

# The limits on prosecutorial discretion in Singapore: Past, present, and future

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## ABSTRACT

The exercise of prosecutorial discretion is a unique executive act that continues to be very well-protected from public scrutiny in many jurisdictions throughout the world. In this article, I attempt to survey virtually the entire body of case law on the limits of prosecutorial discretion in Singapore. Probably because prosecutorial discretion is protected by the Constitution, it took a while for the Singapore courts to retreat from their initial characterisation of the discretion as absolute and outside the scope of any form of review. Against a wider backdrop of increasing rights-consciousness (especially within the courts) and the public demand for transparency and accountability, the legal position has evolved to its current and more legally defensible form, viz, prosecutorial discretion is not absolute, and can be subject to, inter alia, constitutional challenge. It may well be a while before this position evolves again, but the natural progression from this, as seen in other jurisdictions, is the public release of general guidelines for prosecution. While such a progression brings about certain benefits, it is not without its challenges and may be motivated (though not exclusively) by extra-legal considerations such as politics and populism. Ultimately, only the state and its people can decide on the conception of the rule of law that it subscribes to, and it is with humble hope that this article may be used as a reference point when future issues pertaining to prosecutorial discretion are considered.

*Keywords:* prosecutorial discretion, Singapore criminal law, Singapore constitutional law, rule of law, judicial review

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## I. INTRODUCTION AND ROADMAP

Singapore witnessed something of a revival in constitutional law jurisprudence in 2012. Specifically, there was a spate of constitutional challenges via the equality clause, i.e., Article 12(1) of the Constitution.<sup>1</sup> Coincidentally or otherwise, the context in which all the challenges arose was the Misuse of Drugs Act (MDA).<sup>2</sup> Under the MDA, one is subject to the mandatory death penalty if convicted of certain offences, such as trafficking in more than a certain quantity of controlled drugs. But, what happens when two individuals involved in the very same drug trafficking criminal enterprise are subject to different charges, different trials, and as a result different punishments? This was the key issue that emerged in three 2012 Court of Appeal decisions in *Ramalingam Ravinthran v. Attorney-General*,<sup>3</sup> *Yong Vui Kong v. Public Prosecutor*,<sup>4</sup> and *Quek Hock Lye v. Public Prosecutor*.<sup>5</sup> Suffice to say for now that the accused persons in all three cases essentially argued that the Attorney General<sup>6</sup> had discriminated against them and breached their constitutional rights to equality by charging them with offences that carried more severe penalties than their co-offenders; the accused persons also argued, to varying degrees, that the Attorney General had a duty to explain prosecutorial decisions. On the other side of the aisle, it was argued that by virtue of Article 35(8) of the Constitution,<sup>7</sup> the Attorney General was constitutionally conferred a very wide discretion when deciding whether and how to prosecute any given accused person, and in any event was under no legal obligation to explain any prosecutorial decisions.<sup>8</sup>

The constitutional challenge in all three decisions failed, and a common thread can be identified from a collective reading of the reasoning of the decisions. First, under the Constitution, the Attorney General and the judiciary are co-equals, so there can be no judicial interference with the exercise of prosecutorial discretion unless the discretion has been exercised unlawfully. Second, given the high office of the Attorney General, the courts should proceed with the presumption that when the Attorney General exercises prosecutorial discretion, this is done so in accordance with the law. Third, where several offenders are involved in the same or similar offences committed in the same criminal enterprise, the Attorney General can take into account a myriad of factors in determining the appropriate course of action (including bringing different charges against the offenders), as long as there is no arbitrary exercise of power or extraneous purpose involved in the decision-making. Fourth, the legal burden is on the accused person to adduce *prima facie* evidence of any improper exercise of prosecutorial discretion and, unless this burden is discharged, the Attorney General is not obligated to furnish any reasons for any prosecutorial decisions made. Fifth, the court only, at best, has the power to amend charges but not the power to prefer or initiate them. And sixth, even if the Attorney General had acted improperly, the court has no power to set aside the conviction but can only make a declaration, i.e., the Attorney General would then decide what is the best course of action to take.

Given these jurisprudential developments, it would seem then that the Singapore courts continue to keep a fairly (but certainly not entirely) deferential attitude *vis-à-vis* the Attorney General's power of prosecutorial discretion. Some care must be taken with the word "deferential" of course: if the law is clear that prosecutorial discretion cannot be subject to judicial oversight, then that is simply what the

<sup>1</sup>1985 Rev Ed, 1999 Reprint. Article 12(1) states that "[a]ll persons are equal before the law and entitled to the equal protection of the law." Notably, the Malaysian Constitution—the cloth from which the Singapore Constitution was cut—contains the same provision in the form of Article 8(1).

<sup>2</sup>Cap 185, 2001 Rev Ed ("MDA"). The MDA of course has a chequered history, having been subject to many unsuccessful constitutional challenges in the past. See e.g. *Ong Ah Chuan v. Public Prosecutor* [1980–1981] SLR 48 (Privy Council) ("*Ong Ah Chuan*"); *Yong Vui Kong v. Public Prosecutor* [2010] 3 SLR 489.

<sup>3</sup>2 SLR 49 ("*Ramalingam Ravinthran*") (Sing. Ct. App. 2012). For a brief case comment, see Chen Siyuan, *The Expanding Limits of Prosecutorial Discretion* Sing. L. Watch Commentaries (Feb. 2012).

<sup>4</sup>2 SLR 872 ("*Yong Vui Kong*") (Sing. Ct. App. 2012).

<sup>5</sup>2 SLR 1012 ("*Quek Hock Lye*") (Sing. Ct. App. 2012). For a brief case comment, see Chen Siyuan, *Prosecutorial Discretion Revisited* Sing. L. Watch Commentaries (Apr. 2012).

<sup>6</sup>In Singapore, the Attorney General is both the director of public prosecutions and chief legal advisor to the government at the same time.

<sup>7</sup>Article 35(8) states that "The Attorney General shall have the power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence." Article 145(3) of the Malaysian Constitution contains a largely similar provision. A search on Hansard reveals that the words of Article 35(8) have never been discussed in the Singapore Parliament, making the interpretation even more challenging.

<sup>8</sup>It should be noted that prosecutorial discretion is also provided for in s 11 of the Criminal Procedure Code 2010 (Act 15 of 2010) ("CPC 2010"), which in turn is an adaptation of s 336 of its predecessor, the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("CPC"); see also *The Criminal Procedure Code of Singapore 25–28* (Marie & Mohamed Faizal Abdul Kadir eds., Academy Pub. 2012) [hereinafter *The CPC of Singapore*].

law is; expecting the courts to be “mini legislators” by interpreting clearly written law on their own terms would be, in one mainstream view at least, undemocratic and even unconstitutional.<sup>9</sup> Indeed, a longstanding conceptualisation of prosecutorial discretion in both civil and common law jurisdictions<sup>10</sup> – is that the balance to be struck between transparency (explaining prosecutorial decisions) and the efficient and independent administration of crime control (not being accountable for prosecutorial decisions) should be weighed in favour of the state. However, in the light of ever-increasing human rights considerations and greater societal demand for accountability and legitimacy (which in turn impacts the strength of a state’s claim to a commitment to the rule of law),<sup>11</sup> states around the world may need to consider or have already started recalibrating this balance.<sup>12</sup> Singapore is probably no exception, notwithstanding the constitutional status of the Attorney General’s prosecutorial discretion, and the state’s supposedly strong preference for the crime control model over the due process model in terms of its choice of criminal justice paradigm.<sup>13</sup> Notably, there was unprecedentedly extensive nationwide press coverage on the issue of prosecutorial discretion in the wake of *Ramalingam Ravinthran et al.*, prompting the Attorney General’s chambers to address public concerns on the matter.<sup>14</sup> The matter also generated passionate debate in the Singapore Parliament.<sup>15</sup>

The structure and purpose of this article, which proposes to be a comprehensive survey of the law and politics of prosecutorial discretion in Singapore, are thus as follows: In Part II, I first examine the local jurisprudence leading up to *Ramalingam Ravinthran et al.* It will be observed that there has been a distinct shift in the legal position even though the constitutional provisions in question have always remained the same: up until 2008, the largely uniform position as dictated by case law was that the Attorney General’s prosecutorial discretion was absolute and not amenable to any form of judicial oversight. In Part III, I examine the changes in the legal position, some of which are apparent and some are not – an evolution of sorts from absolute discretion, as it were. The genesis of the changes is traceable to the 2008 seminal decision of *Law Society of Singapore v. Tan Guat Neo Phyllis*,<sup>16</sup> which opened pathways, but also created obstacles to challenging prosecutorial discretion. In Part IV, we analyse the issues presented by the collective jurisprudence and also consider some of the possible reasons for the changes in the law, by situating the changes against the wider backdrop of increasing rights-consciousness and institutional legitimacy in Singapore. The benefits and challenges of whether to maintain the high barrier around prosecutorial discretion are then discussed. Part V is where the conclusion resides.

<sup>9</sup>See e.g. *ADP v. ADQ* [2012] 2 SLR 143 at [30] (Sing. Ct. App.).

<sup>10</sup>See e.g. Benjamin Berger, *The Abiding Presence of Conscience: Criminal Justice Against the Law and the Modern Constitutional Imagination* 61 U. Toronto L.J. 579 (2011); Albert Chen, *Prosecutorial Discretion, Independence, and Accountability* 28 H.K. L.J. 406 (1998); Yoav Dotan, *Should Prosecutorial Discretion Enjoy Special Treatment in Judicial Review?* Public Law 513 (1997); Wong Yan Lung, *The Secretary of Justice as the Protector of the Public Interest* 37 H.K. L.J. 319 (2007) [hereinafter *The Secretary of Justice*]; Bharat Malkani, *Article 8 of the European Convention on Human Rights, and the Decision to Prosecute* 12 Crim. L. Rev. 943 (2011); Stanley Yeo, Neil Morgan, and Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* 29–31 (2d ed. LexisNexis 2012). Certain jurisdictions also have a robust and comprehensive option of privately-instituted prosecutions, but that will not be addressed in this article.

<sup>11</sup>See 71 Sing. Parliamentary Rpts, col. 592 (1999) (Minister of State for Law Ho Peng Kee): “[T]he rule of law refers to the supremacy of law, as opposed to the arbitrary exercise of power. The other key tenet is that everyone is equal before the law. The concept also includes the notions of the transparency, openness and prospective application of our laws, observation of the principles of natural justice, independence of the judiciary and judicial review of administrative action.”

<sup>12</sup>It may be argued, of course, that criminal justice discourse is not confined to the individual-versus-state dichotomy and as a result, advancing individual rights need not necessarily lead to erosion of communitarian interests. See e.g. Melanie Chng, *Modernising the Criminal Justice Framework—The Criminal Procedure Code 2010*, 23 Sing. Acad. L.J. 23 (2011) [hereinafter *Modernising the Criminal Justice Framework*].

<sup>13</sup>See e.g. Chan Sek Keong, *The Criminal Process – The Singapore Model* 17 Sing. L. Rev. 434 (1996); Chan Sek Keong, *From Justice Model to Crime Control Model* Int’l Conf. on Crim. Just. Under Stress: Transnational Persps (2006).

<sup>14</sup>See e.g. <http://www.channelnewsasia.com/stories/singaporelocalnews/view/1178035/1.html> (last accessed Mar. 13, 2013); KC Vijayan, *Attorney-General’s Job Better Split Into Two?* The Sunday Times (May 13, 2012) [hereinafter *Attorney-General’s Job Better Split Into Two?*]; KC Vijayan, *Why AG Does Not Have to Give Reasons for Charges*, The Straits Times (Mar. 7, 2012) [hereinafter *Why AG Does Not Have to Give Reasons*]; KC. Vijayan, *AGC: Robust Reviews Before Discretion is Exercised*, The Straits Times (Jan. 21, 2012) [hereinafter *Robust Reviews*]; KC Vijayan, *A-G’s Vision of “Cherished National Institution,” I*, (Oct. 29, 2011); Tessa Wong, *AGC Releases Statement on Woffles Wu Case*, The Straits Times (July 17, 2012); Tessa Wong, *AGC Clarifies Reasons for Charges*, The Straits Times (June 18, 2012); Tham Yuen-C, *Giving Judges Discretion Not a Bad Thing*, The Straits Times (July 14, 2012); Tham Yuen-C, *Lawyers Hail Move as Significant Milestone*, The Straits Times (July 10, 2012) [hereinafter *Lawyers Hail Move*].

<sup>15</sup>*Why AG Does Not Have to Give Reasons*, supra n. 14.

<sup>16</sup>[2008] 2 SLR(R) 239 (“*Tan Guat Neo Phyllis*”) (Sing. Ct. of Three J.).

## II. CASE LAW: THE PREVIOUS POSITION

### A. The beginning

Article 35(8) of the Constitution was first interpreted by the Singapore courts in 1987. The pioneering case was *Sim Min Teck v. Public Prosecutor*, decided by the Court of Criminal Appeal.<sup>17</sup> S, B, and C had planned to rob a person, only to end up killing him. S argued that he was discriminated against because he was charged with and convicted of murder (which carried the mandatory death penalty) while B was charged with the lesser offence of culpable homicide not amounting to murder (which carried a jail term). In a succinct judgment, Wee CJ simply held that there was no breach of Article 12(1) of the constitution because the constitution gave the Attorney General discretion over the conduct of any proceedings for any offence.<sup>18</sup> The court did refer to the Privy Council decision (on appeal from Malaysia) of *Teh Cheng Poh v. Public Prosecutor*, which involved two statutes that criminalised possession of firearms and ammunition, but only one of them made it a capital offence.<sup>19</sup> The accused was charged under the statute that made it a capital offence, but the Privy Council rejected the argument that the accused was deprived of equality before the law. Lord Diplock, delivering the judgment of the Board, said that “[a]ll that equality before the law requires, is that the cases of all potential defendants to criminal charges, shall be given unbiased consideration by the prosecuting authority and that decisions whether or not to prosecute in a particular case should not be dictated by some irrelevant consideration.”<sup>20</sup> While this passage gave some hint of the limits on prosecutorial discretion, the exact contours of these limits were never explored in greater detail in *Sim Min Teck*.

