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MORALIZING SECTION 300(c) OF THE SINGAPORE AND INDIAN PENAL CODE: A CONCEPTUAL ANALYSIS

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"What is justice? To put something in its correct place.
What is injustice? To put something in the wrong place."
Rumi: Masnavi VI: 2596

I Introduction

SECTION 300(c) of the Singapore[1] and the Indian Penal Code, 1860 ostensibly is a technical provision on murder but its subtext is definitely ethical. This section, which only requires an intention to cause bodily injury, classifies an act as murder if the injury intentionally inflicted is sufficient to cause death in the ordinary course of nature. 'Morality' of an offence is important in the manner in which an offence is labeled, the severity and proportionality of the sentence to the criminal act and intention of the offender, the substantive, ethical and political role of the law that the offence is meant to convey.

This paper seeks to examine the morality of section 300(c) of both jurisdictions by examining the following concepts:

i) The philosophy of deterrence espoused in section 300(c);
ii) Hart's 'moral minimum' and principle of fair labeling;
iii) The principle of autonomy and correspondence;
iv) Problems in inferring intention under section 300(c);
v) Relevant murder provisions of the French Penal Code, Livingston's Louisiana Code and the English criminal law from

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1. S. 300(c) of the Singapore Penal Code is in *pari materia* with section 300(c) of the Indian Penal Code, 1860.

which drafters of the Indian Penal Code drew their inspiration; and

vi) Resemblance of section 300(c) to Hammurabi Code of Laws.

The ideology of section 300(c)[2] does not resonate with traditional concepts of criminal responsibility. Actually, section 300(c) is an anomaly. Is it morally right to construct a serious offence by coupling the criminal intention of a minor offence with the consequences of the criminal act? Section 300(c) fails to explicit the moral distinctions, which should be reflected in the law and treats killing with an intention to cause only a bodily injury a distinct homicide offence. Defining 'morality' or a 'moral good' has always been a difficult matter for various reasons. Some would ascribe it to its inherent pluralistic nature whilst others would put it down to the way society perceives morality at different times of civilization. However, there are fundamental moral goods that are universally recognized and accepted. But the fact remains that morality has its own moral mazes and moral panics and perhaps that is the case with section 300(c).

II Sections 299 and 300 of the Singapore Penal Code

Section 299[3] of the Singapore Penal Code defines culpable homicide whilst section 300[4] defines murder as a subset of culpable homicide. Section 300 is meant to deal with aggravated forms of culpable homicide deserving the label of murder. The section spells out four distinct types

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2. Any reference to section 300(c) shall mean the provisions of both jurisdictions, unless otherwise stated.

3. S. 299 of the Singapore Penal Code reads thus. "Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

4. S. 300 of the Singapore Penal Code reads thus. "Except in the cases hereafter excepted culpable homicide is murder -

(a) if the act by which the death is caused is done with the intention of causing death ; or

(b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death ; or

of *mens rea* peculiar to the Penal Code. Liability for clauses (a) and (b) of section 300 may be said to be based on moral culpability of the accused, thus it is subjective in ascribing criminal responsibility. Clauses(c) and (d) of section 300 objectivized as criminal responsibility are based on consequences of the criminal act.[5] In particular, for clause (c) murders, an accused having caused death, (i) need only to have an intention to commit bodily injury; and (ii) is not required to intend or know the fatal consequences of his criminal act.

Whether the injury falls within the ambit of clause (c) is determined objectively by reference to medical evidence. However, all four subsections carry the label of murder and mandatory death penalty and the equivalent section in the Indian Penal Code gives the judge a discretion to sentence the convict to life imprisonment *in lieu* of the death penalty.[6] The subtext of clause (c) is ethical. An intentional injury resulting in fatality in the ordinary course of nature is not to be condoned regardless of whether the accused intends, knows or foresees the consequences. Hence, labeling clause (c) criminal acts as murder could only have been motivated by deterrence and/or retributive ideologies.

