

JUDICIAL REVIEW OF PROSECUTORIAL DECISIONS

FUN WEI XUAN, JOEL¹

I. INTRODUCTION

Prosecutorial discretion, broadly speaking, refers to the Public Prosecutor's ability to, in its sole discretion, make a myriad of decisions, including: whether to initiate prosecution, what charge to prefer, whether to amend a charge, and whether to discontinue prosecution.² This power is provided for in Article 35(8) of the Constitution of the Republic of Singapore,³ the supreme law of the Republic of Singapore.⁴ Specifically, it states that "[t]he Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence." The Attorney-General is the Public Prosecutor, as provided for in the Criminal Procedure Code.⁵

Given the seemingly broad nature of this discretion, there are a few important questions that arise: Is this discretion absolute? Can the court find the exercise of this discretion unlawful? In what circumstances will the court step in to do so? What remedies can the court provide?

II. THE LIMITS TO PROSECUTORIAL DISCRETION

While prosecutorial discretion may have once been considered "absolute" in nature,⁶ this position has shifted significantly in recent years. Contemporary cases have clarified that the court may determine if the Attorney-General's prosecutorial discretion was unlawfully exercised.⁷ As famously elucidated in the Singapore Court of Appeal decision of *Chng Suan Tze v Minister for Home Affairs*,⁸ all legal powers have legal limits,⁹ and Article 35(8) is no exception.¹⁰

The preliminary question that the court will answer is whether the act falls within the scope of the Attorney-General's prosecutorial discretion. Acts which properly fall under this discretion include the decision whether to prosecute a person (or to decline to prosecute, for example, when there is insufficient evidence to prosecute, or on compassionate grounds).¹¹ On the flipside, there are certain acts that do not fall, or do not fall exclusively, within the ambit of the

¹ Year 5 LL.B. and B.B.M. student, Singapore Management University Yong Pung How School of Law. I would like to thank professors Ong Ee Ing and Benjamin Ong for their invaluable comments and guidance. All errors remain my own.

² Chen Siyuan, "The Limits of Prosecutorial Discretion in Singapore: Past, Present and Future" (2013) 2(1) *International Review of Law* 1 at 5.

³ Constitution of the Republic of Singapore (1999 Reprint).

⁴ Article 4, Constitution of the Republic of Singapore (1999 Reprint).

⁵ Section 11(1), Criminal Procedure Code (Cap 68, 2002 Rev Ed).

⁶ See e.g., *Arjan Singh v Public Prosecutor* [1993] 1 SLR(R) 542 at [8]; see also, Chen Siyuan, "The Limits of Prosecutorial Discretion in Singapore: Past, Present and Future" (2013) 2(1) *International Review of Law* 1 at 4.

⁷ See e.g., *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189.

⁸ *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525.

⁹ *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [86].

¹⁰ *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 at [79], referring to *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [149].

¹¹ *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [53]; see also Benjamin Liow & Grace Nai, "Demystifying Prosecutorial Discretion – What It Is & How It Is Exercised" (7 June 2021) *SMU Lexicon* <<https://smulexicon.com/2021/06/07/demystifying-prosecutorial-discretion-what-it-is-how-it-is-exercised/>> (accessed 2 July 2021).

Attorney-General's prosecutorial discretion. Broadly speaking, these acts involve the control of criminal proceedings after the accused is brought before the court within the limits of the Public Prosecutor's judicial and statutory powers.¹² These include the granting of permanent and temporary stays in criminal proceedings due to an abuse of process.¹³

Such abuse occurs where it would be a) either impossible to give the accused a fair trial, or b) where the particular circumstances are such that to try the accused would offend the court's sense of justice and propriety.¹⁴ For instance, the Singapore High Court in *Public Prosecutor v Saroop Singh* found it impossible to give an accused a fair trial where the trial was delayed by over 13 years due to the Prosecution's inaction,¹⁵ rendering it unlikely for key witnesses to be able to accurately recall the events.¹⁶ The court's sense of justice and propriety may be offended where the defendant was abducted in disregard of extradition laws to stand trial.¹⁷ But even if such abuse is absent, the court can intervene if the power is properly situated within the court's duty to supervise and fairly manage criminal proceedings.¹⁸