### B. The shift to absolute discretion

A few years later, the Singapore courts would fundamentally re-characterise the nature of the Attorney General’s prosecutorial discretion. In *Arjan Singh v. Public Prosecutor*, a case involving various petty offences, the accused argued that the prosecution should have been denied an application for a discharge-not-amounting-to-an-acquittal, as doing otherwise would leave the accused under indefinite apprehension of the recommencement of criminal proceedings.<sup>21</sup> Yong CJ held that there

can be no suggestion that the court may interfere with the prosecutorial discretion . . . when the [Public Prosecutor] informs the court that he will not further prosecute a defendant upon a charge, the court has no discretion as to the staying of all proceedings on that charge and as to the discharge of the defendant from and of the same.<sup>22</sup>

This notion of prosecutorial discretion being absolute and unreviewable by the courts became even clearer – and assumed the full gravity of *stare decisis*— in *Govindarajulu Murali v. Public Prosecutor*.<sup>23</sup> There, C was caught selling diamorphine to an undercover officer and was charged and convicted of abetting G to traffic controlled drugs. G argued that given his lesser involvement in the criminal enterprise he should have been charged under a different charge, to which the Court of Appeal said that the court must concern itself with the charge at hand and decide at the end of the day whether the Prosecution has proved beyond a reasonable doubt each and every element of the charge . . . it is not for a court of law to consider the moral complicity of each accused person and question the Prosecution’s absolute discretion in deciding what charge to prefer.<sup>24</sup>

### C. A parenthetical disambiguation of prosecutorial discretion

For the sake of disambiguation, I must pause to parenthetically consider what the courts in the cases thus far could have had in mind when they referred to prosecutorial discretion. Plainly—and this interpretation accords with the literal words of Article 35(8) of the constitution—there are no less than

<sup>17</sup>[1987] 2 SLR(R) 65 (“*Sim Min Teck*”) (Sing. Ct. Crim. App.).

<sup>18</sup>*Id.* at [10].

<sup>19</sup>[1979] 1 MLJ 50 (“*Teh Cheng Poh*”) (Privy Council). As stated in note 7, Malaysia also had, and still has, its equivalent of Article 35(8) in its constitution.

<sup>20</sup>*Id.* at 56.

<sup>21</sup>[1993] 1 SLR(R) 542 (“*Arjan Singh*”) (Sing. High Ct.).

<sup>22</sup>*Id.* at [8], [10].

<sup>23</sup>[1994] 2 SLR(R) 398 (“*Govindarajulu Murali*”) (Sing. Ct. App.).

<sup>24</sup>*Id.* at [40]. This passage was directly affirmed in *Sarjit Singh Rapati v. Public Prosecutor* [2005] 1 SLR(R) 638 at [46]–[47] (Singapore High Court); see also *Public Prosecutor v. Norzain bin Bintat* [1995] 3 SLR(R) 105 at [49]: “[T]he Public Prosecutor’s discretion is never curtailed. Even where a prosecution is pre-empted by a composition, there is nothing to prevent the Public Prosecutor from prosecuting the case.” (Sing. High Ct.).

four aspects to the Attorney General's prosecutorial discretion: whether to initiate prosecution, what charge to prefer before the trial, whether to amend a charge during the trial, and whether to discontinue prosecution.<sup>25</sup> Only the Attorney General possesses the necessary information (i.e., the inculpatory and exculpatory evidence) as to whether a prosecution should be initiated, so it is impractical and indeed premature for the courts to intervene at this particular stage. To allow the Attorney General to have the freedom up to this point is probably uncontroversial,<sup>26</sup> even if the Attorney General refuses to initiate prosecution on the basis of non-evidentiary grounds (such as political sensitivities and compassion) and victims' rights may be at stake: no one can, and no one should be able to, force the Attorney General's hand, bearing in mind, too, that prosecutorial discretion exists to protect the independence of the Attorney General's office from all manner of external influences.<sup>27</sup> Similarly, if the Attorney General should decide while proceedings are on-going that an accused person should no longer be prosecuted, it is hardly objectionable to say that this is not the courts' business either—the Attorney General's duty is to decide when prosecution should begin and when it should end (i.e., a purely executive function that does not yet attract public law intervention), while the courts' duty is to decide if the prosecution succeeds or not in proving the case against an accused person based on the evidence (i.e., a purely judicial function that can only be constrained by the appellate process or transcendent executive action such as a clemency plea). In other words, unless and until the prosecution brings a case to court, judicial scrutiny—of any facet of the case, using any facet of the law—does not begin.<sup>28</sup>

That still leaves the question of whether the courts can intervene at the charge-preference and charge-amendment stages, however. And there is actually another wrinkle: do the courts have any say regarding recommencement of proceedings, for instance when new evidence emerges a long time after an accused person has been given a discharge not amounting to acquittal? Insofar as the courts clearly have the power to amend charges (presumably with moral and/or evidentiary considerations in mind) largely without the assent of the prosecutor,<sup>29</sup> and insofar as the courts have largely unexplored (but certainly existent) inherent powers and discretion to control their own criminal justice process based on the fairness of each case,<sup>30</sup> it is at the very least questionable if cases such as *Arjan Singh* and *Govindarajulu Murali* should have gone as far as to say that questions of moral complicity of accused persons and charge-amendment were solely within the province of the Attorney General, or that the discretion *vis-à-vis* these questions were “absolute” and without exception or possibility of judicial scrutiny. Indeed, it should not be lightly assumed that the cases actually meant to say that there were limits to prosecutorial discretion, but such limits were so trite that they need not be articulated.

<sup>25</sup>*The Secretary of Justice*, *supra* n. 10, at 334–348; see also Robert Misner, *Recasting Prosecutorial Discretion*, 86 J. Crim. L. & Criminology 717 [hereinafter *Recasting Prosecutorial Discretion*].

<sup>26</sup>*Cf.* James Vorenberg *Decent Restraint of Prosecutorial Power* 94 Harv. L. Rev. 1521 (1981) [hereinafter *Decent Restraint*].

<sup>27</sup>In this regard, see *Ramalingam Ravintran*, at [53]:

The Attorney General is the custodian of the prosecutorial power. He uses it to enforce the criminal law not for its own sake, but for the greater good of society, i.e., to maintain law and order as well as to uphold the rule of law. Offences are committed by all kinds of people in all kinds of circumstances. It is not the policy of the law under our legal system that all offenders must be prosecuted, regardless of the circumstances in which they committed the offence. It is not necessarily in the public interest that every offender must be prosecuted . . . .

*Cf. Grenville Cross, The DPP and Exercise of Prosecutorial Discretion*, 28 H.K. L.J. 400, 403 (1998).

<sup>28</sup>See *Goh Cheng Chuan v. Public Prosecutor* [1990] 1 SLR(R) 660 at [13] (Sing. High Ct.); *Recasting Prosecutorial Discretion*, *supra* n. 25.

<sup>29</sup>CPC 2010 at s 128(1), which states that “[a] court may alter a charge or frame a new charge, whether in substitution for or in addition to the existing charge, at any time before judgment is given” and s 390(4) which states that “the appellate court may frame an altered charge . . . if satisfied that, based on the records before the court, there is sufficient evidence . . .”; CPC 2010, at s 163(1); see also ss 10 and 130; The CPC of Singapore, *supra*, n. 8, at 192–196; *Ratanlal & Dhirajlal's The Code of Criminal Procedure* 513–516 (VR Manohar ed, 20th ed., LexisNexis 2012); *Public Prosecutor v. Goh Hock Huat* [1994] 3 SLR(R) 375 at [24] (Sing. Ct. App.).

<sup>30</sup>See e.g. Goh Yihan, *The Inherent Jurisdiction and Inherent Powers of the Singapore Courts: Rethinking the Limits of Their Exercise*, 2011 Sing. J. Leg. Stud. 178 (2011); Goh Yihan, *The Jurisdiction to Reopen Criminal Cases: A Consideration of the (Criminal) Statutory and Inherent Jurisdiction of the Singapore Court of Appeal*, Sing. J. Leg. Stud. 395–419 (2008) [hereinafter *Jurisdiction to Reopen*].

#### D. On the threshold of another shift

The Court of Appeal in *Thiruselvam s/o Nagaratnam v. Public Prosecutor* would be the precursor case to shed some light on the aforementioned issues and move the jurisprudence in a slightly different direction.<sup>31</sup> T faced a capital charge of abetting K in trafficking in some 800 grams of cannabis by negotiating a sale to an undercover officer, S. However, K was willing to plead guilty and was charged and convicted in another trial on two non-capital charges for supplying cannabis to S. The Court of Appeal noted that whereas the appellant in *Sim Min Teck* was the main offender and not a mere accomplice with lower culpability, in this case T was the abettor and K the person who committed the main offence. Nevertheless, Thean JA held that the “principle remains the same. The Prosecution has a wide discretion to determine what charge or charges should be preferred against any particular offender, and to proceed on charges of different severity as between different participants of the same criminal acts.”<sup>32</sup>

Notably, unlike previous cases, the discretion was no longer expressed in absolute terms- it was simply described as “wide.”<sup>33</sup> But it was not long before the courts reverted to the previous position taken.

In *Cheng William v. Loo Ngee Long Edmund*, a question arose as to whether the Attorney General’s power to discontinue criminal proceedings applied to private prosecutions as well.<sup>34</sup> Yong CJ held that the Attorney General’s prosecutorial discretion was “without qualification,”<sup>35</sup> and reiterated this in *Cheng Siah Johnson v. Public Prosecutor*.<sup>36</sup> The screw would tighten further in a series of subsequent decisions, decisions made even after Yong CJ had retired and just about when his successor Chan CJ was appointed.<sup>37</sup> First, in *Public Prosecutor v. Ul*, Choo J held that prosecutorial discretion was “an area outside the court’s purview,”<sup>38</sup> suggesting that there was no room whatsoever for judicial interference. Second, in *Yunani bin Abdul Hamid v. Public Prosecutor*, a case that involved an accused person being re-prosecuted after a 15-year lapse, Rajah JA noted in *obiter dicta* that “[i]t can be said, with some force, that the Constitution, by expressly conferring absolute prosecutorial discretion on the Attorney-General, does not contemplate any judicial oversight over the exercise of such discretion.”<sup>39</sup>

However, Rajah JA also wrote that this was “a matter of such fundamental constitutional importance that I prefer to leave it open for further argument and consideration at a more appropriate juncture.”<sup>40</sup> Perhaps unbeknownst to Rajah JA, that question would be taken up by Chan CJ in a case decided contemporaneously to *Yunani bin Abdul Hamid*: the watershed decision of *Tan Guat Neo Phyllis*.

### III. CASE LAW: THE EVOLVING MODERN POSITION

#### A. The turning point

*Tan Guat Neo Phyllis* involved a case of alleged entrapment; specifically, a law firm had hired a private investigation firm, who in turn hired J, to obtain evidence that P’s law firm was engaging in touting for conveyancing deals. J then lodged a complaint against P to the Law Society of Singapore, and P was charged under the Legal Profession Act for misconduct unbecoming an advocate and solicitor.<sup>41</sup> Before the Court of Three Judges, the tribunal that decides cases involving disciplinary action against lawyers, one of the arguments P made was that any prosecution founded on evidence obtained by entrapment was an abuse of the courts’ process. Chan CJ completely rejected this contention, stating, *inter alia*, that

[The Constitution] expressly separate[s] the prosecutorial function from the judicial function, and give[s] equal status to both functions. Hence, both organs have an equal status under the Constitution, and neither may interfere with each other’s functions or intrude into the powers of the other, subject only to the constitutional power of the court to prevent the prosecutorial

<sup>31</sup>[2001] 1 SLR(R) 362 (“*Thiruselvam Nagaratnam*”) (Sing. Ct. App.).

<sup>32</sup>*Id.* at [32].

<sup>33</sup>*Cf Ramalingam Ravinathan*, at [41].

<sup>34</sup>[2001] 2 SLR(R) 626 (Sing. High Ct.).

<sup>35</sup>*Id.* at [16].

<sup>36</sup>[2002] 1 SLR(R) 839 at [19] (Sing. High Ct.).

<sup>37</sup>Yong CJ’s reign is perhaps best characterised by aggressive case management (which was necessary to clear the backlog of cases at that time) and a hard-line approach towards crime. In this light, one could understand why the courts were slow to challenge prosecutorial discretion.

<sup>38</sup>[2007] 4 SLR(R) 270 at [6] (Sing. High Ct.).

<sup>39</sup>[2008] 3 SLR(R) 383 at [63] (“*Yunani bin Abdul Hamid*”) (Sing. High Ct.).

<sup>40</sup>*Id.*

<sup>41</sup>Cap 161, 2001 Rev Ed, s 83(2) (h).



power from being exercised unconstitutionally. Indeed, this is not even a true “interference” inasmuch as the exercise of a function unconstitutionally is, in effect, not an exercise of that function at all and which it is therefore the duty of the court (pursuant to the Constitution itself) to prevent.

...

[E]xcept for unconstitutionality, the Attorney-General has an unfettered discretion as to when and how he exercises his prosecutorial powers. This also means that it is improper for the court to prevent the Attorney-General from prosecuting an offender by staying the prosecution.<sup>42</sup>

Chan CJ further pointed out that

judicial power... may circumscribe the prosecutorial power in two ways: First, the court may declare the wrongful exercise of the prosecutorial power as unconstitutional... Secondly, it is an established principle that when an accused is brought before a court, the proceedings thereafter are subject to the control of the court... Within the limits of its judicial and statutory powers, the court may deal with the case as it thinks fit in accordance with the law.

...

In our view, the exercise of the prosecutorial discretion is subject to review in two situations: first, where the prosecutorial power is abused, i.e., where it is exercised in bad faith for an extraneous purpose, and second, where its exercise contravenes constitutional protections and rights (for example, a discriminatory prosecution which results in an accused being deprived of his right to equality...<sup>43</sup>

*Tan Guat Neo Phyllis* thus marked a firm return to *Teh Cheng Poh*, in that the court made it clear that there were indeed (at least two) limits on the Attorney General’s prosecutorial discretion, as opposed to no limits whatsoever. Chan CJ followed up with this in a 2011 Court of Appeal decision, albeit in the context of a clemency plea and not prosecutorial discretion, declaring that given the “high constitutional [office] held by... the Attorney-General... no court is justified in hypothesising that... the Attorney-General may give a spiteful opinion on the offender’s case... until the contrary is shown, the courts, instead of proceeding on such fanciful hypotheses, should process on the basis of presumptive legality.”<sup>44</sup>

## B. Concretising the modern position

This maxim of *omnia paesumuntur rite esse acta*, that all executive acts (in this context, by the Attorney General) are to be presumed to have been done rightly and regularly and in conformity with the law, was fully embraced by the Court of Appeal in *Ramalingam Ravintran*. There, R and a co-offender had been caught trafficking a bag containing illegal drugs. The co-offender was charged with trafficking in an amount quantified just below the threshold for the mandatory death penalty, but R was charged with trafficking in an amount quantified above the threshold. In coming to his decision, Chan CJ considered the precedents invoked by R, only to conclude that they were either not directly applicable to the case at hand, or contained flawed reasoning.

To Chan CJ’s mind, *Ong Ah Chuan* was distinguishable because it involved “the application of Article 12(1) of the constitution to [mandatory death penalty] legislation and not to the exercise of prosecutorial discretion”;<sup>45</sup> moreover, “the test of what equality before the law requires is not necessarily the same in both situations.”<sup>46</sup> *Teh Cheng Poh* was also distinguishable because “it was concerned with the exercise of the prosecutorial discretion in relation to a single offender whose acts were punishable under two different statutory regimes carrying different punishments.”<sup>47</sup> As for *Sim*

<sup>42</sup>*Tan Guat Neo Phyllis*, at [144]–[145].

