

## Busting Myths: Understanding Prosecutorial Discretion

### I. Introduction

1. The December 2017 decision to charge a couple who tortured their flatmate, Annie Ee, with the offence of “voluntarily causing grievous hurt”, as opposed to murder, sparked controversy in Singapore.<sup>1</sup> In response, the Attorney-General’s Chambers (“AGC”) released a media statement explaining its decision,<sup>2</sup> and Attorney-General (“AG”) Lucien Wong referred to the matter in his speech at the Opening of the Legal Year 2018.<sup>3</sup> Nevertheless, an online petition seeking harsher punishments for the couple, continuing even after sentencing by the courts, garnered more than 39,000 signatories by April 2018.<sup>4</sup>
2. The case suggests some public confusion about prosecutorial discretion and how it works.<sup>5</sup> The criticism of the charges seems to be an emotional response to the suffering of the victim. However, it is not the duty of the AG (whether acting in his own capacity or in his capacity as the Public Prosecutor), or the officers of the AGC who act under the AG’s authority,<sup>6</sup> to make such emotion-fuelled decisions.<sup>7</sup> This article attempts to explain the operation of prosecutorial discretion and to debunk certain common myths.

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<sup>1</sup> Ng Hui Wen, “Death of Annie Ee: AGC explains why couple who abused her were not charged with murder”, *The Straits Times* (18 December 2017) <<http://www.straitstimes.com/singapore/death-of-annie-ee-agc-explains-why-couple-who-abused-her-were-not-charged-with-murder>> (accessed 27 January 2018).

<sup>2</sup> *Ibid.*

<sup>3</sup> “Opening of the Legal year 2018: Speech by Attorney-General, Mr Lucien Wong, S.C.” <[https://www.agc.gov.sg/docs/default-source/newsroom-documents/Speeches/ag's-oly-speech-\(finalised\).pdf?sfvrsn=0](https://www.agc.gov.sg/docs/default-source/newsroom-documents/Speeches/ag's-oly-speech-(finalised).pdf?sfvrsn=0)> (accessed 1 May 2018).

<sup>4</sup> Change.org petition <<https://www.change.org/p/appeal-for-harsher-sentence-singaporean-couple-abuses-intellectually-disabled-woman-to-death>> (accessed 30 April 2018).

<sup>5</sup> K.C. Vijayan, “Death of Annie Ee: Tragic case highlights the conditions needed for sound court system”, *The Straits Times* (21 December 2017) <<https://www.straitstimes.com/singapore/courts-crime/tragic-case-highlights-conditions-needed-for-sound-court-system>> (accessed 30 April 2018).

<sup>6</sup> See also AGC website – Overview of Functions <<https://www.agc.gov.sg/our-roles/public-prosecutor/public-prosecutor-overview-of-functions>> (last accessed 1 May 2018): “AGC officers in the Criminal Justice and Technology Crime Division act as Deputy Public Prosecutors (DPPs) and Assistant Public Prosecutors (APPs) under the authority of the Public Prosecutor. The Criminal Justice Division is responsible for all criminal prosecutions except those relating to financial and technology offences, which come under the purview of the Financial and Technology Crime Division.”

<sup>7</sup> *Ibid.*

## II. Defining “prosecutorial discretion”

3. Under Article 35(8) of the Singapore Constitution, the AG, in his or her position as the Public Prosecutor,<sup>8</sup> is given the “power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence”. The power of prosecutorial discretion has accordingly been described as “the legal prerogative to initiate prosecution, prefer charges, amend charges and to discontinue prosecution”.<sup>9</sup> These decisions are reserved solely to the AG’s discretion.<sup>10</sup> Indeed, prosecutorial discretion is not a concept unique to Singapore, but is practised also in other jurisdictions like the United States of America and the United Kingdom.<sup>11</sup>
4. As alluded to earlier, the AG does not exercise this function alone.<sup>12</sup> The AG, as the Public Prosecutor, has the control and direction of criminal prosecutions and proceedings,<sup>13</sup> but he or she may also appoint persons to act as Deputy Public Prosecutors (DPPs) or Assistant Public Prosecutors (APPs) in carrying out any of the duties of the Public Prosecutor and assign those duties to them.<sup>14</sup> DPPs and APPs are officers of the AGC<sup>15</sup> and thus assist the AG in performing his role as the Public Prosecutor. Finally, the AG and AGC working in conjunction on criminal prosecutions are collectively referred to as the “Prosecution”.<sup>16</sup>

## III. Myth 1: The Prosecution can simply decide to charge a person for no good reason

5. The first myth is that prosecutorial discretion can be used to charge any person for any crime even without good reason.<sup>17</sup> This is based on the belief that prosecutorial

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<sup>8</sup> Constitution of the Republic of Singapore (1999 Reprint) Art 35(8). The Attorney-General (AG) is an executive office as set out by the Constitution at Art 35. He or she is conferred the power of prosecutorial discretion under Art 35(8) and thus *acts in the capacity of* the Public Prosecutor. See also *PP v Lim Choon Teck* [2015] 5 SLR 1395 at [76].