However, if the Attorney-General's acts fall within its prosecutorial discretion, then the court only has limited powers in reviewing such acts. This is due to the doctrine of the separation of powers, where both the judicial functions of the court and the prosecutorial function of the Attorney-General are given an equal status under the Constitution. Thus, "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 power from being exercised unconstitutionally."¹⁹ The only two grounds for the court to review the Attorney-General's acts are: (A) where the prosecutorial power was abused (*i.e.*, exercised in bad faith for an extraneous purpose); and/or (B) where the prosecutorial power was exercised in a manner that contravened constitutional rights.²⁰

A. Where the prosecutorial power was abused

The touchstone of bad faith is the idea of dishonesty, such where there is a knowing use of a discretionary power for extraneous purposes.²¹ An example where the court may consider the prosecutorial power as being abused is where the Attorney-General prosecutes an accused person for taking drugs after the accused has been ordered to be admitted to a drug rehabilitation centre. In such situations, since the Attorney-General would have already delegated the discretion to the CNB Director to deprive the offender of his/her liberty, a subsequent criminal charge for the same offence may indicate that the prosecutorial discretion was exercised to "serve a purpose other than the *bona fide* prosecution of criminals".²²

¹² *Public Prosecutor v Soh Chee Wen and another* [2021] 3 SLR 641 at [33]; *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [146].

¹³ *Public Prosecutor v Soh Chee Wen and another* [2021] 3 SLR 641 at [40]-[50].

¹⁴ *Public Prosecutor v Soh Chee Wen and another* [2021] 3 SLR 641 at [40].

¹⁵ *Public Prosecutor v Saroop Singh* [1999] 1 SLR(R) 241 at [16], [46].

¹⁶ *Public Prosecutor v Saroop Singh* [1999] 1 SLR(R) 241 at [27], [29].

¹⁷ *R v Horseferry Road Magistrates' Court ex parte Bennett* [1994] 1 AC 42; *Public Prosecutor v Soh Chee Wen and another* [2021] 3 SLR 641 at [47].

¹⁸ *Lim Chit Foo v Public Prosecutor* [2020] 1 SLR 64 at [23]-[25].

¹⁹ *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [144].

²⁰ *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [149]; *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [51]; *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872 at [17].

²¹ *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222 at [70]-[71].

²² *Effrizan Kamisran v Public Prosecutor* [2020] SGHC 135 at [56].

Other hypothetical examples that were suggested by the Singapore High Court in *Law Society of Singapore v Tan Guat Neo Phyllis* include: where the court process is being used to try the defendant on a criminal charge in order to harass him or teach him a lesson even though the Prosecution has no or insufficient evidence; where the defendant has been promised immunity from prosecution in exchange for assisting the police in their investigations; and where the defendant is charged with a more serious charge without any or sufficient evidence so as to pressure him to plead guilty to a less serious charge.²³

B. Where the prosecutorial power was used to contravene constitutional rights

Second, the court may review the exercise of prosecutorial power to determine whether it has contravened constitutional rights. Consider a situation where X and Y were both caught by the police with 5 kg of cocaine prohibited under the Misuse of Drugs Act; however, the Prosecution chooses to charge X with a capital offence which attracts the death penalty (say, trafficking in A kg of drugs) while charging Y with a lesser offence (say, trafficking in only B kg of drugs).²⁴ The unequal treatment of these persons may potentially constitute an abuse of the prosecutorial discretion, as well as a violation of Article 12(1) of the Constitution, which guarantees equality before the law.²⁵

However, as the courts have also highlighted, a mere unequal charge does not violate the constitutional right to equality. This is because, even though these persons may have the same legal guilt, there is a myriad of other factors that the Prosecution can legitimately take into consideration in determining the charge that would be brought against an accused person. Amongst others, these include: the person's moral blameworthiness, his/her willingness to cooperate with law enforcement authorities in providing intelligence, and his/her willingness to testify against co-accused persons.²⁶ Since these factors apply differently to different accused persons, this would justify differential treatment in bringing different charges to X and Y.²⁷ What is clear, however, is that if such constitutional rights are violated, the exercise of prosecutorial discretion would be unlawful.

