separately, and also particularly as regards the issue as to whether the decision challenged arises from an exercise of royal prerogative power or from a power granted in statute instead.

 “My Lords, that a decision of which the ultimate source of power to make it is not a statute but the common law (whether or not the common law is for this purpose given the label of "the prerogative") may be the subject of judicial review on the ground
of illegality is, I think, established by the cases cited by my noble and learned friend, Lord Roskill, and this extends to cases where the field of law to which the decision relates is national security, as the decision of this House itself in [Burmah Oil Co. Ltd, v. Lord Advocate.](http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKHL/1964/1964_SC_HL_117.html) [1964 S.C. (H.L.) 117](http://www.bailii.org/uk/cases/UKHL/1964/1964_SC_HL_117.html)shows.”

I have long regarded this as the single most important passage from this well-known speech. In it Lord Diplock not only eschews any distinction, as to the reviewability of a decision based on any distinction as between prerogative as against statutory authority; but moreover, and to my view equally importantly, he specifically states that (at least with respect to judicial review per “illegality”) jurisdiction for review will reach also so as to include cases where “the field of law to which the decision relates is national security”. In so doing he specifically cites the famous authority of Burmah Oil v. the Lord Advocate (1964), in which, as the reader is asked to recall, the Edinburgh-based oil Corporation had sought a Declarator in the Scots courts, as against the Lord Advocate, to the effect that they were entitled to compensation from the Crown in respect of their oilfields and associated infrastructure, which had been blown up and otherwise destroyed by the British Army during the Second World War. This had been ordered by the Crown deliberately, so as to deny access to the assets to the advancing Japanese armed forces of occupation in Burma. It would be hard to conceive of a policy question more clearly entrenched in national security considerations and concerns of a military necessity nature. Had it been the case that the oil Corporation had instead somehow thought they could challenge in court the Crown’s decision to destroy their oilfields on its merits – then clearly that is something which no court of law could realistically ever have found ‘justiciable’.

However, that is of course, not in any way the issue that the oil Corporation actually sought to put before the court, which instead, albeit in ‘a field of law related to national security’, was the allied legal question as to whether, the oilfields and other assets having been so destroyed, were they entitled to compensation by the Crown for their loss? Accordingly, the fact that the issue raised was arguably in a field of law related to national security, was not then permitted so as to work as any kind of bar to the jurisdiction of the courts for judicial review, of what was always essentially a question of law and not of executive policy.

Having thus dealt with the first ‘head’ of “illegality”, Lord Diplock then proceed to apply the same analysis on scope and jurisdiction for judicial review to each of the remaining further two heads, as he has now just described them, as follows:

 “**….**  While I see no *a priori* reason to rule out "irrationality" as a ground for judicial review of a ministerial decision taken in the exercise of "prerogative" powers, I find it difficult to envisage in any of the various fields in which the prerogative remains the only source of the relevant decision-making power a decision of a kind that would be open to attack through the judicial process upon this ground. Such decisions will generally involve the application of government policy. The reasons for the decision-maker taking one course rather than another do not normally involve questions to which, if disputed, the judicial process is adapted to provide the right answer, by which I mean that the kind of evidence that is admissible under judicial procedures and the way in which it has to be adduced tend to exclude from the attention of the court competing policy considerations which, if the executive discretion is to be wisely exercised, need to be weighed against one another - a balancing exercise which judges by their upbringing and experience are ill-qualified to perform. So I leave this as an open question to be dealt with on a case to case basis if, indeed, the case should ever arise.

As respects "procedural propriety" I see no reason why it should not be a ground for judicial review of a decision made under powers of which the ultimate source is the prerogative. Such indeed was one of the grounds that formed the subject matter of judicial review in Reg. v. Criminal Injuries Compensation Board, Ex parte Lain [1967] 2 Q.B. 864. Indeed, where the" decision is one which does not alter rights or obligations enforceable in private law but only deprives a person of legitimate expectations, "procedural impropriety" will normally provide the only ground on which the decision is open to judicial review. But in any event what procedure will satisfy the public law requirement of procedural propriety depends upon the subject
matter of the decision, the executive functions of the decision-maker (if the decision is not that of an administrative tribunal) and the particular circumstances in which the decision came to be made.”

