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PROSECUTORIAL DISCRETION IS A SHIELD NOT A SWORD

Kumaralingam Amirthalingam*

INTRODUCTION

The administration of criminal justice in the common law world depends on the exercise of discretion at various stages, including investigation, prosecution and sentencing.[1] Prosecutorial discretion assumes particular importance because of its gatekeeping function. It is the prosecutor who decides whether a person should be charged, and if so with what offence. The prosecutor may divert a suspect away from the criminal justice process by imposing certain conditions, secure guilty pleas from the offender through negotiation, and discontinue prosecutions. Prosecutorial discretion, long ago described as "the most dangerous power of the prosecutor,"[2] is always at risk of being abused for political purposes.

To guard against political interference in criminal prosecution, the responsibility for the initiation, continuation and disposition of criminal matters is vested in the Attorney-General as Public Prosecutor, who is expected to act independently of the Government in making prosecutorial decisions.[3] More than that, the Public Prosecutor is expected to act as a "minister of justice" and guardian of the public interest. But: *quis custodiet ipsos custodes*? There is always a risk that the Public Prosecutor may abuse this independence. The existing literature on public prosecution and the rule of law focuses on these twin concerns: namely, ensuring that the Government does not interfere with prosecutorial independence and that the Public Prosecutor does not abuse prosecutorial discretion.

This article explores a hitherto under-analysed problem that lurks at the intersection of prosecutorial independence and the rule of law. Prosecutorial discretion is meant to be used as a shield against political interference, but there is a risk that it may in fact be used as a cover for political interference or as a sword to over-criminalize.[4] It is used as a cover when the Government hides behind a veneer of prosecutorial independence in order to interfere with a prosecutorial decision. It is used as a sword when the Government deliberately, or sometimes inadvertently, co-opts it as a tool to enhance legislative or executive power over criminal matters, or to undermine individual rights.

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1 See general, A Ashworth, *The Criminal Process* (Oxford; New York: Oxford University Press, 4th ed, 2010) ch 1.

2 RH Jackson, "The Federal Prosecutor" (1940) 31 Journal of the American Institute of Criminal Law and Criminology 3 at 5.

3 Many jurisdictions have established independent Offices of Public Prosecutors headed by a Director of Public Prosecutions who is responsible for all prosecutorial decisions. However, the Director of Public Prosecutions is supervised by the Attorney-General who retains the power to intervene if necessary.

4 The expression "over-criminalize" is used loosely here to refer to efforts that indiscriminately extend the reach of criminal legislation or criminal law enforcement.

Cases in which it is used as a cover typically involve prosecutions which raise "national interest" considerations. The UK decision of *R (Corner House Research) v Serious Fraud Office*[5] ("*Corner House*") is a prime example. *Corner House* involved an investigation by the Serious Fraud Office ("SFO") into alleged corruption by a British corporation.[6] A foreign nation, whose interests were implicated in the investigation, threatened to stop defence cooperation with the UK if the investigations continued. Undeterred, the SFO pressed ahead with the investigations, despite repeated intervention by the Prime Minister and Cabinet. Eventually however, the SFO Director reversed his original decision and ordered the end of the investigations.

The Attorney-General then advised Parliament that the decision to cease investigations was arrived at independently by the SFO Director without any influence by the Government. While this may be true, on the face of it the SFO Director was clearly under pressure from the Prime Minister's Office and the decision was influenced by national interest concerns as conveyed by various political and Civil Service actors. However, by maintaining the rhetoric – some might even go so as far to call it a fiction[7] – that the decision was taken independently by the SFO, the Government managed to avoid democratic accountability for an outcome that it wanted and, at the very least, had the appearance of having had a hand in engineering.[8]

Cases in which it is used as a sword manifest themselves in one of three ways, although these ways are by no means exhaustive. Prosecutorial discretion may be used to justify over-reaching criminal legislation, to enable unfettered law enforcement action, or to avoid legislative responsibility for morally controversial laws with adverse consequence on individual rights. Examples illustrating each of these three ways are provided at the outset.

First, terrorism offences show how prosecutorial discretion may be used to justify a broad interpretation of a criminal provision in order to cast the net of criminalization more widely than necessary. For example, in *R v Gul*,[9] the Crown had argued that it would be safe to give the expression "terrorism" in the Terrorism Act 2006 a broad meaning – one that would include non-criminal activities – on the ground that no prosecution would be initiated without the sanction of the Public Prosecutor. The Supreme Court disagreed, highlighting that the province of legislation belonged to Parliament and not to the Executive. A brief excerpt from the judgment is reproduced here as it brings into sharp relief a key argument advanced in this article:

> The Crown's reliance on prosecutorial discretion is intrinsically unattractive, as it amounts to saying that the legislature, whose primary duty is to make the law, and to do so in public, has in effect delegated to an appointee of the executive, albeit a

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5 [2009] 1 AC 756.

6 The position of the Director of the Serious Fraud Office is comparable to the Director of Public Prosecutions in terms of the independence enjoyed and discretion powers wielded.

7 See, for example, P Stenning, "Prosecutions, Politics and the Public Interest: Some Recent Developments in the United Kingdom Canada and Elsewhere" (2010) 55 Criminal Law Quarterly 449 at 464.

8 The timeline of events set out in Appendix 1 shows the Government's incessant efforts to persuade the Director, SFO to reverse his decision.

9 [2014] AC 1260.

> respected and independent lawyer, the decision whether an activity should be treated as criminal for the purposes of prosecution.[10]

The second manifestation of prosecutorial discretion being used as a sword occurs when the Legislature consciously extends the inviolability of prosecutorial discretion from the initiation, conduct and disposition of criminal matters into the investigatory and sentencing arena. For example, under section 33B of the Misuse of Drugs Act (Cap 185) Singapore, a court may sentence a convicted drug trafficker to life imprisonment instead of imposing the mandatory death penalty if the Public Prosecutor issues a certificate attesting that the drug trafficker had provided substantive assistance in disrupting drug trafficking activities. This decision of the Public Prosecutor is treated in the same way as the constitutionally protected prosecutorial discretion, thus enabling the Executive to hang the death penalty over a convicted offender in order to extract information that can disrupt drug trafficking activities. Even if this is, on balance, acceptable law enforcement strategy,[11] it raises the question whether prosecutorial discretion should be used in this instrumentalist manner. It risks opening the door to the co-opting of prosecutorial discretion as a law enforcement tool in other circumstances, undermining the role of the Public Prosecutor as minister of justice.

The third example, illustrating the use of prosecutorial discretion to avoid legislative responsibility for morally controversial matters, is found in the assisting suicide cases. Although assisting suicide is an offence under the Suicide Act 1961, many terminally ill individuals from the UK travel with the assistance of loved ones to Switzerland where they can lawfully end their lives. Prosecutions almost never occur as it is rarely, if ever, in the public interest to proceed. Thus, assisting suicide in the UK, while *de jure* criminal is *de facto* decriminalised by the policies of the DPP. Nonetheless, anyone who assists suicide remains liable to prosecution and cannot know in advance whether they will be prosecuted.

To address the uncertainty, the House of Lords in *R (Purdy) v Director of Public Prosecutions*[12] ("*Purdy*") ordered the DPP to publish offence-specific guidelines on the exercise of prosecutorial discretion in order to give advance notice to individuals contemplating assisting suicide.[13] It is important to recall that prosecutorial discretion is intended to allow the Public Prosecutor to decide whether or not a prosecution is warranted in individual cases, based on past facts. It is not intended to prescribe proactively, and for general application, legal rules setting out the contours of criminal liability. There is a potential blurring of the line separating prosecutorial discretion and legislation.

Nothing in this article should be taken as an attack on the independence of the Public Prosecutor per se or the value of prosecutorial discretion. The purpose of this article is

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10 Id at [36].

11 Several judicial challenges against s33B(4) have failed, with the Singapore Court of Appeal upholding its constitutionality: *Nagaenthran a/l K Dharmalingam v Attorney-General* [2019] 2 SLR 216.

12 [2010] 1 AC 345.

13 For a detailed analysis of the *Purdy* decision and a novel argument based on distinguishing between prosecutorial systems and prosecutorial policy, see J Rogers, "Prosecutorial Policies, Prosecutorial Systems and the *Purdy* Litigation" [2010] Criminal Law Review 543.

to highlight a risk that the Executive or the Legislature may take an instrumental approach to prosecutorial discretion and the hallowed concept of prosecutorial independence, thereby undermining the separation of powers and threatening the rule of law.

This article is in two parts. The first part explains why the Prosecution must act independently of the Government when making prosecutorial decisions and why prosecutors must act as ministers of justice in order to safeguard public interest in the administration of criminal justice. It then goes on to consider the balance between prosecutorial independence and accountability. The second part analyses a set of cases to illustrate the potential for exploitation of prosecutorial discretion, while highlighting the complexities that exist at the intersection of prosecutorial discretion, democratic accountability and the rule of law.