III. EVIDENCE AND THE PRESUMPTION OF CONSTITUTIONALITY

While the court may intervene when the Attorney-General acts in an unlawful manner, one must note the existence of certain complexities. One such complexity relates to the evidence which one would require to prove that the Attorney-General acted unlawfully. The starting point is that the burden of proof lies on the accused person, who must show the existence of a *prima facie* violation of the law;²⁸ only where this is shown will the burden be shifted to the Attorney-General to justify his prosecutorial decision.²⁹

²³ *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [132].

²⁴ A similar situation arose in the case of *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49.

²⁵ *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [9].

²⁶ Other examples of factors that the Prosecution can legitimately consider includes the legal guilt of the offender, the gravity of the harm caused to the public welfare by his/her criminal activity, whether there is sufficient evidence against a particular offender, and the possibility of showing some degree of compassion in certain cases: *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [63].

²⁷ *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [71].

²⁸ Section 103(1), Evidence Act (Cap 97, 1997 Rev Ed).

²⁹ *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [27].

The standard required to show a *prima facie* breach appears to be considerably high – in the Singapore Court of Appeal decision of *Ramalingam Ravinthran v AG* (“*Ramalingam*”),³⁰ the mere existence of different treatment between co-conspirators in the same criminal enterprise of drug trafficking was insufficient to make out a *prima facie* case of a breach of Article 12(1) of the Constitution.³¹ What is required are more significant indications, such as where a less culpable offender is charged with a more serious offence while his/her 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.³²

The presumption of constitutionality, where the courts would presume that the Attorney-General’s prosecutorial decisions are constitutional or lawful until they are shown to be otherwise,³³ poses another hurdle for offenders. Such a presumption exists because the prosecutorial power is a constitutional co-equal to the judicial power set out in Article 93 of the Constitution, and the separation of powers require the courts not to lightly interfere with the exercise of prosecutorial discretion unless exercised unlawfully.³⁴ However, this is only a starting point and may be rebutted, since “relying on a presumption of constitutionality to meet an objection of unconstitutionality would entail presuming the very issue which is being challenged.”³⁵

IV. THE DUTY TO GIVE REASONS

Another complexity is whether the Attorney-General has any duty to give reasons for his prosecutorial decisions. The default position, as reflecting the English position at common law,³⁶ is that there is no such general obligation.³⁷

Nonetheless, this does not preclude the possibility that such a duty may arise in special circumstances, as alluded to in *Ramalingam*. In *Ramalingam*, the court had the occasion to consider the English High Court decision of *R v Director of Public Prosecutions, Ex parte Manning* (“*Ex parte Manning*”).³⁸ That case concerned the Director of Public Prosecutions declining to prosecute a prison officer connected with the death of a person while in remand, even though there were evidence showing that the victim’s death resulted from suffocation while being restrained by the prison officer.³⁹ In considering the fundamentality of the right to life,⁴⁰ the English High Court found that the Director would be expected to give reasons not to prosecute the prison officers in the absence of compelling grounds to the contrary.⁴¹ Notably, instead of outrightly rejecting the legal reasoning of *Ex parte Manning* in *Ramalingam*, the Singapore Court of Appeal merely held that it is “distinguishable on the facts”, since there was

³⁰ *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49.

³¹ *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [71].

³² *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [71].

³³ *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [44].

³⁴ *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [43]-[44].

³⁵ *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [154].

³⁶ *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 534 at 564.

³⁷ *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [74].

³⁸ *R v Director of Public Prosecutions, Ex parte Manning* [2001] QB 330.

³⁹ *R v Director of Public Prosecutions, Ex parte Manning* [2001] QB 330 at [3].

⁴⁰ *R v Director of Public Prosecutions, Ex parte Manning* [2001] QB 330 at [33].

⁴¹ *R v Director of Public Prosecutions, Ex parte Manning* [2001] QB 330 at [32]-[33].

nothing to raise any profound concern as to whether the Applicant was wrongly convicted.⁴² As subsequently held by the Singapore High Court:

“The Public Prosecutor is *not required to disclose his reasons* every time an applicant challenges his decision not to issue a substantive assistance certificate, nor to justify his decision *until the applicant meets the threshold of a prima facie case* [emphasis added].”⁴³

As a *prima facie* case is required to compel the Attorney-General to provide reasons, this may make it harder for offenders to challenge the Attorney-General’s prosecutorial discretion.