<sup>9</sup> See *50 years in the making*, *supra* n 6 at p 428.

<sup>10</sup> *Law Society of Singapore v Tan Guat Neo Phyllis* [2007] SGHC 207 (“*Phyllis*”) at [148]–[149].

<sup>11</sup> Public prosecution is carried out in the United States of America by the United States Attorneys and in the United Kingdom by the Crown Prosecution Service. See the official website for the Offices of the United States Attorneys <[HYPERLINK "https://www.justice.gov/usao/mission" }](https://www.justice.gov/usao/mission)>; see also the official website for the Crown Prosecution Service <[HYPERLINK "https://www.cps.gov.uk/about-cps" }](https://www.cps.gov.uk/about-cps)>.

<sup>12</sup> See main text at Part I.

<sup>13</sup> Criminal Procedure Code (Cap 68, 2012 Rev Ed) s 11(1).

<sup>14</sup> *Id.*, at s 11(4).

<sup>15</sup> See AGC website: overview of functions, *supra* n 6; see also Criminal Procedure Code at s 11(3) – (5).

<sup>16</sup> See *Ramalingam Ravinthran v Attorney-General* [2012] SGCA 2 (“*Ramalingam*”) at [7], [17] and [24]; see also *Quek Hock Lye v PP* [2012] SGCA 25 at [4], [29] and [30]: the term ‘Prosecution’ is used to describe the side which is commencing prosecution of a person.

<sup>17</sup> See Vijayan, “Death of Annie Ee”, *supra* n 5; see also *PP v Knight Glenn Jeyasingam* [1999] 1 SLR(R) 1165 (“*Glenn*”) at [70]. The High Court in *Glenn* held that the judiciary’s decision making power “to affect whatever concerns the administration of justice” was “circumscribed only to the extent that Art 35(8) vests prosecutorial

discretion is freely exercisable, and implicitly suggests the belief that there is no possibility of review of the decision to charge a person.<sup>18</sup>

6. Although the AG has prosecutorial discretion to initiate criminal proceedings against a person, this power cannot be abused and used in bad faith for extraneous purposes.<sup>19</sup> Indeed, it has been suggested that the use of prosecutorial discretion is reviewable by the courts,<sup>20</sup> which can make a declaratory order (a formal statement of law on the unconstitutionality of a prosecution).<sup>21</sup> The AG can then take action to remedy this by making a new decision which resolves such unconstitutionality.<sup>22</sup>
7. The case *Law Society of Singapore v Tan Guat Neo Phyllis* (“*Phyllis*”) explains the rationale for this. The court used the famous line by Wee Chong Jin CJ in *Chng Suan Tze v Minister for Home Affairs*<sup>23</sup> that “all legal powers, even a constitutional power, have legal limits.”<sup>24</sup> On this basis, being under the law, the AG must “act according to law, as his prosecutorial power is not unfettered.”<sup>25</sup>
8. The exercise of prosecutorial discretion is subject to review by the courts where: (a) prosecutorial power is abused, *ie* where it is *exercised in bad faith for an extraneous purpose* and (b) where its exercise *contravenes constitutional protections and rights*.<sup>26</sup>
9. An abuse of prosecutorial power in bad faith for an extraneous purpose is:  
“the use of that process for a purpose for which it is not intended, *ie*, to prosecute an offender for some other ulterior motive and *not to punish him for an offence which he has committed*.”<sup>27</sup> (emphasis added)

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discretion in the AGC”. See also *Phyllis*, *supra* n 10, at [145]. The position in *Glenn* has been regarded as subordinating the judicial power of review to prosecutorial discretion. However, the writer is doubtful if this is an accurate portrayal of the case, as the court in *Glenn* did specify that judicial power would only be circumscribed to the discretion *as granted under Art 35(8) of the Constitution*, that it is a discretion *almost* inviolable, and finally that the judiciary still has “a wider responsibility in the administration of justice involving decision-making”.