PART I

THE PUBLIC PROSECUTOR AS MINISTER OF JUSTICE

Historically, the Attorney-General was the Public Prosecutor in England.[14] That position became muddied with the creation of the position of Director of Public Prosecutions ("DPP") in 1879,[15] re-designated in 1884 as Director of Public Prosecutions and Treasury Solicitor.[16] There was an attempt in 1884 to establish the DPP as the Public Prosecutor, independent of the Attorney-General, but it did not succeed.[17] The Prosecution of Offences Regulations enacted in 1946 reiterated that the DPP acted under the superintendence of the Attorney-General,[18] and, following Sir Hartley Shawcross's famous speech to the House of Commons in 1951,[19] it was clear that the Attorney-General had final control over criminal prosecutions and was accountable to Parliament. The Prosecution of Offences Act 1985, establishing the Crown Prosecution Service ("CPS"), confirms that the DPP is "to discharge his functions … under the superintendence of the Attorney-General."[20]

Although the Attorney-General therefore remains the Public Prosecutor, in practice it is the DPP who is responsible for exercising prosecutorial discretion in criminal matters. The Attorney-General does not interfere with the DPP's exercise of discretion except where issues of national interest are at stake or where the Attorney-General's consent is required. This model prevails in other major common law jurisdictions,

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14 In his statements to the Select Committee on Public Prosecutions, 1854-1856, Lord Chief Justice Cockburn stated, "The Attorney-General is, indeed, in theory the Public Prosecutor, and has so far the control over the proceedings in criminal cases that he has power by entering a *nolle prosequi* to stay all further proceedings in a prosecution." See, JLlJ Edwards, *The Law Officers of the Crown* (London: Sweet & Maxwell, 1964) p 358, n 97.

15 The Prosecution of Offences Act 1879 made it clear that the Director of Public Prosecutions acted under the superintendence of the Attorney-General.

16 Prosecution of Offences Act 1884.

17 See, JLlJ Edwards, *The Law Officers of the Crown* (London: Sweet & Maxwell, 1964) at 377, 387.

18 Id at 389.

19 House of Commons Debates Vol 483, col 683-684.

20 Prosecution of Offences Act 1985 s 3.

including Canada and Australia.[21] The reason for hiving off the prosecutorial functions is that the Attorney-General is the Government's principal legal adviser and often also a Member of Parliament. This makes it difficult for the Attorney-General to be truly independent of the Government; at the very least, it may create the appearance of a lack of independence.

Certain former British colonies have inherited a slightly different model, and it is appropriate at this point briefly to mention the position in Singapore, a jurisdiction from which some of the illustrative cases in Part II are drawn. Singapore does not have a separate Office of Public Prosecutions or an independent DPP. The Attorney-General remains the Public Prosecutor, with discretionary powers that are enshrined in the Constitution of the Republic of Singapore.[22] Unlike England, where the Attorney-General is a Member of Parliament, or Canada and Australia, where the Attorney-General is a Cabinet Minister, the Attorney-General of Singapore is an appointed official, who is part of the Executive and is not a Member of Parliament.[23] The Attorney-General is the Government's Legal Adviser,[24] but, as Public Prosecutor, acts independently of the Government.

Prosecutorial discretion is about choices that a prosecutor is entitled to make. In making their choices, prosecutors need to appreciate their multiple duties to the various stakeholders in the criminal justice process, principally the Government, the police, the victim, the accused and the community. These decisions involve difficult moral and political choices, requiring the prosecutor to act in a quasi-judicial capacity – as a minister of justice.[25] It has been suggested that the notion of the prosecutor as a minister of justice, exercising quasi-judicial functions, originated in the 19th century to "compensate for the unequal playing field that typically existed between prosecution and defence."[26] The idea was that the Prosecution should not take on the role of a partisan advocate in an adversarial system as that could result in an unfair trial between unequals. Even today, the playing field remains uneven in the vast majority of criminal

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21 Canada created the Public Prosecution Service of Canada ("PPSC") in 2006 and each Australian State and Territory as well as the Commonwealth of Australia has a Director of Public Prosecutions.

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

23 The Attorney-General is appointed by the President on the advice of the Prime Minister for a specified term or up to the age of 60. Article 35 (6)(a) provides that the Attorney-General may be removed from office on the advice of the Prime Minister, but "the Prime Minister shall not tender such advice except for inability of the Attorney-General to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour and except with the concurrence of a tribunal consisting of the Chief Justice and 2 other Judges of the Supreme Court nominated for that purpose by the Chief Justice."

24 Article 35 (7) provides that "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."

25 See generally, DS Medwed, "The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit" (2009) 84 Washington Law Review 35

26 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.

trials that do not involve affluent or corporate defendants. In many jurisdictions, suspects continue to be unrepresented and appear in person.

The paramount goal of the prosecutor must be to seek the truth and ensure that the guilty are convicted while the innocent are acquitted.[27] An adversarial mindset is unlikely to optimize this, as advocacy is not about truth-seeking but winning.[28] At the same time, the Prosecution, operating within an adversarial system, must put its case against the suspect effectively or risk undermining the system.[29] There is a delicate balance to be struck between the prosecutor's duty to present the case robustly and the ethos of an advocate, which is to "win at all cost". The minister of justice role assumes greater importance today with the enhanced, quasi-judicial role of the prosecutor in overseeing police investigations, dealing with victims, disposing of matters by way of stern warnings and pre-trial diversionary programmes,[30] entering remediation agreements, and providing inputs on sentencing ranges.[31]

Some writers have argued for a rebalancing of the minister of justice role in favour of a more adversarial approach, on the assumption that the playing field today is more level.[32] However, this misses a key point about this role. It is not only about levelling the playing field in court; it is about exercising prosecutorial discretion responsibly to achieve a just outcome and to preserve the rule of law. The minister of justice role and the rule of law serve as norms of "institutional morality guiding and legitimating public action."[33] They provide "navigational coordinates"[34] to guide the exercise of prosecutorial discretion. Crucially, the minister of justice role is intended to temper the adversarial, law enforcement function of the prosecutor in order to ensure that the public interest, including the accused's interests, are protected.

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27 D Grieve, "The Rule of Law and the Prosecutor" Speech at the Opening of the 18th Annual Conference of the International Association of Prosecutors, 9 September 2013, Moscow, Russia (https://www.gov.uk/government/speeches/the-rule-of-law-and-the-prosecutor, last accessed, 10 October 2018).

28 F Frankfurter, "Mr Justice Jackson" (1955) 68 Harvard Law Review 937 at 939, cited in K Crispin, "Prosecutorial Ethics" in S Parker & C Sampford (eds), *Legal Ethics and Legal Practice: Contemporary Issues* (Oxford: Oxford University Press, 1996) 171 at 172.

29 This concern was expressed extra-judicially by Lord Devlin: P Devlin, *Trial by Jury* (London: Stevens & Sons Ltd, 1956) 122-123.

30 See for example, J Jackson, "The Ethical Implications of the Enhanced Role of the Public Prosecutor" (2006) 9 Legal Ethics 35.

31 Although the Prosecution has traditionally had a limited role in this respect in the United Kingdom, it has come to accept that it has a duty to assist the court in avoiding appealable errors, and through its own appeals against lenient sentences. The Prosecution in Singapore plays a more active role in sentencing with the blessings of the court: 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-confererence-on-9-october-(101014---check-against-delivery).pdf, last accessed, 13 May 2019).

32 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.

33 PA Joseph, "The Rule of Law: Foundational Norm" in R Ekins (ed), *Modern Challenges to the Rule of Law* (Wellington: LexisNexis NA Limited, 2011) 48.