<sup>43</sup>*Id.* at [146], [149].

<sup>44</sup>*Yong Vui Kong v. Attorney-General* [2011] 2 SLR 1189 at [139] (Sing. Ct. App. [hereinafter *Yong Vui Kong (clemency)*]; see also *Huang Meizhe v. Attorney General* [2011] 2 SLR 1149 (Sing. High Ct.); *Chan Heng Kong v. Public Prosecutor* [2012] SGCA 18 (Sing. Ct. App.).

<sup>45</sup>*Ramalingam Ravintran*, at [40].

<sup>46</sup>*Id.* at [20].

<sup>47</sup>*Id.* at [40].

*Min Teck*, while relevant insofar as it was “concerned with prosecutorial discretion to differentiate between the charges against two offenders who were, in law, liable for the same criminal acts,” it had applied the principle in *Teh Cheng Poh* “uncritically without considering the material difference between the factual situations in the two cases.”<sup>48</sup> Similarly, *Thiruselvam Nagaratnam* was also cloaked with doubt because of its uncritical application of *Teh Cheng Poh*; more than that, the case had suggested that the Attorney General can charge an accused person with a capital offence and another accused with a non-capital offence even if the former had played a smaller role in the criminal enterprise and was therefore less morally blameworthy, and had also suggested that prosecutorial discretion could never be exercised unlawfully.<sup>49</sup> Since Chan CJ did not find any of the authorities helpful, he had to return to first principles.<sup>50</sup> He started by referring to his own dictum in *Tan Guat Neo Phyllis* (i.e., there were indeed limits to prosecutorial discretion), before adding the following:

Although [Yong Vui Kong (clemency) was not about] prosecutorial decisions, it is our view that [it] provide[s] additional support for applying a presumption of constitutionality in the prosecutorial context. Given the constitutional status of the Attorney General, the courts should presume that he acts in the public interest as the Public Prosecutor, and that he acts in accordance with the law when exercising his prosecutorial power. This approach should not be regarded as the courts deferring to the Prosecution. It is, instead, really an application of the established principle that the acts of high officials of state should be accorded a presumption of legality or regularity, especially where such acts are carried out in the exercise of constitutional powers.<sup>51</sup>

*Ramalingam Ravinthran* was thus a synthesis of the propositions in *Tan Guat Neo Phyllis* and *Yong Vui Kong (clemency)*. On the one hand, it was made clear that there could be judicial intervention *vis-à-vis* prosecutorial discretion via two grounds: first, if the Attorney General had acted unconstitutionally, and second, if the Attorney General had acted *mala fides* (presumably at any stage of the proceedings). On the other hand, it was also made clear that the Attorney General’s exercise of prosecutorial discretion should, as a starting point, be presumed to be in accordance with the public interest and the law. The practical ramification of this would be that at the outset the legal burden of proof would be placed on an accused to produce evidence of any *prima facie* violation of inequality or *mala fides*; pointing to the mere fact of differentiation in charges, without any specific proof of *mala fides*, would not be enough.<sup>52</sup> Chan CJ then went a step further, and elaborated on some of the factors that the Attorney General might legitimately consider when exercising prosecutorial discretion:

Although the courts are entitled to presume that the prosecutorial power has been properly exercised in a particular case, its exercise is nevertheless subject to legal limits. As a requirement of the rule of law, all legal powers are subject to limits . . . . An inherent limitation on the prosecutorial power is that it may not be exercised arbitrarily, and may only be used for the purpose for which it was granted and not for any extraneous purpose . . . . Art 12(1) [of the Constitution] merely requires the Attorney-General . . . to give unbiased consideration to every offender and to avoid taking into account any irrelevant consideration.

In cases where several offenders are involved in the same or similar offences committed in the same criminal enterprise . . . the Attorney-General . . . may take into account a myriad of factors in determining whether or not to charge an offender (including his co-offenders in the same criminal enterprise, if any) and, if charges are to be brought, for what offence or offences. These factors include the question of whether there is sufficient evidence against the offender and his co-offenders (if any), their personal circumstances, the willingness of one offender to testify against his co-offenders and other policy factors. Where relevant, these factors may justify offenders in the same criminal enterprise being prosecuted differently.

<sup>48</sup>*Id.*

<sup>49</sup>*Id.* at [37], [41].

<sup>50</sup>Interestingly, however, the Court of Appeal had the opportunity to, but did not, refer to *Mohamed Emran bin Mohamad v. Public Prosecutor* [2008] 4 SLR(R) 411, which held at [26] and [28] that “the exercise of the Attorney General’s prosecutorial discretion is an executive act . . . the question [is] whether there are intelligible and rational differentia justifying the Public Prosecutor’s decision to prosecute entrapped drug traffickers but not to bring charges against state *agent provocateurs*.” (“*Mohamed Emran*”) (Sing. High Ct.). Indeed, this appears to be the only case on prosecutorial discretion that has employed conventional Article 12(1) reasoning to come to its conclusion – by conventional reasoning one refers, almost invariably, to *Public Prosecutor v. Taw Cheng Kong* [1998] 2 SLR(R) 489 (Sing. App.).

<sup>51</sup>*Ramalingam Ravinthran*, at [46].

<sup>52</sup>*Id.* at [70]–[72].



...

[T]he Prosecution is obliged to consider, in addition to the legal guilt of the offender, his moral blameworthiness, the gravity of the harm caused to the public welfare by his criminal activity, and a myriad of other factors, including... the possibility of showing some degree of compassion in certain cases.<sup>53</sup>

Chan CJ also added, perhaps a little cryptically, a reference to the vague notion of “public interest”: “[The Attorney General] cannot decide at his own whim and fancy who should or should not be prosecuted, and what offence or offences a particular offender should be prosecuted for. The Attorney General’s final decision will be constrained by what the public interest requires.”<sup>54</sup> He eventually dismissed the appeal in the following terms:

[T]his Motion fails as: (a) the Applicant has not produced any evidence to prove a prima facie case of a violation of Art 12(1); and (b) in any event, the evidence on record is insufficient to rebut the presumption of constitutionality with regard to the Attorney General’s decision to prosecute the Applicant for capital offences rather than for non-capital offences (as in the case of [R]). Moreover, in our view, the evidence does not show that [R] was more culpable than the Applicant in relation to their respective drug trafficking offences. At the highest, they could be said to be of equal culpability and/or moral blameworthiness in the trafficking of controlled drugs. That, in itself, is not sufficient to rebut the presumption of constitutionality vis-à-vis the Attorney-General’s decision to prefer the charges which were brought against, respectively, the Applicant and [R].<sup>55</sup>

### C. Final points of clarification

*Ramalingam Ravinthran* would be revisited by the Court of Appeal in *Yong Vui Kong* and *Quek Hock Lye*. In the former, C, the supposed mastermind behind a drug operation was given a “DNAQ” or discontinuance-not-amounting-to-an-acquittal, and subsequently kept in preventive detention under national security laws without trial, while the supposed mule in the same operation (the appellant) was convicted of drug trafficking and sentenced to mandatory death. The appellant claimed that this was a case of selective prosecution. In a comprehensive judgment that granularly parsed through the entire factual matrix,<sup>56</sup> Chan CJ held that there was simply no evidence adduced by the appellant to show that the Attorney General had abused his prosecutorial power, and indeed all the evidence showed was that preventively detaining the mastermind was an appropriate course of action taken by the Attorney General.<sup>57</sup> *Ramalingam Ravinthran* was cited in support, but interestingly, Chan CJ found it necessary to mention at the end of the judgment that

Even if we were to find... that [the appellant’s] prosecution for a capital offence was in breach of Art 12(1) of the Constitution, we have no power to set aside his conviction for that offence simply on the basis of a breach of Art 12(1). This is because there is nothing wrong in law with the conviction... the court’s power would be confined to making a declaratory order... It would then be up to the [Attorney General] to decide what kind of action he should take to remedy the unequal position.<sup>58</sup>

Rounding off our survey of the case law would be *Quek Hock Lye*. Q was convicted of participating in a criminal conspiracy with W and S to traffic in not less than 62.14 grams of diamorphine (thus attracting the mandatory death penalty).<sup>59</sup> Before Q’s trial began, W had pleaded guilty to a separate charge of possession of not less than 14.9 grams of diamorphine in furtherance of a criminal conspiracy with Q and S to traffic the said drugs (thus avoiding the mandatory death penalty). On appeal, Q argued that as both W and Q fell within the same class of accused persons and shared the same legal guilt (in that both were charged for trafficking diamorphine and were in possession of the same amount of

<sup>53</sup>*Id.* at [51]–[52], [63].

<sup>54</sup>*Id.* at [46], [53].

<sup>55</sup>*Id.* at [73]; See also Lee Jwee Nguan and Mohamed Faizal Abdul Kadir, *Criminal Procedure, Evidence and Sentencing*, 12 Sing. Acad. L., Annual Rev. Cases 243, 244–249 (2011).

<sup>56</sup>One of the interesting allegations in this case was that when the prosecution asked the appellant to testify against C, the appellant refused and claimed that C had threatened his life. The appellant then claimed that his prosecution was the result of a reprisal from the prosecution for his refusal to testify. Another fact that sensationalised the case was that the appellant was only 19 years old when he trafficked the drugs.

<sup>57</sup>*Yong Vui Kong (clemency)* at [20]–[47].

<sup>58</sup>*Id.* at [51].

<sup>59</sup>Officers from the Central Narcotics Bureau had raided and seized drug paraphernalia and no less than 62.14 grams of diamorphine from an apartment rented by Q, W, and S.

diamorphine), Q's constitutional right to equality was breached. In dismissing the appeal, Chao JA cited *Ramalingam Ravinthran*, and also pointed out the following:

[T]he divergent consequences faced by accused persons in the same criminal enterprise from the prescribed punishments (whether mandatory or not), flowing from their respective charges by the Public Prosecutor, are not per se sufficient to found a successful Art 12(1) challenge . . . this divergence in sentence experienced by accused persons is but a consequence of the broader constitutionally vested discretion in the Public Prosecutor in preferring charges against accused persons.<sup>60</sup>

Significantly, Chao JA also categorically held that charge-preference (as opposed to charge-amendment) was completely not open to judicial interference:

[T]he judiciary does not possess the power or jurisdiction to formulate or prefer charges against accused persons; that is the constitutional provenance of the Attorney-General . . . [The] incongruity in the charges faced by [Q] and [W] does not impact their underlying agreement to traffic in the 62.14 g of diamorphine . . . [; this] merely reflects the Public Prosecutor's discretion to prefer a less serious charge . . . where sufficient evidence can be adduced to prove the underlying agreement between the co-conspirators beyond a reasonable doubt, the outcome per se of the proceedings of a co-conspirator . . . is not ipso facto a reason to set aside the conviction or amend the charge preferred against the other co-conspirator.<sup>61</sup>

#### IV. EVALUATION OF THE JURISPRUDENCE AND THE CHALLENGES AHEAD

Having examined the jurisprudence in Parts II and III, I now critically evaluate in this Part the changes (if any) in the law that have been brought about. I then situate these changes in the wider legal landscape in Singapore, and conclude this Part with a discussion on whether the Attorney General should better account for prosecutorial decisions, or how the system can be improved. The challenges generated by over-accounting for prosecutorial decisions will also be discussed.

##### A. Not two grounds but only one ground of review?

From the survey of the case law above, it is rather apparent that the courts have evolved from their previous stand of absolute prosecutorial discretion to the current position of limited review of prosecutorial discretion, even if there are still some obvious hints of maintaining a high barrier around one of the Attorney General's fundamental prerogatives (and perhaps justifiably so). As a preliminary point, however, and presupposing (quite legitimately) that any substantive constitutional challenge against prosecutorial discretion invariably involves only the equality clause (i.e., Article 12(1) of the constitution), it would appear on a close reading of the cases that there are actually not two distinct grounds for judicial review, but in effect only one: at least on the basis of *Ramalingam Ravinthran et al.*, any argument that has gone towards establishing *mala fides*, bad faith, malicious or retaliatory prosecution etc., has necessarily involved the inquiry of whether the Attorney General was biased<sup>62</sup> in the prosecution and/or had factored in irrelevant considerations (as opposed to not factoring in relevant considerations) when making the prosecutorial decision,<sup>63</sup> and such an inquiry is (coincidentally or otherwise) the very same one when answering the question of whether the Attorney General had breached the equality clause when prosecuting different offenders, including those involved in the very same criminal enterprise (with varying degrees of moral culpability or otherwise).<sup>64</sup> The upshot is that the law, as currently conceived by the case law, does not contemplate a prosecutorial decision that breaches the equality clause to be different from a prosecutorial decision that is made in bad faith.

<sup>60</sup>*Quek Hock Lye*, at [24].

<sup>61</sup>*Id.* at [29], [37], [40].

<sup>62</sup>See Chen Siyuan and Lionel Leo, *Reasonable Suspicion or Real Likelihood: A Question of Semantics?* 2 *Sing. J. Leg. Stud.* 446 (2008).

<sup>63</sup>Arguments have also been made along the lines of the Attorney General not factoring in all relevant considerations but for all intents and purposes this is inextricably connected to whether the Attorney General had factored in irrelevant considerations.

<sup>64</sup>To be precise, the cases have employed a wider rubric than *mala fides* for the first limb (i.e., "abuse of power"), but it is difficult to postulate a scenario or a test that can finely distinguish between bad faith and abuse of power; See Michael Hor, *The Independence of the Criminal Justice System in Singapore*, *Sing. J. Leg. Stud.* 497, 510–512 (2002) [hereinafter *Criminal Justice System in Singapore*].

If indeed this analysis is correct (that there is in effect no distinct ground of review for *mala fides* since the required proof is the same for *mala fides* and inequality), then one could say that this makes any challenge against prosecutorial discretion even harder (or at least more limited), bearing in mind, too, that *Ramalingam Ravinthran et al.*, have also established that because of the co-equal constitutional status (*vis-à-vis* other branches of the government) and presumptive legality afforded to the Attorney General, the legal burden, no matter the ramifications there may be on the right to presumption of innocence, is on the accused to adduce any evidence to establish a *prima facie* abuse of power.<sup>65</sup> On the other hand, it is also possible to maintain that there are indeed two distinct grounds of review. Essentially, Article 12(1) of the constitution only guarantees equality before the law, but it does not guarantee that all offenders be treated exactly alike—to take a contrary view would mean that the courts can never increase or decrease sentencing tariffs over time, since that would amount to treating like cases differently. Equality before the law thus means, for instance, that the prosecutor cannot make a blanket rule that a certain racial, religious, social, or economic group will get special consideration when prosecutorial decisions are made.<sup>66</sup> To use another example, suppose that the prosecutor is asked by the government to prosecute a political adversary, even though the evidence is fabricated and the prosecutor knows it. For the prosecutor to proceed nonetheless would be a clear abuse of prosecutorial discretion, without offending the equality provision. Seen from this perspective, there are indeed two distinct grounds (of *mala fide* and inequality) to challenge prosecutorial decisions, even though *Ramalingam Ravinthran* may give the impression of collapsing the manner of proving either ground into a single ground of challenge.

