

Balancing the prosecution

Publishing prosecutorial guidelines will improve transparency and respect of the law



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A PERSON may be accused of a crime, but may never be charged in court. The decision on whether to let someone off with a warning or proceed to charge him rests with the Attorney-General's Chambers (AGC).

This is called "prosecutorial discretion" – the discretion of the Attorney-General as the nation's prosecuting authority to decide whether to charge a person at all and, if so, what crime to charge him with.

The issue of prosecutorial discretion has drawn public interest following reports of two cases last year heard by the Court of Appeal. In one case, two defendants were charged with illegal possessing of cannabis. In the other, two defendants were charged with illegal possession of diamorphine.

In each of these cases, one defendant was charged with possession of illegal drugs to the amount that attracted the mandatory death penalty, whereas his co-defendant involved in the same crime was charged with possession of a smaller quantity of the drug involved so his charge did not attract the death penalty.

In both cases, one defendant's death penalty was confirmed on appeal while his co-defendant received a prison term, thus escaping the hangman's noose.

The difference was literally a matter of life and death. And who decided who lived and who died? In effect, the AGC, via its prosecutorial discretion.

Many found these legal manoeuvres hard to accept. It was unclear why two equally culpable co-defendants could ever be charged with the possession of a different quantity of drugs when the amount was clearly one and the same.

What factors were taken into account in charging one with a

lesser crime? Were the defendants treated equally before the law?

There was some public clamour for the Attorney-General to release the internal guidelines that his deputy public prosecutors (DPPs) use to decide to charge someone, and what charge(s) to throw at the person.

Singapore Management University (SMU) law professor Chen Siyuan noted that Professor Walter Woon (who was Attorney-General from 2008 to 2009) had revealed in a law journal article the internal workings of the AGC when it comes to making prosecutorial decisions. Firstly, the DPP must be convinced of the accused person's guilt beyond reasonable doubt; then, the admissible evidence is evaluated; next, he decides if it is in the public interest to prosecute; and, finally, he determines whether a conviction is sought to rehabilitate, punish, deter or incapacitate.

The current Attorney-General has spoken out against releasing the internal guidelines that DPPs use in this four-stage process for fear of revealing so much that criminals become able to game the system.

As then Chief Justice Chan Sek Keong noted in *Ramalingam Ravinthran v Attorney-General* (2012), the Attorney-General is not obliged to disclose his reasons for prosecuting in a certain way.

This is because, given that the Attorney-General has the same constitutional stature as a Supreme Court judge, CJ Chan noted, his actions as the nation's prosecutorial authority are deemed constitutional until proven otherwise.

But SMU law professor Gary Chan said that since the reasons for his prosecutorial decisions are not disclosed, there does not seem to be a strong case for assuming that they are always constitutional. And concentrating so much power in one person is not consonant with the tenets of the rule of law, Prof Chan argued.

Still, until very recently, the courts have ruled that prosecutorial discretion is "absolute and outside the scope of any form of review" – perhaps because it is considered to be constitutional by de-



The Attorney-General has the same constitutional stature as a Supreme Court judge, so until very recently his actions as the nation's prosecutorial authority are deemed constitutional until proven otherwise. But Prof Chen says there is an increasing attention to defendants' rights "especially within the courts". ST FILE PHOTO

fault, said Prof Chen. But there is an increasing attention to defendants' rights "especially within the courts", he noted, and public clamouring for transparency and accountability too.

Thus, in the *Ramalingam Ravinthran* case last year, the court finally acknowledged that prosecutorial discretion was not absolute, and the Attorney-General's decisions may be challenged on grounds of constitutionality. However, the court ruled that the burden of proving his decisions were unconstitutional fell to the accused.

Given that the Attorney-General is not obliged to reveal how he decides, the odds that a defendant could ever demonstrate that the Attorney-General's decisions are unconstitutional must be very low indeed.

Is there another check on prosecutorial discretion?

In the United States, that check is the ballot box. The state

Attorney-General position is a popularly electable post in 43 states (and in Guam). In *Milliken v Stone* (1925), the US Supreme Court ruled that prosecutorial discretion was checked by a citizenry that controlled its law enforcement officers through the ballot box. This rationale was re-endorsed by the US Supreme Court in *US v Armstrong* (1996).

Prosecutorial power is thus restrained in the US, at least in theory. Some nations with the Westminster parliamentary model such as New Zealand also have an Attorney-General who is a Member of Parliament.

But in Singapore, the Attorney-General and the DPPs acting for him are appointed by the government of the day. They are thus not checked at the ballot box. This leaves them open to political influence – in theory. Prof Chen notes: "What if a rogue government attempted to unduly influence the Attorney-General?"

The Attorney-General and his DPPs don't have the security of tenure that some European and African countries offer to reduce their susceptibility to political influence. Like several of his predecessors, the current Attorney-General is on a two-year contract, Prof Chen said.

In theory, might an Attorney-General seeking contract renewal make decisions favouring the government that appointed him – say by choosing not to prosecute its corrupt officials or by choosing to prosecute its political opponents?

But tenure is no panacea either: Tenure is not practical for DPPs who are rotated all over the Legal Service. As for the Attorney-General, giving one person tenure may be risky if he turns out to make unsound judgments, Prof Chen feels.

Given the recent cases where prosecutorial discretion has been questioned by the public, there is a case to be made for the Attor-

ney-General to reveal the internal guidelines his DPPs might use.

It is true that too much information is not necessarily a good thing in this case. But neither is unfettered prosecutorial discretion. And certainly no public agency or organ of state should make a virtue of concealing things from the public.

Instead, it is likely that more transparency would increase respect for the law as the public comes to see that its inner workings are rigorous, and all citizens are treated equally.

Indeed, several common law places such as Australia, Britain, Canada and Hong Kong do practise limited judicial review of prosecutorial decisions but have also long published their prosecutorial guidelines. Prof Chan noted that this is also in line with the United Nations' Guidelines on the Role of Prosecutors.

Singapore should follow suit.
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