PROSECUTORIAL DISCRETION AND THE LEGAL LIMITS IN SINGAPORE

Article 35(8) of the Constitution of the Republic of Singapore states that the Attorney-General, as the Public Prosecutor, "shall have the power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence". This prosecutorial discretion, though extremely wide, is not an unfettered one and must not be exercised in bad faith or in breach of constitutional rights. With respect to the equality provision in the Constitution, the Prosecution has to give unbiased consideration to all potential accused persons and avoid any irrelevant considerations. The article considers whether the presumption of the constitutionality of prosecutorial decisions and the onerous burden on the accused person to displace the presumption should be re-examined. Further, the Prosecutor should consider disclosing the reasons underlying the prosecutorial decisions as far as possible, subject to minimising potential risks and publishing guidelines on prosecutorial decision-making.

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I. Introduction

1 In recent years, the issue of prosecutorial discretion has generated much publicity, debate and, at times, disquiet in Singapore. In 2008, a donor and recipient of a kidney were both charged under the Human Organ Transplant Act[1] for entering into an illegal sale and purchase of a kidney as well as for making a false statement in a statutory declaration under the Oaths and Declarations Act[2] ("ODA"). A letter to *The Straits Times* criticised the Prosecution for its decision to charge the recipient, who was in ill health, under the ODA, which had resulted in his jail term.[3] The Attorney-General's Chambers defended its position vigorously, and explained that it had "weighed all the relevant factors in the scales of justice and exercised considerable compassion in

1 Cap 131A, 2005 Rev Ed. The current version is 2012 Rev Ed.
2 Cap 211, 2001 Rev Ed.
3 Lee Wei Ling, "Why a Jail Term Shouldn't have been Sought", *The Straits Times* (10 September 2008).

urging the court to temper justice with mercy, accepting the judgment of the court to impose the very shortest sentence possible".[4]

2 More recently, a plastic surgeon was charged under the Road Traffic Act[5] with abetting his employee to provide false information to the police about traffic offences involving speeding and was fined $1,000. The public queried whether the surgeon was let off with a light charge just because he was wealthy instead of a heavier charge under s 204A of the Penal Code[6] for intentionally perverting the course of justice. The Attorney-General's Chambers explained that the offences had taken place before that provision of the Penal Code came into force. The Minister for Law stated that the court sentence was consistent with the norm, and dismissed allegations that there was any differential charging between the "haves" and "have-nots", in order to quell the public perceptions of unfairness and inconsistency in respect of the prosecutorial decision.[7]

3 Another source of contention is related to the public debate as to whether Singapore should retain or repeal s 377A of the Penal Code,[8] which criminalises "acts of gross decency", be it in public or in private, between males. The Government, upon stating that Singapore remains a "conservative society" and that Singaporeans do not approve of homosexuals "actively promoting their lifestyles to others, or setting the tone for mainstream society", decided to retain s 377A.[9] However, it adopted the stance that it will not proactively enforce the statutory provision against adult males engaging in *consensual* sex with each other in *private*.[10]

4 In the subsequent case of *Tan Eng Hong v Attorney-General*,[11] the applicant had been originally charged for an offence under s 377A of

4 See Attorney-General's Chambers, "Justice, Compassion and Prosecutorial Discretion" (18 September 2008) <http://www.webcitation.org/5oxuxhaqJ> (accessed 11 January 2013); see also *Public Prosecutor v Tang Wee Sung* [2008] SGDC 262.

5 Cap 276, 2004 Rev Ed.

6 Cap 224, 2008 Rev Ed.

7 See AsiaOne, "AGC Releases Statement on Woffles Wu Case", *AsiaOne* (17 June 2012) <http://www.asiaone.com/News/Latest%2BNews/Singapore/Story/A1Story20120617-353397.html> (accessed 11 January 2013); *Singapore Parliamentary Debates, Official Report*, "Conviction of Dr Woffles Wu for Abetment of Giving False Information" (13 August 2012), vol 89.

8 Cap 224, 2008 Rev Ed.

9 *Singapore Parliamentary Debates, Official Report* (23 October 2007), vol 83 at col 2354 (Lee Hsien Loong, Prime Minister and Minister for Finance).

10 *Singapore Parliamentary Debates, Official Report* (23 October 2007), vol 83 at col 2354 (Lee Hsien Loong, Prime Minister and Minister for Finance).

11 [2011] 3 SLR 320.

the Penal Code,[12] but it was amended to one under s 294(*a*) of the Penal Code,[13] after the applicant had issued a constitutional challenge against s 377A. The Attorney-General applied for, and successfully obtained from the High Court, an order for the s 377A application to be struck out. However, this decision has been reversed by the Court of Appeal in *Tan Eng Hong v Attorney-General*[14] ("*Tan Eng Hong*"), on the basis that the applicant had *locus standi* because there was an arguable violation of his constitutional rights. This means that the accused person would still be able to advance substantive arguments before the Singapore courts in the near future in order to challenge the constitutionality of s 377A on the merits of the case. Moreover, on the ministerial statements that s 377A will not be "proactively" enforced, the court indicated that they do not fetter the discretion of the Attorney-General.[15]

5 The Attorney-General is the Public Prosecutor empowered to prosecute accused persons, under the Constitution of the Republic of Singapore ("the Constitution").[16] He is not elected but appointed by the President, should the President acting in his discretion concur with the advice of the Prime Minister.[17] In so far as prosecutorial powers are concerned, Art 35(8) of the Constitution confers on the Attorney-General the "power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence". He has control and direction with respect to all criminal prosecutions under the written law.[18]

6 In practice, the range of prosecutorial decisions that may be undertaken is potentially very wide. In addition to decisions on whether to commence prosecutions against a suspect, the Prosecution has the discretion to decide on the possible charges against the accused person, whether to discontinue pending criminal proceedings, and whether to appeal against the acquittal of the accused or against the sentences passed by the courts. Where a prosecution is brought by a private person against the accused, the Public Prosecutor will have to decide whether to take over the conduct of prosecution, allow the private prosecution to proceed or to intervene in, or discontinue, the proceedings.[19]

12 Cap 224, 2008 Rev Ed.
13 Cap 224, 2008 Rev Ed.
14 [2012] 4 SLR 476.
15 *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [181].
16 The Attorney-General also acts as the main legal adviser to the Government on civil matters: Constitution of the Republic of Singapore (1999 Reprint) Art 35(7).
17 Constitution of the Republic of Singapore (1999 Reprint) Art 35(1).
18 Criminal Procedure Code 2010 (Act 15 of 2010) s 11.
19 See Criminal Procedure Code 2010 ("CPC 2010") (Act 15 of 2010) s 13. The Public Prosecutor's fiat is required for the initiation by a private person of prosecution on the person's own behalf, except for summary cases before a Magistrates' Court for offences that entail imprisonment for a term not exceeding three years or punishable with a fine only (ss 11(10) and 12 of the CPC 2010). After a private

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7 Depending on the type and severity of the offences, the penal statutes may stipulate for mandatory caning, prison sentences or death penalty. Mandatory death sentences are currently prescribed for murder and drug-trafficking offences, though the Government is considering legislative reforms to allow for judicial discretion on sentencing for specific instances of these offences.[20] If the Prosecution decides to prosecute, his choice between two charges (assuming one with mandatory penalties and the other without) would have serious consequences for the accused person.[21] Plea negotiations between the Prosecutor and the suspect or accused person[22] may have an important bearing on the choice of charges to bring. During, or as a result of, such negotiations, an accused person may decide to plead guilty to a lesser charge in exchange for the Prosecutor withdrawing a more serious charge, or alternatively, plead guilty to certain charges in exchange for the Prosecution dropping other charges.

8 Prosecutions for offences involving the mandatory death penalty[23] naturally attract high-level publicity. In 2012, the Court of Appeal was confronted with two significant cases on the scope of prosecutorial discretion under the Constitution, involving the differential charging of co-offenders participating in the same criminal enterprise. In *Ramalingam Ravinthran v Attorney-General*[24] ("*Ramalingam*"), the co-offenders were in possession of cannabis and cannabis mixture. The applicant (Ramalingam) was charged under the Misuse of Drugs Act[25] for trafficking with the actual amount of cannabis and cannabis mixture, which attracted the mandatory death penalty. The other co-offender was, however, charged with trafficking a lower amount of

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prosecution has been initiated, the Public Prosecutor retains the discretion to intervene in the proceedings, *eg*, to enter a *nolle prosequi*, which will result in the accused being granted a discharge: see s 184(1) of the CPC (Cap 68, 1985 Rev Ed); s 232 of the CPC 2010 (Act 15 of 2010); *Martinez Marites Dela Cruz v Public Prosecutor* [2011] 3 SLR 142 at [1]; and *Arjan Singh v Public Prosecutor* [1993] 1 SLR(R) 542). Under the CPC, only the Public Prosecutor, not the private person, has the right to appeal against an order of acquittal or conviction by the court: see s 376 of the CPC 2010 (Act 15 of 2010); *Martinez Marites Dela Cruz v Public Prosecutor* [2011] 3 SLR 142 at [3]. Where the private person decides to lodge an appeal against the court's decision, the Public Prosecutor is entitled to intervene and discontinue the proceedings: *Cheng William v Loo Ngee Long Edmund* [2001] 2 SLR(R) 626; *Jasbir Kaur v Muktiar Singh* [1999] 1 SLR(R) 616.

20 See Leonard Lim, "Death Penalty: Govt to Grant Judges Some Discretion", *The Straits Times* (10 July 2012).

21 Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis, 2012) at p 30.

22 *Public Prosecutor v Knight Glenn Jeyasingham* [1999] 1 SLR(R) 1165.

23 *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49; *Quek Hock Lye v Public Prosecutor* [2012] 2 SLR 1012; *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189; *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872.

24 [2012] 2 SLR 49.

25 Cap 185, 2001 Rev Ed.

the drugs, which did not attract the mandatory death penalty. Upon conviction by the High Court, Ramalingam filed a criminal motion for the capital charges against him to be amended to non-capital charges and for the sentence imposed by the High Court to be set aside, arguing that the Attorney-General had exercised his discretion contrary to the equal protection clause, namely, Art 12 of the Constitution.[26]

9 Before the heat and dust from *Ramalingam* had settled, the case of *Quek Hock Lye v Public Prosecutor*[27] ("*Quek Hock Lye*") followed quickly on its heels. Quek had participated with a co-offender to traffic diamorphine contrary to the Misuse of Drugs Act. Quek was convicted and sentenced to death for the offence of possession of drugs in furtherance of criminal conspiracy with the co-offender to traffic the drugs. The co-offender was charged for the same offence but involving a lower quantity of drugs, and was therefore spared the death penalty. In a similar vein, Quek's counsel argued that the differential charges against Quek and the co-offender constituted a breach of Art 12 of the Constitution.