Be that as it may, perhaps the courts, at an appropriate juncture, can clarify if the grounds of *mala fides* and unconstitutionality (via the equality clause) are indeed one and the same, even though they seem to have characterised the grounds as distinct.<sup>67</sup> At any rate, *Ramalingam Ravinthran* should be commended for clarifying that despite what the literal words of Article 35(8) of the constitution suggest (or rather, are silent on), it is now possible to challenge prosecutorial discretion, and that the court can factor in the different moral culpabilities of co-offenders and corresponding charges *inter se* when deciding if there was unlawful discrimination. While the result is there can be no doubt that prosecutors would now be more circumspect when framing the charges against accused persons, particularly those involved in the very same criminal transaction, any prosecutor who somehow manages to institute proceedings in bad faith would probably not make it obvious at all; furthermore, it would probably take a fairly extreme incongruence between an accused person's moral culpability and the charge he faces before the court is satisfied that there is something amiss.

## B. Several internal inconsistencies resolved and to be resolved?

Nonetheless, the sheer fact that the courts now acknowledge that the exercise of prosecutorial discretion is not absolute is a welcome development, not least because this is consistent with a cornerstone of any conception of the rule of law,<sup>68</sup> i.e., that all legal powers have

<sup>65</sup>It may be questionable as to what is so special about prosecutorial discretion that the accused has to shoulder such a burden (again, other than its constitutional protection). With other types of allegations, if an accused person alleges that his recorded confession was tainted by threats, inducements, promises, or oppression, the prosecution must prove beyond a reasonable doubt that the confession was made voluntarily; likewise, if an accused person alleges that his complainants have colluded to frame him, the burden is also on the Prosecution to prove beyond a reasonable doubt that there was no collusion. See Jeffrey Pinsler, *Evidence and the Litigation Process* 88, 166 (2d ed. LexisNexis 2011). One could, of course, draw the distinction by arguing that unlike allegations that have to do with the evidence, any allegation of unlawful prosecutorial discretion does not affect guilt but only the charge (and sentence). But this may not be a convincing distinction insofar as it is as easy to erase the distinction as it is to invent and reinvent the basic conception of presumption of innocence (i.e., the prosecution bears the legal burden to prove a case beyond a certain threshold).

<sup>66</sup>See *Mohamed Emran*, at [26]–[27].

<sup>67</sup>Perhaps not insignificantly, the Court of Appeal said in *Tan Guat Neo Phyllis*, at [146] that once an accused is brought before the court, these proceedings are subject to judicial control and the court may deal with the case “as it thinks fit in accordance with the law.”

<sup>68</sup>See Thio-Li-ann, *A Treatise on Singapore Constitutional Law* 172, 174 (Acad. Pub. 2012) (“Given the competing conceptions of the rule of law . . . if the rule of law is to be useful as a criteria for evaluating constitutional government, the minimalist approach of Joseph Raz has much to commend it . . . (a) All laws should be prospective, open and clear. (b) Laws should be relatively stable. (c) The Making of particular laws . . . should be guided by open, stable, clear and general rules. (d) The Independence of the Judiciary must be guaranteed. (e) The principles of natural justice must be observed. (f) The courts should have review powers over the implementation of the other principles) [hereinafter *A Treatise on Singapore Constitutional Law*]; 71 Sing. Parliamentary Rpts, cols. 602–603 (Nov. 24, 1999) (Member of Parliament Chin

legal limits.<sup>69</sup> Indeed, at the core of any continued insistence on the absoluteness of prosecutorial discretion, even if a literal reading of Article 35(8) of the constitution lends itself to such an interpretation, is a palpable paradox: whereas most governmental (i.e., executive) decisions are open to legal challenge via a variety of grounds in the courts, the Attorney General's prosecutorial discretion was considered somehow unassailable. This was a self-contradiction because whereas most challengeable executive actions have little or nothing to do with life or liberty (which surely must be the apex values deserving of maximum protection in any society), the whole *raison d'être* of the criminal justice process is to identify individuals who have violated some aspect of the social compact (i.e., the promise not to violate criminal law or to face criminal sanction) to the point that such individuals may be deprived of their liberty, and in some cases such as murder and drug trafficking, their lives. If the counter-argument is that prosecutorial discretion is protected in the constitution and must therefore by that reason alone be afforded a certain high level of impregnability, the simple rejoinder is that the life and liberty (and not to mention, equality) of all persons in Singapore also enjoy constitutional protection.<sup>70</sup> The argument from co-equality of status under the constitution (as well as presumed legality) is thus of limited persuasion, and accordingly, the courts stepping away from the position of absolute prosecutorial discretion represents a step away from the self-contradictory state of affairs where liberty and life were mis-prioritised below executive supremacy. Yet there are signs to suggest that the courts may not be done yet in recalibrating their hierarchal cognisance for human liberty and life. For instance, in *Ramalingam Ravinthran*, even though the Court of Appeal (and indeed, the Attorney General) maintained that the Attorney General had no legal obligation whatsoever to explain prosecutorial decisions unless the accused person could furnish some proof of impropriety, the court nevertheless saw a need to proffer some reasons as to why the Attorney General had chosen to prosecute in the way that he did, and even suggested that there was no real mysterious science in prosecutorial decision-making:

[We do not mean to say] that an aggrieved offender can never prove a case of unlawful discrimination. Such a case may be self-evident on the facts of a particular case (for example, where a less culpable offender is charged with a more serious offence while his more culpable co-offender is charged with a less serious offence, when there are no other facts to show a lawful differentiation between their respective charges).

...

Nothing in the present case can be said to raise any profound concern as to whether the Applicant was wrongly convicted of the offence with which he was charged . . . [.] the Applicant is not protesting that he was wrongfully convicted. Instead, his case is that he was wrongfully prosecuted . . . . Given the nature and width of the prosecutorial discretion, coupled with the fact

*Footnote continued*

Tet Yeung); K Shanmugam, Speech at New York State Bar Association Rule of Law Plenary Session, 27 October 2009; <http://www.worldjusticeproject.org/rule-of-law-index/> (accessed May 14, 2012).

<sup>69</sup>This particular phrase is inspired by the seminal decision in *Chng Suan Tze v. Minister for Home Affairs* [1988] 2 SLR(R) 525 (Sing. Ct. App.). By way of *obiter dicta*, the Court of Appeal considered the reviewability of government power in prevention detention cases in the context of the Internal Security Act (Cap 143, 1985 Rev Ed), declaring at [86] that:

the notion of a subjective or unfettered discretion is contrary to the rule of law [because] all power has legal limits." If indeed a governmental act involving national security considerations is open to judicial review (as suggested by this case), *a fortiori*, a governmental act involving municipal crime control is similarly open to judicial review. In any event, leading constitutional law scholar Thio Li-ann praised this decision for "its desire to cultivate a robust conception of the rule of law that promoted government accountability.

Thio Li-ann, *Beyond the "Four Walls" in an Age of Transnational Judicial Conversations: Civil Liberties, Rights Theories and Constitutional Adjudication in Malaysia and Singapore*, 19 Colum. J. Asian L. 428, 452 (2006); see also *A Treatise on Singapore Constitutional Law*, *supra*, n. 68, at 155 ("In Singapore, constitutionalism may be viewed in at least three major ways . . . [one of which is] to guard against constitutional authoritarianism, constitutional principles are harnessed in efforts to secure political accountability, and to implement limited government, to sustain an ordered liberty.").

<sup>70</sup>To be clear, even Article 9(1) of the constitution has an exception built into it: "No person shall be deprived of his life or personal liberty save in accordance with law." However, this does not necessarily end the argument, because the meaning of "law" is, and always has been, open to wide-ranging interpretation. See *e.g.*, *A Treatise on Singapore Constitutional Law*, *supra* n. 68, at 635 ("Complex definitional issues attend Article 9(1) in so far as it . . . contains open-textured terms . . . whose content will be informed by the background political philosophy espoused by the interpreter"). Would it be unfair to suggest that in this day and age, "law" should entail more than just formalistic legality? One may be cynical (or perhaps, simply realistic) by pointing to recent cases that demonstrate considerable judicial deference when it comes to interpreting liberties under the Constitution. See *e.g.*, Aravind Ganesh, *Insulating the Constitution: Yong Vui Kong v. Public Prosecutor* [2010] SGCA 20, 10 Oxford U. Cmmw. L.J. 273 (2010) (The thrust and tenor of this article suggests that the evolution is not yet complete).

that the Applicant did not avail himself of the two opportunities which he had to raise the issue that the Prosecution violated Art 12(1) in charging him[,] . . . there cannot be any compelling grounds for this court to now direct the Prosecution, at this stage . . . to explain its reasons . . .

Furthermore, given the manifold factors that the Attorney-General is entitled to take into account in making a prosecutorial decision, it would be wholly unrealistic for this court to proceed on the basis that the Attorney-General would be unable to point to any relevant consideration to explain his prosecutorial decisions . . . Indeed, it is not difficult to discern a valid consideration in the present case . . . It is a common and well-known practice for the Prosecution to take into account an offender's willingness to testify against his co-offender when deciding what charges to bring against the offender as compared to his co-offender.<sup>71</sup>

It can be said of course that by saying this the Court of Appeal in *Ramalingam Ravinthran* was simply giving a nod to the political traction that accompanies acts promoting public accountability, without going so far as to say such accountability is derived from a legal obligation. Yet, speculating reasons in lieu of the Attorney General's reticence may perhaps be portending a new legal-political reality to come (this will be elaborated upon in the next sub-Part). Whichever the case, stepping away from the position of absolute prosecutorial discretion also served to arguably disentangle the state of the law from a couple of other irreconcilables.

The first, as alluded to briefly earlier in the article, is the express power of the court to amend charges. Indeed, even if the court cannot tell the Attorney General whether or not to charge a person or what to charge a person with before the trial begins (and rightly so), it can, during the trial, amend the charge. This much is clear from the Criminal Procedure Code (CPC) and CPC 2010,<sup>72</sup> as well as the case law. In fact (and ironically so for present purposes), the cases actually state that any amendment of charges cannot result in any undue unfairness to any party, especially the accused person. For instance, Yong CJ held the following in *Lee Ngin Kiat v. Public Prosecutor*, a case that involved the MDA.

It is clear that the Court of Criminal Appeal has the power to alter the charge . . . The Court of Criminal Appeal is empowered to make any order as it may think just, and may by such order exercise such power which the trial court might have exercised . . . This power must be exercised judiciously[;] . . . [the only consideration is that] the possibility of prejudice to the accused (or the Prosecution) must be of utmost concern when this court decides on whether to alter a charge.<sup>73</sup>

The complication to this line of reasoning, presumably, is the distinction drawn between interference with charge-preference and initiation of charge-amendment, in that the court cannot tell the prosecution what charge to proceed with and what charge to prefer during the trial, but the court can on its own initiative or upon conferment with the prosecution amend the charge after the evidence have been presented (but before judgment is rendered).<sup>74</sup> Whether or not this distinction is a principled one to begin with, the practical consequence of this distinction is undeniable and is most pronounced in the context of offences such as those found in the MDA: in contrast to, say, a murder case where a judge can theoretically decide, on the basis of the proven facts pertaining to *actus reus* or *mens rea* for instance, that the charge should be more appropriately amended to one of culpable homicide not amounting to murder (thus preventing the accused from suffering mandatory death upon conviction),<sup>75</sup> it is harder for a judge to justify such a course of action for drug trafficking if the point of contention has nothing to do with *actus reus* or *mens rea* but only quantity. That is, if the charge spells that the quantity of the drugs trafficked is above/below the death-penalty threshold, it seems almost inconceivable that the judge can attempt to amend this on any evidentiary ground—any self-respecting

<sup>71</sup>*Ramalingam Ravinthran*, at [71], [77]–[78] (emphasis in original).

<sup>72</sup>See *supra* n. 29.

<sup>73</sup>[1993] 1 SLR(R) 695 at [42]–[43] (Sing. Ct. Crim. App.); see also *Koh Aik Siew v. Public Prosecutor* [1993] 1 SLR(R) 885 at [29] (Sing. Ct. Crim. App.); *Public Prosecutor v. Tan Khee Wan Iris* [1994] 3 SLR(R) 168 at [7]–[8] (Sing. High Ct.); *Garmaz s/o Pakhar v. Public Prosecutor* [1996] 1 SLR(R) 95 at [29] (Sing. Ct. App.); *Public Prosecutor v. Mohammed Liton Mohammed Syeed Mallik* [2007] SGHC 47 at [3] (Sing. High Ct.); *Quek Hock Lye*, at [28]–[29]. Indeed, if a court can amend the charge to a more serious one as long as it does not unduly prejudice the accused, it must surely stand to reason that it has the power to amend the charge to a less serious one.

<sup>74</sup>*Quek Hock Lye*, at [28]–[29].

<sup>75</sup>Analogously, in *Public Prosecutor v. Ketmuang Banphanuk* [1995] SGHC 46 (Sing. High Ct.), the judge sought to amend a charge of culpable homicide not amounting to murder with one of attempted murder; in *Public Prosecutor v. Ng Jui Chuan* [2011] SGHC 90 (Sing. High Ct.), the judge sought to amend a charge of causing death by a rash act to causing death by a negligent act. See also *Lim Hong Eng v. Public Prosecutor* [2009] 3 SLR(R) 682 (Sing. High Ct.); *Cf Public Prosecutor v. Ketmuang Banphanuk* [1995] 1 SLR(R) 862 at [9] (Sing. Ct. App.); *Public Prosecutor v. Mas Swan bin Adnan* [2012] SGCA 29 (Sing. Ct. App.).



prosecution will definitely have the amount of drugs necessary to fulfil the evidentiary requirement of whatever is eventually stated in the charge. Yet if the judge attempts to amend the charge on any other basis (such as compassion), it may not seem entirely appropriate and indeed is probably not borne out in practice,<sup>76</sup> unless the interventionist exercise is based upon an evaluation of moral complicity/culpability and discordance with the charges (which the older cases reject as a basis for interference and the modern cases permit with noticeable caveats) or some facet of the inherent powers of the courts.<sup>77</sup>

And it is this idea of the inherent powers of the courts that brings me to the other point of disentangled irreconcilability that comes with the recent retreat from absolute prosecutorial discretion. The actual scope of the courts' inherent, revisionary, jurisdictional, and discretionary powers in the criminal law context, and concomitantly the extent of their ability to govern their own criminal justice process that strikes the right customised balance between fairness and certainty have always been extremely blurry, and indeed, replete with internal inconsistencies.<sup>78</sup> In fact, insofar as these broad powers almost always have to be exercised pursuant to either remedying certain (usually exceptional) injustices of a case or preventing an abuse of process, they call into question why such justificatory rationales suddenly pale into non-existence when confronted with the (no doubt constitutionally conferred) prosecutorial discretion of the Attorney General.<sup>79</sup> One could take the argument of presumption of validity of prosecutorial powers a step further and say, for instance, that since the Attorney General is given a wide berth to institute and conduct criminal proceedings as he deems fit, the prosecution has, as a procedural prerogative, no legal duty to disclose unused but relevant evidence to an accused person.<sup>80</sup> Indeed, for a long time in Singapore, it was widely assumed that this was the case. Such an assumption was simply symptomatic of the broader, longstanding and perhaps resigned characterisation of the Singapore criminal justice process: that the laws pertaining to the process's constituent components of criminal procedure, criminal evidence, substantive criminal law, and constitutional and rights were either tilted overwhelmingly in the favour of the state or stacked unduly against accused persons, though such imbalance was justified on the basis of legitimate crime control.<sup>81</sup> In fact, the CPC was repealed and replaced by the CPC 2010 precisely because of this perceived imbalance, though of course improving the laws on criminal procedure is only the first step in holistic reform if one takes (and one has to take) a de-compartmentalised view of the entire criminal justice process.<sup>82</sup> But to return to the point about the prosecution's duty to disclose material: in 2011, the Court of Appeal, in a landmark judgment in *Muhammad bin Kadar v. Public Prosecutor*, held that the prosecution had a legal obligation to disclose to accused persons any unused material that would reasonably be regarded as credible and relevant to

<sup>76</sup>For one, compassion is at best a factor only in sentencing. Yet, for crimes that result in the mandatory death penalty upon conviction, there is no such thing as mitigation or discretionary compassion.