V. REMEDIES

The final complexity discussed here is the remedies that litigants may seek from a judicial review of the Attorney-General’s prosecutorial discretion. While general administrative law remedies include mandatory orders (*i.e.*, to direct the body to reconsider its decision),⁴⁴ prohibiting orders (*i.e.*, to restrain a public body from acting),⁴⁵ quashing orders, order for review of detention, and declaratory relief,⁴⁶ the court has indicated that the range of remedies that may be available to a litigant seeking judicial review of the Attorney-General’s prosecutorial discretion may be limited, due to the constitutional co-equal status of the courts and the Attorney-General.⁴⁷

VI. CONCLUSION

Recent developments, including the case of *Parti Liyani v Public Prosecutor*,⁴⁸ have raised concerns as to the limits of the Attorney-General’s prosecutorial discretion. Given suggestions of possible wrongdoing in the prosecutors’ conduct of the trial,⁴⁹ one may readily jump to the conclusion that the court should take a high degree of scrutiny of prosecutorial discretion, such as by requiring a general duty to give reasons. But a few concerns must first be acknowledged.

One is the separation of powers, including notions such as institutional competence and autonomy.⁵⁰ Another is the need to acknowledge the risks that will come with disclosure of intelligence in an open court.⁵¹ Ultimately, it is important to acknowledge the myriad concerns that the judiciary would have to consider in determining whether and how to adjudicate on the exercise of prosecutorial discretion.

Finally, whichever approach one prefers, any premature imputation of bad faith on the judicial process, because the outcome does not comport with one’s view of how this balance should be

⁴² *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [77]; see also, Gary KY Chan, “Prosecutorial Discretion and the Legal Limits in Singapore” (2013) 25 SAclJ 15 at 41-42.

⁴³ *Adili Chibuike Ejike v Attorney-General* [2019] 4 SLR 1051, at [22].

⁴⁴ *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2014] 4 SLR 773 at [33]-[34]; see also, *CBB v Law Society of Singapore* [2021] SGCA 6 at [19]-[26].

⁴⁵ *Gobi a/l Avedian and another v Attorney-General and another appeal* [2020] 2 SLR 883 at [54].

⁴⁶ Jack Tsen-Ta Lee, “A Place to Stand to Move the Earth: Standing and the Rule of Law” (2020) SJLS 367 at 368.

⁴⁷ *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [145]-[146].

⁴⁸ *Parti Liyani v Public Prosecutor* [2020] SGHC 187.

⁴⁹ *Re Parti Liyani* [2020] 5 SLR 1080.

⁵⁰ Thio Li-Ann, *A Treatise on Singapore Constitutional Law* (Academy Publishing, 2012) at 160, 189.

⁵¹ *Singapore Parliamentary Debates, Official Report*, “Head R - Ministry of Law (Committee of Supply)” (6 March 2012), vol 88.

struck, is unhelpful. Such imputations of bad faith ultimately undermine the institutions fundamental to the rule of law, which judges and counsel alike seek to uphold.⁵² Even the Prosecution has acknowledged its crucial role in serving the wider public and the rule of law. Indeed, in his recent speech, the Attorney-General highlighted that:

“(we recognise our duty) as a grave and sacred duty to use our prosecutorial discretion to serve the public interest. That is the lodestar for all prosecutors. Our motive is not to win at all costs, or to secure the most convictions, but to reach just outcomes fairly. This overriding principle informs every stage of our work.”⁵³

⁵² Chief Justice Menon, “Opening of the Legal Year 2021” (11 January 2021), <<https://www.supremecourt.gov.sg/docs/default-source/default-document-library/cj-speech-for-oly-2021-final.pdf>> (accessed 7 July 2021) at [21].

⁵³ Lucien Wong, “Opening of the Legal Year 2021” (11 January 2021) <<https://www.agc.gov.sg/docs/default-source/default-document-library/oly-2021---ag's-speech.pdf>> (accessed 7 July 2021).