10 Both Ramalingam and Quek failed in their quest to set aside their convictions. First, the court confirmed that the two legal limits to prosecutorial discretion are breach of constitutional rights and bad faith. In essence, it decided that there was a presumption of constitutionality of prosecutorial discretion premised on the doctrine of separation of powers, and insufficient *prima facie* evidence of a breach of Art 12 to rebut that presumption. Further, the Attorney-General is not obliged to supply reasons for his prosecutorial decisions. Both cases have nevertheless raised legitimate questions about the scope of the Attorney-General's prosecutorial powers. How wide is the discretion to prosecute? Should the Judiciary intervene; if so, in what circumstances? How should the parameters be drawn? What are the underlying rationales? Should the Prosecutor not be required to provide reasons for his decisions?

11 This article is concerned as much about criminal justice as it is about the legal limits of powers granted to important organs of state, in particular, the Prosecution. The crux of the issue is the life and liberty of the individual, lying in the intersection of criminal justice and constitutional law, and in this regard, the Judiciary clearly plays a vital role. Apart from local precedents, the court also examines foreign sources, such as Malaysian, Indian, English and US case authorities, on the limits and application of prosecutorial power. The current legal

26 Article 12(1) of the Constitution of the Republic of Singapore (1999 Reprint) states: "All persons are equal before the law and entitled to the equal protection of the law."

27 [2012] 2 SLR 1012.

limits to prosecutorial discretion based on a breach of constitutional rights and the doctrine of bad faith, as delineated by the Judiciary, are, in principle, sound. However, as will be argued below, the scope of the presumption of constitutionality of prosecutorial discretion and the narrow circumstances in which such presumption may be rebutted should be re-examined. Further, though the Prosecutor need *not* be obliged to disclose his reasons for the exercise of prosecutorial discretion *in every case*, arguments may be advanced for reasons to be disclosed by the Prosecutor as far as possible, subject to minimising potential risks, and for guidelines on prosecutorial decision-making to be disseminated to the public.

II. The legal limits to prosecutorial discretion in Singapore

12 Common law jurisdictions generally allow for a wide, though not unlimited, scope of prosecutorial discretion. Courts in the UK,[28] the US,[29] Canada[30] and Trinidad and Tobago[31] have generally adopted the position that, while the decision to prosecute may in principle be susceptible to judicial review, it would in practice be extremely rare for the Judiciary to intervene in the exercise of prosecutorial discretion. This wide scope of prosecutorial discretion (or narrow scope for judicial intervention) is premised on the doctrine of separation of powers,[32] as well as the view that the considerations and issues requiring the exercise of prosecutorial discretion are not amenable to judicial review.[33]

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28 *R v Inland Revenue Commissioners ex parte Mead* [1993] 1 All ER 772; *R v Director of Public Prosecutions ex parte C* [1995] 1 Cr App R 136; *R (Bermingham) v Director of the Serious Fraud Office* [2007] 2 WLR 635. In the UK, the discretion lies with the Crown Prosecution Office headed by the Director of Public Prosecutions, who is in turn accountable to the UK Attorney-General.

29 *United States v Batchelder* 442 US 114 (1979). In the US, prosecutorial power is granted to US attorneys *via* the Judiciary Act of 1789 ch 20, 1 Stat 73 (US).

30 *Kostuch v Attorney General of Alberta* (1995) 128 DLR (4th) 440.

31 *Sharma v Browne-Antoine* [2006] UKPC 57 (on appeal from the Court of Appeal of Trinidad and Tobago).

32 *R v Power* (1994) 89 CCC (3d) 1 (Supreme Court of Canada) at [39]; *R (Corner House Research) v Director of the Serious Fraud Office (JUSTICE intervening)* [2009] 1 AC 756 at [31], *per* Lord Bingham.

33 *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712 at 735–736; *R v Power* (1994) 89 CCC (3d) 1 (Supreme Court of Canada) at [39]; *Inmates of Attica Correctional Facility v Nelson A Rockefeller* 477 F 2d 375 at 380 (1973) (that "difficult questions" pertaining to, for example, the appropriate point in time for prosecutorial intervention, evidentiary standards for compelling prosecution and the amount of leeway for prosecutorial judgment, engender "serious doubts" as to the judicial capacity to review prosecutorial decisions); *United States v Christopher Lee Armstrong* 517 US 456 (1996) (that factors such as "the strength of the case, the prosecutor's general deterrence value, the Government's enforcement priorities, and the relationship of the case to the Government's overall enforcement plan" are not susceptible to judicial analysis).

13 In Singapore, prosecutorial powers are similarly wide in scope, but not absolute. Prior to *Ramalingam* and *Quek Hock Lye*, the legal limits to prosecutorial discretion were already outlined in *Law Society of Singapore v Tan Guat Neo Phyllis*[34] ("*Tan Guat Neo Phyllis*"). There, the Court of Appeal held that all legal powers have legal limits and the concept of an unfettered discretion is contrary to the Rule of Law.[35] On the specific limits, it stated that prosecutorial discretion must be exercised in good faith and not for an extraneous purpose or in breach of constitutional rights. This means that the court cannot stay the prosecution initiated by the Attorney-General based generally on the doctrine of abuse of process,[36] unless it is shown that the prosecutorial discretion was not exercised in good faith or in breach of the Constitution.[37]

14 In a different context involving the clemency power of the Executive under Art 22P[38] of the Constitution, the court in *Yong Vui Kong v Attorney-General*[39] ("*Yong Vui Kong*") had also emphasised that the exercise of the executive power cannot be *mala fide* or exceed constitutional limits. The same legal limits were applied in *Huang Meizhe v Attorney-General*[40] to deny a challenge by the deceased victim's widow and mother against the Prosecutor's refusal to appeal against the sentence meted out to the accused person. Conversely, the court in

34 [2008] 2 SLR(R) 239.

35 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [149] (citing *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525).

36 Abuse of process referred to the use of the judicial process for "a purpose for which it is not intended or in circumstances where the extraneous purpose is the dominant purpose for its use": see *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [130].

37 *Cf R v Jewitt* (1985) 21 CCC (3d) 7 (Supreme Court of Canada) at [26] (that the judge has a "residual discretion" to stay proceedings where compelling an accused to stand trial would violate the "fundamental principles which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings").

38 Article 22P of the Constitution of the Republic of Singapore (1999 Reprint) reads:

> The President, as occasion shall arise, may, on the advice of the Cabinet —
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> (*a*) grant a pardon to any accomplice in any offence who gives information which leads to the conviction of the principal offender or any one of the principal offenders, if more than one;
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> (*b*) grant to any offender convicted of any offence in any court in Singapore, a pardon, free or subject to lawful conditions, or any reprieve or respite, either indefinite or for such period as the President may think fit, of the execution of any sentence pronounced on such offender; or
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> (*c*) remit the whole or any part of such sentence or of any penalty or forfeiture imposed by law.

39 [2011] 2 SLR 1189 at [80].

40 [2011] 2 SLR 1149. Applying the decision in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239, the High Court found no evidence of bad faith or breach of constitutional rights.

Tan Eng Hong[41] has recently confirmed that there is a right not to be prosecuted under an unconstitutional law. Thus, where a prosecution is brought under an unconstitutional law, the decision to prosecute under that law will also be unconstitutional.

15 The following section discusses both the constitutional limits (equal protection and prohibition against double jeopardy) as well as the doctrine of bad faith.

A. Equal protection under the law

16 *Ramalingam* and *Quek Hock Lye* have presented a unique opportunity to scrutinise the operation of the equal protection provision as a challenge to prosecutorial decision-making, in particular, the decision involving the prosecution of co-offenders participating in the same criminal enterprise.[42] The applicant in *Ramalingam* contended that the Attorney-General had exercised his prosecutorial discretion contrary to the equal protection clause embodied in Art 12 of the Constitution. Though the application was denied due to the lack of *prima facie* evidence of unconstitutionality, the pronouncements of the Court of Appeal have significantly advanced the jurisprudence relating to prosecutorial discretion and Art 12.

17 The first and crucial point identified by the Court of Appeal is that "an exercise of an executive decision-making power, even one with a constitutional status, cannot be allowed to override a fundamental liberty enshrined in the Constitution".[43] With respect to Art 12, the Privy Council decision (on appeal from Malaysia) of *Teh Cheng Poh v Public Prosecutor*[44] ("*Teh Cheng Poh*") was applied. It involved a prosecutorial choice between two statutes giving rise to two different punishments. The issue was whether the Malaysian Attorney-General's decision to prosecute the accused under one particular statute,[45] which attracted capital punishment instead of another set of statutes[46] that did not, was against Art 8 of the Federal Constitution of Malaysia[47] (*in pari materia*

41 *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [113], [171], [175].
42 See also *Sinniah Pillay v Public Prosecutor* [1991] 2 SLR(R) 704 (that the Prosecutor had the prerogative to charge the appellant under a different statute, *ie*, s 326 of the Penal Code (Cap 224, 1985 Rev Ed), from that of his co-conspirators under the Corrosive and Explosive Substances and Offensive Weapons Act (Cap 65, 1985 Rev Ed)).
43 *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [41].
44 [1979] 1 MLJ 50.
45 Internal Security Act 1960 (No 82 of 1972) (M'sia) s 57(1).
46 Arms Act 1960 (No 21 of 1960) (M'sia), read with Firearms (Increased Penalties) Act 1971 (No 37 of 1971) (M'sia).
47 7th Reprint, 1978.

with Art 12 of the Constitution of the Republic of Singapore).[48] The court opined that Art 12 required the Prosecution to give unbiased consideration to all potential accused persons and to avoid any irrelevant considerations (what the author would refer to as the "impartiality test").[49] Moreover, in tandem with the Rule of Law, like cases should be treated alike (the "consistency test").[50] The court in *Ramalingam* has now confirmed that the impartiality and consistency tests in *Teh Cheng Poh* would be similarly applicable to the case of several offenders involved in the same or similar offences committed in the same criminal enterprise.[51]

18 It suffices to note at this juncture that the obligation on the Attorney-General to apply the consistency test under Art 12 of the Constitution[52] did not prevent him from taking into account certain factors in prosecutorial decision-making. In fact, these factors may be applied differently to different accused persons in order to justify differential treatment, as in *Ramalingam* and *Quek Hock Lye*, that is, charging a defendant differently from his co-offender by reducing the quantity of drugs specified in the charge.

19 The impartiality and consistency tests, though useful, are couched in fairly broad terms. This gives rise to the question of what the more concrete circumstances that would amount to a breach of Art 12 are. In this regard, the court referred to *Thiruselvam s/o Nagaratnam v Public Prosecutor*[53] ("*Thiruselvam*"). In that case, one K was arrested when he offered to sell cannabis to a Central Narcotics Bureau ("CNB") officer. Thiruselvam was arrested on his way to receive money from a CNB officer after making calls to K (which calls were intercepted and answered by the CNB officer). Thiruselvam was charged with abetting

48 The Privy Council decided that there was no evidence that the Prosecution had exercised his discretion unlawfully.

49 *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [51].