III Philosophy of deterrence espoused in clause (c) of section 300 of the Indian Penal Code

The Indian Penal Code drafted by Lord Macaulay, a Benthamite, was further refined by Sir Barnes Peacock and the members of the Indian Law Commission.[7] Generally, the provisions therein encapsulate the deterrence ideology, some more than the others. Clause (c) of section 300 would be a classic exponent of the deterrence ideology. The deterrence theory behind clause (c) appears to be that applying harsh levels of punishment prevents and controls criminal acts of the nature outlined in that provision. Jeremy Bentham, the founding father of deterrence theory was principally of the view that humans were rational and, therefore, he

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(d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid."

5. M. Sornarajah, "The Definition of Murder under the Penal Code" 1 *Sing JLS* (1994).

6. S. 302 of the Indian Penal Code, 1860, reads thus: "Whoever commits murder shall be punished with death or imprisonment for life, shall also be liable to fine."

7. R. Cross Crim LR 524 (1978).

was motivated to obey the law due to threat of punishment as one wanted to avoid pain and maximize pleasure.[8]

There is an assumption by the drafters of the Code and policy makers that utilitarian values associated with crime control and prevention drives criminal justice behaviour. However, 150 years into the birth of the Indian Penal Code, there is no empirical data to suggest that that is the case. The deterrence philosophy has its own set of issues. *Firstly*, Bentham's theory of deterrence is based on the assumption that human beings act rationally and that they comply with laws due to the threat of punishment and not necessarily due to the intrinsic goodness of law. It is a fact that human beings are not always driven by pain and pleasure. It is often the case that an offence is committed when the offender fails to act rationally. Thus Bentham's deterrence theory ceases to be effective when individuals act irrationally.[9] *Lim Poh Lye*,[10] *Tan Cheow Bock*,[11] *Ow Ah Cheng*,[12] *etc.* are some examples of offenders who did not act rationally. Even Bentham conceded to the inherent limitations of his assumptions made on human behaviour.[13] If the philosophy of clause (c) of section 300 is premised on the assumption of rational behaviour, then the clause *per se* or its punishment cannot be effective and legitimate. *Secondly*, punishment can only have a deterrent effect, if the offender is mindful of the consequences[14] of his criminal act at the relevant time. Where intention, knowledge or foresight of consequences is absent,[15] how does one deter

8. For Bentham, there was only one moral principle, the principle of utility. Simply put, whenever there is a choice to be made between alternative actions or social policies, one must choose that which produces what Bentham called 'the general good' or the greatest happiness of the greatest number. His moral compass was one based on happiness and his concept of morality did not make any reference to a code of divine nature or rules. Much of Bentham's reform did not succeed for this reason alone.

9. Meaning the individuals are not driven by the equations of pleasure or pain or the equation it did not even enter their consciousness at any point in time or were of the view that that they could avoid detection.

10. *PP* v. *Lim Poh Lye* [2005] SGCA 31.

11. *Tan Cheow Bock* v. *PP* [1991] SLR 293.

12. *PP* v. *Ow Ah Cheng* [1992] 1 SLR 797.

13. *Crime, Reason and History* (London, 2nd ed., 2001).

14. This would cover both factual and legal consequences.

15. For s. 300(c), the offender need not have knowledge or foresight that his act would result in fatality. This will be discussed further when one looks at direct and oblique intent.

the act? Since a clause (c) offender is not required to have intended, known or foreseen the fatality of the bodily injury, the effectiveness of deterrence as a form of governance is questionable. Deterrence cannot solely be based on punishment. The assumption that human behaviour is driven only by pain and pleasure is simplistic. Deterrence is dependent on multiple factors such as social environment, nature of the offence, risk of detection and certainty of prosecution, social stigma attached to the offence and certainty of punishment.[16] For punishment to be effective, these factors must be considered. Besides, punishment levels that fail to commensurate with moral culpability of the accused loose moral credibility. Punishment can only become an effective deterrent if the nature and degree of punishment is proportional to the moral culpability of the accused.[17] This is not the case with clause (c) of section 300.