<sup>18</sup> *Ibid*.

<sup>19</sup> *Phyllis*, *supra* n 10, at [148]-[149].

<sup>20</sup> *Ibid*.

<sup>21</sup> Rules of Court (Cap 332, R 5, 2014 Rev Ed) O 15 r 16 and O 53 r 1.

<sup>22</sup> *Yong Vui Kong v PP* [2012] SGCA 23 (“*Yong Vui Kong*”) at [51].

<sup>23</sup> *Chng Suan Tze v Minister for Home Affairs* [1998] 2 SLR(R) 525 at [86].

<sup>24</sup> *Phyllis*, *supra* n 10, at [149].

<sup>25</sup> *Id*, at [148].

<sup>26</sup> *Id*, at [149].

<sup>27</sup> *Id*, at [147].

For instance, using prosecutorial discretion to harass a defendant would be such an abuse of power.<sup>28</sup> The purpose of the criminal process is the “*bona fide* prosecution of criminals”,<sup>29</sup> and prosecution may only be undertaken to “punish an offender for an offence he *has* committed [emphasis added]”.<sup>30</sup>

10. Prosecutorial discretion may not contravene constitutional protections and rights, such as those found in Part IV of the Singapore Constitution. For instance, *Ramalingam Ravinthran v Attorney-General* (“*Ramalingam*”) considered “the right to equality before the law and the equal protection of the law” under Art 12 of the Constitution.<sup>31</sup> To not contravene this right, prosecutorial discretion requires unbiased consideration of each case where “[i]n general, like cases must be treated alike”.<sup>32</sup> Thus, biased and irrelevant considerations cannot be involved in the exercise of prosecutorial powers<sup>33</sup>
11. However, the Prosecution is able to consider and distinguish relevant factors *specific to each case* to determine how to charge different offenders.<sup>34</sup> In fact, the Prosecution is obliged to consider many other factors in addition to the legal guilt of the offender.<sup>35</sup> These include the moral blameworthiness of the offender, the gravity of harm to public welfare, the co-operation of the offender with law enforcement authorities, and many other factors “up to and including the possibility of showing some compassion in some cases”.<sup>36</sup> Thus, these considerations do not contravene the right to equality and are within the legitimate use of prosecutorial discretion.
12. The offender who alleges that a breach of powers has occurred bears the burden of proving it.<sup>37</sup> However, once that is established, the burden shifts to the Prosecution to

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<sup>28</sup> *Id*, at [132].

<sup>29</sup> *Id*, at [132].

<sup>30</sup> *Id*, at [147].

<sup>31</sup> *Id*, at [148].

<sup>32</sup> *Ramalingam*, *supra* n 16, at [24].

<sup>33</sup> *Id*, at [24].

<sup>34</sup> *Ibid*.

<sup>35</sup> See *Ramalingam*, *supra* n 16, at [63].

<sup>36</sup> *Ibid*.

<sup>37</sup> *Id*, at [26]–[27].

justify its decision to the court.<sup>38</sup> Where there has been a violation of a constitutional right, the court may make a declaratory order that the prosecution is unconstitutional.<sup>39</sup>

13. Therefore, the Prosecution does not have unfettered discretion, but must exercise prosecutorial discretion legally and constitutionally; the Prosecution is also subject to judicial review should it do otherwise.

#### **IV. Myth 2: The Prosecution represents the interests of victims**

14. Another common myth is that the Public Prosecutor represents the interests of the victims.<sup>40</sup> This is inaccurate. Criminal prosecutions are brought, not to further the private interests of the victim, but to further the larger public interest.<sup>41</sup>

15. “[P]ublic interest considerations” are a relevant factor for the Public Prosecutor’s consideration in making prosecutorial decisions.<sup>42</sup> Prosecutors are to be “guided at all times by the public interest in the application of the rule of law”, where it is important to maintain public confidence in the administration of criminal justice with sound decisions.<sup>43</sup> Although there is no judicial ruling on the meaning of “public interest” with relation to prosecutorial discretion, AG Lucien Wong, in his speech for the Singapore Law Review Lecture 2017 “Prosecution in the Public Interest”, defined prosecution in the public interest to mean that:

- (i) Prosecutions are conducted in the name of the public;
- (ii) Offences are prosecuted for the good of the public;
- (iii) Proceedings are conducted according to the values expected by the public; and
- (iv) Action is taken in the eye of the public.<sup>44</sup>

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<sup>38</sup> *Id.*, at [44]–[46] and [27]–[28].