50 See the following quote from *Sharma v Browne-Antoine* [2006] UKPC 57 at 786–787 (on appeal from the Court of Appeal of Trinidad and Tobago): "The rule of law requires that, subject to any immunity or exemption provided by law, the criminal law of the land should apply to all alike. A person is not to be singled out for adverse treatment because he or she holds a high and dignified office of state, but nor can the holding of such an office excuse conduct which would lead to the prosecution of one not holding such an office. The maintenance of public confidence in the administration of justice requires that it be, and be seen to be, even-handed."

51 *Sim Min Teck v Public Prosecutor* ("*Sim Min Teck*") [1987] SLR(R) 65 concerned co-offenders involved in the same criminal enterprise but charged with different offences. The Court of Appeal in *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [32] observed that the decision in *Sim Min Teck* had applied *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50 in a straightforward manner, without recognising the material differences in the facts between the two cases.

52 1992 Reprint.

53 [2001] 1 SLR(R) 362.

the trafficking of cannabis (a capital offence), whilst K was charged with two non-capital offences. On the question of Art 12, L P Thean JA noted that Thiruselvam was only an abettor of K, who committed the main offence. However, the judge was of the view that the Prosecution has a wide discretion to bring charges of different severity as between participants in the same criminal activity, and concluded that there was no breach of Art 12.

20 The Court of Appeal in *Ramalingam*, however, found the approach in *Thiruselvam* "uncritical"[54] and proceeded to evaluate the facts in *Thiruselvam*. It observed that Thiruselvam could have been more culpable than K, as Thiruselvam had acted as a "controller or supplier" of the drugs, in instructing K to pay him the proceeds of the sale of drugs upon the delivery of the drugs.[55] Further, the offence of abetment generally carries the same punishment as the substantive offence,[56] and the abettor in *Thiruselvam* would have posed a greater danger to society than the actual drug trafficker. What is even more central, for the purpose of this article, is the Court of Appeal's statement in *Ramalingam* about a hypothetical circumstance that would amount to a breach of Art 12, that is, *if* the evidence had indeed shown Thiruselvam to have played a *lesser role*, the Prosecution should not have charged him with the *more serious* capital offence as compared to K. If the Prosecution had done so in these circumstances, it would, with all other things being equal between Thiruselvam and K, have amounted to an arbitrary or biased exercise of prosecutorial discretion and hence a *prima facie* breach of Art 12.[57]

21 Another hypothetical circumstance that would amount to a breach of Art 12 was highlighted in *Tan Guat Neo Phyllis*,[58] where the court opined, in the context of entrapment evidence obtained by law enforcement officers, that a failure to prosecute might be in breach of the constitutional right to equality if the Attorney-General condones "the unlawful conduct of law enforcement officers, which is particularly *egregious*" [emphasis added].[59] In this connection, it is apposite to refer

54 *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [36].
55 *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [38].
56 Section 109 of the Penal Code (Cap 224, 2008 Rev Ed) states:

> Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

57 *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [37].
58 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239.
59 [2008] 2 SLR(R) 239 at [147].

to *R v Sang*,[60] in which the House of Lords referred to the "unusual" case where:[61]

> … a dishonest policeman, anxious to improve his detection record, tries very hard with the help of an agent provocateur to induce a young man with no criminal tendencies to commit a serious crime; and ultimately the young man succumbs to the inducement … [T]he policeman and the informer who had acted together in inciting him to commit the crime should … both be prosecuted and suitably punished.[62]

22 The test of whether the conduct of the law enforcement officers was so "egregious", such that a failure to prosecute might contravene Art 12, is a stringent one. In *Mohamed Emran bin Mohamed Ali v Public Prosecutor*,[63] the appellant, who was convicted of drug trafficking, alleged that he was entrapped by a state agent to traffic in drugs. The court held that the failure of the Public Prosecutor to prosecute the state *agents provocateurs* was not contrary to Art 12 of the Constitution.[64] The undercover operations, which were "targeted at suppliers of drugs" through "necessary subterfuge", did not fall within the "egregious" description.[65]

B. Prohibition against double jeopardy

23 Apart from Art 12 as a constitutional limit to prosecutorial discretion, reference should also be made to Art 11(2) on the prohibition against double jeopardy. The prohibition against double jeopardy protects a person from the peril of criminal penalties more than once for the same offence. Given the specific facts and applications in *Tan Guat Neo Phyllis*, *Ramalingam* and *Quek Hock Lye*, there was no necessity for the Court of Appeal to specifically examine double jeopardy as a constitutional restraint on prosecutorial powers. However, it is clear from the cases that prosecutorial powers cannot transgress any part of the Constitution. Article 11(2) of the Constitution[66] states:

60 [1980] AC 402.

61 [1980] AC 402 at 443.

62 Cited in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [80].

63 [2008] 4 SLR(R) 411.

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

65 *Emran bin Mohamed Ali v Public Prosecutor* [2008] 4 SLR(R) 411 at [33]. In construing whether the prosecutorial decision was against Art 12, the High Court applied the traditional test for determining the constitutionality of a statute in the face of an Art 12 challenge. As the prosecutorial decision was based on an intelligible differentia between entrapped drug traffickers (who had the *mens rea* and *actus reas* to promote the drug trade) and the *state agents provocateurs* (who were sanctioned by the State to curb the drug trade, which is a socially desirable objective), it was not unconstitutional.

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

> A person who has been convicted or acquitted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was convicted or acquitted.

This doctrine of double jeopardy is also reflected in s 244 of the Criminal Procedure Code 2010.[67]

24 The High Court in *Re Wee Harry Lee*[68] endorsed the House of Lords' decision in *Connelly v Director of Public Prosecutions*[69] ("*Connelly*"), that the doctrine of *autrefois convict*[70] only applies where the accused is charged with the *same* offence, in fact and in law.[71] As stated by Lord Morris in *Connelly*, "the test is … whether such proof as is necessary to convict of the second offence would establish guilt of the first offence or of an offence for which on the first charge there could be a conviction".[72] The law did not prevent the same set of circumstances from giving rise to two separate breaches of the law and for the offender to be punished for both breaches. However, when the elements of one offence *necessarily* encompassed the elements of another, the offender could be said to be doubly punished should he be charged and convicted for committing both offences.[73] This occurs, for example, when a person is charged and convicted of inflicting "grievous hurt" on another, contrary to s 322 of the Penal Code[74] and for causing "hurt" under s 321 of the same Code.

25 Apart from the requirement as to the content of the offences in question, there must have also been a previous criminal "conviction" (or "acquittal") of an "offence". A detention under the Misuse of Drugs Act in the Drug Rehabilitation Centre as ordered by the Director of the Central Narcotics Bureau,[75] for example, does not amount to a criminal

67 Act 15 of 2010.

68 [1983–1984] SLR(R) 274. The first complaint – that the respondent had delayed in reporting to the Law Society of Singapore the conduct of a legal assistant employed by him for misappropriating clients' moneys in circumstances amounting to grossly improper conduct in the discharge of his professional duty (see s 84(2)(*b*) of the Legal Profession Act (Cap 217, 1970 Rev Ed) – was clearly different from the second complaint, that the respondent has been convicted of criminal offences implying a defect of character, which makes him unfit for his profession under ss 84(1) and 84(2)(*a*) of the Legal Profession Act.

69 [1964] AC 1254.

70 It means "formerly convicted".

71 See *Pearce v The Queen* (1998) 194 CLR 610; *Island Maritime Ltd v Filipowski* (2006) 226 CLR 328.

72 *Connelly v Director of Public Prosecutions* [1964] AC 1254 at 1309.

73 *Arjun Upadhya v Public Prosecutor* [2011] 1 SLR 119.

74 Cap 224, 2008 Rev Ed.

75 Misuse of Drugs Act (Cap 185, 2008 Rev Ed) s 34(2)(*b*). The Director must be satisfied that it was "necessary" for the accused to "undergo treatment or rehabilitation or both at an approved institution".

conviction.[76] In the determination of the detention order, there is no question of a specific charge or offence committed by the detainee. Hence, such a prior detainee, who is subsequently charged and convicted of the offence of unauthorised drug consumption under the same statute based on the same incident for which he was detained under the Act, cannot challenge the prosecutorial decision based on the doctrine of double jeopardy.[77]

C. Bad faith

26 As discussed above, in the Singapore decisions of *Tan Guat Neo Phyllis*[78] and *Yong Vui Kong*,[79] the element of bad faith was cited as a ground for judicial review, in addition to breach of constitutional rights. To act in bad faith is to do so for extraneous purposes,[80] that is, outside the purpose for which the power is intended, which is the conviction and punishment of offenders.[81]

27 The Court of Appeal in *Tan Guat Neo Phyllis* analysed a prosecution for extraneous purposes (bad faith) separately from prosecution in breach of constitutional rights. It stated that where the Prosecutor prosecutes an offender for extraneous purposes instead of punishing him for the offence, there is an abuse of prosecutorial power, which is also an abuse of the judicial process. However, where there is, in an entrapment scenario, a failure of the Prosecutor to prosecute certain unlawful and egregious conduct of law enforcement officers, this may constitute discriminatory treatment amounting to a breach of constitutional rights.[82]

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76 Nonetheless, previous Drug Rehabilitation Centre admissions may constitute aggravating factors for purposes of subjecting offenders to enhanced minimum punishments under s 33A of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed): see *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] SGHC 163 at [46]; *Amazi bin Hawasi v Public Prosecutor* [2012] SGHC 164 at [17].

77 *Lim Keng Chia v Public Prosecutor* [1998] 1 SLR(R) 1. The court, based on a perusal of the parliamentary debates, decided that Parliament did not regard the making of a detention order as a bar to subsequent prosecution of the detainee after release from the Drug Rehabilitation Centre.

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

79 *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189.

80 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [148]–[149]. See also decisions such as *R v Director of Public Prosecutions ex parte Kebilene* [2000] 2 AC 326 at 376 ("dishonesty, bad faith or some other exceptional circumstance") and *R v Power* (1994) 89 CCC (3d) 1 at 17 ("improper motives or of bad faith or of an act so wrong that it violates the conscience of the community").

81 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [149].

82 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [147].

28 It is true that acting in bad faith is not equivalent to breaching the equality protection clause. For example, prosecuting A for an offence for the sole purpose of harassment when the Prosecutor has no evidence to support the charge or charging a suspect with serious charges solely for the purpose of compelling him to plead guilty to lesser charges would amount to acting in bad faith, without any concomitant breach of constitutional rights.[83] However, the application of the concept of "bad faith" may in *certain* situations overlap with a breach of Art 12 of the Constitution. After all, one aspect of the impartiality test is that the Prosecutor should avoid taking into account irrelevant considerations in his decision-making. This appears to overlap with the notion of the Prosecutor not acting for extraneous purposes (bad faith). If suspects A and B played similar roles in the same criminal activity, and the Prosecutor, with a personal vendetta against suspect A arising from a prior sour relationship, brings more serious charges against suspect A in comparison to the lenient charges brought against suspect B, the Prosecutor would be acting for an extraneous purpose (bad faith) as well as in breach of the equal protection provision (breach of impartiality and consistency tests).

