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Prosecutorial Discretion and Sentencing in Singapore

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Abstract

Singapore recently amended its laws to replace the mandatory death penalty regime for murder and drug trafficking with a discretionary sentencing regime under certain conditions. One of the conditions with respect to drug trafficking was that the convicted trafficker had to be granted a certificate by the Public Prosecutor stating that the trafficker had provided substantive assistance that led to the disruption of drug trafficking activities. The amended law expressly provided that the Public Prosecutor had the sole discretion to determine whether or not to issue the certificate of substantive assistance. That decision is not subject to judicial review except under very narrow circumstances, protected in the same way as the constitutionally protected prosecutorial discretion.

This paper addresses two inter-related questions. Should the grounds for judicial review of prosecutorial discretion – at least with respect to the granting of the certificate of substantive assistance – be broadened to ensure transparency and fairness? Is s33B(4) of the Misuse of Drugs Act (Cap 184, Rev Ed 2008) ('MDA') – the provision that protects prosecutorial discretion with respect to the certificate – unconstitutional on the ground that it violates the doctrine of separation of powers by drawing the Public Prosecutor directly into the arena of sentencing? The paper implicitly considers the potential conflict in the role of the Public Prosecutor as an enforcer of the criminal law while at the same time being the guardian of the public interest.

Keywords: Criminal justice, public prosecution, prosecutorial discretion, death penalty, separation of powers

PROSECUTORIAL DISCRETION AND SENTENCING IN SINGAPORE

Kumaralingam Amirthalingam*

INTRODUCTION

In 2012, Singapore amended its laws to replace the mandatory death penalty for murder and drug trafficking with a discretionary regime. When certain conditions were met, courts had the discretion to impose either the death penalty or life imprisonment. One of the conditions with respect to drug trafficking was that the convicted trafficker had to be granted a certificate by the Public Prosecutor stating that the trafficker had provided substantive assistance that led to the disruption of drug trafficking activities. The amended law expressly provided that the Public Prosecutor had the sole discretion to determine whether or not to issue the certificate of substantive assistance. That decision was not subject to judicial review except under very narrow circumstances, protected in the same way as the constitutionally protected prosecutorial discretion. As a result of the amendment, the Prosecution has a direct role in the sentencing of the offender.

It bears noting that prosecutorial discretion is intended to enable the Public Prosecutor to temper justice with mercy and to act independently. Coupled with this independence is an expectation that the Public Prosecutor acts as a 'minister of justice' in conducting prosecutions.¹ This means that the Public Prosecutor should not merely act as an advocate of the Government nor should the Public Prosecutor adopt a 'win-at-all-cost' approach. This quasi-judicial role is heightened when criminal prosecutions are disposed through diversionary processes (by-passing the judiciary) and when the Public Prosecutor plays an active role in sentencing matters.

This paper addresses two inter-related questions. Should the grounds for judicial review of prosecutorial discretion – at least with respect to the granting of the certificate of substantive assistance – be broadened to ensure transparency and fairness? Is s33B(4) of the Misuse of Drugs Act (Cap 184, Rev Ed 2008) ('MDA') – the provision that protects prosecutorial discretion with respect to the certificate – unconstitutional on the ground that it violates the doctrine of separation of powers by drawing the Public Prosecutor directly into the arena of sentencing?² The paper ends

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¹ DS Medwed, 'The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit' (2009) 84 Washington Law Review 35.

² A constitutional challenge to s33B(4) of the MDA has been heard by the Singapore Court of Appeal and judgment is pending.

by raising a question about the role of the Public Prosecutor as an enforcer of the criminal law while at the same time being the guardian of the public interest.

THE PUBLIC PROSECUTOR IN SINGAPORE

The Attorney-General is the Public Prosecutor in Singapore. The Attorney-General's Office in Singapore traces its history to the creation of the Straits Settlements in 1867 and the appointment of its first Attorney-General, Thomas Braddell.³ The Attorney-General at that time was a member of both the Executive and the Legislative Councils, mirroring the position in most other British colonies. Section 59 of the Crown Suits Ordinance 1876 cemented the Attorney-General's role as guardian of the public interest. Article 35 of the Constitution of the Republic of Singapore sets out the terms of appointment, tenure, functions and removal of the Attorney-General. Pertinent to this paper are the following two provisions:

Art35 (7) - It shall be the duty of the Attorney-General to advise the Government upon such legal matters and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the President or the Cabinet and to discharge the functions conferred on him by or under this Constitution or any other written law.

Art 35 (8) The Attorney-General shall have the power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence.

Art 35(7) sets out the Attorney-General's role as the Government's principal legal adviser while Art 35(8) grants the Attorney-General complete discretion over all aspects of criminal proceedings. Section 11 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) provides that the 'Attorney-General shall be the Public Prosecutor and shall have the control and direction of criminal prosecutions and proceedings under this Code or any other written law.' Together, these provisions raise two critical questions:

- To what extent should the exercise of prosecutorial discretion be subject to judicial review?
- How should the doctrine of separation of powers impact on the powers of the Public Prosecutor?