<sup>77</sup>See Glenn Seah and Lee Lit Cheng, *5 Criminal Procedure, Evidence and Sentencing Annual Review of Singapore Cases* ch.11 (2004).

<sup>78</sup>See e.g., *The Jurisdiction to Reopen*, *supra* n. 30; Chen Siyuan, *The Judicial Discretion to Exclude Relevant Evidence: Perspectives from an Indian Evidence Act Jurisdiction*, 16 Intl. J. Evid. & Proof 398 (2012) [hereinafter *The Judicial Discretion to Exclude Relevant Evidence*]; Chen Siyuan, *The 2012 Amendments to Singapore's Evidence Act: More Questions than Answers as Regards Expert Opinion Evidence* (forthcoming 34 Stat. L. Rev. (2013)). One is reminded too, at this point, of Ronald Dworkin's "right answer thesis," that law is a seamless web and in each and every case the theory that is constructed is one that best fits and justifies the law as a whole (i.e., law as integrity).

<sup>79</sup>One does wonder, again, why Chao JA in *Ramalingam Ravinthran* made the curious remark that the Attorney General's exercise of prosecutorial discretion must necessarily be constrained by the "public interest." Insofar as the courts are supposed to be a protector and embodiment of "public interest," does this mean that the discretion should be constrained by the courts?

<sup>80</sup>Or more simply, argue that by virtue of Article 35(8) of the Constitution, the prosecution possesses wide powers of the control of criminal proceedings, including the management of inculpatory and exculpatory evidence.

<sup>81</sup>In particular, Professor Michael Hor, a prolific academic in criminal and evidence law in Singapore, has written extensively on this. For a list of his works see [http://law.nus.edu.sg/about\\_us/faculty/staff/publist.asp?UserID=lawhorngm](http://law.nus.edu.sg/about_us/faculty/staff/publist.asp?UserID=lawhorngm) (last accessed May 14, 2012). See also Bhaskaran s/o Sivasamy, *The Criminal Appellate System in Singapore*, 16 Sing. L. Rev. 319 (1995); Gregory Gan, *The Crippled Accused: Miranda Rights in Singapore*, 28 Sing. L. Rev. 123 (2010); KS Rajah, *The Constitutional Right of Access to Counsel*, 4 L. Gaz. (2002); KS Rajah, *The Constitutional Right of Silence: Abridged?* 1 L. Gaz. (2003); KS Rajah, *The Right to Discovery in Criminal Proceedings*, 1 L. Gaz. (2005); Chin Tet Yeung, *Remaking the Evidence Code: Search for Values*, 21 Sing. Acad. of L.J. 52 (2009) [hereinafter *Remaking the Evidence Code*].

<sup>82</sup>See generally *Modernising the Criminal Justice Framework*, *supra* n. 12; *Three Speeches of Opening of the Legal Year 2011*, Sing. L. Watch, (Jan. 11, 2011); Chin Tet Yeung, *Criminal Procedure Code 2010: Confessions and Statements by Accused Persons Revisited*, 24 Sing. Acad. of L.J. 60 (2012) [hereinafter *Confessions and Statements*]. As regards evidence law, there is no doubt that the Evidence Act (Cap 97, 1997 Rev Ed) is very antiquated (enacted in 1893 with *ad hoc* amendments along the way. See generally *The Judicial Discretion to Exclude Relevant Evidence*, *supra* n. 78; *Remaking the Evidence Code*, *supra* n. 81.



questions of innocence and guilt, and any unused material that would provide a real chance of pursuing a line of inquiry that would lead to material that might reasonably be regarded as credible and relevant to questions of innocence and guilt.<sup>83</sup> This decision created quite a stir,<sup>84</sup> not just because this new legal duty of disclosure was not readily discernible from the rules found in the CPC, CPC 2010, or then-existing common law,<sup>85</sup> but it was also a clear rebuttal to the prosecution's longstanding assumption and practice that it had unfettered discretion regarding disclosure of any kind of unused evidence/material. The court, in other words, took an expansive view of its duty as the guardian of individual rights and saw a need to create an extra check against the powers of the prosecution, although one could argue that despite the new requirements established by the court, the court never left and remained firmly in the realm of criminal evidence law (which is obviously within its judicial purview).<sup>86</sup> Much depends, then, on the characterisation of the cases. Can *Muhammad bin Kadar* thus be read harmoniously with the notion that the Attorney General has a broad mandate in the conduct of prosecutions and that whatever he does should be presumed legal and in the public interest? Or does the unexpected development (in the sense of the court tapping on abstract impulses such as remedying injustice rather than relying purely on black-letter legal rules) of *Muhammad bin Kadar* suggest that the criminal justice landscape in Singapore is slowly changing, albeit not entirely with internal consistency? Or is *Ramalingam Ravinthran et al.*, as far as the envelope can be pushed by the courts (for now)? It seems apposite then at this juncture to step back from the specific jurisprudence on prosecutorial discretion, and examine the fuller landscape of its contiguous, yet overarching parts: rights and the rule of law.

### C. The wider backdrop of rights-consciousness and public accountability

To be clear, any discourse on rights and rights-centred conceptions of rule of law—which is what the whole debate on prosecutorial discretion ultimately leads to—is never straightforward. Any analysis of rights-consciousness<sup>87</sup> and the value attached to public accountability would be normative in the political (i.e., extra-legal, even non-legal) sense, while the state of the (black-letter) stated law is read with the lens of rigid positivism and certainty, creating the occasional uncomfortable interface between the two ends of a complex continuum, especially when the stated law was originally enacted with a view to buttressing goals of crime control. Making things even more complicated is the fact that, as mentioned, the entire criminal justice process comprises so many distinct parts (procedure, evidence, substantive law, and constitutional and human rights) such that the dynamic interaction as between the parts becomes impossibly mind-numbing when one endeavours to normatively evaluate the legal obstacles faced by any given person who has been charged with a crime. That having been said, apart from *Ramalingam Ravinthran et al.*, and *Muhammad bin Kadar*, Singapore's criminal law jurisprudence in the last four to five years has revealed a remarkable and consistent commitment by the courts to achieve unprecedented accused-centred processes and outcomes, marked in some cases by a noticeable gravitation towards demanding a higher degree of accountability and legitimacy by the various stakeholders in the criminal justice process (which in turn is consistent with the foundational desire to ensure that all criminal convictions are built only upon sufficient, safe, and reliable evidence, and also (separately) demonstrates a re-appraisal of the individual-state dichotomy in the criminal law context), and marked in other cases by a rigorous scrutiny of the factual and legal matrices coupled with a breathing sensibility to achieve equitability.<sup>88</sup> This pattern completely contradicts a commonly

<sup>83</sup>[2011] 3 SLR 1205 (Sing. Ct. App.) This case received considerable press coverage, because of the two brothers who were originally convicted of having the common intention to murder an old woman, one of them was completely exonerated of all charges on appeal. The resolution of the case took six years, with many twists and turns to the actual facts, and the Court of Appeal used unprecedentedly strong language to rebuke the police and the prosecutors for adopting questionable practices *vis-à-vis* the gathering and disclosure of important pieces of evidence.

<sup>84</sup>Due to the unexpected introduction of these legal requirements, the prosecution sought extensive clarifications from the Court of Appeal. See *Muhammad bin Kadar v. Public Prosecutor* [2011] 4 SLR 791 (Sing. Ct App.).

<sup>85</sup>See generally Chen Siyuan, *The Prosecution's Duty of Disclosure in Singapore: Muhammad bin Kadar v. Public Prosecutor*, Oxford U. Cmmw. L.J. 207 (2012).

<sup>86</sup>The court was also clear that it was not the courts' function to discipline the police if they should obtain evidence improperly. One could argue by analogy that it is also not the courts' function to discipline the prosecution if any prosecution is brought in bad faith. However, what is being sought here is not the disciplining or punishing of the prosecution. Rather, the question is whether there should be a higher level of accountability.

<sup>87</sup>Needless to say, the rights of the accused are not the only rights at stake. Members of society, too, have rights to safe and crime-free streets.

<sup>88</sup>See Cheah Wui Ling, *Developing a People-Centred Justice in Singapore: In Support of Pro Bono and Innocence Work*, (forthcoming, U. Cin. L. Rev. (2012) [hereinafter *Developing a People-Centred Justice in Singapore*]).

held claim by non-government organisations that Singapore's criminal justice system has a poor rights record.<sup>89</sup> A chronological sampling of just some of the cases would illuminate the point, as well as assist in critically situating, within the wider legal-political landscape, the jurisprudence on prosecutorial discretion just explored; it bears reiteration that in all of the following cases, the courts did things that were largely unprecedented:

1. In *Yunani bin Abdul Hamid*, as alluded to above, the applicant was facing re-trial after a lapse of 15 years, after the alleged co-offender in the case had resurfaced after having absconded. The prosecution amended the original capital charge to a much less serious one, and the applicant decided to plead guilty. On a criminal revision application, the High Court exercised its rarely invoked revisionary powers by setting aside the conviction and remitting the matter for re-trial, as it was of the view that the facts indicated that the applicant had faced overwhelming pressure to plead guilty, and furthermore, the totality of the evidence raised serious doubts as to his guilt.<sup>90</sup>
2. In *Tan Kiam Peng v. Public Prosecutor*, the Court of Appeal was confronted with two possible interpretations of s 18(2) of the MDA, with the broader interpretation favouring the prosecution and the narrow interpretation favouring accused persons.<sup>91</sup> Although s 9A(1) of the Interpretation Act mandates that all statutory interpretations must yield to the purposive approach;<sup>92</sup> although the general purpose of the MDA (ie., to neutralise the inimical effects of drug abuse in society) comported with the broad interpretation, and although the existing case law supported the broad interpretation, the court was of the view that a literal reading of s 18(2) combined with the application of the strict construction of penal statutes principle meant that the narrow interpretation should be preferred.<sup>93</sup>
3. In *Daniel Vijay s/o Katherasan v. Public Prosecutor*, the Court of Appeal rejected decades of its own jurisprudence, including its own decision in 2008, and restated the law on common intention with respect to liability in twin crime (e.g., robbery-murder) cases.<sup>94</sup> Originally, even if the secondary offenders only intended to commit the primary offence but not the secondary offence, they could be found guilty of the secondary offence. In 2008, the court modified the position to require the secondary offender to subjectively know that his co-offender might likely commit the secondary offence in furtherance of the common intention to carry out the primary offence. In *Daniel Vijay*, the court overturned this as well, stating that the secondary offender must have had the intention to commit the secondary offence.<sup>95</sup>
4. In *Lim Boon Keong v. Public Prosecutor*, the High Court pointed out that the Health Sciences Authority must ensure proper compliance with its internal procedures to avoid wrongful convictions, and raised questions about whether the authority's urine-testing methodology (for controlled drug consumption) adequately met the detailed requirements of the MDA.<sup>96</sup> This caused a shake-up as the authority subsequently changed its urine-testing procedures to comply with the observations of the court.

<sup>89</sup>See e.g., <http://www.hrw.org/asia/singapore> (last accessed May 14, 2012); <http://www.amnesty.org/en/region/singapore> (last accessed May 14, 2012); <http://maruah.org/> (last accessed May 14, 2012). With respect to a slightly different public law context, see Tey Tsun Hang, *Judicial Internalising of Singapore's Supreme Political Ideology*, 40 H.K.L.J. 293. Indeed, even the past practice of detaining politically controversial figures under preventive national security laws seems to have stopped now. Instead, such laws are used in moderation when dealing with hardened criminals or alleged terrorists.

<sup>90</sup>*Yunani bin Abdul Hamid*, at [57]–[62].

<sup>91</sup>[2008] 1 SLR(R) 1 (Sing. Ct. App.) ("*Tan Kiam Peng*"). Section 18(2) states that "Any person who is proved or presumed to have had a controlled drug in his possession shall, until the contrary is proved, be presumed to have known the nature of that drug."

<sup>92</sup>Cap 1, 2002 Rev. Ed. Section 9A (1) states that "In the interpretation of a provision of a written law, an interpretation that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to an interpretation that would not promote that purpose or object."

<sup>93</sup>*Tan Kiam Peng*, at [83]–[95].

<sup>94</sup>[2010] 4 SLR 1119 (Sing. Ct. App.). The 2008 decision was *Lee Chez Kee v. Public Prosecutor* [2008] 3 SLR(R) 447 (Sing. Ct. App.).

<sup>95</sup>See also Eunice Chua, *Raising the Bar for the Mens Rea Requirement in Common Intention Cases*, 29 Sing. L. Rev. 21 (2011); Chen Siyuan, *The Final Twist in Common Intention?* 1 Sing. J. Leg. Stud. 237 (2011).

<sup>96</sup>[2010] 4 SLR 451 at [21]–[51] (Sing. High Ct.). The Court of Appeal would subsequently address this issue in *Mohammad Ashik bin Aris v. Public Prosecutor* [2011] 4 SLR 802 (Sing. Ct. App.).