29 If the Prosecutor acts in a non-independent manner, such as by bowing to political pressures, it might constitute a ground for judicial review. In *Sharma v Browne-Antoine*,[84] for example, it was said that the "surrender of what should be an independent prosecutorial discretion to political instruction (or … persuasion or pressure) is a recognised ground of review",[85] and that "[i]t is a grave violation of their professional and legal duty to allow their judgment to be swayed by *extraneous considerations* such as political pressure" [emphasis added].[86] The above example, it is submitted, should be considered as one of acting in bad faith. This is applicable to Singapore, given that the Attorney-General should be independent from the Government, in so far as the exercise of prosecutorial powers is concerned under the Constitution. However, not all kinds of political pressure on prosecutorial decision-making will necessarily result in judicial intervention. For example, the House of Lords in *R (Corner House Research) v Serious Fraud Office*[87] justified its decision for not intervening in the Director's decision not to continue investigations into an alleged bribery, based on a weighing of public interests. It decided that the *public interest* in protecting British lives under threat by a foreign nation that was against the investigations outweighed the *public*

83 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [132].
84 [2007] 1 WLR 780 (on appeal from the Court of Appeal of Trinidad and Tobago).
85 *Sharma v Browne-Antoine* [2007] 1 WLR 780 at 787–788. See *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712 at 735–736; *Mohit v Director of Public Prosecutions of Mauritius* [2006] 1 WLR 3343 at [17].
86 *Sharma v Browne-Antoine* [2007] 1 WLR 780 at 787.
87 [2008] 3 WLR 568.

interest in securing a conviction. It was argued that acting in the interests of the public (in this case, the physical safety of the people) should not amount to bad faith. As Baroness Hale said, there is a distinction between safeguarding "the *personal* and the *public* interest" [emphases added].[88]

30 The concept of "bad faith" underlies, and is consistent with, the concept of malice in the civil actions of malicious prosecution and misfeasance in public office,[89] which may be pursued, in principle, against public prosecutors. Such consistency between the grounds for judicial review and civil actions would not be unexpected.[90] The civil action arises when the prosecution of the plaintiff by the defendant was made maliciously and without reasonable and probable cause,[91] and provided the prosecution was finally determined in the plaintiff's favour (for instance, *via* an acquittal of the charges).[92] Where the action in malicious prosecution is against the Crown Prosecutor, the absence of "reasonable or probable cause" refers solely to the Prosecution's *professional and objective* assessment of the guilt of the accused person; whether he subjectively believed in the guilt of the accused person is irrelevant.[93] On the other hand, the requirement of malice on the part of the Prosecution demands proof that the Prosecutor was actuated by improper considerations,[94] which is similar to the concept of bad faith sufficient for judicial review of prosecutorial discretion. For example, where the Prosecutor distorted the accused person's words in order to secure a conviction, this would amount to malice.[95] Absence of honest belief, though a relevant factor, is not by itself sufficient to found malice where it is due, for instance, to the Prosecutor's incompetence or negligence.[96] In addition to malicious prosecution, actions for misfeasance

88 *R (Corner House Research) v Serious Fraud Office* [2008] 3 WLR 568 at [53].

89 See generally Gary Chan Kok Yew, "Abuse of Process and Power: Malicious Prosecution and Misfeasance in Public Office" in *The Law of Torts in Singapore* (Academy Publishing, 2011) at pp 647–662.

90 However, precise congruence should not be required, given that the outcomes for judicial review (setting aside of prosecutorial decision) and civil actions (compensation via damages) are different.

91 The test is whether the defendant "believed that there was a case against the [plaintiff] to be tried": see *Zainal bin Kuning v Chan Sin Mian Michael* [1996] 2 SLR(R) 858 (citing *Glinski v McIver* [1962] AC 726, *per* Lords Devlin and Denning).

92 *Zainal bin Kuning v Chan Sin Mian Michael* [1996] 2 SLR(R) 858. For UK, see *Gray v Crown Prosecution Office* [2010] EWHC 2144 (QB) (where the action in malicious prosecution failed on the elements).

93 *Miazga v Kvello Estate* [2009] 3 SCR 339.

94 *Zainal bin Kuning v Chan Sin Mian Michael* [1996] 2 SLR(R) 858 at [84].

95 *Proulx v Quebec (Attorney-General)* [2001] 3 SCR 9. Note that fraud or deceit on the part of the Prosecution may amount to abuse of process: see *The Queen v Hui Chi-ming* [1991] 2 HKLR 537 at 554 (Privy Council decision on appeal from Hong Kong).

96 *Miazga v Kvello Estate* [2009] 3 SCR 339.

in public office can be pursued against a prosecutor provided it is proved that the Prosecutor has undertaken a prosecutorial decision maliciously that would foreseeably cause damage to the plaintiff and the plaintiff suffered actual damage.[97]

III. Separation of powers, the presumption of constitutionality of prosecutorial decisions and rebutting the presumption

31 The operation of the legal limits to prosecutorial discretion may be better understood in light of two important constitutional rationales, namely, the doctrines of separation of powers and the presumption of constitutionality. Questions may be raised in respect of the circumstances in which the presumption of constitutionality may arise and the difficulties faced by the accused person who seeks to rebut the presumption. The problems are exacerbated by the absence of an obligation on the Prosecution's part to disclose the reasons for the prosecutorial decisions.[98]

A. Separation of powers

32 Both the Judiciary and the Prosecution are regarded as separate powers and equal in status. The qualifications for the position of the Attorney-General,[99] the removal process[100] and security in the terms of service[101] are similar to those for a Supreme Court judge. Further, Art 35(8) of the Constitution vests power in the Attorney-General to make prosecutorial decisions, while Art 93[102] of the Constitution explicitly vests judicial power in the courts.[103] As the powers are separate

97 *Lines International Holding (S) Pte Ltd v Singapore Tourist Promotion* [1997] 1 SLR(R) 52 (the defendants were statutory bodies). See the alternative test in the subsequent House of Lords' decision in *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1. There are, as yet, no cases in Singapore involving misfeasance in public office against prosecutors.

98 See paras 49–68 below.

99 Constitution of the Republic of Singapore (1999 Reprint) Art 35(1).

100 Removal of the Attorney-General for inability to discharge the functions of his office (whether arising from infirmity of body or mind, or any other cause) or for misbehaviour is subject to the concurrence of the President and a tribunal consisting of the Chief Justice and two Supreme Court justices: Constitution of the Republic of Singapore (1999 Reprint) Art 35(6).

101 The Attorney-General's terms of service cannot be altered to his disadvantage during his office: Constitution of the Republic of Singapore (1999 Reprint) Art 35(12).

102 Article 93 of the Constitution of the Republic of Singapore (1999 Reprint) reads:

> The judicial power of Singapore shall be vested in a Supreme Court and in such subordinate courts as may be provided by any written law for the time being in force.

103 Judicial power depends on the existence of a controversy between a State or one or more of its subjects, or between two or more subjects of a State, entails making a

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and equal,[104] the Judiciary cannot intervene or encroach upon the Prosecutor's powers, save that the Judiciary has the power to prevent the unconstitutional exercise of prosecutorial power.[105] This is because the Constitution is the overarching and independent source of law, whereby both organs have to abide. It should be highlighted that the Government regards the doctrine of separation of powers as an important facet of the Rule of Law.[106]

33 The doctrine of separation of powers was applied in *Quek Hock Lye*, albeit with a twist. Quek's counsel argued that the Public Prosecutor's actions in "manipulating" the quantity of drugs had infringed Art 93 of the Constitution, which vests judicial power in the courts.[107] The argument here is that the Prosecutor had interfered with judicial power[108] and thus the prosecutorial decision should be set aside. The Court of Appeal rejected the argument as spurious, based on the intrinsically different functions of the Prosecutor and the Judiciary,[109] and explained the role of the courts as follows:[110]

> [T]he question of usurpation of judicial power does not arise. It is not the function of the court to prefer charges against an accused brought before it. The court exercises its judicial power in relation to

finding of facts, applying law to the facts and determining the rights and obligations of parties: see *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] SGHC 163 at [27].

104 *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] SGHC 163 at [16].

105 *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [43] (citing *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [44], [144]). In *Director of Public Prosecutions v Humphrys* [1976] 2 WLR 857 at 871, Viscount Dilhorne said: "A judge must keep out of the arena. He should not have or appear to have any responsibility for the institution of a prosecution"; and at 896, *per* Lord Edmund-Davies: "Any such assertion of judicial omnipotence must inevitably be unacceptable in any country acknowledging the supremacy of the rule of law."

106 See K Shanmugam, Minister for Law, speech at New York State Bar Association Rule of Law Plenary Session (28 October 2009) at [6]; see also *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] SGHC 163 at [19]; *Director of Public Prosecution of Jamaica v Mollison* [2003] 2 AC 411 at [13].

107 *Quek Hock Lye v Public Prosecutor* [2012] 2 SLR 1012 at [26].

108 See also *Public Prosecutor v Dato Yap Peng* [1987] 2 MLJ 311.

109 See *Public Prosecutor v Norzian bin Bintat* [1995] 3 SLR(R) 105 (that Art 35(8) of the Constitution of the Republic of Singapore ("the Constitution") (1992 Reprint) does not allow prosecutorial discretion where criminal proceedings were terminated as a result of a *judicial* decision consenting to the composition of an offence, given Art 93, which vests power in the judiciary). However, compounding for certain offences specified in the Fourth Sched of the Criminal Procedure Code 2010 (Act 15 of 2010) is now allowed if the Public Prosecutor, instead of the courts, consents to such composition. This is more in sync with the wide discretion conferred under Art 35(8) of the Constitution (1999 Reprint): *The Criminal Procedure Code of Singapore – Annotations and Commentary* (Jennifer Marie & Mohamed Faizal Mohamed Abdul Kadir eds) (Academy Publishing, 2012) at p 353.

110 *Quek Hock Lye v Public Prosecutor* [2012] 2 SLR 1012 at [28].

> the charge or charges brought by the Public Prosecutor against an accused person.

34 Quek's counsel relied on *Mohammed Muktar Ali v The Queen*[111] ("*Mohammed Muktar Ali*"). Under the Constitution of Mauritius,[112] the Director of Public Prosecutions has the power to institute and undertake criminal proceedings before any court. The Mauritius Dangerous Drugs Act 1986[113] states that a person charged with the offence of importation of drugs may be charged and tried at the Supreme Court before a judge without a jury, or at the Intermediate or the District Court "at the discretion of the Director of Public Prosecutions", and that any person charged with the offence before a judge without a jury and found to be a trafficker in drugs was to be sentenced to death. Upon the direction of the Director of Public Prosecutions, they were each tried in the Supreme Court before a judge sitting without a jury and eventually convicted, found to be traffickers and sentenced to death under s 38(4)[114] of the Dangerous Drugs Act 1986. The defendants contended that the principle of the separation of the powers implicit in the Constitution of Mauritius had been breached. The Privy Council agreed, holding that as the Director of Public Prosecutions possessed the discretion under the Mauritius Dangerous Drugs Act 1986 to select the court in which a drug importer should be tried and, in effect, to select the mandatory (death) penalty to be imposed, s 38(4) was unconstitutional. As such, though the convictions were upheld, the death sentences were set aside.