<sup>39</sup> *Yong Vui Kong*, *supra* n 21, at [51].

<sup>40</sup> This is an issue which has been pinpointed as an important point in “Prosecution in the Public Interest” <<https://www.agc.gov.sg/docs/default-source/default-document-library/singapore-law-review-annual-lecture-2017---prosecuting-in-the-public-interest.pdf?sfvrsn=0>> (accessed 1 May 2018). In this speech, AG Wong clarified that criminal prosecutions are not meant to further the private interests of victims, but to further the larger public interest.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ramalingam*, *supra* n 16, at [24].

<sup>43</sup> The Attorney-General’s Chambers: The Code of Practice for the conduct of criminal proceedings by the prosecution and the defence <<https://www.agc.gov.sg/docs/default-source/newsroom-documents/media-releases/2013/code-of-practice-for-the-conduct-of-criminal-proceedings---final.pdf?sfvrsn=2>> at pp 5 (accessed 27 January 2018).

<sup>44</sup> *Ibid.*

16. Thus, for instance, AG Wong identified victims who, for personal reasons, may be either uncooperative or even hostile to prosecution.<sup>45</sup> However, the AGC<sup>46</sup> will consider if there are compelling reasons to continue with the prosecution, where a charge has the significance of indicating that an accused person has offended not just the victim, but fundamental values to Singapore, and thus has to answer not just to the victim but to the public in general.<sup>47</sup>
17. On the other extreme end are victims who feel very strongly that the offender should be punished although there may be no public interest served.<sup>48</sup> There are a variety of reasons not to prosecute offenders, who may be first-timers, young, have committed minor offences, have been co-operative, made restitution, expressed remorse and so on.<sup>49</sup> In previous instances of this situation, AG Wong expressed that the AGC has taken the steps of informing the victim that the case will not be taken further and has in some cases intervened to stop private prosecution.<sup>50</sup>
18. Regarding sentencing, the Prosecution does not seek a sentence for the sake of a victim, but seeks a punishment that is just and fair to the offender. Indeed, in the landmark case of *PP v Lim Choon Teck*, the Prosecution took the unusual step of appealing against a sentence as manifestly excessive.<sup>51</sup> It was eventually successfully lowered to a three-week sentence.<sup>52</sup> The court also spoke favourably of such an approach: it held that by proceeding in such a manner, the Public Prosecutor advanced the public interest by ensuring that “offenders are appropriately punished”.<sup>53</sup>
19. It is thus clear that the AG’s role as Public Prosecutor is not to act for the private interests of the victim but to seek the public interest in its decisions.

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<sup>45</sup> “Prosecution in the Public Interest”, *supra* n 39 at [22]–[26].

<sup>46</sup> See main text at Part I.

<sup>47</sup> *Id.*, at [25].

<sup>48</sup> *Id.*, at [26].

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *Lim Choon Teck*, *supra* n 8, at [1]. See also “Prosecution in the Public Interest”, *supra* n 34, at [62]–[63].

<sup>52</sup> *Lim Choon Teck*, *supra* n 8, at [73].

<sup>53</sup> *Id.*, at [78]–[79].

**V. Myth 3: Public interest prosecution means that the Prosecution should follow public opinion**

20. Although prosecutions are conducted with respect to the values of the public, decisions are not made on the basis of popularity with the public. AG Lucien Wong in his speech at the Opening of the Legal Year 2018 (“OLY Speech 2018”) expressed that “decisions in the public interest are not necessarily synonymous with decisions which are popularly received”.<sup>54</sup> Rather than be influenced by a “vocal minority” or short-term views,<sup>55</sup> he explained that:

“In everything that we do, AGC will continue to hold fast to our guiding principles and to the rule of law, and these will guide us to do what is fair and right, for the people and the system. If we do not get it right, rest assured that we will correct it. This, in my view, is how the trust of the Singapore public is maintained.”<sup>56</sup>

21. AG Lucien Wong also expressed that the AGC “does not intend to join the shouting game”, referring to the ease of spreading misinformation in this era potentially shifting the contest from sense to “who has the loudest voice”.<sup>57</sup> Prosecutors are instead meant to “hold fast to guiding principles and to the rule of law”.<sup>58</sup>

22. Thus, the Prosecution does not make decisions based on popular or publicised opinions, but takes a principled approach with the purpose of seeking what is fair and right.<sup>59</sup> Indeed, it has been highlighted in *Ramalingam* that prosecutorial power is used to enforce criminal law “not for its own sake but for the greater good of society” in “maintain[ing] law and order as well as to uphold the law”.<sup>60</sup>

23. Although prosecutorial power is not meant to cater to public opinion, the AGC has explained its prosecutorial decisions to increase public understanding of its processes where it sees value in doing so (even though it is not legally bound to do so).<sup>61</sup> This

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<sup>54</sup> “OLY Speech 2018”, *supra* n 3, at [24].