5. In *Ong Pang Siew v. Public Prosecutor*, the Court of Appeal readily criticised the prosecution's expert for falling short of professional standards.<sup>97</sup> The accused was found guilty of murder after the trial judge had rejected his defence of diminished responsibility. In contrast to the prosecution's expert witness, the accused's expert witness was very experienced in the field, had communicated with the accused in the latter's dialect, and set out his opinion in a very detailed and comprehensive report. The court considered the prosecution's expert witness to have given an unsatisfactory assessment of the accused, and declared it unsafe to rely on his assessment.<sup>98</sup> The Court of Appeal would admonish the prosecution's expert in even stronger terms in *Eu Lim Hoklai v. Public Prosecutor*, describing her as possessing over-enthusiastic zeal to an untenable case theory, giving an opinion on matters unrelated to her area of expertise as though they carried the weight of an expert, infusing her crime scene reconstruction report with pure conjecture, and giving undue weight to questionable evidence that supported her report while ignoring evidence that disagreed with it.<sup>99</sup>
6. In *Thong Ah Fat v. Public Prosecutor*, the trial judge had found the accused guilty of trafficking drugs and sentenced him to death; on appeal, the Court of Appeal remitted the matter, heavily criticised the brief, five-paragraph judgment as "unclear" and lacking adequate reasons, and held that the "judicial duty to give reasoned decisions" was not discharged.<sup>100</sup> This decision was also unprecedented in the way in which the trial judgment was criticised (such as pointing out all the evidential gaps in the case), as well as for the judicial establishment of guidelines for reasoned fact-finding.<sup>101</sup>
7. In *Mathavakannan s/o Kalimuthu v. Attorney General*, the High Court resolved the doubt surrounding the meaning of the phrase "imprisoned for life" in a presidentially-commuted sentence (the original sentence was mandatory death) in the accused's favour to mean 20 years' imprisonment instead of imprisonment for the duration of the prisoner's natural life.<sup>102</sup> An earlier Court of Appeal decision had held that "life imprisonment" had the latter meaning,<sup>103</sup> but the High Court took the view that the President ought to have alluded to the said decision in the commutation order if he thought that "life imprisonment" had such a meaning.<sup>104</sup>
8. In *Azman bin Mohamed Sanwan v. Public Prosecutor*, the Court of Appeal closely scrutinised the events surrounding the recording of two self-inculpatory statements and found them to be unreliable in many ways.<sup>105</sup> Specifically, the court speculated that a close reading of the facts demonstrated that when an investigating officer had made unannounced visits to the accused, he did so to deliver threats on the accused's wife, and to promise that the accused would be spared the death penalty if he co-operated, rather than to serve additional charges and record the confessions as claimed.<sup>106</sup> Accordingly, the Court of Appeal held that the trial judge was wrong to have held that the reliability of the confessions was not compromised.<sup>107</sup>
9. In *AOF v. Public Prosecutor*, the Court of Appeal, in a 143-page judgment, exonerated the accused from a 29-year imprisonment and 24-stroke sentence for allegedly raping his then 16-year-old daughter after another extremely granular scrutiny of the prosecution's factual narrative.<sup>108</sup> The Court of Appeal also went one step further in terms of extending protection to the accused: instead of ordering a re-trial after new crucial evidence had emerged after the trial, it was of the view that in the totality of the circumstances (with particular regard to the fact that the evidence at the original trial was insufficient to justify a conviction, and that the length of time before the putative retrial is

<sup>97</sup>[2011] 1 SLR 606 (Sing. Ct. App.).

<sup>98</sup>*Id.* at [66]–[73].

<sup>99</sup>[2011] 3 SLR 167 at [53]–[59] (Sing. Ct. App.).

<sup>100</sup>[2012] 1 SLR 676 at [11] and [59] (Sing. Ct. App.).

<sup>101</sup>See generally Chen Siyuan & Nicholas Poon, *The Judicial Duty to Give Reasons*, Sing. L. Watch Commentaries (Dec. 2011).

<sup>102</sup>[2012] SGHC 39 (Sing. High Ct.).

<sup>103</sup>*Abdul Nasir bin Ameh Hamsah v. Public Prosecutor* [1997] 2 SLR(R) 842 (Sing. Ct. App.).

<sup>104</sup>See also Chen Siyuan, *The Meaning of "Life Imprisonment" in the Context of a Presidential Commutation Order* Sing.

L. Watch Commentaries (Mar. 2012.).

<sup>105</sup>[2012] SGCA 19 (Sing. Ct. App.).

<sup>106</sup>*Id.* at [16]–[27].

<sup>107</sup>See generally Chen Siyuan & Nicholas Poon, *The Inadmissibility of Unreliable Self-Inculpatory Statements*, Sing.

L. Watch Commentaries (Mar. 2012.).

<sup>108</sup>[2012] SGCA 26 (Sing. Ct. App.).

disproportionate to the accused's sentence and/or on-going period of incarceration), the fairer outcome, and the one that accorded with the presumption of innocence, was an acquittal.<sup>109</sup>

10. In *Mas Swan bin Adnan*, a case involving a couple who had allegedly trafficked heroin into Singapore, the Court of Appeal amended the charges to find the couple guilty of attempting to traffic synthetic drugs instead (as they claimed to have been doing); the court added the following:

[T]he trial judge should not shut his mind to any alternative defence that is reasonably available on the evidence even though it may be inconsistent with the accused's primary defence. . . . The trial judge cannot shirk the responsibility of considering any alternative defence reasonably available on the evidence before the court even if the Defence has not relied on that defence, or even if the Prosecution and the Defence have agreed not to raise it.<sup>110</sup>

The fact that the criminal justice landscape in Singapore has been experiencing a shift from various directions in the last few years has not been lost on academic observers, though the consensus is that there is still room for development and recalibration. In 2009, prior to *ad hoc* amendments to the Evidence Act, Chin opined that maximum individualisation, procedural fairness, and legitimacy in adjudication were the key contemporary values that were still starkly missing from Singapore's criminal justice system, particularly in the realm of criminal evidence law.<sup>111</sup> In 2011, following the introduction of the CPC 2010, Chng acknowledged that Singapore's criminal justice system was still undergoing reform, although the CPC 2010 signified a departure from an unthinking preference for crime control values and formed the nascent steps in striking a fairer balance between the rights of society and the rights of accused persons.<sup>112</sup> In 2012, Cheah observed that recent changes to Singapore's criminal justice system, such as a more rigorous scrutiny of state organs and more public engagement when amending criminal laws reflected a wider normative shift away from a state-centred approach to justice to one that was individual-centred and more inclusive and accountable; however, she also pointed out when the life and liberty of an accused person conflicts with state interests, the current balance is still tilted significantly in favour of the state because the advantageous position (mainly in the form of access to legal resources) that the state enjoys.<sup>113</sup>

#### **D. How much more accountability for prosecutorial decisions is necessary?**

##### **(1) The arguments supporting minimal disclosure**

Having considered the wider normative context and legal framework in which the evolution of jurisprudence in prosecutorial discretion has operated in, this article necessarily culminates in the question of whether *Ramalingam Ravinthran et al.*, represent the highest watermark in the foreseeable future, in terms of how much scrutiny (judicial or otherwise) prosecutorial discretion can and should be subjected to. If anything, the ever-evolving legal-political landscape suggests that it is a matter of time before the high wall surrounding prosecutorial discretion is lowered even further in one way or another, so it is all the more imperative to analyse the likely development of this area of the law dispassionately.<sup>114</sup> Notably, however, none of the cases on this issue, with the exception of a brief discussion in *Ramalingam Ravinthran*, have sought to elaborate on why prosecutorial decisions should not be explained. Instead, the cases focus on justifying why such decisions do not need, as a matter of formalistic law, to be explained. In the same vein, none of the cases have sought to elaborate on why there might conceivably be some value in explaining prosecutorial decisions or issuing general

<sup>109</sup>*Id.* at [306]–[315].

<sup>110</sup>*Mas Swan bin Adnan*, at [68], [74].

<sup>111</sup>*Remaking the Evidence Code*, *supra* n. 81.

<sup>112</sup>*Modernising the Criminal Justice Framework*, *supra* n. 12; see also *Confessions and Statements*, *supra* n. 82.

<sup>113</sup>*Developing a People-Centred Justice in Singapore*, *supra* n. 88.

<sup>114</sup>One may also be tempted to draw a link between the rapidly changing political landscape in Singapore and the development of public law in Singapore. In a nutshell, the 2011 general election in Singapore is widely characterised as the 50-year ruling party's worst election, as it lost a Group Representative Constituency for the first time (and with it, one cabinet minister and two ministers of state) and received the lowest percentage of total votes cast since 1965. It can be said that one of the main reasons for this change in fortunes was the public's growing discontent with the government's policies. While it is not clear if the unhappiness was only focused on socio-economic policies and not so much on seemingly oppressive laws, it is clear that the incumbent ruling party is increasingly becoming more transparent and accountable in its formulation of policies and laws. Alternatively, one may interpret the aforementioned case developments as the courts assuming a more proactive role in protecting the rights of accused persons to "compensate" for the imbalances in the criminal justice system, but precisely because of this proactivity, it will recalibrate other aspects of the system in favour of the state.

guidelines, especially in contentious scenarios (i.e., accused persons being prosecuted for offences not commensurate to their moral culpabilities, most so far for those involved in the very same transaction). Influential local scholars have previously weighed in on the matter, however. Thio, in the most seminal work on Singapore constitutional law yet, opines that

one of the core functions of the separation of powers doctrine is to ensure efficiency and competence in allocating powers, to fit form to function by matching tasks to the most suitable body. This focus on function specialisation and professional competence places efficiency rather than liberty as the core value, as there is public value in an efficient government that accomplishes the goals it sets . . . .

In relation to the review of prosecutorial discretion, rule of law values may need to be qualified by separation of power values, such as institutional competence and autonomy, as well as the enforcement priorities of the Government, which is a matter of policy . . . .<sup>115</sup>

Hor, arguably the most liberal and prominent critic on Singapore's criminal justice process, has surprisingly taken a view not dissimilar from his more politically moderate colleague:

At first sight, whether or not a person is charged depends on whether there is sufficient evidence of a crime. That is true, but it is also the case that no jurisdiction charges and tries everyone for whom there is evidential sufficiency, without exception. Certainly the most serious of offences are seldom not prosecuted, but along the continuum of moderate to low gravity offences, a large measure of prosecutorial discretion is necessary for a number of reasons—eg,[sic] to allocate prosecutorial resources in the best way possible, or to take into account mitigating factors not adequately represented in the substantive law. Scholars compendiously call these extra-evidential factors “the public interest.” In practice, prosecutions are pursued only if there is both evidential and public interest sufficiency.<sup>116</sup>

A conclusion that can be drawn from these two passages is that perhaps, in Singapore at least, the prosecution can be trusted by the public to do its job fairly, and not standing in the way would only reinforce the separation of powers. Indeed, it would not be inaccurate to say that generally Singapore's crime control agencies (in the main, the police and the Attorney General's Chambers) have consistently enjoyed an excellent reputation for not only being extremely professional and efficient, but also extremely above-board.<sup>117</sup> Furthermore, in recent years, the local criminal bar has enjoyed a good relationship with the Attorney General's Chambers.<sup>118</sup> Why, then, is there a need for the prosecution to be forthcoming about prosecutorial decisions? Why fix something that is not broken, and potentially create counter-productivity? Is there a purpose served; and even if there is a purpose served, are there good reasons not to disclose the factors that go into prosecutorial decisions? Interestingly, not long before *Ramalingam Ravinthran* was decided, the Law Society of Singapore had organised the 2011 Criminal Law Conference, in which the keynote lecture (delivered by Lord Goldsmith QC) happened to be about prosecutorial discretion. The introductory preface to the lecture was expressed in the following prescient terms:

With an increasingly rights-conscious society . . . notions of accountability, transparency and consistency can be expected to take centre-stage in analysing prosecutorial decisions. How can prosecutorial discretion be safeguarded whilst ensuring that decisions are principled and fair? An increasing number of countries have promulgated guidelines that provide the public an insight into the principles that guide the exercise of prosecutorial discretion, but would this result in unexpected problems and unnecessary pressure on prosecutorial agencies? How can the proper balance be struck between transparency and fact-sensitive justice? What institutional safeguards should there be to ensure that prosecutorial discretion is exercised in a principled fashion?<sup>119</sup>

It would be remiss not to add that since the current Attorney General took office in late-2010, the Attorney General's Chambers has actually responded to public concerns regarding the issue of prosecutorial discretion several times. The Attorney General personally had this to say in 2011:

An integral part of every prosecutorial decision is consideration of the public interest . . . it is very difficult to explain exactly what it means or how it plays out in practice . . . public interest

<sup>115</sup>A *Treatise on Singapore Constitutional Law*, *supra* n. 68, at 160, 189.

<sup>116</sup>*Criminal Justice System in Singapore*, *supra* n. 64, at 509.

<sup>117</sup>*Attorney-General's Job Better Split Into Two?*, *supra* n. 14.

<sup>118</sup>*Id.*

<sup>119</sup><http://www.lawsociety.org.sg/Conference/CLC2011/Topic3.htm> (accessed 14 May 2012).

connotes the fact that when a prosecutor makes a charging decision he or she is doing so in an expression of his or her assessment of what society's response to the crime that has been committed should be. This can be a very complex assessment . . . There is no grid or formula that you apply in coming to a decision . . . To ensure consistency we have regard to our internal guidelines and our disposal of past cases in similar circumstances.<sup>120</sup>

After *Ramalingam Ravinthran* was decided, the Attorney General's Chambers addressed the public via the national newspaper:

The AGC explained that in everyday matters . . . [t]he decision to charge a person is taken by at least two officers with at least one separate higher level of review in all cases . . .

Among other things, the officers look at the evidence, the facts as they relate to the law, the investigations done and the public interest in charging the accused person. Cases in which two offenders may have been caught in apparently similar circumstances but are charged differently could be due to a wide range of factors. These include the strength of evidence, the cooperation shown by the accused and mitigating circumstances such as mental or physical weakness, which might call for a compassionate approach. Internal guidelines exist to ensure consistency. But these guidelines are not published and the Attorney-General does not generally explain his prosecutorial decisions because in arriving at the decisions, he and his officers "consider a large number of often competing interests, including those of the victim, the accused person and society as a whole." Also, with the inevitable resource constraints, the AGC has to prioritise and it takes into account enforcement priorities, among other things. By not publishing the guidelines, the Attorney-General is also able to be flexible when it needs to depart from them. This is critical because each case can then be scrutinised on its own merits.

Revealing the guidelines would also show which areas the prosecution is focused on and may incentivise offenders to commit crimes where they expect lesser charges. Demand for reasons behind every decision would also delay proceedings and lead to frequent challenges by people unhappy with specific decisions . . . Any shift would impair the Attorney-General's ability to prosecute.<sup>121</sup>

The Minister for Law and Minister for Foreign Affairs K Shanmugam, in the wake of *Ramalingam Ravinthran* and upon being quizzed by the opposition in parliament as to whether the Attorney General's Chambers should consider disclosing reasons for prosecutorial decisions or just issuing general guidelines on the matter (especially since certain law academics and human rights activists had supposedly been pressing for this), replied in a manner that was consonant with what the Attorney General's Chambers had stated:

I think we need to start with a context here – what is the kind of criminal justice system that we want. We want a system where the guilty are convicted, the innocent are acquitted and the wider interests of society are protected, which includes the protection of society from those who could cause it harm. If it is clear that public disclosure by the Attorney-General, of his reasons why differential treatment has been given, will improve the criminal justice system, then it is a no-brainer . . .