35 *Mohammed Muktar Ali* was, however, distinguished by the Court of Appeal in *Quek Hock Lye*. The former case was concerned with the constitutionality of a *statute*, and not the constitutionality of prosecutorial discretion.[115] *Mohammed Muktar Ali* did not concern the prosecutorial discretion to prefer a more serious or less serious charge against an accused person as in *Quek Hock Lye*.[116] Further, as noted by the Singapore Court of Appeal,[117] Lord Keith in *Mohammed Muktar Ali* clearly stated, "In general, there is no objection of a constitutional or

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111 [1992] 2 AC 93.

112 Constitution of Mauritius (1968) s 72(3)(a).

113 Dangerous Drugs Act 1986 (No 32 of 1986) s 28(8) (Mauritius).

114 Section 38(4) of the Dangerous Drugs Act 1986 (No 32 of 1986) (Mauritius) reads:

> Any person who is charged with an offence under section 28(l)(c) before a judge without a jury and who is found to be a trafficker in drugs shall be sentenced to death.

115 *Quek Hock Lye v Public Prosecutor* [2012] 2 SLR 1012 at [31].

116 The legislation in *Mohammed Muktar Ali v The Queen* [1992] 2 AC 93 did not stipulate any threshold quantity of drugs for the purposes of determining whether prosecution should take place: *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] SGHC 163 at [54].

117 *Quek Hock Lye v Public Prosecutor* [2012] 2 SLR 1012 at [31].

other nature to a prosecuting authority having a discretion of that nature."[118]

36 Though *Mohammed Muktar Ali* was, strictly speaking, about the constitutionality of a statute, it was substantively concerned with the *nature* of the Prosecution's exercise of his discretion to select the *court* that will try the offence. Ultimately, the legislative provision conferring such a prosecutorial power to select the court was held to be unconstitutional, as the *effect* of the provision was to leave the Supreme Court with no choice but to mete out the death sentence, and hence it had unlawfully encroached into the judicial arena. On the other hand, in *Quek Hock Lye*, the focus was *solely* on the *nature* of the prosecutorial decision to select the *charge* and offence on which the charge was based, by specifying the quantity of the drugs. The nature of this prosecutorial decision to select the charges was taken by the Court of Appeal to be separate and distinct from the exercise of judicial power, which was to decide whether the accused should be convicted and sentenced on those charges, and hence there was no breach of separation of powers. This conclusion was reached notwithstanding that the *effect* of the prosecutorial decision, which was the mandatory death sentence meted out by the Judiciary, was the same as in *Mohammed Muktar Ali*. Should the substantive effect of a prosecutorial decision not be regarded as more important than the nature of that decision?

B. Presumption of constitutionality of prosecutorial discretion

37 Due to the high office of the Attorney-General,[119] there is a judicial presumption that the prosecutorial decisions are constitutional unless shown to be otherwise. The Court of Appeal in *Ramalingam* added that the courts should "presume that [the Attorney-General] acts in the public interest as the Public Prosecutor, and that he acts in accordance with the law when exercising his prosecutorial power".[120] Based on the judicial presumption, the burden lies with the defendant to show that his prosecution was unconstitutional by producing *prima facie* evidence of the alleged unconstitutionality. Only when this has been shown will the Attorney-General have the evidential burden to justify the exercise of prosecutorial discretion. The Court of Appeal in *Ramalingam* cited the case of *United States v Christopher Lee Armstrong*,[121] which involved an allegation of selective prosecution based

118 *Mohammed Muktar Ali v The Queen* [1992] 2 AC 93 at 104.

119 *Ramalingam Ravinthran v Attorney-General* ("*Ramalingam*") [2012] 2 SLR 49 at [44]. See also *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 at [139] (cited in *Ramalingam* at [45]).

120 [2012] 2 SLR 49 at [46].

121 517 US 456 (1996) (Justice Stevens dissenting) (at 465: to show discriminatory effect under US equal protection law, the claimant must show that similarly

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on race, that in order to override the presumption that a prosecutor has not violated equal protection, the defendant must present clear evidence to the contrary.[122]

38 The Court of Appeal drew an analogy between the presumption of the constitutionality of prosecutorial discretion and *statute*. As stated by the Court of Criminal Appeal in *Lee Keng Guan v Public Prosecutor*[123] ("*Lee Keng Guan*"), applying the Indian case of *Shri Ram Krishna Dalmia v Shri Justice S R Tendolkar*[124] ("*Ram Krishna Dalmia*"), the rationale for the presumption of constitutionality of a statute is that "the courts [presume] that the legislature understands and correctly appreciates the need of its own people, and that laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds".[125] In *Public Prosecutor v Taw Cheng Kong* ("*Taw Cheng Kong*"), the Court of Appeal explained the heavy burden of displacing the presumption:[126]

> [*I*]*t seemed to us that, unless the law is plainly arbitrary on its face, postulating examples of arbitrariness would ordinarily not be helpful in rebutting the presumption of constitutionality. This is because another court or person can well postulate an equal number if not more examples to show that the law did not operate arbitrarily.* If postulating examples of arbitrariness can always by themselves be sufficient for purposes of rebuttal, then it will hardly be giving effect to the presumption that Parliament knows best for its people, that its laws are directed at problems made manifest by experience, and hence its differentiation is based on adequate grounds. Therefore, *to discharge the burden of rebutting the presumption, it will usually be necessary for the person challenging the law to adduce some material or factual evidence to show that it was enacted arbitrarily or had operated arbitrarily.* Otherwise, there will be no practical difference between the presumption and the ordinary burden of proof on the person asserting unconstitutionality. [emphases added]

39 However, it should be noted that there are limits to such presumption of constitutionality of statutes. There were statements in

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situated individuals of a different race were not prosecuted). In *United States v Bass* 536 US 862 (2002), it was held that nationwide statistics showing that the US charges blacks with death-eligible offence more than twice as often as it charges whites did not satisfy the *United States v Christopher Lee Armstrong* 517 US 456 (1996) requirement as to "similarly situated defendants".

122 See *United States v Chemical Foundation Inc* 272 US 1 at 14–15 (1926) (on the presumption as applied to public officers generally).

123 [1977–1978] SLR(R) 78.

124 1958 AIR SC 538.

125 [1977–1978] SLR(R) 78 at [19].

126 [1998] 2 SLR(R) 489 at [80]. See also *Johari bin Kanadi v Public Prosecutor* [2008] 2 SLR(R) 422 at [10] (that the person alleging unequal protection has to show that the statutory provision or exercise of power was "arbitrary and unsupportable").

Ram Krishna Dalmia, cited in *Lee Keng Guan*[127] and *Taw Cheng Kong*,[128] that the presumption does not extend so far as to assume the existence of reasons that were not disclosed or known:[129]

> … that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be *some undisclosed and unknown reasons* for subjecting certain individuals or corporation to hostile or discriminating legislation. [emphasis added]

40 If the above qualification were applied to the issue of the constitutionality of prosecutorial discretion, the decision of the Prosecutor cannot always be presumed to be constitutional if some undisclosed and unknown reasons exist. Further, with specific reference to *Ramalingam* and *Quek Hock Lye*, one cannot presume that prosecutorial discretion was exercised constitutionally if there might be reasons that were not disclosed by the Prosecutor for the differential charging of co-offenders involved in the same criminal enterprise. Hence, the strength of the presumption of constitutionality depends to some extent on the availability of reasons for the prosecutorial decision. However, this point was not raised in either *Ramalingam* or *Quek Hock Lye*.

C. Rebutting the presumption

41 In order to rebut the presumption of constitutionality, the accused shoulders the burden of adducing sufficient *prima facie* evidence of unconstitutionality. In *Ramalingam*, the court decided that the applicant had not produced evidence to show a *prima facie* case of a breach of Art 12 to rebut the presumption of constitutionality, and that the evidence on record did not show that the co-offender was more culpable than Ramalingam in relation to the drug trafficking offences. According to the Court of Appeal in *Quek Hock Lye*, Quek had not shown sufficient evidence of a *prima facie* case of unconstitutionality, and that "Quek was really the brain behind the criminal enterprise and thus the main culprit".[130] The mere fact of a difference in the charges against the co-defendants *per se* did not constitute *prima facie* evidence of bias or taking into account irrelevant considerations by the

127 *Lee Keng Guan v Public Prosecutor* [1977–1978] SLR(R) 78 at [19].
128 *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [79].
129 *Shri Ram Krishna Dalmia v Shri Justice S R Tendolkar* 1958 AIR SC 538; 1959 SCR 279 at 297–298.
130 *Quek Hock Lye v Public Prosecutor* [2012] 2 SLR 1012 at [25].

Prosecution.[131] How then does one show *prima facie* evidence sufficient to rebut the presumption of constitutionality of prosecutorial discretion? There seem to be three interrelated methods to rebut the presumption, as gleaned from the Singapore decisions, but none of them is free from difficulties.

42 One example was supplied by the Court of Appeal in *Ramalingam* in its examination of *Teh Cheng Poh*. The Court of Appeal stated that the appellant in that case would have been able to "show *prima facie* impropriety by producing evidence that another offender in similar circumstances had been prosecuted for a non-capital offence".[132] It seems that the phrase "*had been* prosecuted" would suggest that the similar circumstances must be based on past events and not some hypothetical event. In *Teh Cheng Poh*, the offender, the reader would recall, was prosecuted for a capital offence despite the availability of prosecution for a non-capital offence. One question that arises is how *Teh Cheng Poh* may be compared with the *Ramalingam* situation. As *Ramalingam* concerned a case of co-defendants charged with *different* offences, it should suffice, for purposes of rebutting the presumption, if the applicant was able to produce evidence that another set of co-defendants in similar circumstances was charged with the *same* offence. If so, the applicant should be able to rebut the presumption so that the Attorney-General will have to justify his prosecutorial decision. What is meant by "similar circumstances"? The scope of the phrase seems fairly elastic, though it should include the circumstances leading to the commission of the offences by the co-offenders and the relative roles of the co-offenders in the criminal activities. Thus, whether the accused person can rebut the presumption in a particular case would depend heavily on the availability of suitable precedents (which may or may not exist for a particular offence, or if they do exist, may not be publicly available or accessible to the accused or counsel) and the scope of the court's interpretation of "similar circumstances".

43 Another method of rebutting the presumption suggested by the Court of Appeal in *Ramalingam*[133] is that the offender who alleges a breach of Art 12 has to prove that "there are no valid grounds" for the differentiation in the charges between co-offenders. However, it is difficult to prove a negative condition, that is, the lack of grounds or reasons. In order to prove such negative conditions, the accused would probably need to know the reasons for the prosecution in the first place. As it stands, there is no obligation on the Prosecution to divulge his reasons for a particular prosecutorial decision undertaken.[134] An

131 *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [70].
132 *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [26].
133 *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [70].
134 See paras 49–68 below.

alternative interpretation may be that the accused person would have to prove that all the relevant factors determining the charges fall equally as between the co-offenders, and that there should therefore not be any difference in the charges. However, given the non-exhaustive list of factors, this burden of proof is not easily discharged.