34 Ibid.

PROSECUTORIAL DISCRETION AND INDEPENDENCE

The defining moment in the history of the independence of the Public Prosecutor in the United Kingdom lies in the events leading to the fall of the Labour Government in 1924.[35] The Attorney-General had given consent to prosecute John Ross Campbell, the editor of a publication of the Communist Party of Great Britain, under the Incitement to Mutiny Act 1797. Following a meeting with the Prime Minister, who expressed the view that the prosecution was ill-advised for political reasons, the Attorney-General decided to discontinue the prosecution. Despite the Attorney-General's protestations that he had acted properly,[36] a scandal ensued when Cabinet documents were subsequently released, showing that the Government had given an express direction to the Attorney-General not to initiate or discontinue political prosecutions without the sanction of the Cabinet.[37]

Since then, prosecutorial independence has become an article of faith, with any intrusion into it viewed as sacrilegious. This has hampered reasonable debate on whether the public interest must always be determined independently by the Public Prosecutor. Surely, there will be some exceptional cases where the DPP cannot be better placed than the Government of the day to determine sensitive questions of international relations or national security. Ultimately, the Government should be held responsible for these matters. The present position is that the Attorney-General should be fully acquainted with all the relevant facts and political consequences, but must maintain independence in the final decision. This balancing act is articulated in what is referred to as the Shawcross direction, contained in a speech by the Attorney-General, Sir Hartley Shawcross, to the House of Commons in 1951:

> I think the true doctrine is that it is the duty of an Attorney-General, in deciding whether or not to authorise the prosecution to acquaint himself with all the relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other consideration affecting public policy. In order so to inform himself, he may, although I don't think he is obliged to, consult with any of his colleagues in the government. … On the other hand, the assistance of his colleagues is confined to informing him of particular considerations which might affect his own decision, and does not consist, and must not consist, in telling him what that decision ought to be. *The responsibility for the eventual decision rests with the Attorney-General, and he is not to be put, and is not put, under pressure by his colleagues in the matter. Nor, of course, can the Attorney-General shift his responsibility for making the decision on to the shoulders of his colleagues*.[38]

Some have questioned why the Public Prosecutor should take responsibility for a decision that ought to be taken by the Government.[39] The Shawcross direction is both

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35 See, JLlJ Edwards, *The Law Officers of the Crown* (London: Sweet & Maxwell, 1964) chs 10 & 11.

36 House of Commons Debates, Vol 177, col 613-614, 8 October 1924.

37 JLlJ Edwards, *The Law Officers of the Crown* (London: Sweet & Maxwell, 1964) at 213.

38 House of Commons Debates Vol 483, col 683-684 (emphasis added).

39 This was implicit in the question put by Ramsay McDonald, the Prime Minister of the Labour Government during the Campbell affair: "It is on record that the opinions of the Law Officers have been influenced to the extent of being altered and being reversed by the advice given to

pragmatic and principled, but it lends itself to legal fiction and avoidance of democratic accountability. This reality was noted long ago by a former Attorney-General of South Australia who put it bluntly:

> What I gradually came to see was the artificiality of the distinction between Cabinet response to consultation, and direction by Cabinet. … It is highly unsatisfactory that where Cabinet has made its view clear to the Attorney-General, it should nevertheless be able to escape accountability by resorting to a doctrine that the Attorney-General acts on his responsibility alone in deciding whether or not to prosecute.[40]

In politically sensitive cases where the Attorney-General and the Prime Minister do not see eye to eye, the principle of prosecutorial independence creates an alternate centre of executive power, posing challenges to democratic accountability. A recent high-profile Canadian illustration of this problem is found in the SNC Lavalin ("SNC") investigation and prosecution.

SNC was investigated for corrupt practices and fraud, including allegations that it had paid almost $50 million in bribes to foreign government officials and that it had committed related frauds totalling almost $130 million between 2001 and 2011.[41] The Royal Canadian Mounted Police brought charges against SNC for corrupt practices. Sometime after this, the Criminal Code (RSC 1985, c46) was amended to allow for remediation agreements.[42] Subsequently, SNC made representations to the DPP urging her to consider a remediation agreement instead of prosecution. Under a remediation agreement, SNC would acknowledge wrongdoing and pay an agreed penalty, allowing it to avoid prosecution. A conviction would render SNC ineligible to bid for Government contracts for 10 years, the economic consequences of which would potentially jeopardize almost 9000 jobs in Canada as SNC was a major employer, especially in Quebec.

The DPP decided to proceed with the prosecution. Concerned that prosecution of SNC would result in massive job losses, officials from the Prime Minister's Office intervened to persuade the Attorney-General to review the DPP's decision. Under the Director of Public Prosecutions Act 2006, the Attorney-General had the power to take over a prosecution or to issue directives to the DPP. However, the Attorney-General refused to use these powers and instead deferred to the DPP, arguing that the DPP's prosecutorial independence was sacrosanct. It should be noted that the Prime Minister's Office was careful to reiterate that the decision ultimately was for the Attorney-General

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them by the executive. Is that improper? ... Surely, every prosecution, especially of a political character, is undertaken in the interests of the state. Surely, every Law Officer who is undertaking a prosecution in the interests of the state must possess himself not only of guidance on technical law but must possess himself of guidance on this question, whether if a prosecution is instituted the effect of the prosecution will be harmful or beneficial to the state in whose interests it has been undertaken." House of Commons Debates, Vol 177 col 629.

40 LJ King, "The Attorney-General, Politics and the Judiciary" (2000) 29 Western Australian Law Review 155 at 163.

41 The charges were brought pursuant to paragraph 3(1)(b) of the Corruption of Foreign Officials Act (SC 1998, c34) and section 380(1) of the Criminal Code (RSC 1985, c C46).

42 The remediation agreement scheme was introduced in 2018 as Part XXII.1 of the Criminal Code (RSC 1985, c C46).

to make and indeed, the Attorney-General's independence was not in fact compromised.

Representations by the Government to the Attorney-General is to be expected in politically sensitive cases as part of the Shawcross exercise. The question is whether the representations cross the line to become improper interference with prosecutorial independence. It is debatable whether the Prime Minister crossed the line in the SNC case, especially when compared with the events surrounding the UK case of *Corner House.*[43] Nonetheless, following an ethics inquiry, the Ethics Commissioner found that the Prime Minister had acted improperly in attempting to influence the Attorney-General.[44] There were also calls to investigate the Attorney-General for unethical behavior following revelation that she had secretly taped a conversation between herself and the Clerk of the Privy Council, the transcript of which was subsequently released. The extract below suggests the Attorney-General had made a pre-emptive move, invoking comparisons with the Saturday Night Massacre during the recorded conversation:

> Clerk: Well … it is not a good idea for the Prime Minister and his Attorney General to be at loggerheads.
>
> AG: Well I feel that I am giving my best advice and if he does not accept that advice then it is his prerogative to do what he wants. … But I am trying to protect the Prime Minister from political interference or perceived political interference or otherwise.
>
> Clerk: Alright, I understand that … but he does not have the power to do what he wants … all the tools are in your hands so …
>
> AG: …Ok so then … so I am having thoughts of the Saturday Night Massacre here …[45]

The SNC saga illuminates both the error of treating prosecutorial independence as an end in itself,[46] and the danger of placing it on a pedestal, allowing it to be politicised. It raises questions of democratic legitimacy and public confidence, particularly when the DPP and the Attorney-General provide no explanation for the decision. It remains unclear why a remediation agreement was inappropriate in this case.[47] The individuals

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43 This decision is discussed below at text to nn 9-11 and nn 63-67.

44 Mario Dion, *Trudeau II Report 2019*, Office of the Conflict of Interest and Ethics Commissioner, August 2019 (https://ciec-ccie.parl.gc.ca/en/publications/Documents/InvestigationReports/Trudeau%20II%20Report.pdf#search=trudeau%20report%20II, last accessed, 8 May 2019).

45 Honourable Jody Wilson-Raybould, *Submission to the House of Commons Standing Committee on Justice and Human Rights*, 26 March 2019, p 17. The Saturday Night Massacre refers to the crisis that brought about the fall of the Nixon Presidency after President Nixon attempted to force his Attorney-General to fire the Special Prosecutor investigating him.

46 A former Ontario Court of Appeal judge once observed in extrajudicial comments on the role of the Attorney-General with respect to prosecutions, "Independence is not an end in itself, but it serves the rule of law…" M Rosenberg, "The Attorney-General and the Prosecution Function in the Twenty First Century" (2009) 34 Queen's Law Journal 813 at 825.

47 A challenge to review the DPP's decision on administrative law grounds failed, with the Federal Court holding that the decisions with respect to remediation agreements remained part of

responsible for SNC's alleged wrongful conduct are no longer in charge and SNC itself has put in place procedures to prevent such conduct. Prosecuting SNC may send a message, but no more than that which a remediation agreement would. The difference is that with the latter, Canadian jobs would not be lost.

It is arguable that in exceptional cases where "national interest" forms part of the "public interest" concerns at stake, the Shawcross exercise should be reversed. That is to say, instead of the Attorney-General making the final decision after consulting Cabinet members, the Government should be entitled to make the prosecutorial decision with the concurrence of the Attorney-General. The Attorney-General's role becomes one of oversight, ensuring that the Government's decision is defensible. This article does not underestimate the difficulty in determining the conditions under which national interest considerations should be determined by the Government: that question should be the subject of further research.

To offer some preliminary thoughts, it is critical to ensure that the proposed exception does not swallow the rule. Thus, the qualifying national interest must be strictly defined: at a minimum, it must pose a serious threat to national security or human lives, or to social and economic stability.[48] There must be no hint of partisan interests, and perhaps, there should be support for the decision from the leader of the Opposition. There should be published guidelines, and as far as possible there should be a transparent approach to decision-making.[49] This will go some way to prevent politicization of public prosecution and to preserving public confidence in the administration of criminal justice.