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*; see also main text at Part I.

<sup>57</sup> “OLY Speech 2018”, *supra* n 3, at [23].

<sup>58</sup> *Id.*, at [24].

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ramalingam*, *supra* n 16, at [56]; see also *Lim Choon Teck*, *supra* n 8, at [76].

<sup>61</sup> “OLY Speech 2018”, *supra* n 3, at [24].

open approach is meant to increase public trust and understanding of the decisions it makes and allows greater accountability.<sup>62</sup>

## **VI. Myth 4: You have been determined to be guilty once you are charged**

24. The fourth myth is that a person who is charged is considered to be guilty.<sup>63</sup> There is, however, a crucial distinction between a person who has been charged with an offence versus a person who has been convicted of a crime.

25. The Public Prosecutor has the power to prosecute and charge a person, but it is the courts which hold the power to convict.<sup>64</sup> The court has the power to:

“review the considerations taken into account by the Public Prosecutor in preferring the charge, to decide whether or not the evidence adduced by the Public Prosecutor proves the charge beyond a reasonable doubt and to amend the charge in light of the evidence before it”.<sup>65</sup>

Therefore, it is the courts which consider if a charge is properly made out and if a person should be convicted. Furthermore, although the “limitation of the sentencing range or sentence available to the court is a necessary consequence following the charge preferred”,<sup>66</sup> the courts determine the final sentence. Thus, it is not true that a person who is charged with a crime is automatically guilty of the crime.

## **VII. Conclusion**

26. The writer agrees that to prosecute a person based on his deemed guilt in the public sphere is potentially an exercise of discretion in bad faith based on an extraneous purpose, and hence against the law.<sup>67</sup> The use of the court process to “harass” or “teach [the alleged perpetrator] a lesson” in the absence of sufficient evidence to justify the charge would be such an abuse of power.<sup>68</sup> Thus, popular opinion on a person’s

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<sup>62</sup> *Ibid.*

<sup>63</sup> See Vijayan, “Death of Annie Ee”, *supra* n 5.

<sup>64</sup> The Constitution, *supra* n 8, at Art 93.

<sup>65</sup> *Quek Hock Lye v PP* [2012] SGCA 25 at [29].

<sup>66</sup> *Ibid.*

<sup>67</sup> See main text at Part III.

<sup>68</sup> *Phyllis*, *supra* n 10, at [132].



culpability should not influence the Public Prosecutor's consideration of the evidence in determining if a viable charge can and should be made against a person. Should it sway the Public Prosecutor's stance that the prosecution proceeds without sufficient evidence, this would be an abuse of power by the Public Prosecutor, which is wholly undesirable.

27. Prosecutorial discretion is a power exercisable only by the Public Prosecutor, and involves a considered approach to making a decision to charge a person based on the evidence that he or she has committed a crime.<sup>69</sup> There are various intervening factors which may lead to the decision not to charge a person, or for the Public Prosecutor to prefer a charge of a certain degree.<sup>70</sup> Although the Public Prosecutor's duty is to protect the public interest, this does not include ensuring popularity with the masses.<sup>71</sup> Should prosecutorial discretion be abused, or exercised unconstitutionally, the courts may review the use of power.<sup>72</sup> A charge is not the final determinant of a person's guilt and the evidence pointing to a person's culpability must be proven before the court.<sup>73</sup>
28. Understanding this, one should recognise the complex nature of the decision to charge a person, which requires a balance between what is fair for the offender and good for the public.<sup>74</sup> Hopefully, this may lead to a more reasonable public perspective regarding such cases.

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<sup>69</sup> See main text at Part II.

<sup>70</sup> See main text at Part IV.

<sup>71</sup> See main text at Part IV.

<sup>72</sup> See main text at Part III.

<sup>73</sup> See main text at Part VI.

<sup>74</sup> See main text at Part IV.