Independence, discretion and justice

The independence of the Public Prosecutor is vital to the administration of criminal justice,⁴ providing a shield against politically motivated interference or over-criminalisation by the Government. The risk of political interference is illustrated by the famous *Campbell* affair of 1924. The Attorney-General of the United Kingdom, who had determined that a prosecution against a political activist was warranted, was ordered to withdraw the charges under apparent influence from a Labour Government sympathetic to the accused. This created a backlash in Parliament, resulting in the fall

³ Tan Boon Teik, 'The Attorney-General' [1988] Malayan Law Journal lviii.

⁴ For a comparative survey of statutory mechanisms designed to ensure prosecutorial independence, see, BA MacFarlane, 'Sunlight and Disinfectants: Prosecutorial Accountability and Independence through Public Transparency' (2001) 45 Criminal Law Quarterly 272.

of the Government. The new Government declared in Parliament that such executive interference in the Attorney-General's prosecutorial discretion was 'unconstitutional, subversive of the administration of justice, and derogatory to the Office of the Attorney General.'⁵

Apart from protecting the independence of the Public Prosecutor, the discretionary power also facilitates compassionate and efficient administration of criminal justice. In most common law jurisdictions, including Singapore, a prosecution will only be initiated when first, there is sufficient evidence for a reasonable prospect of conviction and second, it is in the public interest to proceed.⁶ Depending on the facts and circumstances, the prosecutor may decide not to prosecute or to proceed with a less serious charge. Alternatively, the prosecutor may dispose of the matter by way of a warning or through pre-trial diversion. Successful pre-trial diversionary programmes have been introduced in Singapore with diversionary decisions taken by prosecutors through the exercise of prosecutorial discretion.⁷

The role of prosecutors as 'ministers of justice' is at its zenith here. However, it must be recognized that prosecutorial discretion and the quasi-judicial function of the prosecutor can be double-edged swords: on the one hand they are vital for an independent, fair and objective prosecutorial system; on the other, they open the door to usurpation of judicial function without any transparency or accountability, especially when scope for judicial review is limited.⁸ To ensure transparency and consistency, the Public Prosecutor in most Anglo-American jurisdictions has taken to issuing prosecutorial guidelines.

Judicial review

There have been several unsuccessful challenges to the exercise of prosecutorial discretion over the years in Singapore. Of particular significance is a trilogy of Court of Appeal decisions in 2012 involving the mandatory death penalty for trafficking in diamorphine.⁹ In Singapore, the mandatory death penalty is triggered when a person is convicted of, for example, trafficking in 15 grammes or more of diamorphine. It was common practice for the Public Prosecutor to charge an accused with trafficking in not less than 14.99 grammes of diamorphine in order to avoid the mandatory death penalty, even though the actual amount trafficked was greater. In many cases, the traffickers worked in pairs and when arrested both would be jointly charged for trafficking. Sometimes, the Prosecution would charge one accused person with trafficking in the actual amount of drugs while charging the co-accused

⁵ See, IG Cross, 'Focus on the Discretion Whether to Prosecute' (1998) 28 Hong Kong Law Journal 400 at 403,404.

⁶ See generally, K Amirthalingam, 'Prosecutorial Discretion and Prosecution Guidelines' [2013] Singapore Journal of Legal Studies 50.

⁷ For an overview and discussion of the development of pre-trial diversion in Singapore, see, K Amirthalingam, 'Criminal Justice and Diversionary Programmes in Singapore' (2013) 24 Criminal Law Forum 527.

⁸ D Plater & L Line, 'Has the 'Silver Thread' of the Criminal Law Lost its Lustre? The Modern Prosecutor as a Minister of Justice' (2012) 31 The University of Tasmania Law Review 55.

⁹ *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49; *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872; *Quek Hock Lye v Public Prosecutor* [2012] 2 SLR 1012.

with trafficking in not less than 14.99 grammes, thereby condemning one to face the death penalty and the other to face imprisonment and caning.

The facts in the three cases decided by the Court of Appeal in 2012 were similar: each involved two co-accused persons trafficking drugs in quantities that attracted the mandatory death penalty. In two of the cases,¹⁰ the Public Prosecutor charged the respective appellants with trafficking in a quantity of drugs above the death penalty threshold while charging the respective co-accused persons with trafficking in a quantity of drugs that fell below the threshold. In the third case,¹¹ the Public Prosecutor charged both co-accused with capital offences, but subsequently discontinued the case against one party, proceeding against the appellant only. In all three cases, the appellants argued that the Public Prosecutor had violated art 12 of the Constitution, the equal protection clause.¹²

In the leading case of *Ramalingam Ravinthran v Attorney-General*,¹³ the Court of Appeal held that the exercise of prosecutorial discretion was subject to judicial review on two grounds: abuse of power and breach of constitutional rights.¹⁴ The Court held that the Public Prosecutor could legitimately treat the co-accused differently for the same offence by taking into consideration various factors including the available evidence against the individual accused; the personal circumstances of the individual accused; the degree of co-operation of the accused with law enforcement agencies; and public interest considerations. The Court also reiterated that there was a presumption that the Public Prosecutor had exercised the discretion constitutionally; that the burden of proving a prima facie case of unconstitutionality rested with the accused; and that the Public Prosecutor was under no obligation to give reasons for the exercise of prosecutorial discretion.