PROSECUTORIAL DISCRETION AND ACCOUNTABILITY

Transparency and accountability are critical safeguards to the proper exercise of prosecutorial discretion, and the UK CPS leads the way. Section 10 of the Prosecution of Offences Act 1985 requires the DPP to issue and keep updated a Code for Crown Prosecutors, setting out guidance on general principles to be applied when exercising prosecutorial discretion with respect to charging matters.[50] The Code, along with all guidelines on general matters and specific offences, is published on the CPS website.[51] In the general run of cases, prosecutors apply the Full Code Test, which involves two stages: evidential sufficiency and public interest. Under the first stage, prosecutors must be satisfied that there is sufficient evidence that is admissible, credible and

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prosecutorial discretion and not subject to judicial review in the absence of evidence of abuse of process – SNC-Lavalin Group Inc v Canada (Public Prosecution Service) 2019 FC 282.

48 Although the Criminal Code, following the OECD Anti Bribery Convention 1997, prohibits the consideration of "national economic interest" as a public interest consideration when exercising prosecutorial discretion, a distinction can be drawn between "national economic interest" and "social and economic stability". The latter is concerned with Governments sanctioning cross-border bribery as a business cost; the latter is about the economic and social impact on innocent individuals who are collateral damage.

49 K Roach, "The SNC Lavalin Controversy: The Shawcross Principle and Prosecutorial Independence" (April 5, 2019). Available at SSRN: https://ssrn.com/abstract=3367097 or http://dx.doi.org/10.2139/ssrn.3367097, last accessed, 16 November 2019).

50 The current version is Code for Crown Prosecutors 2018.

51 https://www.cps.gov.uk/prosecution-guidance, last accessed, 18 February 2019.

reliable, and which provides "a realistic prospect of conviction."[52] If the evidential stage is not satisfied, a prosecution should not be initiated. If it is satisfied, the prosecutor must then consider whether it is in the public interest to proceed.[53]

Guidelines help individual prosecutors to exercise prosecutorial discretion in a manner that is transparent and consistent. Internal review and judicial review processes provide some measure of accountability. The CPS has an internal review process to enable victims of crime to seek review of certain prosecutorial decisions.[54] At a more general level, CPS policy and practice are monitored and reviewed by the CPS Inspectorate, headed by a Chief Inspector who reports annually to the Attorney-General. Judicial review of prosecutorial decisions is permitted, but only minimally.[55] This makes prosecutorial discretion a dangerous power whose abuse strikes at the heart of Western ideals of the rule of law.

The classic statement on the rule of law in the English common law world may be found in the celebrated work of AV Dicey, who wrote that the rule of law was:

> the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; a man may be punished for a breach of law, but he can be punished for nothing else. It means, again, equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts …[56]

This description squarely raises the compatibility of discretion and the rule of law. Sir Jeffrey Jowell has argued that the existence of judicial review facilitates the coexistence of discretion and the rule of law. Drawing on the ideas of Lord Bingham,[57] Jowell identified four key aspects of the rule of law: legality, legal certainty, equality, and access to justice and rights.[58] Jowell recognized that discretion has a legitimate function in the administration of justice and does not necessarily result in arbitrariness, as long as discretionary power is "controlled by principles of good governance which themselves draw their authority from the rule of law (namely, its requirement that power … be exercised legally, rationally and fairly)."[59] The fourth aspect, "access to justice and rights," provides the cornerstone for Jowell's conception of the rule of law:

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52 The Code for Crown Prosecutors 2018, para 4.6

53 Here, the prosecutor is required to consider a series of general questions set out in para 4.14 of the Code, in addition to any specific guidance or policy issued by the DPP. See generally, J Rogers, "Restructuring the Exercise of Prosecutorial Discretion in England" (2006) 26 Oxford Journal of Legal Studies 775.

54 The Victims' Right to Review Scheme was introduced in 2013 following comments by the Court of Appeal in *R v Christopher Killick* [2011] EWCA Crim 1608.

55 *R v DPP, Ex p C* [1995] 1 Cr App R 136.

56 FG Brennan, "Role of the Legal Profession in the Rule of Law" in F Neate (ed), *The Rule of Law: Perspectives from Around the World* (London: LexisNexis, 2009) 108.

57 Lord Bingham, *The Rule of Law* (Allen Lane, Penguin Press, 2010).

58 J Jowell, "The Rule of Law: A Practical and Universal Concept" in J Jowell, JC Thomas & J van Zyl Smit (eds), *Rule of Law Symposium 2014: The Importance of the Rule of Law in Promoting Development* (Singapore: Singapore Academy of Law, 2015) at 4-6.

59 Id at 5.

> In fact, it could be said that perhaps the most important defining feature of a state based upon the rule of law is that a person in a rule of law state has the opportunity of challenging the government of the day with a reasonable prospect of success in an appropriate case.[60]

The ability to challenge an official decision with a reasonable prospect of success provides the accountability mechanism. It is essential that discretionary powers be subject to review and challenge. However, the scope for judicial review of prosecutorial discretion is modest as courts generally will not entertain an application to review the exercise of prosecutorial discretion except on very narrow grounds. Prosecutorial discretion thus acts like a black box, shielding decision-makers from review.

In England, the grounds meriting judicial review include situations where the Prosecution has acted in bad faith, abused its powers, or failed to comply with published guidelines as required under the Prosecution of Offences Act.[61] Further, courts have taken the view that while a decision not to prosecute may be subject to judicial review, a decision to prosecute should generally not be subject to judicial review as the matter would already be before the courts, which can then decide on its merits.[62] In Singapore and Canada, the grounds for review are even narrower, restricted to bad faith and unconstitutionality in the former and to abuse of process in the latter.[63]

At the end of the day, the balance between independence and accountability, and the coexistence of prosecutorial discretion within a rule of law framework, depend on a conglomeration of factors including prosecutorial ethics, prosecution guidelines, internal checks and judicial review. The near inviolability of prosecutorial discretion is necessary to ensure the independence of the Public Prosecutor, protecting it from undue interference by the Government, be it the Executive, the Legislature or the Judiciary. However, it can also be turned inwards, allowing the Government to hide behind, or to co-opt, prosecutorial independence to avoid democratic accountability for certain executive or legislative acts or omissions.

PART II

PROSECUTORIAL DISCRETION AS A SHIELD

In the general run of cases, the Government has no business interfering with the Public Prosecutor's decision whether to prosecute an accused person – a bright line can be drawn. Prosecutorial discretion acts as a shield against political interference, ensuring that the criminal law is used neither to persecute nor favour particular individuals – all are equal before the criminal law. However, some cases are so inextricably interwoven with political consideration and national interest that this line becomes blurred. This is

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60 Id at 6.

61 For a summary of the authorities, see *Kotova v Director of Public Prosecutions* [2015] EWHC 4111 (Admin) at [18]-[23].

62 *R v DPP, ex p Kebeline and Ors* [2002] 2 AC 326. See also, *R (on the application of Pepushi) v Crown Prosecution Service* [2004] EWHC 798 (Admin) at [49].

63 *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49; *R v Anderson* [2014] 2 SCR 167

where the Shawcross exercise is necessary, but as foreshadowed in Part I, there is an irreconcilable conflict between political reality and principle.

The challenge raises two questions. One – which is beyond the scope of this paper – is whether ultimately it should be the Public Prosecutor or the Prime Minister, as leader of the Government, who should make the decision and be held democratically accountable. This is a question that was in fact debated soon after the *Corner House* decision, with supporters of the argument on both sides.[64] The second question, which will be explored is whether the Shawcross exercise enables the Government to use prosecutorial independence as a cover to achieve an outcome without taking responsibility for it.

Corner House involved an investigation by the Serious Fraud Office ("SFO") into alleged corruption under the Anti-terrorism, Crime and Security Act 2001 against a British company, BAE Systems plc ("BAE"). The investigation touched on a valuable arms contract between the British Government and the Kingdom of Saudi Arabia, for which BAE was the main contractor. During the course of the investigation, BAE wrote to the Attorney-General warning that disclosure of sensitive information affecting Saudi interests would adversely affect relations between the two countries. The Ministry of Defence ("MOD") contacted the Legal Secretary to the Law Officers, advising that there was a public interest issue to be considered in proceeding with the investigation. The Legal Secretary took the view that the matter was within the SFO Director's discretion. Soon after, the Permanent Secretary of the MOD contacted the SFO Director with additional information, again requesting that he consider the public interest before proceeding.