44 A third possible approach mentioned in *Ramalingam* is that an offender can prove a case of unlawful discrimination if "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" [emphasis added].[135] This is akin to the *Thiruselvam* case discussed above, and involves the assessment of the relative roles of the co-offenders. While the second method above relates to the proof of the absence of grounds or reasons, this third method involves the proof of an absence of facts. One question is whether the proviso as to the absence of facts should be proved by the accused person. Similar to the argument above, it would be overly onerous for the accused person to prove the absence of facts indicating a lawful differentiation in the charges. On the question of relative culpability, the court had also stated that, even if both the co-offenders in *Ramalingam* were equally culpable, that would not be sufficient to rebut the presumption.[136] One would have thought that if both co-offenders were *equally* culpable, the differential charging decision of the Prosecution would, all other things being equal, raise a *prima facie* case of unconstitutionality that demands an explanation from the Prosecution. Otherwise, the odds would be heavily stacked against the accused person seeking to challenge a prosecutorial decision.

45 Subsequent to *Ramalingam* and *Quek Hock Lye*, the issue of the relative culpability of co-offenders arose in the Court of Appeal decision of *Yong Vui Kong v Public Prosecutor*.[137] Between the two co-offenders for drug trafficking offences, Chia, the boss and supplier of the drugs to Yong, was more culpable than Yong. A total of 26 charges (including three capital charges) were levelled by the Prosecution against Chia. One of the capital charges against Chia was for instigating Yong to transport diamorphine into Singapore. The Prosecution subsequently decided that there was insufficient evidence against Chia and applied for a discontinuance not amounting to an acquittal ("DNAQ"). While Chia was later detained under the Criminal Law (Temporary Provisions) Act,[138] Yong was convicted of trafficking diamorphine and sentenced to death. Following the decision in *Ramalingam*, Yong challenged the

135 *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [71].
136 *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [73].
137 [2012] 2 SLR 872 at [28].
138 Cap 67, 2000 Rev Ed.

prosecution decision as a violation of Art 12 of the Constitution.[139] The court, however, dismissed the constitutional challenge, on the basis that Yong has not proved that the Prosecution had abused its power in an arbitrary or discriminatory manner, or had failed to consider certain relevant factors prior to the prosecutorial decision. In fact, the Prosecution had explained that its application for DNAQ was due to insufficient evidence against Chia.

46 Another difficulty faced by the accused in rebutting the presumption relates to the nature and scope of the factors to be considered in prosecutorial decision-making. The Court of Appeal in *Ramalingam* referred to the *obligation* of the Prosecution to consider the following factors in the exercise of prosecutorial power:[140]

> … 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 whether there is sufficient evidence[141] against a particular offender, whether the offender is willing to cooperate with the law enforcement authorities in providing intelligence, whether one offender is willing to testify against his co-offenders,[142] and so on – up to and including and even the possibility of showing some degree of compassion in certain cases.

47 Apart from the fact that the above list of factors is non-exhaustive, it should be highlighted that some of the factors are subjective in nature (such as the assessment of the moral blameworthiness of the accused person and the possibility of showing compassion in individual cases). It would be difficult for the accused person to rebut the presumption if the Prosecution is given wide discretion in weighing these subjective factors prior to making prosecutorial decisions.

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

140 *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [63].

141 See *R v The Director of Public Prosecutions ex parte Patricia Manning* [2001] QB 330 at [23], *per* Lord Bingham CJ (that the Director of Public Prosecutions' decision depends on "the exercise of an informed judgment of how a case against a particular defendant, if brought, would be likely to fare in the context of a criminal trial" and involves an "assessment of the strength, by the end of the trial, of the evidence against the defendant and of the likely defences").

142 The Court of Appeal in *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [78] interpreted the co-offender's willingness to give evidence for the Prosecution against the applicant as a factor for the differential charges, even though the Attorney-General did not disclose his reasons. On the other hand, in *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872 at [25], [30], [35], Yong's unwillingness to testify against Chia, his boss and supplier of drugs, was relevant to the Prosecution's assessment not to call Yong as a witness against Chia. In any event, the purported usefulness of Yong as a prosecution witness in securing Chia's conviction (as opposed to the application of a discontinuance not amounting to an acquittal) was not proved. Therefore, the Prosecution's failure to compel Yong to testify against Chia was not an abuse of discretion.

48 It is argued that the courts should limit the prosecutorial discretion in considering the above factors in at least one respect. On the issue of whether the offender is willing to co-operate with law enforcement authorities or to testify against his co-offenders, the Prosecutor should be obliged, in the interests of impartiality and consistency, to consider whether to offer the same opportunities to both co-offenders to co-operate or testify against his co-offender, unless there are good reasons as to why an offender should not be offered those opportunities in a particular case. Moreover, it would not be unreasonable to assume that one of the motivations behind an offender's efforts to co-operate with law enforcement authorities or testify against co-offenders might be to serve his own vested interests, even at the expense of the other co-offender. Though such co-operation and testimonies of offenders are important in order to further police investigations and the Prosecutor's aim of enforcing the criminal law in Singapore, the emphasis on impartiality and consistency in the treatment of the co-offenders would ensure that the prosecutorial function and objective are carried out in a fair and just manner.

IV. Whether the Prosecutor should disclose the reasons for the prosecutorial decision

49 The Court of Appeal in *Ramalingam* had highlighted that the Attorney-General's decision would be constrained by "what the public interest requires".[143] As a "custodian" of prosecutorial power, the Attorney-General is required to use that power to enforce the criminal law for public good, that is, to maintain law and order and to uphold the rule of law.[144] How then can the Judiciary ensure that the Prosecution's obligation to consider the relevant factors, as well as public interest in the exercise of prosecutorial discretion, is duly discharged in a particular case?

50 There appear to be three potential restrictions. First, the court cannot intervene in the exercise of prosecutorial discretion unless the failure of the Prosecution to consider the factors amounts to a breach of constitutional rights or bad faith. Second, to the extent that certain factors are subjective in nature, it may be difficult to determine with certainty whether a subjective factor has been properly considered by

143 *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [53].

144 *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [53]; see *R v Power* (1994) 89 CCC (3d) 1 at [17], *per* L'Heureux-Dubé J (La Forest, Gonthier and McLachlin JJ concurring): "The Attorney General is a member of the executive and as such reflects, through his or her prosecutorial function, the interest of the community to see that justice is properly done. The Attorney General's role in this regard is not only to protect the public, but also to honour and express the community's sense of justice."

the Prosecution. Third, the court may not be in a position to assess whether the factors have indeed been taken into account if the Prosecution decides to keep the reasons for prosecution under wraps and the accused person is unable to adduce *prima facie* evidence of unconstitutionality. Indeed, as discussed above, the capacity of the accused person to raise such *prima facie* evidence may be hampered, in part at least, by the lack of transparency as to the underlying reasons for the prosecution in the first place.

51 Be that as it may, the court in *Ramalingam* agreed with the Attorney-General that there is no general obligation to disclose his reasons for making any particular prosecutorial decision. The applicant's counsel had initially argued for the Prosecution to disclose the reasons for the charging decisions but subsequently withdrew the argument. The court observed that this position of non-disclosure is consistent with the English position in *R v Secretary of State for the Home Department ex parte Doody*[145] ("*Doody*"). It should, however, be highlighted that *Doody* was not, strictly speaking, a case on the obligation to disclose reasons in the exercise of prosecutorial discretion. It was concerned with the Secretary of State's review of a prisoner's period of sentence upon consultation with the Lord Chief Justice under the Criminal Justice Act 1967,[146] and specifically, whether the Secretary of State was obliged to give reasons if he departed from the judicial recommendation. In any event, there was, on the facts, a duty to disclose the reasons. Lord Mustill in *Doody* opined that there was a duty to disclose reasons where fairness requires it.[147] The English Court of Appeal in *Doody* also cited *R v Civil Service Appeal Board ex parte Cunningham*[148] ("*Cunningham*") for the proposition that, though there is no general obligation to give reasons for an "administrative decision", such a duty may in appropriate circumstances be implied.[149] *Cunningham* concerned the decisions made by the Civil Service Appeal Board, a public law judicial tribunal, on the award of compensation to an officer who was dismissed from his post. Further, while it is true that there is no general duty to give reasons for a decision under administrative law unless this is required by statute, there appears to be a perceptible trend in England towards requiring decision-makers to provide reasons.[150]

145 [1994] 1 AC 531.
146 c 80 (UK).
147 *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531 at 564.
148 [1992] ICR 816.
149 *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531 at 564.
150 See Peter Leyland & Gordon Anthony, *Textbook on Administrative Law* (Oxford University Press, 6th Ed, 2009) at pp 371–376.

52 The applicant in *Ramalingam* had, on the other hand, cited *R v Director of Public Prosecutions ex parte Manning*[151] ("*Manning*") in support of his argument (which was subsequently withdrawn). The Director of Public Prosecutions in *Manning* decided not to prosecute N in connection with the death of the applicant's brother. The court stated that, while there is no general obligation for the Prosecution to give reasons for his decision,[152] the Director of Public Prosecutions would be expected, in the absence of compelling grounds to the contrary, to give reasons for his decision not to prosecute N. This was because the case involved the right to life, which is one of the most fundamental human rights in the European Convention for the Protection of Human Rights and Fundamental Freedoms.[153] As certain factors relating to the prospects of success of a prosecution if brought were not taken into account against N, the decision of the Director of Public Prosecutions was quashed. However, the Court of Appeal in *Ramalingam* downplayed the significance of *Manning*, highlighting one part of the judgment in *Manning*:[154]

> [T]he effect of this decision is not to require the Director [of Public Prosecutions] to prosecute. It is to require reconsideration of the decision whether or not to prosecute. On the likely or proper outcome of that reconsideration we express no opinion at all.

53 The Court of Appeal further distinguished *Manning*, as both the co-offenders in *Ramalingam* have already been prosecuted and convicted of the drug trafficking offences. As the applicant could have raised the objection against the prosecution at the point when he was prosecuted for the offence but did not do so, the Court of Appeal felt that there were no compelling reasons to require the Prosecution to explain its reasons for prosecuting the applicant at the subsequent stage of the proceedings.[155]

54 There are two points to note. First, in view of the gravity of the matter involving one of life and death, the fact that the objection was raised at the appeal stage should not, by itself, justify the conclusion that there are no compelling reasons to require the Prosecution's disclosure of reasons. In this regard, the accused person should not have been prejudiced. Second, though the facts in *Manning* concerning the

151 [2001] QB 330. See generally Mandy Burton, "Reviewing Crown Prosecution Service Decisions not to Prosecute" (2001) Crim L Rev 374.

152 See *Mohit v Director of Public Prosecutions of Mauritius* [2006] 1 WLR 3343 at [21].

153 Entered into force on 3 September 1953. The court also stated that the giving of reasons was "to meet the reasonable expectation of interested parties", given that the coroner's inquest into the death led to the jury verdict of an unlawful killing that implicated a clearly identified person: *R v Director of Public Prosecutions ex parte Manning* [2001] QB 330 at [33].