(Emphasis by underlining added)

Accordingly, it is essentially in relation to these second two so-called Diplock heads of judicial review, irrationality and procedural impropriety, that the concept of so-called “subject matter” limitation or restriction on justiciability in practice arises. Under the auspices of which rubric the entire thrust of the decision in this case is then said, by defendants of government immunity, to amount in effect to a simple substitution of the “subject matter” limitation in place of any previously understood prerogative/statutory distinction. Lord Roskill in the following speech sets out much to the same effect, at p. 956 (AllER) , where he in his turn said, as follows:

“But I do not think that that right of challenge can be unqualified. It must, I think, depend upon the subject matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter is such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another. “

Yet to my mind the simple substitution of the so-called “subject matter” test is a vast, and indeed vastly misleading, over-simplification of the actual *ratio decdendi* in this case. Were it true, as so simply put, then on the facts of the case in cause, their Lordships would have had to go no further than simply accept that, given the Minister’s assertion that the decision to ban trade unions at GCHQ was taken on grounds of “national security”, that there then was an end of the matter and no further judicial enquiry or examination of the “procedural propriety”, in particular, with respect to which the Minister acted, could be undertaken. However, I respectfully submit, that in the outcome that is neither the way that Lord Diplock, nor for that matter Lord Roskill, nor indeed any of their Lordships, actually approached their final decision in the case. Take for example the following clear language of Lord Roskill, in the next speech, that mere assertion of a “prohibited area”, as in the mere invocation of the “national security interests” rubric alone, was by itself insufficient to bar further examination in right of the court’s jurisdiction for judicial review of executive action. His analysis begins (@ p.957 of the AllER Report) as follows :

“But that is not the present issue. It is asserted on behalf of the respondent that the reason for the instructions being given without prior consultation was that it was feared that so to consult would have given rise to grave risk of industrial action through the reaction of the appellants and others and thus have brought about the very situation which the oral instructions were themselves designed to avoid, namely the risk of industrial action by the staff at GCHQ caused or at least facilitated by a membership of trade unions, and damaging to national security. GCHQ was, it was said, and is, highly vulnerable to industrial action and prior consultation would have revealed to those who had previously organised disruption that high degree of vulnerability.

@ p.958 **….**

Historically, at least since 1688, the courts have sought to present a barrier to inordinate claims by the executive. But they have also been obliged to recognise that in some fields that barrier must be lowered and that on occasions, albeit with reluctance, the courts must accept that the claims of executive power must take precedence over those of the individual. One such field is that of national security. The courts have long shown themselves sensitive to the assertion by the executive that considerations of national security must preclude judicial investigation of a particular individual grievance. But even in that field the courts will not act on a mere assertion that questions of national security were involved. Evidence is required that the decision under challenge was in fact founded on those grounds. That that principle exists is I think beyond doubt.

@ p.959 **…..**

My Lords, I venture to think that today this principle cannot be disputed. The question is whether, on the evidence before your Lordships, the respondent is entitled to assert that it was for fear of revealing the vulnerability of GCHQ to industrial action that it was decided that advance consultation could not take place.

@ p.960 **…..**

My Lords, I have therefore reached the clear conclusions, first, that the respondent has established that the work at GCHQ was a matter of grave national security, second, that that security would have been seriously compromised had industrial action akin to that previously encountered between 1979 and 1981 taken place, third, that consultation with the appellants prior to the oral instructions would have served only further to reveal the vulnerability of GCHQ to such industrial action, fourth, that it was in the interests of national security that that should not be allowed to take place, and fifth, that accordingly the respondent was justified in the interests of national security in issuing the instructions without prior consultation with the appellants.”

(Emphasis by underlining added)

Equally, and to the same clear effect, is the following, which appears in the preceding speech of Lord Scarman, (starting at p.948 in the AllER), as follows:

“As I read the speeches in *Chandler's case*, the House accepted that the statute required the prosecution to establish by evidence that the conspiracy was to enter a prohibited place for a purpose prejudicial to the safety or interests of the state. As Parliament had left the existence of a prejudicial purpose to the decision of a jury, it was not the Crown's opinion as to the existence of prejudice to the safety or interests of the state but the jury's which mattered: hence, as Lord Devlin at p.811, remarked, the Crown's opinion on that was inadmissible but the Crown's evidence as to its interests was an "entirely different matter." Here, like Lord Parker in *the Zamora,* Lord Devlin was accepting that the Crown, or its responsible servants, are the best judges of what national security requires without excluding the judicial function of determining whether the interest of national security has been shown to be involved in the case.