The reality is that the position is not so clear. There are trade-offs . . . If the reasons for the underlying prosecutorial decisions are revealed, it can compromise intelligence and other confidential sources that inform such decisions . . . Let us not kid ourselves, you will have some criminals who will try and work around the guidelines and game the system . . .

On the other hand, if reasons are revealed, it can, of course, be a safeguard against the discretion being exercised wrongly or maliciously by the Attorney-General. So the question that we have to ask ourselves is this: there are these two situations, the risk of the prosecution acting wrongly, compared to the risks associated with the compromise of intelligence and all the other attendant risks if disclosure is made. Which is the more serious risk in the context? Our view is that the prosecution acting wrongly or maliciously is the lesser of the two risks. The Attorney-General's Chambers has internal guidelines and layers of review, and in capital cases the Attorney-General reviews the facts himself . . .

So you have all these layers of checks, and within this framework, we believe that a system where the Attorney-General exercises his discretion without having to make those reasons public is better for society. If we are convinced of the opposite . . . we will change the law.<sup>122</sup>

<sup>120</sup>Attorney General's vision, *supra* note 14.

<sup>121</sup>*Robust Reviews*, *supra* n. 14; see also *Why AG Does Not Have to Give Reasons*, *supra* n. 14.

<sup>122</sup>88 Singapore Parliamentary Rpts, col. 57–58, (Mar. 6, 2012) (Minister for Law and Minister for Foreign Affairs K Shanmugam).



Considering the points made above, the reasons and justifications for not (overly) explaining prosecutorial decisions can be distilled as follows, in no particular order: there is presumed institutional competence and specialised expertise of the Attorney General's Chambers; the Attorney General's Chambers should be afforded institutional autonomy to allocate its own resources (presumably it also has to try to factor in existing judicial, prison and other rehabilitative resources as well); prosecutors sometimes factor in mitigating circumstances that are not adequately represented in the substantive law; the public has faith and trust in the Attorney General's Chambers; there is an inherent difficulty in explaining and weighing "public interest"; there exists internal guidelines and multiple levels of internal review set by the Attorney General's Chambers; the Attorney General's Chambers must be given enough flexibility so that it can depart from its own guidelines when necessary (the label "individualised justice" may be appropriate);<sup>123</sup> accused persons should not be given a chance to game the system; and there is potential risk of compromising intelligence and confidentiality.

In addition to the points made above, we also know that some of the relevant factors that the prosecution will consider when framing the charge are the sufficiency of the evidence for the case in question; the willingness of co-offenders to testify against other co-offenders (presumably some element of plea-bargaining enters here); and grounds relating to compassion or mercy. Moreover, the courts technically have the power to amend charges without the assent of the prosecution but this is exercised very sparingly and usually only after all, if not most of the evidence has been presented; the courts, the Attorney General, and the Minister for Law have all alluded to a broad and residual notion of the Attorney General needing to act in and be constrained by the "public interest";<sup>124</sup> and judicial evaluation of the moral culpability of an offender who seems to have been charged with an offence that is incommensurate to that culpability is now possible as compared to the past.

With respect to the last point, it cannot be gainsaid that the principal argument against using moral culpability as a touchstone is that the court is not provided with all the information that the prosecutor—who also has access to a far wider range of sources of information and evidence—may have, and as a result, is not in a better position to judge the moral culpability of an accused person than the prosecutor.<sup>125</sup> For instance, a testimony may be contradicted by the evidence of a witness who refuses to testify,<sup>126</sup> or an accused person may have been implicated in many other similar criminal transactions, but it is not yet an appropriate time to adduce evidence for this (for perhaps intelligence or security reasons). In both scenarios, the court would not have knowledge of such important information, even though it may be relevant to the innocence or guilt of an accused person. Judicial evaluation of the moral culpability of an offender thus potentially presents a double-edged sword, in which case, then it makes sense to introduce this only in cases where two (or more) co-accused persons are alleged to have committed the same crime but face charges with potential penalties that reflect a wide divergence in moral culpability.<sup>127</sup>

Nonetheless, if indeed two of the cardinal pillars of the rule of law are that all laws should be clear and applied consistently and with certainty, and that there should be checks and balances within a particular legal (in this case, criminal justice) regime,<sup>128</sup> does the current state of the law on prosecutorial decisions meet that standard? In all fairness, the answer is probably yes: the points listed in the two preceding paragraphs, taken together with the current legal position that an accused person can challenge prosecutorial discretion if he can adduce *prima facie* evidence of *mala fides*, at the very least demonstrate that the idea of prosecutorial discretion is no longer shrouded in mystery and judicially characterised with unassailability. This shows that nobody is above the law and no one power is concentrated in the hands of one person—overall, this surely imbues in the public a certain amount of confidence in the Attorney General's Chambers. But, this does not mean that this is all there is to it.

<sup>123</sup> Peter Krug, *Prosecutorial Discretion and its Limits*, 0 Am. J. Comp. L. 643 (2002).

<sup>124</sup> One wonders if "public interest" may act as another ground for judicial interference with prosecutorial discretion. However, "public interest" is simply too wide a term and until the courts clarify what it means (and indeed, whether it is a ground for judicial scrutiny), it remains a very vague notion.

<sup>125</sup> See *Ramalingam Ravinathan v. Attorney General* [2011] 4 SLR 196 at [17] (Sing. High Ct.).

<sup>126</sup> Cf. *Muhammad bin Kadar*.

<sup>127</sup> See Walter Woon, *Crime and Punishment: The Problems of Sentencing*, 27 Sing. L. Rev. 1, 9 (2009) [hereinafter *Crime and Punishment*].

<sup>128</sup> To be clear, certainty can cut both ways and is not limited to the meaning as viewed by an accused person. Certainty for the prosecution is also invaluable, and would promote efficacy, which in turn would promote the public interest in controlling crime—assuming, of course, that the prosecution maintains high standards in integrity and professionalism.

## (2) Other factors that ought to be considered in the future discourse

For one, the stark binary presented between certainty/predictability/transparency and the potential risk of gaming the system/compromise of intelligence, is an interesting one that merits further investigation and justification. There is already a good amount of certainty/predictability/transparency in the criminal law when it comes to the black-letter rules governing substance, procedure, evidence, and even sentencing: statutes, case law precedents, secondary sources, academic texts, and practicing guidelines provide such certainty/predictability/transparency. But would one say that such certainty/predictability/transparency also allows an accused person to game the system and strategise his criminal activities ahead in time?<sup>129</sup> The more legitimate objection may be the compromise of intelligence, but it is difficult at this point to see the connection between disclosure of general (as opposed to case-specific) guidelines and intelligence-gathering: perhaps much would depend on the extent and specificity of any such disclosure (in this regard, the suggested factors that go into prosecutorial decisions will be discussed below). The fact that the Minister for Law seems prepared to change the law if the public wills it, and the fact that he sees some value in this, would suggest that some reasonable compromise is actually possible, either now or further down the road.

To be clear, greater disclosure of how prosecutors make their decisions than what already exists can assume various forms: the release of general (and non-legally binding) guidelines on prosecutorial decisions; *ad hoc* addresses by the Attorney General's Chambers to the public in contentious, controversial cases; and the creation of a legal obligation for the prosecutor to explain and justify a prosecutorial decision when an accused person successfully adduces *prima facie* evidence of malicious prosecution.<sup>130</sup> *Ramalingam Ravinthran et al.*, have put a halt to the third option for the foreseeable future, while many states around the world have experimented mainly with the first two options, with mixed results. To the extent that most states rely on more or less the same parameters and are constrained by similar challenges when formulating their own guidelines,<sup>131</sup> not much is really being given away should the Attorney General's Chambers follow suit in creating a set of publicly accessible general guidelines for prosecutorial decisions. But even before heading afield there is more to be learned from existing local material. In this regard it is useful to refer to an illuminating account by

<sup>129</sup>See also *Decent Restraint*, *supra* n. 26, at 1549–1551:

Some prosecutors argue that specific guidelines deprive criminal statutes of part of their deterrent effect. Guidelines saying that first-time shoplifters . . . will not be prosecuted, for example, become an invitation to commit crimes within the area of immunity. Similarly, some prosecutors worry that if they announce that a defendant against whom they have a solid felony case can plead guilty to a misdemeanor, the deterrence the legislature envisioned under the felony statute will be reduced to that of the misdemeanor . . . . Many offenders may be able to gauge pretty well the low probability of being prosecuted for a particular offense, and many are risk takers by nature who may tend to underestimate the risk once they acquire a general impression of uneven enforcement . . . . Were there reliable evidence that a prosecutor's ability to give different treatment to like cases provides a higher level of deterrence and "more bang for the buck" than would a system of clearly established, uniform sanctions, one could argue that gains in crime control outweigh the inherent unfairness of unpredictable differentiation. Such clear gains have not been shown, however, and the burden of persuasion ought to be on those who advocate a policy that seems dangerously at odds with basic notions of equal protection . . . . Guidelines indicating how the law will be enforced conceivably could undermine public faith in the law, since the public would see that certain laws could be violated without fear of punishment. To leap from this possibility to the presently unbridled regime of prosecutorial discretion, however, is to make a virtue of deceiving the public. The fact is that nonenforcement of the law will occur anyway. If anything, eliminating unguided discretion over enforcement decisions should increase respect for law among both defendants and the public as the workings of the system become more principled, visible, and understandable.

<sup>130</sup>There is also a fourth possibility, and that involves the pre-trial stage when all parties sit down with the presiding judge in a conference to iron out all pre-trial issues. While this may be suitable for points of procedure and evidence, it remains to be seen if this can and should be extended to the appropriateness of charges (i.e., prosecutorial authority is diluted and shared with the Judiciary).

<sup>131</sup>See e.g. Crown Law, *Prosecution Guidelines* (available at [http://www.crownlaw.govt.nz/uploads/prosecution\\_guide\\_lines.pdf](http://www.crownlaw.govt.nz/uploads/prosecution_guide_lines.pdf)); The Crown Prosecution Service, *Prosecution Policy and Guidance* (available at <https://www.cps.gov.uk/publications/prosecution/>); Cf Jonathan Rogers, *Restructuring the Exercise of Prosecutorial Discretion in England*, 26 Oxford J. Leg. Stud. 775 (2006) [hereinafter *Restructuring Prosecutorial Discretion in England*]; *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process* (available at <http://www.cdpp.gov.au/Publications/ProsecutionPolicy/ProsecutionPolicy.pdf>); Office of the Director of Public Prosecutions, <http://www.dppi.reland.ie/publications/category/14/guidelines-for-prosecutors/> (list of publications) (last accessed Mar. 14, 2013); U.S. Attorneys' Office, *United States Attorneys' Manual* (available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/27mcr.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcr.htm)).

a former Attorney General on the four-stage thought process that guided his prosecutors back in 2008–2009:

Firstly, the prosecutor must be convinced beyond reasonable doubt that the accused is guilty of the crime alleged against him . . . an evaluation of the available information is made. The quality of the oral and documentary evidence is assessed. The prosecutor may [also] be provided with . . . the results of polygraph tests, information received from intelligence sources, statements made by persons who are unwilling to testify in court . . .

[T]he next stage of the decision process is an evaluation of the admissible evidence. Not every piece of information available to the prosecutor can be presented to the court . . .

[O]ne proceeds to the third stage, viz, to decide whether it is in the public interest to bring the accused to court at all . . . The prosecutor will decide whether a conviction is necessary for the purposes of retribution, denunciation, general deterrence, specific deterrence or protection of the public . . .

...

In many instances the facts of the case may support different charges . . .

Assuming that the evidence will support the whole range of charges, the issue boils down to what the paramount sentencing consideration is. If the primary consideration is deterrence, then the choice will veer towards charges at the more severe end of the range; contrariwise if rehabilitation is the major concern . . . If protection is a factor, then obviously a charge which carries a custodial sentence will be chosen.

[S]uppose that a person sprays graffiti on walls with indelible paint . . . If the view is taken that such anti-social behaviour must be deterred and that a severe penalty is necessary in order to denounce it, then a charge under the Vandalism Act may be preferred. Caning is mandatory for vandalism . . . If the accused is young and impressionable and has been led astray by bad company, the view may be taken that rehabilitation should be the main consideration. In that case, a charge under the Penal Code for committing mischief will be preferred—no caning, but a fine or imprisonment instead.<sup>132</sup>

One possible reading of this passage is that apart from the confirmation of what the evidential threshold entails, it sheds some interpretive light on the recurring but elusive notion of “public interest,” in that the prosecutor, when deciding whether or not to charge someone (or whether to simply let someone off with a stern warning or so), has to decide how successfully convicting that person and which of the classic sentencing objectives (i.e., whether to rehabilitate, punish, deter, or incapacitate) would best serve the public interest (after which the prosecutor selects an appropriate offence as the charge). Admittedly, this aspect of the prosecutor’s job is potentially politically sensitive (hence the aversion to too much disclosure), because while sentencing principles and guidelines may seem to be freely available as they can be found in a stockpile of written criminal law judgments, these are meant to provide certainty after conviction, rather than (as is the difficulty here) before a charge is brought and before a charge is preferred. Much as *Ramalingam Ravinthran* has declared that there is usually no mysterious science that guides prosecutorial decisions, we also know that not everyone who has been accused of committing an offence would be charged. Thus, in determining what is in the public interest as to whether and what to charge, what might be some of the supposedly unarticulable factors that sway the mind of prosecutor?

One enters into the realm of speculation here, but, within reasonable grounds and with reference to the practice of other states,<sup>133</sup> one would imagine they include the seriousness of the offence (the scale of the offence and how it affects public sensibilities; the complexity of the offence such as whether there are many transactions within one single criminal enterprise; whether it is a high-profile offence, which, notwithstanding weak merits of the case may nevertheless have some form of symbolic value; whether there is a vulnerable victim involved; whether the offence is committed egregiously (aggravating factors); whether there is premeditation; whether there is an abuse of power and trust);<sup>134</sup> whether the existing resources conduces prosecution (manpower needs, specialist needs (such as specialist engineers, scientists, or doctors to testify), whether it is a high-priority offence based on prevailing directives, the availability of judicial and prison resources); and whether there are any

<sup>132</sup>See *Crime and Punishment*, *supra* n. 127 at 9; see also *Lawyers Hail Move*, *supra* n. 14.

<sup>133</sup>For resources discussing practices in other States, see *supra* n. 131.