In *Yong Vui Kong v Public Prosecutor*,¹⁵ the appellant argued that his art 12 rights were breached when the Prosecution proceeded against him while discontinuing the case against his co-accused, the alleged mastermind, on the ground of lack of evidence.¹⁶ The appellant argued that the Public Prosecutor could have called on him to give evidence against the co-accused. The Court of Appeal, noting art 35(8), affirmed that prosecutorial discretion included not just the initiation, but also the

¹⁰ *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49; *Quek Hock Lye v Public Prosecutor* [2012] 2 SLR 1012.

¹¹ *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872

¹² For detailed discussion of these cases, see Chen Siyuan, 'The Limits on Prosecutorial Discretion in Singapore: Past, present and Future' (2013) *International Review of Law* 5 (online publication, 1 June 2013, <http://dx.doi.org/10.5339/irl.2013.5>); G Chan, 'Prosecutorial discretion and the Legal Limits in Singapore' (2013) 25 *Singapore Academy of Law Journal* 15.

¹³ [2012] 2 SLR 49.

¹⁴ Citing the earlier authority of *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239.

¹⁵ [2012] 2 SLR 872.

¹⁶ A Discontinuance Not Amounting to an Acquittal does not prevent the Public Prosecutor from reinstating the charges against the offender (Criminal Procedure Code (Cap 68, 2012 Rev Ed). It should be noted that the offender in this case was detained under the Criminal Law (Temporary Provisions) Act (Cap 67, 2000 Rev Ed).

conduct and discontinuance of criminal proceedings. As such, the Public Prosecutor's decision not to call the appellant in conducting its case against the co-accused could not be reviewed in the absence of evidence of bad faith or unconstitutionality.

In *Quek Hock Lye v Public Prosecutor*,¹⁷ in addition to an art 12 argument, the appellant argued that the Prosecution had violated the doctrine of the separation of powers by venturing into the arena of sentencing, a matter properly for the judiciary to determine. Thus it was argued that art 93 of the Constitution, vesting judicial power in the courts had been violated. The appellant's contention was that by manipulating the quantity of drugs subject to the trafficking charge to ensure that the appellant's co-accused escaped the death penalty, the Prosecution had usurped the judiciary's sentencing powers. The Court rejected this argument, adopting a 'harmonious' approach to the separation of powers:

Counsel's argument characterising the Public Prosecutor's exercise of his discretion in relation to Quek and Winai as unconstitutional disregards the fact that Art 35(8) of the constitution confers upon the Attorney-General, as the Public Prosecutor, a constitutional power to exercise his discretion in individual cases, which must necessarily impact the sentencing range available to the court in relation to the particular charge preferred. ... *Articles 93 and 35(8) of the Constitution should be construed harmoniously, with neither being subordinate to the other.* Counsel's submission would mean that Art 93 of the Constitution overrides Art 35(8) of the Constitution.¹⁸ (emphasis added)

The above cases highlight the near immunity of prosecutorial discretion as well as the expansive scope of that discretion, covering all aspects of initiating, conducting and terminating prosecutions. The reforms to the drug trafficking laws suggest that the scope of prosecutorial discretion has been extended to certain aspects of sentencing. It is questionable whether courts should be so deferential to the Public Prosecutor. The constitutional protection of prosecutorial discretion was intended to shield the Public Prosecutor from political interference. It has however been interpreted as – or at least has the practical effect of – immunizing the Public Prosecutor from judicial review. This criticism has been levelled in Hong Kong where a similar constitutional provision exists in Article 63 the Basic Law, which has also been interpreted in a manner that confers near immunity on prosecutorial discretion:

However, the assumption that Article 63 is all-protective of the public prosecutor arguably has had a much wider practical effect than merited and risks substantially immunizing the Secretary for Justice and the Director of Public Prosecutions (DPP) from *judicial* interference and ironically increasing their exposure to *political* criticism.¹⁹

It will be argued below, that the parsimonious approach to judicial review and the separation of powers adopted in *Quek Hock Lye* should be reconsidered in criminal cases, particularly when an individual's life is at stake.

¹⁷ [2012] 2 SLR 1012.

¹⁸ Ibid at [28]-[29].

¹⁹ M McConville, 'Politicians and Prosecutorial Accountability in Hong Kong' (2007) 36 Common Law World Review 355 at 359-360.