The Director, with the advice of the Attorney-General, conducted a Shawcross exercise to solicit the views of relevant Government ministers in order to make an informed decision. After careful consideration of their views, the SFO Director decided that it was in the public interest to proceed. As the investigation drew closer to sensitive financial information, the Saudi authorities threatened to withdraw from bilateral counter terrorism cooperation and to end negotiations to purchase British fighter planes. This information was brought to the attention of the Legal Secretary and the SFO Director by the Cabinet Secretary and the Prime Minister. The Prime Minister, in a meeting with the Attorney-General said that while he "recognized that the supervision of the investigation was a matter for the Attorney-General … [he] … *considered this the clearest case for intervention in the public interest*."[65]

Following that meeting, the Attorney-General again met the SFO Director, who eventually decided to discontinue the investigation in the public interest. Throughout the saga, it was maintained by all parties that the decision was solely that of the SFO Director without any influence by the Government. Indeed, the Director was diligent in making his own inquiries before arriving at his decision. However, the detailed timeline of meetings and communication between the interested parties set out in Lord

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64 P Stenning, "Prosecutions, Politics and the Public Interest: Some Recent Developments in the United Kingdom Canada and Elsewhere" (2010) 55 Criminal Law Quarterly 449; K Roach, "Prosecutorial Independence and Accountability in Terrorism Prosecutions" (2010) 55 Criminal Law Quarterly 486.

65 *R (Corner House Research) v Serious Fraud Office* [2009] 1 AC 756 at 836 (emphasis added).

Bingham's judgment fairly raises some skepticism as to whether the Director's decision was as independent as claimed.[66] The Director himself was less sanguine about whether the rule of law had been respected, acknowledging that it had "been necessary to balance the need to maintain the rule of law against the wider public interest,"[67] implying a trade-off.

So, was *Corner House* the triumph of prosecutorial independence and the Shawcross doctrine or was it a political farce that allowed the Government to have its cake and eat it? In the final analysis, *Corner House* involved a complicated determination of national interest. A judgment call was made by the Government, which had all the intelligence; knowledge of risks and consequences; diplomatic channels for communication; and crucially, responsibility for the lives of British citizens. The SFO Director had no choice but to accept the Government's advice in reversing his original decision.

While it would be unsafe to allow the Government to override the DPP or the Attorney-General, cases such as *Corner House* and *SNC* challenge the Shawcross assumption that the Attorney-General must be solely responsible for the decision. As ruminated on earlier, in exceptional cases, it may be more appropriate in the interest of transparency and democratic accountability to force the Government formally to take ownership of the decision and be answerable at the ballot box. The problem with this is that it is impossible to delineate "exceptional cases," and the exception will likely eat up the rule.[68] Governments may prefer to take populist decisions rather than preserve the rule of law.

It is also unclear whether the ballot box would function as a proper check – voters may be less interested in the rule of law than in jobs. The SNC Lavalin scandal is instructive. Despite the widespread publicity about the allegations of inappropriate actions by the Prime Minister and the adverse finding by the Ethics Commissioner,[69] a poll conducted before the October election suggested that the scandal had not adversely affected the Prime Minister, with voters largely focused on other matters.[70] Indeed, the Prime Minister subsequently won the election, but was reduced to forming a minority government.

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66 See Appendix A.

67 *R (Corner House Research) v Serious Fraud Office* [2009] 1 AC 756 at 837.

68 K Roach, "Prosecutorial Independence and Accountability in Terrorism Prosecutions" (2010) 55 Criminal Law Quarterly 486 at 492-494

69 Mario Dion, *Trudeau II Report 2019*, Office of the Conflict of Interest and Ethics Commissioner, August 2019 (https://ciec-ccie.parl.gc.ca/en/publications/Documents/InvestigationReports/Trudeau%20II%20Report.pdf#search=trudeau%20report%20II, last accessed, 8 May 2019).

70 (Global News, 21 August 2019 (https://globalnews.ca/news/5792602/liberals-snc-lavallin-re-election/, last accessed, 8 November 2019).

PROSECUTORIAL DISCRETION AS A SWORD

Prosecution and national security

Prosecutions involving matters that are deemed to affect national security raise particular challenges for the prosecutor.[71] These prosecutions often involve international parties, cross-border transactions, official secrets, State intelligence, witnesses who need protection and complex trails of evidence. More importantly, the underlying philosophy in such cases tends to lie closer to that underpinning the crime control model than that underlying the due process model of criminal justice.[72] Criminal laws tend to be drafted broadly, enforcement powers tend to be generous, and procedural safeguards are often compromised. The prosecutor as minister of justice is placed in an invidious position balancing national interests against individual fairness. Two examples illustrate the claim in this article that prosecutorial discretion may be used inappropriately to extend legislative or executive reach.

The first comes from the terrorism cases. *R v Gul*[73] is a UK Supreme Court decision involving an appeal against conviction for the offence of disseminating terrorist publication contrary to section 3 of the Terrorism Act 2006. The appellant had uploaded videos of actual terrorist and martyrdom incidents, accompanying them with text praising the attackers and calling for others to follow their example. The issue on appeal was the definition of the expression "terrorism" in section 1 of the Terrorism Act 2006. The certified question was posed thus:

> Does the definition of terrorism in section 1 of the Terrorism Act 2000 operate so as to include within its scope any or all military attacks by a non-state armed group against any or all state or inter-governmental organization armed forces in the context of a non-international armed conflict?

The appellant argued that the section 1 definition had to be qualified as it over-extended the criminal law by including potentially lawful conduct. The Prosecution, recognizing that the law risked "criminalising activities which should not be prosecuted,"[74] argued that the requirement of the DPP's consent justified a broad interpretation of the definition.[75] The Supreme Court accepted that the expression "terrorism" used in the legislation had a broad meaning, citing the natural meaning of the statutory language and Parliamentary intention. However, it went on to warn against the danger of allowing prosecutorial discretion to become enmeshed in the legislative process, giving the Legislature *carte blanche* to enact wide criminal laws. In the Court's words:

> The Crown's reliance on prosecutorial discretion is intrinsically unattractive, as it amounts to saying that the legislature, whose primary duty is to make the law, and to

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71 See, K Roach, "Prosecutors and National Security" forthcoming in R Wright, K Levine & R gold (eds), *Oxford Handbook on Prosecutors and Prosecutions* (Available at SSRN: https://ssrn.com/abstract=3333325, last accessed, 8 May 2019).

72 This dualistic approach was first described by Herbert Packer in 1964. See, H Packer, "Two Models of the Criminal Process" (1964) 113 University of Pennsylvania Law Review 1.

73 [2014] AC 1260.

74 Id at [30].

75 Section 117 of the Terrorism Act required the consent of the Director of Public Prosecutions to proceed.

> do so in public, has in effect delegated to an appointee of the executive, albeit a respected and independent lawyer, the decision whether an activity should be treated as criminal for the purposes of prosecution. *Such a statutory device, unless deployed very rarely indeed and only when there is no alternative, risks undermining the rule of law.* It involves Parliament abdicating a significant part of its legislative function to an unelected DPP, or to the attorney-General, who, though he is accountable to Parliament, does not make open, democratically accountable decisions in the same way as Parliament. Further, such a device leaves citizens unclear as to whether or not their actions or projected actions are liable to be treated by the prosecution authorities as effectively innocent or criminal – in this case seriously criminal.[76]

In similar vein, developments in Singapore highlight how prosecutorial discretion may be employed as a strategic tool to enforce the criminal law with little or no judicial review. Singapore has long had the mandatory death penalty for selected offences, including drug trafficking.[77] In 2012, the Misuse of Drugs Act (Cap 185) Singapore ("MDA") was amended to replace the mandatory death penalty with discretionary sentencing for those whose involvement in drug trafficking was strictly limited to the role of courier.[78] Judges were given discretion to impose life imprisonment instead of the death penalty on couriers who received a certificate from the Public Prosecutor, attesting that the offender had "substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities within or outside Singapore."[79]

Significantly, section 33B(4) of the MDA provides as follows:

> 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.

This provision expressly restricts judicial review of a prosecutorial decision pertaining to a sentencing matter to the narrowest of grounds. The reasons for restricting judicial review of the general prosecutorial discretion to initiate, conduct and discontinue any criminal proceedings are well understood.[80] When a prosecutor exercises discretion to proceed, the matter comes before the court and judges retain control of the trial. When a prosecutor decides not to proceed, the suspect is not subject to the risks and consequences of the criminal justice system.[81] However, the decision not to issue a

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76 *R v Gul* [2014] AC 1260 at [36] (emphasis added).

77 The death penalty is imposed for trafficking or importing more than a prescribed quantity of specified drugs. Misuse of Drugs Act (Cap 185) Second Schedule.

78 Misuse of Drugs Act (Cap 185) s 33B modified the mandatory death penalty regime for couriers who were found guilty of trafficking drugs. Under s 33B(3)(b), a courier who was suffering from a mental impairment would be sentenced to life imprisonment instead of death.