All of the above instances only illustrate that punishment having a polysemic quality should be understood properly to be used as a deterrence tool. Various effects and meanings of punishment must be considered. The simplistic stand that all human beings act rationally must be rethought or banished altogether. It may have worked in the 19th century but to be bound to such views in this day of evolving criminal justice theories and criminological concepts is but naïve. These arguments apply to all provisions which base deterrence as its philosophy but more so for a provision that carries a mandatory death penalty which is the case with clause (c) of the Singapore Penal Code. Under clause (c), punishment is designed to fit the crime and not the criminal. Embracing an objective theory of liability, it supposedly seeks to reduce crime in society by attempting to mould individuals to accepted standards of societal conduct.[18] This philosophy though resonated with theories of retribution and general deterrence, fails to take into account the Benthamite attribute, which is to fit the punishment to the criminal.

Lack of proportionality in section 300(c)

It is indubitable that there is a lack of proportionality between

16. J. Norberry, "Environmental Offences : Australian Responses" in D Chappell and P Wilson (eds.), *The Australian Criminal Justice System : The Mid 90s* 164 (1994). This was observed by the writer to be the position with respect to environmental violations. However, the argument is just as tenable with respect to other violations.

17. Victor V. Ramraj, "Murder without an intention to kill", *Sing JLS* 560 (2000).

18. The purpose here is to educate society into a knee jerk reaction.

restricting individual liberty and preventing harm to society in clause (c). For Bentham, individual liberty was sovereign and should only be interfered to the extent of preventing harm to society.[19] Obviously, this is not the case with clause (c). It is tenable that harm to society could be prevented and general welfare of the people promoted just as well by incarcerating the offender for a life term or otherwise. Insofar as Singapore is concerned, the implications on state resources should be life imprisonment instead of the mandatory death penalty that currently exists. Nonetheless, it is important to note that clause (c) of the Indian Penal Code allows the judge a discretion to sentence the convict to life imprisonment as opposed to the mandatory death penalty.

In India, death penalty is reserved for the "rarest of the rare" cases.[20] Hence, death sentence would be imposed where murder is committed with inhuman brutality, in a deliberate or diabolical or revolting or dastardly manner, which would arouse intense and extreme indignation of the community.[21] In considering the appropriate punishment for section 300 murders, the Indian courts have rightly taken into account the factual matrix of the case, including the context in which the crime was committed, history of relationship between the accused and the victim, background facts and the motive of the accused person.[22] However, the Indian courts have consistently made it clear that the passing of the death penalty must elicit the greatest concern and solicitude of the judge because that is one sentence which cannot be recalled.[23] In *Sunil Batra*,[24] it was observed by the constitution bench of the Supreme Court that, "[T]he scheme of the Indian Penal Code, read in light of the Constitution, leaves no room for doubt that reformation, not retribution, is the sentencing lodestar."

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19. See Mary Warnock on Utilitarianism; On Liberty; Essay on Bentham; and selected writings of Jeremy Bentham and John Austin (1977).

20. *Dayanidhi* v. *State of Orissa* (2003) 9 SCC 310.

21. *Bikas Chatterjee* v. *Union of India*, I (2005) SLT 159; *Shiv Ram* v. *State of U.P.*, 1998 Cri LJ 2259; *Mohd. Chairman* v. *State,* 1998 Cri LJ 3739 (Del).

22. *Chhota Singh Hira Singh* v. *State*, AIR 1964 Punj. 120; *Francis alias Pornan* v. *State of Kerala*, AIR 1974 SC 228; *State of Bihar* v. *Ram Padarath Singh*, 1998 Cri LJ 343 (SC).

23. *Shankarlal Gyarsilal Dixit* v. *State of Maharashtra*, 1981 Cri LR 616 (SC).

24. *Sunil Batra* v. *Delhi Administration* (1978) 4 SCC 494.

IV Hart's moral minimum and principle of fair labeling

Generally, public acceptance of a law or system of rules is facilitated when it is morally acceptable or attractive.[25] HLA Hart saw an essential connection between law and morals. According to him, there must be a minimum content of natural law/morality in a legal system otherwise its validity as law or as a system of rules is questionable.[26] For Hart, rules conforming to principle of autonomy[27] or acts contrary to basic moral principles[28] satisfy the minimum moral content required of a law and hence are morally right. These rules emanated as a result of the need to protect basic rights; personal or property for basic survival when civilization was at its incipient stage of evolution. Having regard to the principles of fair labeling, autonomy and correspondence, it is debatable whether clause (c) of section 300 has a minimum moral content.