154 *R v Director of Public Prosecutions ex parte Manning* [2001] QB 330 at [42].

155 *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [77].

decision whether to prosecute are different from those in *Ramalingam*, the central question is the same, namely, whether there are circumstances in which the Prosecution should be obliged to give reasons for the prosecutorial decision in question.

55 Apart from the cases examined above, the Court of Appeal did not explain in detail the rationales for adopting the non-disclosure position, given that there was no "live" dispute since the applicant's counsel had withdrawn his argument. Nonetheless, the Attorney-General's Chambers have, in the wake of the *Ramalingam* decision, released a report[156] explaining why the current position on non-disclosure of reasons for prosecution cases should be maintained:

> [Prosecution] is a function entrusted to the executive branch of government and it is exercised with access to material that the judicial branch would not always have. Indeed, there is a broad range of factors and information, including not only traditional forms of evidence but also intelligence and other sensitive information that are relevant to the making of such decisions.
>
> …
>
> Any requirement for reasons to be given in every case would also delay criminal proceedings and undermine prosecutorial effectiveness. Delay and ineffectiveness is likely to result as the publication of reasons for all cases would likely lead to frequent challenge in the courts by persons unhappy with specific decisions. Each decision considers multiple factors; it is unlikely that any decision will be able to satisfy all parties.

56 The Supreme Court of Canada in *R v Power*[157] also expressed support for non-disclosure on the following bases: disclosure will (a) generate more documentation and review work; (b) reveal the Prosecutor's "confidential strategies and preoccupations"; (c) generate more challenges against the exercise of prosecutorial discretion via judicial review; (d) discourage prosecutors from formulating or changing policies; and (e) promote inflexibility in decision- and policy-making.[158] The reasons (a) to (c) above are similar to those expressed by the Attorney-General's Chambers' report. While the consequences arising from (a), (b) and (c) may be undesirable, they should be weighed against the potential benefits of uncovering a breach of

156 See Attorney-General's Chambers, "The Exercise of Prosecutorial Discretion", press release (20 January 2012) <http://app.agc.gov.sg/DATA/0/Docs/NewsFiles/AGCPressRelease200112-THEEXERCISEOFPROSECUTORIALDISCRETION.pdf> (accessed 11 January 2013).

157 (1994) 89 CCC (3d) 1.

158 *R v Power* (1994) 89 CCC (3d) 1 at [44]. Arguments (c) and (d) were based on the remarks of Richard S Frase, "The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion" (1980) 47 U Chi L Rev 246.

constitutional rights or bad faith on the part of the Prosecution. As for (d) and (e), it is true that the obligation to disclose reasons would render prosecutorial decision-making more inflexible and discourage policy-making, on the assumption that prosecutorial decisions must be made in a consistent manner. However, consistency in prosecutorial practice is not altogether a bad thing, provided there is ample room to take account of particular factors pertaining to the case at hand.

57 The Attorney-General's Chambers' report also explained why their internal guidelines are not published to the general public, and that the Prosecution does not generally disclose reasons for prosecutorial decisions:[159]

> (a) in evaluating whether it is in the public interest to take a particular prosecution decision, the Attorney-General considers a large number of often competing interests, including those of the victim, the accused person and society as a whole;
>
> (b) non-disclosure enables the Attorney-General's Chambers to retain flexibility to depart from the guidelines when the interests of justice call for this in any given case, while keeping to a broadly consistent path;
>
> (c) any attempt to publish guidelines is likely to result in vague guidelines, which would in turn have the undesirable effect of reducing, rather than enhancing, consistency; and
>
> (d) the publication of specific guidelines would identify prosecution priorities, as well as areas where the Prosecution might exercise restraint, which may lead to an increase in offending in those specific areas.

58 Notwithstanding the practical arguments raised above for non-disclosure of reasons, whether for specific prosecution cases or in terms of general guidelines, there nevertheless remain areas of concern. First, there is a danger that, without any obligation to provide any reasons, the powers of judicial review, restricted as they are currently to breach of constitutional rights and bad faith, would be further diluted. It has been argued that "[w]ithout requirements for reasons and guidelines to identify what reasons are inadequate and improper, the promise of judicial review will remain illusory".[160] As explained earlier,

159 See Attorney-General's Chambers, "The Exercise of Prosecutorial Discretion", press release (20 January 2012) <http://app.agc.gov.sg/DATA/0/Docs/NewsFiles/AGCPressRelease200112-THEEXERCISEOFPROSECUTORIALDISCRETION.pdf> (accessed 11 January 2013).

160 Kent Roach, "The Attorney General and the Charter Revisited" (2000) 50 U Tor LJ 1 at 30.

the constitutional limits to prosecutorial discretion and the capacity of the accused person to displace the presumption of constitutionality depend considerably on the accused's accessibility to, and knowledge of, the Prosecution's reasons for the charges brought against him.

59 Second, there might be a problem of a lack of public trust and potential risks from wrong prosecutorial decisions. An Opposition Member of Parliament raised a pertinent query in Parliament, that "taking public interest into account, would not disclosure by the Attorney-General also engender greater trust in the legal system, and in the office of the Attorney-General?"[161] In reply, the Minister for Law assessed the potential risks as follows:[162]

> [T]here 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.

60 The Minister added that there are other layers of checks, such as the Attorney-General's Chambers' internal guidelines and review processes, and that "if a prosecutorial decision is untenable on its face, it must be explained, or else the Court will infer that there is no good reason for it".[163] However, as discussed above, the Court of Appeal had emphasised the presumption of constitutionality of prosecutorial discretion to begin with. The burden is on the accused, not the Prosecution, to raise *prima facie* evidence to rebut the presumption. The Prosecution does not have to "explain" unless and until the accused adduces sufficient *prima facie* evidence. Further, a difference on the face of the charges against co-offenders *per se* is not sufficient to rebut the presumption.

61 As highlighted by the Minister and Prosecution, it is true that there are risks associated with the disclosure of reasons by the Prosecution. On the other side of the risk equation, however, one important question that should be asked is whether the current risks of the Prosecutor acting wrongly are acceptable or may be ameliorated. In this regard, it must be remembered that the life and liberty of accused

161 *Singapore Parliamentary Debates, Official Report*, "Head R – Ministry of Law (Committee of Supply)" (6 March 2012), vol 88 (Pritam Singh).

162 *Singapore Parliamentary Debates, Official Report*, "Head R – Ministry of Law (Committee of Supply)" (6 March 2012), vol 88 (K Shanmugam, Minister for Law).

163 *Singapore Parliamentary Debates, Official Report*, "Head R – Ministry of Law (Committee of Supply)" (6 March 2012), vol 88 (K Shanmugam, Minister for Law).

persons, who bear the brunt of any prosecutorial errors, are at stake. Due to the need to ensure that the limited constitutional and legal checks on prosecutorial powers are not illusory, the desirability of enhancing public trust in the prosecutorial system and the quest for a more judicious balance of the potential risks involved, given that the life and liberty of accused persons are at stake, it is proposed that some adjustments should be made, with a view to easing the heavy burden of the accused person in rebutting the presumption of constitutionality of prosecutorial discretion.

62 As discussed above, *prima facie* evidence that the co-offenders are *equally culpable* should suffice to rebut the presumption. There should not be a need to show that the offender, who is challenging the conviction, played a lesser role or was less culpable than the co-offender. Further, the requirement to adduce evidence of other offenders in "similar circumstances" should be construed broadly rather than strictly against the accused person. The burden of the accused person is merely to prove a *prima facie* case, not to provide conclusive evidence, so that the Prosecution would have the onus to explain the prosecutorial decision. In this regard, it should also be noted that the strength of the presumption, analogous to the presumption of constitutionality of statutes, is not unrelated to the underlying reasons for the prosecutorial decision. To the extent that there are unknown or undisclosed reasons for the prosecutorial decision, the presumption of its constitutionality would appear weak. Further, the Prosecutor should, as a default position, consider offering the same opportunities to both co-offenders to co-operate or testify against his co-offender, subject to extenuating circumstances in a particular case.

63 Further, while it is acknowledged that there is no legal burden to disclose the reasons for every prosecutorial decision, in view of the discretion conferred on the Attorney-General and in light of the prevailing case law, there are good arguments based on public confidence in the administration of criminal justice, fairness and consistency, the life and liberty of the accused persons and the onerous burden on the accused person to supply the reasons as far as possible. In fact, the Attorney-General's Chambers have on occasion given specific reasons in particular cases of prosecution, to clarify the factors and reasons for the specific prosecutorial decisions,[164] and the Government

164 See Attorney-General's Chambers, "Justice, Compassion and Prosecutorial Discretion" (18 September 2008) <http://www.webcitation.org/5oxuxhaqJ> (accessed 11 January 2013); see also *Public Prosecutor v Tang Wee Sung* [2008] SGDC 262 and *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872.

has also announced a policy that it will not proactively enforce particular criminal law provisions.[165]

64 On the question of publication of general guidelines, there are some merits in greater disclosure of the factors underlying prosecutorial discretion, provided the risks of disclosure (such as the disclosure of sensitive information and intelligence), as highlighted in the Attorney-General Chambers' report, are avoided. Developed common law jurisdictions such as the UK, Australia,[166] Canada[167] and Hong Kong[168] have issued public codes to guide the exercise of prosecutorial discretion. It is noted that the publication of guidelines to enhance fairness and consistency would be in line with the UN Guidelines on the Role of Prosecutors.[169]

65 With respect to the UK Crown Prosecution Service's Code for Crown Prosecutors ("CPS Code"), which was issued by the Director of Public Prosecutions pursuant to UK legislation,[170] the English judges and

165 See Michael Hor, "Changing Criminal Law – Singapore Style" in *Lives in the Law: Essays in Honour of Peter Ellinger, Koh Kheng Lian and Tan Sook Yee* (Dora Neo, Tang Hang Wu & Michael Hor eds) (Faculty of Law, National University of Singapore and Academy Publishing, 2007) at p 124.

166 Australia has issued a code or policy on the exercise of prosecutorial discretion "to promote consistency in the making of the various decisions which arise in the institution and conduct of prosecutions … The Policy also serves to inform the public and practitioners of the principles which guide the decisions made by the [Commonwealth Director of Public Prosecutions]": Commonwealth Director of Public Prosecutions, "Prosecution Policy of the Commonwealth" (November 2008) <http://www.cdpp.gov.au/Publications/ProsecutionPolicy/> (accessed 11 January 2013).

167 See Federal Prosecution Service, Department of Justice Canada, "The Decision to Prosecute" (Part V, ch 15) in *The Federal Prosecution Service Deskbook* (2000) <http://www.ppsc-sppc.gc.ca/eng/fps-sfp/fpd/ch15.html> (accessed 11 January 2013).