79 Misuse of Drugs Act (Cap 185) s 33B(2)(b).

80 See the recent discussions in *DPP v H* [2018] EISC 32 at [51]-[61]; *The Attorney-General v Norberto Tome Francisco Teixera* [2018] JRC O72 at [26]-[28]. See also, *R (Chaudhry) v DPP* [2016] EWHC 2447 (Admin) at [35]-[38]; *R v DPP, Ex p Manning* [2001] QB 330 at [21]-[23]; *R v DPP, Ex p C* [1995] 1 Cr App R 136 at 140-141.

81 Unless there is a successful challenge to the DPP's decision and a prosecution is subsequently initiated, in which case the suspect is subject to the jurisdiction of the court.

certificate of substantive assistance under section 33B(2)(b) of the MDA condemns the offender to the death penalty.

Further, the Public Prosecutor is not required to give reasons for the decision not to issue a certificate.[82] Again, not having to give reasons may be justified in the context of the general discretion with respect to charging decisions. If a prosecutor has decided not to proceed or to proceed on a lesser charge for lack of evidence or for public interest reasons, it may actually cause more harm to disclose the reasons, which may unfairly taint the accused, endanger potential witnesses, or embarrass vulnerable third parties. These considerations are not present with respect to the issuance of a certificate of substantive assistance. Here, the main concern if the Prosecution were compelled to explain their reasons or if the scope of judicial review were too wide is that there would be a risk that operational intelligence and methods of the Central Narcotics Bureau would have to be disclosed, potentially compromising the law enforcement efforts of that agency.[83]

The Singapore Government has been transparent about its intention to use section 33B as a sword against drug traffickers rather than as a shield against the death penalty.[84] While section 33B(4) may not be unconstitutional,[85] it does raise rule of law questions about the role of the Public Prosecutor in the administration of criminal justice. The Public Prosecutor is meant to maintain an independent aloofness and act as a minister of justice. Yet, under section 33B, prosecutorial discretion is deployed as a strategic tool, hanging the threat of the death penalty over convicted drug traffickers in order to incentivize them to cooperate with the authorities.[86] It is important to bear in mind that the reason courts were traditionally reluctant to review prosecutorial discretion was because they recognized that it fell squarely within the prosecutorial function. Here, the discretion is used for intelligence gathering and sentencing.

The issues raised by section 33B of the MDA and sections 1 and 117 of the Terrorism Act 2006 highlight how prosecutorial discretion may be harnessed to expand the reach of the criminal law while avoiding democratic accountability and judicial review. The

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82 *Ramalingam Ravinthran v AG* [2012] 2 SLR 49 at [74]-[78]. See also, *R v DPP, Ex p Manning* [2001] QB 330 at [24]-[33].

83 See, *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222 at [66].

84 This was acknowledged in *Prabagaran a/l Srivijayan v Public Prosecutor* [2017] 1 SLR 173 at [37], in which the Court of Appeal noted that "the amendments are not primarily intended to spare certain couriers from the death penalty, but to disrupt the activities of drug trafficking syndicates by providing an incentive for offenders to provide information which would enhance the capabilities of law enforcement agencies in the war against drugs." See also, *Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89 (Mr Teo Chee Hean, Deputy Prime Minister and Minister for Home Affairs); *Singapore Parliamentary Debates, Official Report* (14 November 2012), vol 89 (Mr K Shanmugam, Minister for Law).

85 Challenges to the constitutionality of s 33B(4) have failed and the Court of Appeal has ruled authoritatively in *Nagaenthran a/l K Dharmalingam v Attorney-General* [2019] 2 SLR 216. Perhaps a sentence or two explanation of this decision would be helpful

86 The then Deputy Prime Minister and Minister for Home Affairs stated during Parliamentary debate of the bill: "All in all, it will create an atmosphere of risk and uncertainty in the organisation, because they do not know if one of them gets caught, whether he will reveal secrets that will then cause problems for all of them." *Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89 (Mr Teo Chee Hean, Deputy Prime Minister and Minister for Home Affairs)

following section examines how prosecutorial discretion may result in the undermining of the rule of law, this time by enabling the Legislature to avoid democratic accountability for morally controversial criminal laws.

Prosecution and public morals

Section 2(1) of the Suicide Act 1961 prohibits assistance or encouragement of suicide.[87] This provision has caused immense personal suffering to individuals who are terminally ill but are unable to end their lives themselves. Some of them seek the assistance of friends and relatives, or health care professionals to assist them to end their lives. However, rendering assistance exposes those individuals who do so to criminal liability. While prosecutions are almost unheard of, nonetheless there have been several challenges to the constitutionality of section 2 as well as to the guidelines governing the exercise of prosecutorial discretion.

The first significant decision was *R (Pretty) v United Kingdom*[88] ("*Pretty*") in which it was argued that section 2(1) of the Suicide Act 1961 was incompatible with article 8(1) of the European Convention on Human Rights, which guaranteed the right to respect for private and family life. This argument failed in the House of Lords,[89] which held that article 8(1) was limited to protecting the autonomy of individuals while they were alive; it did not create a right to die. A different view was taken by the European Court of Human Rights, which held that article 8(1) was engaged. However, the Court went on to hold that article 8(2) allowed for interference with that right where such interference was "in accordance with the law" and was necessary. In determining what was necessary and in accordance with the law, a wide margin of appreciation was given to States. Section 2(1) was thus justified as a matter of domestic law to protect vulnerable classes of individuals.

Like section 117 of the Terrorism Act 2006, prosecutions under section 2(4) of the Suicide Act 1961 require the consent of the DPP. This consent requirement was cited as a factor that saved the blanket prohibition on assisted suicide from being disproportionate.[90] However, this is a misguided view, as all the consent provision does is to prevent *private* prosecutions from being initiated.[91] Recall: the DPP *always* has discretion whether to initiate or discontinue a prosecution.

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87 Section 2(1) provides that a person commits an offence if (a) he or she does an act capable of encouraging or assisting the suicide or attempted suicide of another person, and (b) his or her act was intended to encourage or assist suicide or an attempt at suicide.

88 (2002) 35 EHRR 1.

89 *R (Pretty) v Director of Public Prosecutions* [2002] 1 AC 800.

90 (2002) 35 EHRR 1 at [76].

91 In the subsequent decision of *R (Purdy) v Director of Public Prosecutions* [2010] 1 AC 345 at [45]-[46], Lord Hope referred to five reasons for the consent requirements, gleaned from the Law Commission's Report, "Consents to Prosecutions" (1998) (Law Com 255(HC 1085) at para 3.33. Some of the reasons included consistency of practice; prevention of abuse; recognition of mitigation factors; and control of the criminal in its application to sensitive matters. However, the general discretionary powers enjoyed by prosecutors is sufficient to meet these goals. The only practical effect of the consent requirement is to prevent private prosecutions in certain categories.

It has been argued that section 2(1) should not apply to certain classes of people as a matter of law because it would be unconscionable to treat as criminal certain categories of assisted suicide.[92] Building on that argument, it has been further argued that the consent provision should be read as part of the definitional elements of the offence, making the DPP "a subordinate legislator by defining more precisely the conditions of criminal sanction."[93] This further argument was given judicial life in *R (Purdy) v Director of Public Prosecutions*[94] ("*Purdy*").

In *Purdy*, the House of Lords departed from its decision in *Pretty*, affirming that the article 8(1) right to respect for private life was engaged in the assisted suicide cases. The claimant wished to end her life by travelling to Switzerland to use the service of Dignitas,[95] an organization that provided assistance with end of life matters. However, she required her husband's assistance to travel. To ensure that her husband would not be prosecuted for assisting her, she sought information from the DPP as to the likelihood of consent being given to prosecute her husband. The DPP argued that the published Code for Crown Prosecutors contained sufficient information on how prosecutorial discretion would be exercised.

The House of Lords disagreed, holding that any law interfering with article 8 rights had to be "accessible and foreseeable." The general guidelines were found to be inadequate, and the House of Lords ordered that the DPP should "promulgate an offence-specific policy identifying the facts and circumstances which he will take into account in deciding, … whether or not to consent to a prosecution."[96] The Law Lords were careful to note that they were not dictating the contents of the DPP's policy, but merely holding that in order to ensure that the law was accessible and foreseeable, a clear, offence-specific policy was necessary. Lord Hope held that by virtue of section 10 of the Prosecution of Offences Act 1985, the DPP's Code for Crown Prosecutors, constituted law.[97] However, the Code did not satisfy the article 8(2) requirement that the law be "accessible and foreseeable." Thus, the House ordered specific guidelines on assisted suicide; by inference, the specific guidelines presumably also constitute law for the purposes of article 8(2).