<sup>134</sup>See *Restructuring Prosecutorial Discretion in England*, *supra* n. 131 at 784–787.

mitigating circumstances for the alleged offender (whether they are first-time or recalcitrant offenders, whether there are truly extenuating personal circumstances, whether there is some kind of genuine mistake, whether there are compelling representations received from lawyers for the accused persons); whether the recovery of the proceeds of the crime is more effectively pursued by a civil suit; and whether a trial may disproportionately harm sources of information, international relations, or matters of national security.<sup>135</sup> To be sure, the public interest aspect of the decision can be regarded separately from the likelihood of conviction, which relies on whether there is sufficient objective evidence (including whether the offender can properly be identified, whether it is an opportune time to prosecute, whether the evidence can be said to be reliable, whether the offence is better prosecuted in another jurisdiction); whether the accused person is likely to succeed in pleading a defence; whether there is sufficient and credible testimonial evidence; and whether there is witness co-operation, especially from vulnerable witnesses and co-offenders (in the latter, some kind of *de facto* plea bargain may be involved, also another extremely politically sensitive factor).<sup>136</sup> Indeed, this bifurcation of the enquiry (i.e., whether there is sufficient evidence to convict and whether there is a public interest served) is a model adopted by many Commonwealth jurisdictions.<sup>137</sup> But with so many normative and positive factors to consider, one obviously cannot expect a rigid formula to be readily available when the factors necessarily have to be weighed and balanced in their entirety. Accordingly, it may be argued that it is counter-productive to release guidelines that may create the misimpression of over-flexibility.

The main problem that emerges is that at this point in time, the aforementioned factors for the prosecution's consideration are simply guesses on our part and nothing more. Moreover, should the prosecution maintain non-disclosure of prosecutorial decisions using the justification of the difficulty of explaining certain aspects of the decision-making process, the reality of the matter is that in the end, it is the courts—and the courts alone—that have to bear the brunt of the public's wrath whenever any politically contentious prosecutorial decision is made, a problem that is exacerbated in this digitised, internet-communicating age. As it is, because of their respect for the constitutional co-equal status of the Attorney General's office, the Singapore courts now are neither proactive in amending charges nor willing to create a legal onus for the prosecution to explain a charge if an accused person alleges that the charge is not commensurate with the moral culpability. Yet, it is the courts that are vilified when some young drug courier (as opposed to say, the mastermind of the drug syndicate) is sentenced to

<sup>135</sup>See also *Decent Restraint*, *Supra* n. 26, at 1552:

When discretion is used regularly to soften the impact of penalties imposed by an alarmed legislature, the case for the dispensing power is harder to make. Not only is the prosecutor overruling the legislator's judgment; he may be preempting as well the only method for bringing home to the legislature the impact of its tough stance. By doing so, he is increasing his own power, for he decides when the harsh penalty should be imposed and when it should be used as a lever for plea bargaining. Even if the harsh law reflects an oversight or the legislature's general failure to deal with obsolete provisions, a prosecutor who habitually dispenses leniency is arrogating to himself a powerful weapon that he may use at his pleasure. If we are truly concerned about compassion, we are less likely to achieve it through the hidden and unpredictable use of prosecutorial discretion than through encouraging the legislature to see and respond to the results of archaic or overly harsh laws.

<sup>136</sup>See also *ibid* at 1553: "Prosecutors' discretion to offer substantial incentives in order to induce guilty pleas has been defended as part of a voluntary transaction in which rational, autonomous actors participate to obtain mutual advantage . . . The argument for free choice does not require unguided prosecutorial power to select the offenses to which and defendants to whom leniency will be allocated, especially in light of the potential for arbitrariness and discrimination that such discretion creates. Prosecutors may dislike certain offenses or offenders for political or personal reasons, and may therefore vary discounts on irrational bases, a fact not accounted for in the assumption of rational, autonomous actors. Nor do the state interests thought to justify a "free market" for pleas justify the prosecutor's ability to vary the discount he offers in order to induce pleas from defendants who have strong defences. The plea may be in some sense voluntary, since plea bargaining must rest on the meaningful assent of the defendant. It does not follow, however, that the prosecutor should be allowed to offer proportionately heavier incentives to induce that assent in cases in which the defendant may be innocent or have an unusually strong defence, for the state obviously has no legitimate interest in convicting those who would be found innocent at trial."

<sup>137</sup>For resources discussing practices in other States, see *supra* n. 131. See also *Restructuring Prosecutorial Discretion in England*, *supra* n. 131 at 787: "The prosecutor must bear in mind that in deciding to prosecute, he will be subjecting the defendant to a series of harms which will follow almost inevitably and irrespectively of whether he is later acquitted or convicted. I shall call these harms 'the harms of prosecution', in order to distinguish them from the 'harms of punishment', which would be the pain involved in suffering whatever sentence is passed, and the stigma of conviction. The point is that, whereas the judge or magistrate will assume the ultimately responsibility for inflicting *punishment*[,] . . . the prosecutor is solely responsible for inflicting the harms of *prosecution*, and I shall argue that, exceptionally, a case which meets the first part of the public interest test might have to be abandoned because the *defendant cannot fairly be expected to suffer the harms of prosecution*." (emphasis in original).

death because the prosecution proceeded with a charge that exceeded the threshold for the mandatory death sentence; when some group of co-offenders are all sentenced to death for committing murder pursuant to a common intention because the prosecution was of the view that gang violence needed to be curbed; or when some young man with a so-called bright future is let off with a light fine and a minimal jail sentence for mowing an innocent person down with his vehicle because the prosecution took pity on the young man. There are countless more real-life examples but the point is this: when controversial prosecutorial decisions are made, the courts take the position that their only responsibility is to decide innocence and guilt on the basis of the evidence, and tend not to be proactive in initiating amendment of the charge or questioning the commensurability of the accused person's moral culpability. Add to the fact that the prosecutors effectively cannot be held accountable in court for their decisions, and the public blames the courts instead, and gradually loses confidence in the courts, and in turn, the criminal justice process.<sup>138</sup>

On the other hand, if the public has a better idea of how prosecutors generally exercise their discretion (especially if it can be shown that prosecutorial decisions are by and large above politics and not subject to personal whims and fancies), this has the potential of the public gaining even more confidence in the criminal justice process.<sup>139</sup> As it were, discretion is already practiced at many stages of the criminal justice process: whether to charge, what to charge, whether to amend the charge during the trial, and what to sentence (though for certain crimes the discretion is either almost completely or completely curtailed). Moreover, if indeed one is committed to the basic tenets of the rule of law, the concentration of virtually unaccountable power in an institution as important as the Attorney General's Chambers seems politically and legally incongruous. Given that the Attorney General has dual responsibilities in being the chief legal advisor to the government and the director of public prosecutions,<sup>140</sup> what would happen if the government (or for that matter, the Attorney General) should turn rogue one day and attempts to unduly influence the prosecutors? The prosecutors do not have the security of tenure and would face a difficult dilemma. While a rogue government in Singapore seems unlikely in the foreseeable future, one must be ready for all eventualities, and indeed the whole point of the separation of powers doctrine is to insure against the worst possible outcomes. On an ostensibly more benign level, what if the state decides to (or is forced to) allocate much fewer resources to the Attorney General's Chambers than before, and the Attorney General's Chambers can no longer (as they presently do) attract the best in the profession, both qualitatively and quantitatively? The public is expected to continue to trust in the integrity, competence, self-governance, and internal review processes of a depleted pool of prosecutors, and has little other choice. Greater transparency in the prosecutorial decision-making process, especially if facilitated with the cooperation of other stakeholders in the criminal justice process (such as the relevant professional bodies) would be one

<sup>138</sup>Yet another possibility is the transference of some of the prosecutor's discretionary powers to the courts. In July 2012, the Singapore government announced that the courts would finally have sentencing discretion for certain offences that previously carried the mandatory death penalty, such as certain drug trafficking offences (such as those involving couriers) and certain types of murder (in that only offenders who clearly intended the death of the victim would receive the mandatory death penalty). See Leonard Lim, *Stance on Drugs to Get Tougher*, The Straits Times, (July 10, 2012); Jeremy Au Yong, *Courts to Get More Discretion in Murder Sentencing*, The Straits Times, (July 10, 2012) Tham Yuen-C, *Giving Judges Discretion not a Bad Thing*, The Straits Times (July 14, 2012).

<sup>139</sup>See also *Decent Restraint*, *supra* n. 26, at 1564:

Concern about creating new defences based on the asserted failure to comply with charging and bargaining guidelines has been a major discouragement to the development of such guidelines, although a desire to *maintain* flexibility is probably involved as well. There are ways to ease the former concern. Legislatures could provide that noncompliance with guidelines would not be an independent basis for attacking prosecutions and convictions, thus limiting defendants' attacks on charging decisions to the narrow range now recognized. Even with such limitation, noncompliance with guidelines presumably could be used to buttress a factual showing that the defendant was singled out on an illegitimate basis. It might also constitute prima facie evidence of a violation of the constitutional limitations on prosecutorial discretion, since the prosecutor would have failed to follow his own, carefully enumerated criteria for legitimate decision making. This would ease the substantial problem of proof defendants now face when alleging unconstitutional use of prosecutorial discretion. In addition to encouraging more consistent decision making by the prosecutor's office, guidelines – even unenforceable ones – would be of great value to defence counsel in persuading the prosecutor to drop or lower an excessive charge. Defence counsel often have minimal leverage beyond an empty threat to go to trial; they currently have little basis to evaluate the fairness of prosecutor's offers made to their clients relative to those made to other defendants. Guidelines would provide that basis.

<sup>140</sup>Contrast this with the offices in other Commonwealth jurisdictions such as the UK, Hong Kong, and Australia.



possible safeguard against the challenges brought about by the two extreme scenarios just contemplated, though a question arises as to whether the mere publication of general, non-binding guidelines would suffice.<sup>141</sup> Ultimately, perhaps, much on how a state and its people move forward with this issue hinges on how one conceptualises the enterprise of law. If law is simply what is enacted and what is decided by the courts (i.e., to take a totally positivistic view), one consequence is that the state of the law will remain quite static and vulnerable to abuse (especially if the courts are non-interventionist).<sup>142</sup> Yet if law shares a necessary connection with moral values, then one could make the argument that certainty and consistency in the law will be constantly compromised. The introduction of human rights considerations and political accountability sits somewhere in the middle between the two extreme conceptions, but the truth of the matter is that if law is politics and nothing more, it will be guided and shaped entirely by populism, which in any event is a misnomer because any extended public participation in the law and politics in Singapore is usually confined to a very small segment of society.

Finally, it will always be difficult to divorce the issue of prosecutorial discretion from the concept of security of tenure and its concomitant ramifications. Whereas the constitution (Article 98(1)) provides that as a matter of default, Supreme Court Judges are given tenure of office up to the age of 65, it states in Article 35(4) that the Attorney General does not have similar tenure by default (which in any event is only given up to the age of 60), but instead may be subject to appointments of various durations. The impeachment proceedings are also more rigorous for Supreme Court Judges (see Article 98(4)), which is slightly anomalous as the office of the Attorney General is at the very least equal in status as a Supreme Court Judge in the government hierarchy. Indeed, there have also been a surprising number of changes in Attorney Generals in Singapore since 2006. When then Attorney General Chan left office to assume his new role as CJ in 2006, Chao JA became the new Attorney General. Attorney General Chao would return to being a JA two years later, and his replacement, Attorney General Woon, also only held office for two years (a stint that was, according to some views, controversial).<sup>143</sup> Solicitor General Koh was Acting Attorney General for six months, before Attorney General Menon took office in 2010. However, this term lasted only 18 months, before the mantle was passed to Attorney General Chong (Attorney General Menon became a JA). It is not known if Attorney General Chong is meant to be a long-term solution,<sup>144</sup> but what is known is that the circumstances in the last six years have not been particularly ideal in terms of stability. A possible danger, even if more perceived than real, is that an Attorney General seeking renewal of his term may pull his punches when it comes to making contentious decisions, such as being asked by the ruling party to go after political adversaries or destabilising elements in the country.<sup>145</sup> Indeed, it may even be argued that the risk of the Attorney General having some personal animus towards an accused person is minimal, whereas the risk of political influence in the decision to prosecute or not is more real. However, there are currently no known plans to create a separate office of the Director of Public Prosecutions, and the present trajectory in this area of the law is characterised in terms of whether greater disclosure of reasons behind particular prosecutorial discretions is necessary and desirable.

## V. CONCLUSION

The exercise of prosecutorial discretion is a unique executive act that continues to be very well-protected from public scrutiny in many jurisdictions throughout the world. In this article, I have endeavoured to survey virtually the entire body of case law on the limits of prosecutorial discretion in Singapore. Perhaps mainly because prosecutorial discretion is protected by the Constitution, it took a while for the Singapore courts to retreat from its initial characterisation of the discretion as absolute

<sup>141</sup>An alternative of leaving everything to judicial review, however, is not without difficulty: see *A Treatise on Singapore Constitutional Law*, *supra* note 68, at 538–556.

<sup>142</sup>Indeed, notwithstanding the latest developments in the jurisprudence concerning various aspects of the criminal justice process, the Singapore courts continue to be perceived as very positivistic, particularly in the realm of public law.

<sup>143</sup>See e.g., PN Balji, *An Opportunity Missed?: What Walter Woon's Interview Says of Change in Singapore*, Today, (Apr. 19, 2010); Zakir Hussain & KC Vijayan, *Longest Two Years of My Life*, The Straits Times Apr. 13, 2010); Leong Wee Keat, *They Don't Call Me Late Night to Tell Me Who to Prosecute*, Today (Apr. 13, 2010).

<sup>144</sup>Like several of his predecessors, Attorney-General Chong, who is 54 years old, is on a two-year contract. KC Vijayan, *Changes in Appeal Court, A-G Chambers*, The Straits Times (June 1, 2012).

<sup>145</sup>However, while some critics point to Singapore's strict defamation laws and the existence of internal security (i.e., preventive detention) laws as examples of intolerance of political dissent, the NGO Transparency International (<http://www.transparency.org/>) has consistently ranked Singapore amongst the Top 5 in the world for being corruption-free.



and outside the scope of any form of review. Against a wider backdrop of increasing rights-consciousness (especially within the courts) and the public demand for transparency, accountability, and greater institutional legitimacy, the legal position has evolved to its current and more legally defensible form, *viz*, prosecutorial discretion is not absolute, and can be subject to, *inter alia*, constitutional challenge. However, it remains theoretically possible for serious cracks to creep into the system, such as serious crimes being completely unprosecuted without the public ever knowing, let alone the reasons why. It may well be a while before the current legal position evolves again, but the natural progression from this, as seen in other jurisdictions, is the public release of general guidelines for prosecution. While such a progression brings about certain benefits, it is not without its challenges and may be motivated (though not exclusively) by extra-legal considerations such as politics and populism. Ultimately, only the state and its people can decide on the conception of the rule of law that it subscribes to, and it is with humble hope that this article may be used as a reference point when future issues pertaining to prosecutorial discretion are considered.