SENTENCING REFORMS IN THE MISUSE OF DRUGS ACT (CAP 185)

The drug trafficking reforms were motivated in part due to recognition that the low level couriers were less culpable due to their peripheral role in drug trafficking, moreso when they suffered from an abnormality of mind, leaving them more prone to manipulation, control and temptation. Alongside the compassionate basis for the reforms to the death penalty regime was a strategic imperative. The amendments were also aimed at enhancing enforcement operations by providing couriers with an incentive to provide information that could disrupt drug trafficking activities. To qualify for discretionary sentencing under s33B of the MDA, the offender carried the burden of proving that he or she was merely a courier, and that he or she either had provided substantive assistance to 'the Central Narcotics Bureau in disrupting drug trafficking activities within or outside Singapore,' or was suffering from an abnormality of mind at the time of the offence.

The contentious provision, raising the separation of powers question, is s 33B(4):

The determination of whether or not any person has substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities shall be at the sole discretion of the Public Prosecutor and *no action or proceeding shall lie against the Public Prosecutor in relation to any such determination unless it is proved to the court that the determination was done in bad faith or with malice* (emphasis added)

The first case to consider the difficulties with the new sentencing regime was *PP v Chum Tat Suan*.²⁰ Having convicted the accused of a capital drug trafficking charge, Choo Han Teck J, in the High Court of Singapore, considered the application of s33B. He noted that the Prosecution was not prepared to make a decision on the certificate of substantive assistance until a judicial determination was made as to whether the accused was a courier, following which the Prosecution would take a further statement from the accused to determine whether to issue the certificate. This meant that the Prosecution would be directly involved in determining the sentence of the offender after his or her trial was over.

Choo J pointed out some of the practical difficulties with this procedure. If new evidence on the accused's role as a courier were permitted at the sentencing stage, there was a chance that that evidence might contradict earlier evidence relied upon at trial and thereby undermine the conviction. On the other hand, to deny new evidence at the sentencing stage and to require the accused to lead evidence at trial that he or she was a courier in order for the accused to take advantage of the discretionary sentencing regime would undermine the accused's right to run his or her defence fully. For example, an accused who chooses to remain silent as to his role and simply attack the Prosecution's case to raise reasonable doubt, would if convicted, be unable to argue that he or she was merely a courier and therefore eligible to be sentenced under s33B.

The Public Prosecutor referred the case to the Court of Appeal as a Criminal Reference to determine certain questions of law, including whether new evidence should be admitted. The Court of Appeal was divided on this issue. The majority,

²⁰ [2014] 1 SLR 336.

taking the view that the amendments were intended to give the accused person a chance to come clean at trial,²¹ held that the accused was bound by the evidence at trial; the dissenting judge, noting that this was a matter of life and death, held that the accused should be permitted to introduce new evidence at the sentencing stage.²² Subsequently, at the sentencing hearing,²³ Choo J, observing that ‘the Public Prosecutor may be duty bound to certify that a person convicted had rendered substantive assistance if the facts so justify,’²⁴ warned against the Public Prosecutor straying into the sentencing arena by refusing to provide a certificate to prevent the court from exercising sentencing discretion. Such exercise of discretion could be found to be in bad faith and contrary to s 33B(4).²⁵

Choo J may have been prescient with his observation. In *Public Prosecutor v Mohd Taib bin Ahmadi*,²⁶ the Public Prosecutor did not provide the certificate. Lee Sieu Kin J noted that the Deputy Public Prosecutor, in refusing to provide the certificate, had stated in court that the accused had given information only on the eve of the verdict and sentence, instead of much earlier when he could have. Lee J observed that timely provision of assistance was not a requirement under the law;²⁷ it was the utility of the information that was relevant. However, there is no way of knowing whether useful information was provided and whether it did lead to disruption of drug trafficking activities. If the refusal to provide the certificate was due to the Prosecution’s view that the accused was not deserving of it by not coming clean earlier, then this would be a clear violation of s33B(4).

The Court of Appeal considered the scope of judicial review of prosecutorial discretion under s33B in *Muhammad Ridzuan bin Mohd Ali v Attorney-General*.²⁸ The appellant and another individual were jointly charged and convicted of a drug trafficking offence. The other individual was issued a certificate by the Public Prosecutor and escaped the death sentence. The appellant was sentenced to death. He sought judicial review of the Public Prosecutor’s decision not to issue a certificate. The Court reaffirmed that in addition to the two grounds of review in s 33B(4) (bad faith and malice), the Public Prosecutor’s decision was also subject to constitutional challenge. Here, there was no evidence that the Public Prosecutor had acted unconstitutionally, in bad faith or with malice.

²¹ *PP v Chum Tat Suan and another* [2015] 1 SLR 834 at [81] per Woo Bih LI and Tay Yong Kwang JJ.

²² *Ibid* at [32]-[38] per Chao Hick Tin JA. Following the Criminal Reference, the case was remitted to the High Court where Choo J found that the offender had acted only as a courier.

²³ *PP v Chum Tat Suan* [2016] SGHC 27. The Public Prosecutor eventually issue the certificate, but ironically, the offender, then aged 67, instructed his counsel that he preferred the death penalty to life imprisonment. Choo J imposed life imprisonment as the circumstances did not warrant the death penalty.

²⁴ *Ibid* at [9]

²⁵ The difficulty, of course, is that the Public Prosecutor does not have to disclose anything, and it would be an uphill task for an accused person denied a certificate to argue that it was done in bad faith.