Finally, I would refer to Secretary of State for Defence and Another v. Guardian Newspapers Ltd. [1984] 3 W.L.R. 986, a case arising under section 10 of the Act of 1981. As in Chandler's case, the interest of national security had to be considered in
proceedings where it arose as a question of fact to be established to the satisfaction of a court. Though the House was divided as to the effect of the evidence, all their Lordships held that evidence was necessary so that the court could be judicially satisfied that the interest of national security required disclosure of the newspaper's source of information.

My Lords, I conclude, therefore, that where a question as to the interest of national security arises in judicial proceedings the court has to act on evidence. In some cases a judge or jury is required by law to be satisfied that the interest is proved to exist: in others, the interest is a factor to be considered in the review of the exercise of an executive discretionary power. Once the factual basis is established by evidence so that the court is satisfied that the interest of national security is a relevant factor
to be considered in the determination of the case, the court will accept the opinion of the Crown or its responsible officer as to what is required to meet it, unless it is possible to show that the opinion was one which no reasonable minister advising the Crown could in the circumstances reasonably have held. There is no abdication of the judicial function, but there is a common sense limitation recognised by the judges as to what is justiciable: and the limitation is entirely consistent with the general development of the modern case law of judicial review.” (Emphasis by underlining added)

Accordingly, and to my mind, in concluding, the very highest at which the actual *ratio* in the CCSU can be said to have placed judicial deference to ministerial assertion of immunity from judicial review is really as follows:

(a) the assertion by the Government that the decision, subject to challenge, was taken under the Royal prerogative – is nothing whatever to the point. There is no longer any distinction of any real significance, as between whether the decision is taken in the exercise of a prerogative power, or pursuant to a power granted by statute instead.

(b) the mere assertion by the Government that the decision, subject to the challenge, was taken in the interests of “national security” – is not in and of itself alone, sufficient to banish the possibility of examination pursuant to judicial review. The matter needs to be examined further, at least sufficient so as to satisfy the court on evidence that there is some genuine conflict, as between, on the one hand, the legal right or principle asserted by the claimant and by which the decision-making process is impugned, as against, on the other, a genuine policy decision taken in a so – called “prohibited” subject matter area.

(c) where the courts are so satisfied that there is evidence, and not just mere assertion, of such a genuine conflict, then unsurprisingly they will not enter into the arena of deciding, as between the conflicting contentions, on their opposing merits. For that would require them, in effect, to substitute their own view, as to the importance of the claimed necessity to defer to the requirements of “national security interests” instead, in place of the view as reached as by the duly appointed government ministers instead – something which would frankly usurp the democratic separation of powers, were they to attempt to do so.

Consequently, in the circumstances of this present case, the court’s jurisdiction for judicial review was not ousted by reason of either (a) the assertion of the exercise of the Royal prerogative, nor (b) the mere assertion alone of justification by reason of reference to “national security interests”. Rather, instead, that jurisdiction was only modified when, the Courts were fully satisfied that the Minister’s assertion that, forewarning the trades unions at GCHQ, by way of advanced invitation to consultation, would have instead genuinely risked an incitement to further industrial action, the result which could reasonably have endangered the national intelligence gathering capacity, was a genuine conflict , with what would otherwise be a legitimate expectation to consultation by the Claimants unions ; and the courts were, quite properly not prepared to, as it were weigh-in, and substitute their own views on the voracity or strength of that alleged conflict, for the view taken by the lawfully appointed ministers of the executive instead.

Alas, in one’s experience that more nuanced analysis of the *ratio* in this case is rarely appreciated in practice, and it is far more often the case that it is subsumed into the far simpler and plainer notion that in certain “prohibited places”, where the subject matter is especially “politically sensitive”, the courts will simply always defer to the better judgment of the executive government, and eschew any claim to jurisdiction for judicial review. That certainly seems to this author, alas, to be the substance of the manner in which this authority was then later employed and applied to the subsequent question of the post-*Gouriet* case law on the non-reviewability of the Attorney-General’s prosecutorial powers.