168 See The Department of Justice of Hong Kong SAR, "The Statement of Prosecution Policy and Practice – Code for Prosecutors" (2009) <http://www.doj.gov.hk/eng/public/pdf/2008/dpp20081223e.pdf> (accessed 11 January 2013). See also Department of Justice for HK SAR, "The Policy for Prosecuting Cases Involving Domestic Violence" (2006) <http://www.doj.gov.hk/eng/public/pubppcdv.html> (accessed 11 January 2013).

169 Article 17 of the UN Guidelines on the Role of Prosecutors (adopted in 1990) stipulates:

> In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution.

170 The Crown Prosecution Service ("CPS") published the Code for Crown Prosecutors in 1986, with subsequent editions, with the latest in 2010 (6th Ed): see CPS, "Code for Crown Prosecutors" (February 2010) <http://www.cps.gov.uk/publications/docs/code2010english.pdf> (accessed 11 January 2013). The Code for Crown Prosecutors was issued pursuant to s 10 of the Prosecution of Offences Act 1985 (c 23) (UK). Section 10(1) of the Act reads:

(*cont'd on the next page*)

commentators have highlighted the merits and virtues of having a public code: to promote consistency of practice; to serve as a "valuable safeguard for the vulnerable";[171] to warn the people "so that, if they are of a law-abiding persuasion, they can behave accordingly";[172] to reduce "uncertainty";[173] to fulfil "the reasonable expectations of interested parties";[174] to achieve the goals of "public interest in fair, consistent and principled decision-making";[175] and for "policy guidance and accountability".[176] In this regard, it is also pertinent to point out that the CPS Code has undergone public consultation and incorporated public views.[177] Moreover, the issuance of the CPS Code on particular areas pertaining to the exercise of prosecutorial discretion does not preclude the Prosecutor's reliance on internal guidelines with respect to other sensitive prosecutorial matters (impacting on national security, for instance) that should be concealed from the public.[178]

66 There is no clear-cut answer as to the appropriate flexibility and specificity of guidelines as referred to in the Attorney-General Chambers' report. The content of guidelines, if any, would probably be informed by the internal guidelines, practices, processes and the collective experiences and wisdom of the prosecutors in the Attorney-General Chambers. Contrary to the report, it is argued that, while the ideal of perfect clarity and consensus as to the guidelines would be utopian, the publication of guidelines would not necessarily lead to vagueness or reduction in consistency.

67 One possible example is offered by the CPS Code. What the CPS Code outlines, and this is broadly similar to that employed in the above

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The Director shall issue a Code for Crown Prosecutors giving guidance on general principles to be applied by them —

(a) in determining, in any case —

(i) whether proceedings for an offence should be instituted or, where proceedings have been instituted, whether they should be discontinued; or

(ii) what charges should be preferred.

171 *R (on the application of Purdy) v Director of Public Prosecutions* [2010] 1 AC 345 at [54], *per* Lord Phillips.

172 *R (on the application of Purdy) v Director of Public Prosecutions* [2010] 1 AC 345 at [59], *per* Baroness Hale.

173 *R (on the application of Purdy) v Director of Public Prosecutions* [2010] 1 AC 345 at [16], *per* Lord Phillips.

174 *R v Director of Public Prosecutions ex parte Manning* [2001] QB 330 at 347.

175 Andrew Ashworth, "The 'Public Interest' Element in Prosecutions" [1987] Crim L Rev 595 at 606.

176 Andrew Ashworth, "The 'Public Interest' Element in Prosecutions" [1987] Crim L Rev 595 at 606.

177 Roger Daw & Alex Solomon, "Assisted Suicide and Identifying the Public Interest in the Decision to Prosecute" [2010] Crim L Rev 737 at 743.

178 Andrew Ashworth & Julia Fionda, "The New Code for Crown Prosecutors: (Part 1) Prosecution, Accountability and the Public Interest" [1994] Crim L Rev 894 at 900.

common law jurisdictions, is a two-pronged test: (a) whether there is sufficient evidence to justify prosecution; and (b) whether the Prosecution is required in the public interest.[179] With respect to the evidential test in (a), the Prosecutor must be satisfied that there is sufficient evidence to "provide a realistic prospect of conviction" against the suspect on each charge.[180] On the question of sufficiency of evidence, the Prosecutor has to consider whether the evidence can be used and whether it is reliable.[181] With regard to the public interest criterion in (b), the CPS Code appears to adopt a presumptive position in favour of prosecution subject to countervailing public interest. It states that "a prosecution will usually take place unless the prosecutor is sure that there are public interest factors tending against prosecution which outweigh those tending in favour".[182] It is not a factor-counting exercise but more of a balancing act requiring a judgment that is sensitive to the myriad facts.[183] The various public interest factors tending towards prosecution[184] and those tending against prosecution[185] are explicitly set out in the CPS Code.

68 The publication of guidelines, such as the CPS Code, may be undertaken with a view to engendering "greater openness and accountability"[186] on prosecutorial decisions. Prosecutorial decisions in the UK are reviewable where the decision in question was clearly

179 See generally Andrew Ashworth & Mike Redmayne, *The Criminal Process* (Oxford University Press, 4th Ed, 2010) at pp 193–227.

180 Crown Prosecution Service, "Code for Crown Prosecutors" (February 2010) at para 4.5. This is an "objective test" based solely upon the Prosecutor's assessment of the evidence and any information that he has about the defence that might be put forward by the suspect: at para 4.6.

181 Crown Prosecution Service, "Code for Crown Prosecutors" (February 2010) at para 4.7.

182 Crown Prosecution Service, "Code for Crown Prosecutors" (February 2010) at para 4.12.

183 Crown Prosecution Service, "Code for Crown Prosecutors" (February 2010) at para 4.13: "Each case must be considered on its own facts and on its own merits. Prosecutors must decide the importance of each public interest factor in the circumstances of each case and go on to make an overall assessment."

184 Examples include the following: conviction is likely to result in a significant sentence, the offence involved the use of a weapon or the threat of violence, the offence was committed against a person serving the public, the offence was premeditated, and there are grounds for believing that the offence is likely to be continued or repeated: Crown Prosecution Service, "Code for Crown Prosecutors" (February 2010) at para 4.16.

185 Examples include the following: the court is likely to impose a nominal penalty, the offence was committed as a result of a genuine mistake or misunderstanding, the suspect played a minor role in the commission of the offence and a prosecution may require details to be made public that could harm sources of information, international relations or national security: Crown Prosecution Service, "Code for Crown Prosecutors" (February 2010) at para 4.17.

186 See generally Andrew Ashworth & Mike Redmayne, *The Criminal Process* (Oxford University Press, 4th Ed, 2010) at pp 193–227.

contrary to the CPS Code.[187] Notwithstanding that the CPS Code has generated satellite litigation pertaining to the Code provisions[188] and concomitant costs,[189] it should be highlighted that it would be rare, in practice, for a prosecutorial decision to be set aside on the above ground.[190] This is consistent with the general approach that the power of judicial interventions in prosecutorial decisions should be sparingly exercised. Finally, the CPS Code (and, for that matter, public guidelines on prosecutorial discretion generally) are not writ in stone. The contents of public codes may be reviewed and fine-tuned in light of experience and societal circumstances[191] as well as inputs from the courts, lawyers and members of the public.

V. Concluding remarks

69 Prosecutorial discretion is wide but not unfettered in Singapore. The wide discretion of prosecutorial discretion (and narrow scope of judicial intervention) is justified by the doctrine of separation of powers. As the Judiciary and the Prosecution are regarded as independent, separate and equal powers, the prosecutorial powers, though broad in scope, can be checked by the Judiciary in limited and specified circumstances. The doctrine of presumption of constitutionality of prosecutorial discretion, which is premised on the Attorney-General's constitutional high office, means that he is presumed to act in the public interest in prosecutorial decision-making, but this presumption may be rebutted by *prima facie* evidence to the contrary.

70 Notwithstanding its broad scope, the Judiciary has correctly highlighted that there are legal limits to prosecutorial discretion,

187 *A v R* [2012] EWCA Crim 434; [2012] 2 Cr App R 8.

188 *Eg*, *R (on the application of E) v Director of Public Prosecutions* [2012] 1 Cr App R 6 (that the policy set out in the UK Code for Crown Prosecutors was lawful); *R (on the application of Gujra) v Crown Prosecution Service* [2012] 3 WLR 1227 (that the test for the continuance of a private prosecution contained in the Crown Prosecution Service's Code for Crown Prosecutors ("CPS Code") did not frustrate the policy and objects in the Prosecution of Offences Act 1985 (c 23) (UK) and was lawful); *R v Director of Public Prosecutions* [1995] 1 Cr App R 136 (that the Prosecutor failed to follow the CPS Code to have regard to the lines of defence, which were plainly open to the accused); *R v Director of Public Prosecutions ex parte Manning* [2001] QB 330 at [45] (that the Prosecutor applied a test higher than the evidential test in the CPS Code).

189 David Ormerod, "Prosecution Policies" [2012] Crim L Rev 653 at 654.

190 *R v Chief Constable of Kent* [1991] 93 Cr App R 416 at 428; *R v Director of Public Prosecutions* [1995] 1 Cr App R 136 at 144 (which was acknowledged as "one of those rare cases" in which prosecutorial decision was flawed as it was not in accordance with the Crown Prosecution Service's Code for Crown Prosecutors).

191 See Roger K Daw, "The 'Public Interest' Criterion in the Decision to Prosecute" [1989] J Crim L 484 at 500.

namely, that the power cannot be exercised in bad faith or in breach of constitutional rights (including the prohibition against double jeopardy and equal protection of the law). It is the hallmark of a system governed by Rule of Law that legal powers are subject to checks. An executive power, even if it is imbued with constitutional standing such as the prosecutorial powers exercised by the Attorney-General, cannot be permitted to override constitutional rights. It is also clear that one cannot sanction or condone an exercise of prosecutorial powers beyond or contrary to the purpose for which the power was intended to be used, that is, the maintenance of law and order.

71 The life and liberty of accused persons lie in this delicate balance between constitutional law and criminal justice administered by the Judiciary and Attorney-General's Chambers. It is argued that the current scales of justice should be tilted so as to ease the burden of the accused person in challenging prosecutorial discretion allegedly exercised in bad faith or in breach of the Constitution. As it stands, the accused shoulders an onerous burden to rebut the presumption that the prosecutorial decision was constitutional. There is also no general duty imposed on the Prosecution to disclose the reasons for prosecution in a particular case. In order to prevent the above limited constitutional and legal checks on prosecutorial powers from being illusory, as well as to bolster public trust in the prosecutorial system and achieve a proper balance of the potential risks of a wrong prosecutorial decision against the risks of disclosure of reasons, the courts should consider making some adjustments so as to broaden the circumstances in which the accused person may be permitted to rebut the presumption of constitutionality. Finally, in view of the onerous burden of the accused person, as well as the importance of public trust, fairness and consistency, the Prosecution should, as far as possible, disclose the reasons for the particular prosecutorial decision, so long as the potential risks of disclosure can be avoided and public interest is not compromised, and seriously consider publishing objective guidelines on prosecutorial decisions.