²⁶ [2016] SGHC 124.

²⁷ *Ibid* at [22].

²⁸ [2015] 5 SLR 1222.

The fact that the appellant had given his fullest cooperation was irrelevant if the assistance did not result in actual disruption of drug trafficking activities. Indeed, the Court noted that the Public Prosecutor would be acting *ultra vires* if he issued the certificate to an offender who had given full cooperation but where no actual disruption to drug trafficking had occurred.²⁹ The Court was clearly in agreement with the Legislature and the Prosecution on the underlying policy and operation of s33B:

Having regard to what was clear Parliamentary intention underlying the scheme set out in s 33B of the MDA ... and in order to ensure that the effectiveness of CNB is not undermined, we are in agreement with the Respondent that if we were to treat the issue of the grant of a certificate of substantive assistance as if it were a matter to be proven and justified at trial, our entire battle against drug trafficking, which we have relentlessly pursued for more than 40 years, would be seriously jeopardised and along with it so would the general interest of society. It is for this reason (the need to avoid jeopardising the operational capability of CNB) that we accept the submission of the Respondent ... that the Judge is not the appropriate person to determine the question of whether a convicted drug trafficker has rendered substantive assistance. Section 33B expressly confers upon the PP the discretion to make the decision on substantive assistance. We would also reiterate that we are, at this stage, not dealing with an accused (who is presumed innocent) but a person who is convicted, after due process, of drug trafficking and is, in the normal course, to be sentenced to suffer death. The statements in Parliament show quite clearly that the object of s 33B of the MDA is not to send the message that society has gone soft on drug traffickers; on the contrary, it is another string to our bow, perhaps in a different way, to combat drug trafficking – to get at the real kingpins behind the couriers. A convicted drug trafficker must 'earn' the certificate of substantive assistance. It is not a matter of entitlement.³⁰

In a strict legal sense, the Court was correct. However, there are some deeper questions that need to be explored, including whether the new regime breached – if not the letter, at least the spirit of – the doctrine of separation of powers; whether the instrumental approach of using the death penalty to incentivise cooperation was justified;³¹ and whether the decision to issue the certificate of substantive assistance should have been clothed with the equivalent of the Public Prosecutor's constitutionally protected discretionary power.³² It is critical to note that the discretionary sentencing regime here is severely restricted – the judge can only choose between life imprisonment and the death penalty. In practice, if the Public Prosecutor issued the certificate of substantive assistance, a court is not likely to impose the death penalty. Thus, the sentence is effectively decided by the Public Prosecutor.

²⁹ Ibid at [48]. It is interesting to note that the court in the three cases discussed above flirted with administrative review language, suggesting that the Public Prosecutor's decision could be subject to review on broader administrative review grounds, unlike the earlier decisions (see n 9) on the exercise of prosecutorial discretion with respect to charging where the courts appeared to draw a brighter line with respect to judicial review.

³⁰ Ibid at [66].

³¹ During the Second Reading of the Misuse of Drugs (Amendment) Bill, the Minister for Home Affairs made clear that the underlying reason for the substantive assistance proviso was not mercy but to add to operational efficacy. It was to incentivize accused persons to provide information. Singapore Parliamentary Debates, *Official Reports*, vol 89, sitting no 11 (14 November 2012) (Minister for Home Affairs).

³² The Court of Appeal has recently heard an appeal to determine the constitutionality of s33B(4) and has reserved judgment.

THE PUBLIC PROSECUTOR AND SENTENCING

It cannot be gainsaid that the Public Prosecutor does exert influence on sentencing by virtue of having discretion over the selection of the charge. However, the Prosecution, at least in England and Australia, is not expected – indeed not permitted – to play an active role at the sentencing stage, apart from assisting the court.³³ It has been argued, particularly in light of the fact that the Prosecution has the right of appeal against sentence, that it should have a more active role in advocating for a particular sentence on behalf of the State.³⁴ In Singapore, the Prosecution regularly presses for benchmark sentences for particular offences in court. Recently, the Public Prosecutor made history by appealing against a sentence on the ground that it was manifestly excessive.³⁵ However, there is a fine line between the Prosecution assisting the court to the Prosecution advocating for a particular sentence and finally to the Prosecution having a say in the actual sentence,³⁶ at which point the delicate separation of powers is disturbed.

There is a long line of authorities in Commonwealth jurisdictions establishing a clear rule that the Executive should not be involved in determining the sentence of individual offenders.³⁷ The Legislature sets out the general sentencing framework and the Judiciary is responsible for determining individual sentences.³⁸ Under this framework, the Legislature is perfectly entitled to set mandatory punishments, thereby depriving the Judiciary of sentencing discretion;³⁹ however, it can never authorise the

³³ The High Court of Australia in *Barbaro v The Queen; Zirilli v The Queen* (2014) 253 CLR 58 recently overruled the earlier Victorian case of *R v MacNeil-Brown* (2008) 20 VR 677, which held that the Prosecution should submit on the available range of sentences.