***R. v. the Attorney-General, ex p. Ferrante* (1995)**

Firstly, in *R. v. the Attorney-General, ex p. Ferrante* (3 Apr 1995 – unreported?) - regarding a failed judicial review of a refusal by the Attorney-General to authorise proceedings, under section 13 of the Coroners Act 1988, so as to order an inquest be re-held. After reviewing the authorities referred to in *Gouriet’s case* and the *CCSU* cases (as above) - also *R v the Inland Revenue Commission ex parte National Federation of Self Employed* [1982] A.C. 617, and *R v Secretary of State for the Home Department ex parte Bentley* [1994] QB 349, Mr Justice Popplewell derived the following propositions:

"(1) ***Gouriet* is of general application and is not limited to relator actions.**

(2) The decision whether the power of the Attorney General is immune from review does not depend upon the source of those powers but on their character. Arguments relating to the prerogative and statutory duties are sterile.

(3) The Attorney General is acting as guardian of the public interest in applications under Section 13 of the Coroner's Act.

(4) The fact that he is no longer the exclusive guardian of the public interest is irrelevant. His continued inclusion as a necessary element in the re-hearing of an inquest makes that clear.

(5) The fact that a local authority exercising similar powers is subject to judicial review though logically compelling is not a reason for making the Attorney General so subject.

(6) The question of whether the decision is amenable to judicial process depends on the nature and subject matter.

(7) It is for the Courts to decide on a case by case basis whether the matter in question is reviewable or not.

(8) The Attorney General's consent is required for a wide variety of litigation. Thus in the criminal law in relation to corruption, explosive substances, official secrets, Public order act offences, racial hatred offences, proceeding under the Contempt of Court Act 1981 Section 7 power to enter *a nolle prosequi* in civil law the power to make a litigant a vexatious litigant.

(9) These are only some of the situations in which Parliament has imposed upon the Attorney-General, the right as guardian of the public interest either himself to bring the proceedings or to give authority for proceedings to be brought. These examples are of a similar nature; which involve or may involve questions of policy which it is for Parliament and not for the Courts to assess."

(Emphasis by underlining added)

***R v Solicitor-General, ex p Taylor & Taylor* (1996)**

Secondly, this imposing set of propositions were then picked up on by Stewart-Smith LJ, the following year in the matter of *R v Solicitor-General, ex p Taylor & Taylor* (1996)[[7]](#footnote-7). This again concerned a failed attempt to bring a judicial review of the procedural powers, albeit this time of the Solicitor-General, but acting as the duly authorised deputy of the Attorney-General, and this time in relation to his powers to bring contempt of court proceedings under s.7 of the Contempt of Court Act , 1981.

Having cited the nine “Popplewell propositions”, Stuart-Smith LJ, proceeded as follows :

“**….** The authorities to which I have referred which lay down the rules in relation to the Attorney-General, point to his unique constitutional position. If his office was invented by statute tomorrow without the weight of precedent as to his position, there would be great force in Mr Robertson's submission, but they cannot override the clearly established position.

**…**

I cannot see the fact that section 7 of the 1981 Act of Parliament took away the hitherto existing right of a citizen to apply to this court under Order 52 Rule 2 for leave to move for committal for contempt, advances the Applicant's argument in any way. In practice prior to the Act, criminal contempts were prosecuted by or with the Attorney-General's consent.

Parliament must be taken to know the law as stated in *Gouriet* and the previous authorities; and if it had intended the Attorney-General's discretion to be reviewable by this court in this instance, in my view it would have said so.

**….**

The fact that the source of this power is statutory and not the prerogative is also not in point. It is now well established that the source of power is immaterial, it is the nature of it is that it is important, see the CCSO case.
**….**

I also respectfully agree with Mr Justice Popplewell's decision in *ex parte Ferrante* and adopt the nine propositions which are set out. The case went to the Court of Appeal, but that Court did not consider the issue of jurisdiction. I do not consider there is any distinction in principle between the statutory power in the two cases. In my judgment, the court has no jurisdiction to review the Solicitor General's decision in this case.”

