PROSECUTORIAL DISCRETION: A CRITICAL EVALUATION

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This article was written by Ms. Ng Sook Zhen, who was then Deputy Editor of the SLR in 2008. It was featured in Vol. 4, Issue 5 of that year.

William O. Douglas, the longest-serving Justice of the Supreme Court of the United State once mused: "Absolute discretion is a ruthless master. It is more destructive of freedom than of any man's other inventions." Indeed, while internal guidelines ensure that prosecutorial discretion is less than absolute in Singapore, the Public Prosecutor (official the Attorney-general on whose authority the Deputy Public Prosecutors act) is undeniably a very important actor in the local criminal justice system.

As Mr Winston Cheng, Deputy Public Prosecutor of the Attorney-General's Chambers admitted during a talk held in NUS law school on March 18 this year: "We have the sole discretion in the institution, conduct and discontinuation of criminal procedure."

This discretion operates on two-folds.

First, public prosecutors decide what to prosecute, looking at each crime committed on a case-by-case basis. The decision on whether to prosecute, as Mr Cheng noted, is "not for the sole purpose of obtaining a conviction".

"If a person is a first offender, is a student and is remorseful, you are not going to put him on a trial."

The second form of discretion – and often the unwilling result of the sheer volume of cases to be reviewed – is the length of time taken to bring a case to trial. The usual lag time between when an offence is committed and when it is prosecuted in court is estimated to be about one to two years, depending on the complexity of the cases.

But there is no limitation period for criminal offences locally, and public prosecutors may choose to prosecute a case well beyond the time after it was committed.

The case of *Chan Kum Hong Randy v Public Prosecutor* [2008] SGHC 20 (HC) [*Chan*], for instance, showed that long lag times are not rare occurrences. In *Chan*, six to ten years elapsed between the detection of the offences committed and the actual prosecution.

"As a result of the delay in the prosecution, the appellant faces the prospect of having to suffer not once but twice the pain and hardship of incarceration as well as the rigours of reintegration into a society," said Justice VK Rajah, who head the appeal. (*Chan* at [50])

And the worry about discretion does not just stop there. Currently there is little publicly available information about this discretion process, and the lack of transparency is fast growing into a pressing concern.

This issue was further highlighted in section 2 of the Workers' Party Manifesto 2006, which read: "The real power to determine the offender's sentence shifts from the Courts to the prosecution who will decide which to proceed on to produce the appropriate sentence. This encourages plea-bargaining which makes justice less transparent as the exercise of prosecutorial discretion cannot be reviewed or appealed against."

Although Associate Professor Ho Peng Kee, Senior Minister of State for Law had announced during the 2007 Budget Debate that more disclosure measures would be introduced, no official response has yet to be implemented.

Given unseen guidelines and unarticulated rationales, until more disclosure measures are in place, perhaps the sole comfort in prosecutorial discretion is our faith in the integrity of the people which operate the system.

As the former Attorney-General and now Chief Justice Mr. Chan Sek Keong emphasized in his speech during the 10th Singapore Law Review Lecture, delivered in 1996: "It is people who make a system fair and just, and not the reverse."