³⁴ See, J Rogers, 'Restructuring the Exercise of Prosecutorial Discretion in England' (2006) 26 *Oxford Journal of Legal Studies* 775 at 782.

³⁵ *PP v Lim Choon Teck* [footnote to be inserted] The case involved a cyclist rashly endangering others by using a pedestrian path. The Prosecution had submitted to the court that a custodial sentence of two to four weeks would be appropriate, but the court sentenced the offender to eight weeks imprisonment. The Prosecution appealed to reduce the sentence, and the Attorney-General in a media statement, said, 'It is a crucial aspect of the administration of criminal justice in Singapore that all offenders are *appropriately* punished – neither in a manifestly inadequate nor in a manifestly excessive manner – to ensure justice is done. All stakeholders in our criminal justice system, including the Attorney-General's Chambers, shoulder this heavy responsibility to ensure fairness and proportionality in the punishment meted out.'

³⁶ This issue was explored two decades over through a comparative study of selected European jurisdictions: J Fionda, *Public Prosecutors and Discretion: A Comparative Study* (Oxford: Clarendon Press, 1995)

³⁷ *DPP v Fitzgibbons* [2014] IECCA 25; *Barbar v The Queen* [2014] HCA 2; *DPP v Mollison (Jamaica)* [2003] UKPC 6; *Mohammed Muktar Ali v The Queen* [1992] 2AC 93; *Hinds v The Queen* [1977] AC 195.

³⁸ *Deaton v Attorney-General and the Revenue Commissioners* [1963] IR 170.

³⁹ See, for a recent reaffirmation, *Ellis v The Minister for Justice and Equality & ors* [2016] IEHC 234.

Executive to exercise sentencing powers in criminal matters.⁴⁰ The classic statement is found in *Deatons v Attorney-General and the Revenue Commissioners*:⁴¹

There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of a general rule, which is one of the characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case. ... The legislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule, and the application of that rule is for the courts ... the selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the executive ...

The Public Prosecutor in Singapore, as a member of the Executive branch of Government,⁴² should not play an active role in sentencing. However, unlike the UK and Australia, the Prosecution in Singapore does play an active role in sentencing, albeit with the judiciary retaining sole authority to determine the final sentence. This collaborative approach has been encouraged, with the Chief Justice of Singapore noting the important role the Prosecution played in assisting the courts in sentencing matters and setting out some guidelines on the nature and extent of that assistance.⁴³ Nonetheless, the Chief Justice reiterated that ultimately, it is for 'the court to come to its own conclusion as to what the just sentence should be.'⁴⁴ The argument advanced here is that while Singapore may differ from other jurisdictions in terms of the extent to which the Prosecution may assist the court in sentencing matters, it can never be the final arbiter of the sentence, legally or in practical terms.⁴⁵

In *Mohammad Faizal bin Sabtu v Public Prosecutor*,⁴⁶ the Court of Appeal reaffirmed that the separation of powers doctrine was part of the basic structure of the Singapore Constitution. The offender, convicted of drug consumption, was sentenced to an enhanced term of imprisonment under s33A(1) of the MDA. The aggravating factor in his case was that he had two previous admissions to the Drug Rehabilitation Centre ('DRC'). These admissions were based on executive orders made by the Director of the Central Narcotics Board. The offender argued that s33A(1) violated the separation of powers as it treated an executive order as a prior conviction. This argument was rightly rejected by the court: a prior DRC was simply an aggravating factor that the Legislature had considered was a relevant consideration for sentencing purposes.

⁴⁰ See the considered opinion of the House of Lords in *R v The Secretary of State for the Home Department, ex parte Anderson* [2003] 2 AC 837.

⁴¹ [1963] IR 170 at 182-183.

⁴² Art 35 of the Constitution setting out the Office of the Attorney-General appears in Chapter 2, which deals with the Executive.

⁴³ Chief Justice Sundaresh Menon, 'Opening Address' Sentencing Conference 2014 (Supreme Court of Singapore, 9 Oct 2014, available online: [http://www.supremecourt.gov.sg/docs/default-source/default-document-library/sjc/opening-address---sentencing-conference-on-9-october-\(101014---check-against-delivery\).pdf](http://www.supremecourt.gov.sg/docs/default-source/default-document-library/sjc/opening-address---sentencing-conference-on-9-october-(101014---check-against-delivery).pdf), last accessed, 5 July 2016).

⁴⁴ Ibid at [38].

⁴⁵ This was recently reaffirmed forcefully by the Chief Justice in *Janardana Jayasankarr v Public Prosecutor* [2016] SGHC 161 at [12].

⁴⁶ [2012] 4 SLR 947.

The case of *Dinesh Pillai a/ K Raja Retnam v Public Prosecutor*⁴⁷ raised a more interesting question. Section 53 of the MDA conferred jurisdiction on the District Court to hear drug trafficking cases and impose penalties up to the level permissible in the High Court, except for the death penalty. The offender, relying on the Mauritian appeal to the Privy Council in *Mohammed Muktar Ali v The Queen*,⁴⁸ argued that s53 was unconstitutional as it permitted the Public Prosecutor to select the court in which to bring the charge, thereby allowing the Public Prosecutor to determine whether the offender would be subject to the death penalty.