And so we arrive at, what at least was the conventional position by 1996, whereby it was clearly understood on the established case law that, in effect, the exercise of any procedural power by the Attorney-General (and by extension the Solicitor-General when acting as his deputy) – whether in criminal law as in a prosecutorial power, or in civil law as in a *relator* proceeding – and equally whether deriving from an explicit statutory power, or from an ancient prerogative power instead – was simply a matter un-reviewable by the Courts, whether on an application for judicial review or otherwise.

Contrariwise, it is also particularly worth noting that a Divisional Court of the Queen’s Bench Division (Kennedy LJ giving judgement) had little or no difficulty in holding, the year before *ex p*. *Ferrante,* namely in 1994, in the matter of *R. v the DPP ex-p.C* (1994) [[8]](#footnote-8), that a decision of a Crown Prosecutor, taken on behalf of the Director of Public Prosecutions instead, not to prosecute a police sergeant for the act of repeated non-consensual buggery of his Asian wife, was made contrary to the proper application of the statutory Code for Crown Prosecutors and was therefore “reviewable”, albeit only ‘sparingly’ and in the rare case of a clear failure to follow the Code by the Director, or his deputies. Hopefully, the reader will immediately appreciate why I consider this to be such an especially incongruent and contradictory finding, given that the so-called “subject matter” area, namely the decision to not commence, or otherwise prohibit, a criminal prosecution, is on its face identical with that deemed unreviewable, only when exercised by the Attorney-General instead.

Notwithstanding, there with such incongruities and contradictions the case law could have rested as at the start of the current century, however, there are at least a further two references which suggest, to this author at least that, the rule of law imperative will not lay down its noble head and be quite so easily forgotten.

***R. v. the Attorney-General, ex p. Rockall* (2000)**

Firstly, there is an admittedly oblique case of interest and relevant by reason really only of omission, that being the case of *R. v. the Attorney-General, ex p. Rockall* (2000)[[9]](#footnote-9) and which concerned again a failed attempt to bring a judicial review. This time, however, as against a decision of the Attorney-General *to grant* his statutory consent to a prosecution of the Claimant on a charge of conspiracy to make corrupt payments to an MoD civil servant – a charge which arguably carried with it the so-called “reversal of burden” provision as set out in s.2 of the Prevention of Corruption Act 1916, and which therefore brought with it “*the safeguard*” of the Attorney-General’s procedural prosecutorial consent. The Claimant’s position being that the Attorney-General ought to have reversed his decision, to consent to the prosecution, in light of recent authority on the asserted incongruity of this reversal of burden, as compared with his rights to a fair trial under article 6 of the European Convention instead.

One would have be forgiven for thinking, given what we have now heard, that the matter would have be dismissed *ab initio* by the leave judge (Maurice Kay J.) on the simple premise that the Attorney-General’s decision to consent (or not) to a prosecution was simply “unreviewable” full stop. However, seemingly just because Counsel for the Attorney-General (Mr Perry QC) wanted to argue the point at issue on its merits[[10]](#footnote-10), namely that the technical ‘*reversal of burden’* point would not in any event arise in relation to an indictment under s.1 of the Criminal Law Act 1977 (statutory conspiracy), the whole issue as to the “non-reviewability” of a prosecutorial procedural decision by the Attorney-General – was simply not even addressed *!*

[***Mohit v. The Director of Public Prosecutions of Mauritius***](http://www.bailii.org/uk/cases/UKPC/2006/20.html)  **[2006]**

On a more substantive point however, a few years later in 2006, we have the view of no less a champion of the “rule of law” principle than Lord Bingham of Cornhill himself, though this time sitting as an appeal Lord in the Privy Council. In the case of[*Mohit v. The Director of Public Prosecutions of Mauritius* (Mauritius)](http://www.bailii.org/uk/cases/UKPC/2006/20.html) [2006] UKPC 20 the Director of Public Prosecutions of Mauritius had repeatedly intervened to exercise his constitutional powers of *nolle prosequi*, in order to quash repeated efforts by a ‘concerned’ Mauritian citizen to launch a private prosecution against the Prime Minister of Mauritius on charges of harbouring a wanted criminal, indeed an accused murderer no less. At paragraph 14 in his speech Lord Bingham says as follows:

“ In *Gouriet*, above, the House of Lords unanimously held that only the Attorney General could sue on behalf of the public in civil proceedings and that his decision to withhold consent to the bringing of proceedings in his name was immune from challenge in the courts. The Supreme Court ..[of Mauritius]..relied in particular on a strong statement by Viscount Dilhorne at p 487:

“The Attorney-General has many powers and duties. He may stop any prosecution on indictment by entering a nolle prosequi. He merely has to sign a piece of paper saying that he does not wish the prosecution to continue. He need not give any reasons. He can direct the institution of a prosecution and direct the Director of Public Prosecutions to take over the conduct of any criminal proceedings and he may tell him to offer no evidence. In the exercise of these powers he is not subject to direction by his ministerial colleagues or to control and supervision by the courts.”

Unless reviewed or modified in the light of the later decision of the House in the GCHQ case (*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374), this remains a binding statement of English law on cases covered by it. It must, however, be borne in mind that the power in question was a non-statutory power deriving from the royal prerogative. It was moreover a power exercised by a minister answerable to Parliament, a matter recognised as of significance by Lord Edmund-Davies (p 512) and Lord Fraser of Tullybelton (p 524), as it had been by Cockburn CJ in the leading case of *R v Allen* (1862) 1 B & S 850, 855, when he spoke of the Attorney General as “responsible for his acts before the great tribunal of this country, the High Court of Parliament”. Where the Attorney General’s power derives from a statutory source, as in giving his consent to prosecutions requiring such consent, Professor Edwards has noted (The Attorney-General, Politics and the Public Interest (1984), p 29), and the Law Commission has tacitly accepted (LCCP 149 Criminal Law: Consents to Prosecution, September 1997, p 29), that “[s]ince the source of the discretionary power [to grant or refuse consent] rests in statute law there are no inherent constitutional objections to the jurisdiction of the courts being invoked”. Much more closely analogous to the position of the Mauritian DPP than the English Attorney General is the English DPP, and his prosecuting decisions have not been held to be immune from review, as mentioned below.”

Itself a very nuanced (if not indeed wistful) reference by the noble and learned Lord, nonetheless I think worthy of a special note, since having made specific reference to the *CCSU* case (as above), the widely accepted purport of which was to extinguish any distinction in scope for judicial review based on a contrast, as between a decision taken pursuant to a power derived from the royal prerogative as against one taken under power granted by statute instead ; he then immediately cites from a learned constitutional law Professor, who seeks to make some important significance based on such said very distinction?

If we are now in a world where judicial review limitations are indeed imposed by reason of a so-called “subject matter” doctrine, then there surely can no longer be any force, either in logic or law, to differentiate as between those of the Attorney-General’s prosecutorial powers which he derives from the Royal prerogative, and those which he enjoys pursuant to statute, instead ? So it is then, with such further incongruities and inconsistencies that, as of 2006 at least, the English case law authorities had left their mark on the perhaps, at the very least, irksome question of the extent to which, the Attorney-General’s powers of prosecutorial prohibition (and permission) were to be regarded as constitutionally incapable of subjection to the judicial review jurisdiction of the courts.

1. (1843) 1 Car &K 730; 174 ER 1009 [↑](#footnote-ref-1)
2. See *Cooke v DPP and Brent JJ* (1992) 156 JP 497. [↑](#footnote-ref-2)
3. See *Turner v DPP* (1979) 68 Cr App R 70. [↑](#footnote-ref-3)
4. See for instance in the speech of Viscount Dilhorne in *Gouriet’s Case* (below) [↑](#footnote-ref-4)
5. <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/15197/Protocol_between_the_Attorney_General_and_the_Prosecuting_Departments.pdf> [↑](#footnote-ref-5)
6. [1977] 1 AllER 696 (CA) *sub nom. Gouriet v Union of Post Office Workers et al.* [1978] AC 435 (HL). [↑](#footnote-ref-6)
7. [1996] COD 61 [↑](#footnote-ref-7)
8. [1995] 1 Cr App Rep 136 [↑](#footnote-ref-8)
9. 1 WLR , [1999] All ER (D) 726 [↑](#footnote-ref-9)
10. “*The Attorney General has been represented before me. His position is that I ought to refuse permission on the ground that the applicant does not have an arguable case*. “ [↑](#footnote-ref-10)