Purdy compelled the DPP to do what the courts constitutionally were unable to do and Parliament politically was unwilling to do.[98] The DPP was forced into the legislative arena with no judicial or democratic accountability. The Commission on Assisted Dying made the following observation about *Purdy*:

> There is no doubt that the DPP has a public interest discretion not to bring a prosecution even if he is satisfied that the evidential test is satisfied. But that public interest test is normally used to deal with the exceptional individual case. By contrast, the guidelines provide a reason not to prosecute that applies equally to all. Or, to put it another way,

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92 R Tur, "Legislative Technique and Human Rights: The Sad Case of Assisted Suicide" [2003] Criminal Law Review 3.

93 Id at 8.

94 [2010] 1 AC 345.

95 http://www.dignitas.ch/?lang=en, last accessed, 8 February 2019.

96 [2010] 1 AC 345 per Lord Hope at [56].

97 Id at [47].

98 Note Lord Hope's opening observations in *R (Purdy) v Director of Public Prosecutions* [2010] 1 AC 345 at [26].

> they take a whole identifiable category of case out of the ambit of the criminal justice process. Currently, the decision about whether the law should be changed, in a contested area (contested in the sense there are strong views for and against law change) is not being made by the law-makers (Parliament), but by the DPP. … Thus the question of whether a category of persons will be prosecuted depends on the view of one official and that view could change when the DPP changes. The essence of the rule of law is that our society is 'ruled by laws not men'. The situation reached with the guidelines is that this basic tenet of the rule of law is broken.[99]

The practical effect of the *Purdy* judgment and the DPP's guidelines is the *de facto* decriminalization of assisted suicide within the parameters defined by the DPP. The non-prosecution regime for assisted suicide post-*Purdy* is unlike the general exercise of the discretion not to prosecute, where the decision is taken after the event and confined to the particular individual. For assisted suicide, the DPP has, in effect, given guidance to a general class of individuals as to when they may commit a crime for which they can expect not to be prosecuted.[100] As a matter of constitutional law, it is obvious that the DPP cannot, to use Lord Bingham's words, give a "proleptic grant of immunity from prosecution."[101] Lord Sumption in a later decision reiterates this point, emphasizing that the DPP's *Purdy* guidelines were not aimed at excluding categories of people from prosecution but were merely setting out relevant factors to be taken into account in individual cases to guide the exercise of prosecutorial discretion.[102]

What seems to be missed is the fact that assisted suicide requires the consent of the party wishing to commit suicide; otherwise, the matter become homicide for which there are other existing criminal provisions. The scope of the offence is narrowed to the point that any *bona fide* assisted suicide will come within the guidelines for non-prosecution; any non *bona fide* assisted suicide should be caught by other criminal laws concerning offences to the person.[103] The exercise of prosecutorial discretion in assisted suicide cases is fundamentally different from the exercise of prosecutorial discretion in most other offences. Take for example, the offence of theft. The DPP may well issue prosecution guidelines that apply to certain categories of people (young offenders) or actions (first time theft of a low-value item). However, this still leaves the vast majority of theft cases to be prosecuted. Not so with assisted suicide. Indeed, there has been no prosecution for assisting suicide despite a significant number of assisted suicides taking place.[104]

These concerns were debated in Parliament in an impassioned session in March 2012,[105] during which the House of Commons passed a motion to endorse the DPP's

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99 Lord Falconer, *The Commission on Assisted Dying* (London, 2011) at 285-286.

100 Supporters of the status quo argue that this guidance does not amount to decriminalization but simply sets out the conditions under which a prosecution will be initiated. The reality is that no prosecution has ever been initiated in these cases, thus effectively decriminalizing the only practically relevant category of assisted suicide, that is, by loved ones of the deceased.

101 *R (Pretty) v Director of Public Prosecutions* [2002] 1 AC 800 at [39].

102 *R (Nicklinson) v Ministry of Justice* [2015] 1 AC 657 at [244]-[246].

103 See below text at nn 125-126, for a similar situation with respect to s377A of the Penal Code of Singapore criminalizing homosexual acts

104 See below, text at nn 116-117.

105 Hansard (HC Debates), 27 March 2012, cols 1363-1440. The House explicitly refused to debate the legalization of assisted suicide, an issue which had been debated in Parliament on several

guidelines. However, it rejected a motion to place the guidelines in statutory form, which would have required Parliamentary action to amend the guidelines in the future. Notably, the Solicitor-General argued forcefully that placing the guidelines in statutory form would be an inappropriate fetter to prosecutorial discretion. Further, the Solicitor-General categorically stated that the DPP's guidelines did not constitute law – the law was as stated in section 2(1) of the Suicide Act 1961, under which assisted suicide remained a criminal offence. Thus, individuals who assist suicide but are not prosecuted pursuant to the exercise of prosecutorial discretion are treated as persons who have committed a crime but who are "forgiven,"[106] rather than as persons who have done no wrong.

While this debate was going on, another case was winding its way through the judicial system, eventually reaching the Supreme Court in 2015 – *R (Nicklinson) v Ministry of Justice*[107] ("*Nicklinson*"). *Nicklinson* was different from *Purdy* as it involved healthcare professionals rather than family members who potentially could be implicated in assisting suicide. Involving two separate cases, the key arguments were that the defence of necessity should be available to a charge of murder (in cases of voluntary euthanasia) or assisting suicide; that section 2(1) of the Suicide Act 1961 should be declared incompatible with article 8 of the European Convention on Human Rights; and that the DPP should issue further policy guidance to deal with healthcare professionals who assisted suicide. The necessity argument was abandoned, and a majority of five judges out of nine held that the court had the power to declare section 2(1) of the Suicide Act incompatible with the Convention by virtue of section 4 of the Human Rights Act 1998.[108] All the judges acknowledged the difficult policy choices inherent in legislating against assisting suicide.

The Court of Appeal, by a majority of 2-1, had ordered the DPP to expand the existing policy in order to give clearer guidance to healthcare professionals. The dissenting judge held that it was apparent from the DPP's submissions in court that the existing policy would not treat a healthcare professional differently from family members, despite the published policy's stating that if the individual assisting suicide were a healthcare professional, that would be a factor in favour of prosecution. The Supreme Court unanimously allowed the DPP's appeal, reiterating that it was not for the court to dictate the DPP's policy. Nevertheless, some of the judges expressed the view that while they were not going to order the DPP to revise the policy, they expected her to

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occasions (for a summary of Parliamentary debates on this issue between 2003 and 2017, see, *Conway, R (on the application of) v Secretary of State for Justice* [2018] EWCA Civ 1431 at [18]-[48]).

106 This dilemma between viewing assisting suicide as lawful and commendable against wrongful but forgivable was considered by Lord Brown in *R (Purdy) v Director of Public Prosecutions* [2010] 1 AC 345 at [86]. R Tur, "Legislative Technique and Human Rights: The Sad Case of Assisted Suicide" [2003] Criminal Law Review 3 at 8; A Duff, "Discretion and Accountability" in M Langer & DA Sklansky (eds), *Prosecutors and Democracy: A Cross-National Study* (Cambridge: Cambridge University Press, 2017) 9 at 31.

107 [2015] 1 AC 657.

108 Nonetheless, seven of the judges held that it would be inappropriate to do so given the wide margin of appreciation accorded to States.

do so in order to resolve the obvious confusion in the policy that had divided the Court of Appeal.[109]

Consider the current situation. Assisting suicide is a crime under section 2(1) of the Suicide Act 1961. Despite several challenges, the Supreme Court has upheld the validity of this section. Parliament has debated a bill to legalize assisted suicide and has voted against it.[110] However, it has also voted to give its endorsement to the DPP's *Purdy* guidelines, despite acknowledging that that in effect amounts to *de facto* decriminalization of assisting suicide.[111] Evidence provided in *Nicklinson* showed that there had been only one prosecution under section 2,[112] and of the 215 people who used the services of Dignitas between 1998 and 2011, not a single person who provided assistance was prosecuted.[113] A particular law that is not enforced undermines respect for the law as a whole. Learned Hand J observed in the context of homosexual offences:

> Criminal law which is not enforced practically is much worse than if it was not on the books at all. I think homosexuality is a matter of morals, a matter very largely of taste, and it is not a matter that people should be put in prison about.[114]

This is an opportune segue to an analogous story in Singapore with respect to section 377A of the Penal Code (Cap 224), a colonial-era provision criminalizing homosexual acts. By way of background, carnal intercourse against the order of nature with a man, woman or beast was a crime in Singapore under section 377. In 2007, section 377 was abolished to decriminalize anal and oral sex between heterosexual partners, but section 377A was retained to continue criminalizing homosexual acts between males. Several constitutional challenges were mounted against s377A, but failed.[115] Three new challenges are now before the court.[116] One of the new arguments is on the role of the Public Prosecutor in exercising prosecutorial discretion.