Section 28(1)(8) of the Mauritius Dangerous Drugs Act provided, ‘Any person who is charged with an offence under subsection (1)(b) or (1)(c) shall be tried before a judge without a jury, the Intermediate or the District Court at the discretion of the Director of Public Prosecutions.’ If the case were tried before a judge without a jury, the only sentence was mandatory death; if it were tried in the other courts, the maximum sentence was twenty years’ imprisonment. The Privy Council struck down that provision on the ground that it violated the doctrine of separation of powers by allowing the Director of Public Prosecution to determine the sentence.

The Court in *Dinesh Pillai* distinguished *Mohammed Muktar Ali*, noting that in Singapore the MDA provided for different penalties based on the quantity of drugs and it was well established that the Public Prosecutor had full discretion in determining the charge. Thus, the Court accepted that the Public Prosecutor could use the charging discretion to avoid the death penalty. However, this conclusion may be suspect as the court seems to have collapsed two separate issues: prosecutorial discretion with respect to charging on the one hand and mandatory sentencing on the other. With respect to certain drug trafficking categories, Parliament has expressly removed sentencing discretion from the judge and set out very clearly in the legislation that the sole trigger for the death penalty is the quantity of drugs trafficked. No other consideration bearing on the moral culpability of the accused is relevant – no mitigation, no mercy.⁴⁹ The Legislature has been explicit. Therefore, it is arguably unconstitutional for the Public Prosecutor to undermine the Legislature’s considered policy by manipulating the quantity of drugs trafficked solely in order to avoid the death penalty.⁵⁰

Dinesh Pillai, while arguably open to criticism for its approach to the exercise of discretion with respect to charging, was clear – and rightly so – that the Public Prosecutor could not directly interfere with the sentencing outcome once the charging

⁴⁷ [2012] 4 SLR 772.

⁴⁸ [1992] 2AC 93.

⁴⁹ During the Second Reading of the Misuse of Drugs (Amendment) Bill, the Minister for Law reiterated that mandatory sentencing was solely within the province of Parliament and that no mitigating factors should be taken into account once the accused was caught trafficking in more than 15 grammes of diamorphine. Otherwise, the drug suppliers would use couriers who ‘fit the profile’ for mitigation and this would lead to the de facto abolition of the death penalty. Singapore Parliamentary Debates, *Official Reports*, vol 89, sitting no 11 (14 November 2012) (Minister for Law).

⁵⁰ While few would quibble with the Prosecution’s strategy of charging an accused with trafficking in a quantity of drugs below the death penalty threshold as a matter of mercy, as a matter of constitutional law, it raises real questions about the separation of powers and penal policy.

decision had been taken. It noted with disapproval an earlier decision suggesting that the Public Prosecutor could use s53 to avoid the death penalty.⁵¹ The Court stated:

In our view ... the purpose of s 53 of the MDA was not to enable the Public Prosecutor to bring a trafficking charge for a capital offence in the District Court so as to effectively reduce it to a non-capital charge. ... *Indeed, if the Public Prosecutor were to do so, it would raise an issue as to whether the Public Prosecutor's decision might have been arbitrary or might not have been made in good faith.* In our view, the purpose of s 53 of the MDA was to vest in the Subordinate Courts sentencing powers with respect to non-capital drug offences beyond their normal sentencing powers ...⁵² (emphasis added)

The encroachment by the Public Prosecutor into the realms of sentencing arguably violates the doctrine of separation of powers, as set out in the leading authorities referred to earlier. This topic – separation of powers – deserves close attention and will be developed elsewhere in order to do it justice. For the purpose of this paper, the simplistic dichotomy of formalist and functionalist approaches to separation of powers will be adopted to further the central arguments advanced with respect to judicial review of prosecutorial discretion and the constitutionality of s33B(4).⁵³ One explanation of the difference between these two models of separation of powers is that that the former promotes ‘rule of law values,’ requiring strict separation, whereas the latter promotes ‘pragmatic values,’ permitting some co-mingling of powers.⁵⁴

Not surprisingly, Singapore, a nation committed to economic development, and defined by a self-perceived threat to its existence,⁵⁵ has adopted the functional approach.⁵⁶ The functional approach may be justified in the context of the ‘administrative state’ with its internal systems of checks,⁵⁷ but it poses a real threat to individual liberty when applied to criminal matters, moreso in a jurisdiction whose criminal justice policies are aligned with the crime control model.⁵⁸ The crime control model, emphasising maintenance of public order and effective criminal justice

⁵¹ *Nguyen Tuong Van v PP* [2005] 1 SLR(R) 103.

⁵² [2012] 4 SLR 772 at [23].

⁵³ See generally, PL Strauss, ‘Formal and Functional Approaches to Separation of Powers Questions – A Foolish Inconsistency?’ (1987) 72 *Cornell Law Review* 488.