The issue has polarized the nation, and, in an attempt to appease both sides, the Government retained section 377A. However, during the debate on the Penal Code

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109 The DPP duly clarified the policy, which was duly challenged, unsuccessfully (*R (Kenward and Kenward) v DPP and HM Attorney General* [2016] 1 Cr App R 16. In November 2018, the Supreme Court declined to grant leave to appeal to reconsider whether section 2(1) of the Suicide Act 1961 violated art 8(1) of the Convention: *Conway, R (on the application of) v Secretary of State for Justice* [2018] UKSC B1.

110 The Assisted Suicide Bill, introduced in June 2015 was defeated in Parliament by a vote of 330-118.

111 Hansard (HC Debates), 27 March 2012, cols 1363-1440.

112 The facts were quite exceptional, involving an offender who had provided petrol and a lighter to a vulnerable person who was known to have suicidal intent. The victim suffered severe burns.

113 *Nicklinson* at [48].

114 Quoted in S Gilreath, *Sexual Politics: The Gay Person in America Today* (Ohio: University of Akron Press, 2006) 16.

115 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26; *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059.

116 R Kuhori, "Three Court Challenges Against s377A to be Heard in November" *The Straits Times*, 3 October 2019 https://www.straitstimes.com/singapore/courts-crime/three-court-challenges-against-section-377a-to-be-heard-in-november, last accessed 18 November 2019).

amendments, the Prime Minister assured Parliament that although section 377A would not be abolished, the law would not be enforced proactively.[117]

In 2018, there were renewed calls to abolish section 377A following an Indian Supreme Court decision holding section 377 of the Indian Penal Code unconstitutional.[118] Two former Attorneys-General waded into the public debate. One highlighted the danger of selective enforcement of criminal laws.[119] The other warned against perceived interference with prosecutorial independence by the Government:[120]

> We cannot have a crime which is not enforced. The Government should not tell the Public Prosecutor that some things are crimes but there will be no prosecution. This is a slippery slope that we should not go down.

All this prompted the incumbent Attorney-General to issue a public statement, distinguishing between the law enforcement practices and policies of the police on the one hand and those of the Prosecution on the other, reaffirming that the "[Public Prosecutor's] exercise of prosecutorial discretion has always been, and remains, unfettered."[121] The Attorney-General's position was that "where the conduct in question was between two consenting adults in a private place, … prosecution would not be in the public interest." However, it should be highlighted there is no need to rely on section 377A if the conduct involved a minor, was non-consensual or in public. There are various other criminal laws in place to deal with these situations. The Attorney-General's position amounts to *de facto* repeal of section 377A – although there is nothing to prevent him or his successor from reversing that policy at any time.[122]

Parliaments in both the United Kingdom and Singapore respectively have taken the view, rightly or wrongly, that assisted suicide and homosexual acts should remain crimes. Yet, in both cases, there is recognition that enforcing the law would result in injustice. Instead of confronting the moral and political challenges, and taking responsibility for penal policy, the Government shifted the responsibility to the Public Prosecutor. To reiterate: the Public Prosecutor has discretion whether or not to prosecute in individual cases. That discretion should not be used to provide a blanket immunity to certain categories of individuals or to abstain from enforcing the law, especially in cases where the stakes are so high. It may have been a pragmatic solution

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117 Singapore Parliamentary Debates, *Official Reports*, 23 October 2007, col 2401

118 *Navtej Singh Johar v Union of India* [2018] INSC 746.

119 VK Rajah, "Section 377A: An Impotent Anachronism" The Straits Times, 30 September 2018.

120 Walter Woon posted comments on an online forum supporting the repeal of s 377A (https://ready4repeal.com/who/, last accessed, 12 February 2019), echoing earlier public comments he had made: "So we have a very dangerous precedent here where the political authorities are saying to the Public Prosecutor — who is supposed to be independent — there are some laws that you don't enforce...I find that very uncomfortable." W Sim, 'Top Lawyers Debate Repealing s 377A at Human Rights Session' The Straits Times, 18 September 2014.

121 AG Lucien Wong, "Government has not Removed or Restricted Prosecutorial Discretion for Section 377A, Public Prosecutor Retains Full Prosecutorial Discretion" Attorney-General's Chambers, 2 October 2018 (https://www.agc.gov.sg/docs/default-source/newsroom-doucments/media-releases/2018/agc-media-release---public-prosecutor-retains-prosecutorial-discretion-for-section-377a_final.pdf, last accessed, 12 February 2019).

122 This was a concern expressed in the UK Parliament with respect to the DPP's policy on assisted suicide, which was rejected by the Solicitor-General as an unlikely risk (Hansard (HC Debates), 27 March 2012, col 1380).

in both cases, but it undermines the rule of law, more so when the "law" can be changed at the whim of the Attorney-General.

CONCLUSION

The Public Prosecutor must remain independent and have full discretion to decide whether to initiate or discontinue prosecutions in the public interest. This need for independence is even greater when the decision involves a political dimension, as Governments should never be allowed to weaponise the criminal law or to interfere in its enforcement for illegitimate reasons. There are myriad factors that go into prosecutorial decisions, and judicial review must of necessity be kept to a minimum. It is also acknowledged that the boundaries demarcating Prosecutorial, Executive and Legislative functions cannot be drawn in hard lines – some overlap is necessary to sustain a criminal justice framework that is sufficiently nuanced.

While strongly defending all of the above, this article has argued that there is a risk that prosecutorial independence may on occasion be exploited or misconstrued. Several scenarios were examined. First, the form – but not substance – of prosecutorial independence may be deployed to mask politically sensitive decisions when carrying out the Shawcross exercise, as seen in the *Corner House* case. This allows the Government to avoid democratic accountability by hiding behind the independence of the Public Prosecutor. Secondly, it may be invoked to enable legislative or executive over-reach, as seen in the terrorism and drug trafficking discussion. Thirdly, it may also be used as a smokescreen by the Legislature to avoid democratic accountability for morally difficult legislative choices, as seen in the assisted suicide and homosexual offences discussion.

The special protection afforded to prosecutorial discretion is for a very specific and limited purpose, namely to prevent political interference in prosecutorial decisions relating to the initiation, continuance or disposition of criminal prosecutions. It goes hand in hand with the role of the prosecutor as minister of justice and guardian of the public interest. At its core, it is meant to protect the citizen from the Government, not to enable the Government to use it to enhance the reach of the criminal law or to avoid accountability for its actions.

Appendix A

Date	Significant events in *Corner House*
29-11-2004	Serious Fraud Office (SFO) launches investigation into BAE for corruption.
14-10.2005	SFO writes to BAE seeking information pertaining to payments under the investigated contract.
7-11-2005	BAE writes to SFO advising that the investigation would harm UK-Saudi relations.
7-11-2005	Permanent Under-Secretary Ministry of Defence (MoD) contacts the Legal Secretary to the Law Officers alerting them to the public interest in this case.
15-11-2005	SFO writes to BAE pressing for more information.
15-11-2005	MoD calls SFO asking them to consider the "public interest".
30-11-2005	Cabinet Secretary reaches out to the Attorney-General (AG).
2-12-2005	AG and Director SFO agree to carry out a Shawcross exercise.
6-12-2005	AG carries out Shawcross exercise.
16-12-2005	Cabinet Secretary replies to AG with views of cabinet ministers highlighting the delicacy of the situation, but expressly acknowledging that the decision is for the Attorney-General to make.
19-12-2005	SFO case controller drafts note to Director highlighting importance of independent investigation and prosecution.
11-1-2006	SFO Director and officers meets Law Officers to discuss.
25-1-2006	Legal Secretary informs Cabinet that AG and Director SFO decided it was in public interest to continue.
29-9-2006	Cabinet Secretary writes to AG to give new information, include advice that the "public interest" had become more compelling.
30-9-2006	AG shows letter to Director SFO.
3-10-2006	Legal Secretary writes to Cabinet Secretary informing of AG's view that Saudi threats should not dissuade the investigation.
3-10-2006	Director SFO writes to Cabinet Secretary confirming that AG agreed case should continue.
30-11-2006	Director SFO has first meeting with Her Majesty's Ambassador to Saudi Arabia to get more information on the matter.
Early Dec	Director SFO and AG agree to a limited plea deal with BAE.
6-12-2006	Prime Minister (PM) informed about the deal.
8-12-2006	PM sends a personal minute to AG asking to reconsider the decision based on public interest.
11-12-2006	Director SFO meets Legal Officer; AG meets PM. AG starts to waver, asks whether there is sufficient evidence to prosecute.
12-12-2006	AG personally begins to review the case.
12-12-2006	Director SFO has third meeting with Ambassador who reaffirms the real threat to British lives
13-12-2006	Director SFO informs AG that following meetings with UK Ambassador to Saudi Arabia, he accepted the public interest concerns but remained convinced there was sufficient evidence to prosecute. Director SFO was asked to consider the matter overnight.

14-12-2006	Director SFO informs Legal Secretary he is stopping the investigation in the public interest. AG informs Parliament of the decision.