⁵⁴ WN Erskridge Jr, ‘Relationships Between Formalism and Functionalism in Separation of Powers Cases’ (1998) 22 *Harvard Journal of Law and Public Policy* 21 at 22.

⁵⁵ At the time of writing this article, an op-ed appeared in the *Straits Times* discussing why Singapore continued to act like ‘a fortress under siege.’ Han Fook Kwang, ‘Will ‘follow-the-money’ formula work in changed landscape?’ *Straits Times*, 19 June 2016, B5.

⁵⁶ Thio Li-ann, ‘The Rule of Law within a Non Liberal Illiberal ‘Communitarian’ Democracy: The Singapore Experience’ in R Peerenboom (ed), *Asian Discourses of Rule of Laws: Theories and Implementation of Rule of Law in Twelve Asian Countries with Comparisons to France and the US* (London/New York: Routledge Curzon, 2004), 180 184.

⁵⁷ JM Landis, ‘The Administrative Process (1938) in WW Fisher III, MJ Horwitz & TA Reed (eds), *American Legal Realism* (New York: Oxford University Press, 1993) 159 at 163.

⁵⁸ Singapore has clearly adopted the crime control model with clear statements from a former Attorney-General and Chief Justice, Mr Chan Sek Keong as well as the present Attorney-General, Mr VK Rajah. See, Chan Sek Keong, ‘The Criminal Process – The Singapore Model’ (1995) 17 *Singapore Law Review* 433; VK Rajah, ‘Judicial Review – Politics, Policy and the Separation of Powers’ (Lecture at Singapore Management University, 24 March 2016) See generally, K Amirthalingam, ‘Criminal Justice and Diversionary Programmes in Singapore’ (2013) 24 *Criminal Law Forum* 527 at 529-532.

strategies, is generally contrasted with the due process model, prioritizing individual rights and liberties.⁵⁹ When the Executive and Legislature favour the crime control model, it is incumbent on the Public Prosecutor and the Judiciary to provide a balance in order to protect individual rights and liberties.

However, the Judiciary has been ambivalent about its role in scrutinizing and striking down executive or legislative action. For example, a constitutional challenge to s377A of the Penal Code, criminalising homosexual acts, failed in *Lim Meng Suang v Attorney-General*,⁶⁰ in which the Court of Appeal reiterated the functionalist approach to the doctrine of separation of powers, treating it as a *constraint* on the judiciary's role in checking legislative and executive power, rather than as an *enabler* of the checks and balances required to protect individual rights and liberties.⁶¹

Lim Meng Suang may not be the last word on separation of powers. In a subsequent decision,⁶² the Court of Appeal, in reviewing ministerial discretion ordering detention without trial, reaffirmed the role of the courts as the final arbiter of the legality of Governmental action. Singapore is not unique in its approach to separation of powers in the criminal law context. It has been noted that courts in the US too have allowed a functional approach to take hold.⁶³ As alluded to earlier, the Prosecution's role as 'ministers of justice,' is a double edged sword: it leaves judges 'desensitized to a criminal justice system in which prosecutors exercise extensive judicial power.'⁶⁴ The judiciary needs to be vigilant and perform its role in our constitutional system of checks and balances.

CONCLUSION

The role of the Public Prosecutor in Singapore has evolved over the last decade. From being concerned primarily with initiating and conducting prosecutions, the Public Prosecutor is increasingly involved in the quasi-judicial functions of determining pre-trial diversions, advocating for benchmark sentences and most recently, directly influencing the sentencing outcome in individual cases. It is vital to reconsider the scope of prosecutorial discretion, the extent of judicial review and the spirit of the separation of powers to ensure that there is transparency, accountability and sufficient checks and balances.

Singapore has embraced the crime control model, prioritising efficiency over individual liberty and due process. Section 33B is a classic crime control

⁵⁹ This duality is attributed to H Packer, 'Two Models of Criminal Justice' (1984) 113 University of Pasadena Law Review 1.

⁶⁰ *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26.

⁶¹ *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [77], [189]. Compare this with a later decision concerning detention without trial where the Court of Appeal reasserted the role of the judiciary as the final arbiter of the legality of government action. *Tan Seet Eng v Attorney-General* [2015] 2 SLR 1158.

⁶² *Tan Seet Eng v Attorney-General* [2015] 2 SLR 1158.

⁶³ See generally, R Barkow, 'Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing' (2003) 152 University of Pasadena Law Review 33,

⁶⁴ R Barkow, 'Separation of Powers and the Criminal Law' (2006) 58 Stanford Law Review 989 at 1038.

phenomenon. It creates a powerful inducement for offenders to assist law enforcement authorities, with the death penalty hanging over them like the Sword of Damocles. It is understandable why a Government, faced with the scourge of drug trafficking, would resort to such a strategy. But should the Public Prosecutor – the guardian of the public interest – be drawn into this? To use prosecutorial discretion as an instrument of Legislative or Executive strategy – immunized from judicial review or constitutional challenge – is contrary to the original intent of the discretionary power and risks undermining the doctrine of separation of powers.