(a) Principle of fair labeling

In considering whether clause (c) has a minimum moral content, one must consider the manner in which the offence is labeled and the appropriate punishment accorded to it. The labeling of an offence must be morally fair. One of the basic functions of criminal law is not only to express the fact of wrongdoing but also the degree of criminal doing.

The principle of fair labeling dictates that crimes must be classified according to the type and the degrees of wrongdoing to reflect the nature and seriousness of the crime for various reasons.[29] *Firstly*, this serves to educate the public in reinforcing social standards. *Secondly*, the labeling reflects the common norms in society and hence where there are distinct forms of wrongdoing, the offence should be reflected separately to ensure proportionality and fairness to individuals. Accused persons must be labeled and punished in proportion to their wrongdoing.

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25. There may be issues as to what constitutes morally attractive given its pluralistic nature. However, once the boundaries are ascertained, it is indubitable that it facilitates its acceptance provided the society is inclined to the morality the law is promoting or enforcing.

26. See R Dworkin, *The Philosophy of Law* 17 (Oxford University Press, 1982).

27. The autonomy principle gave rise to the development of *mens rea* as an essential element in offences.

28. Such as laws against murder, violence, grievous hurt, *etc.*

29. Andrew Ashworth, *Principles of Criminal Law* 88-89 (Oxford Publishers, 5th ed., 2006).

However, this is not the case with section 300. The section treats different forms of wrongful conduct under a single label of murder.[30]

In particular, clause (c) does not fit into the traditional mould of intentional killing with malice aforethought or vicious will. It would come within the classification of manslaughter, second-degree murder or culpable homicide or crimes of violence but not murder historically seen, given the offender's intention only to cause bodily injury. Nonetheless, it is labeled as murder with mandatory death penalty in Singapore, the maximum sentence penalty meant to convey the seriousness of the crime. The labeling of clause (c) is simply out of sync with traditional label of murder.

It also fails to reflect the distinct degrees of wrongdoing between murder, culpable homicide and offenses against person. An offender who had injured another fatally with intention only to cause bodily injury can come within the definition of section 300(c), 299(2) or provisions relating to non-fatal offences against person in both Codes.[31] Generally, these offences would be regarded distinct but given the fine distinction between the three categories of offences and the exercise of prosecutorial discretion, it becomes difficult to assess when an offender will be charged under clause (c) for causing bodily injury with intention.

The aforementioned problem is further accentuated by lack of proper distinction between section 300(c) murder and 299(2) culpable homicide. An act caused with an intention to cause bodily injury resulting in fatality can come within section 299(2) culpable homicide or 300(c) murder. The *mens rea* for section 299(2) and section 300(c) is coterminous. The only difference between the two provisions is the degree of probability. This is a very subtle distinction and a hard one to make given that a decision is often based on inferences drawn. However, the punishment for the

30. See M. Warsik who has expressed similar views with respect to the width of murder in the context of mandatory life imprisonment in English Law. He takes the view that mandatory life sentence can only have moral authority if it is confined to the homicide offence with the highest degree of fault. M, Warsik "Sentencing in Homicide" in A. Ashworth and B Mitchell et.at.(eds.), *Rethinking English Homicide Law* 192 (2000). The Law Commission for England and Wales, *A New Homicide Act for England and Wales*? Consultation Paper no. 177 (London, 2005) as a matter of fact takes this view and had proposed a three tier structure of first and second degree murder and manslaughter. The latter two offences have a discretionary sentence structure as opposed to first degree murder which carries a mandatory life imprisonment.

31. See s. 322 of the Singapore and the Indian Penal Code, 1860.

respective provisions differs between death penalty and an imprisonment term for life. In that way, India's segregation of "rarest of rare" murder cases for death penalty attempts to morally distinguish between the different degrees of "murder" in section 300.

(b) *Mens rea* and principle of autonomy

Section 300(c) would be jurisprudentially flawed in Hart's context as it fails to recognize man as a moral agent responsible for his conduct. The juridical basis for having *mens rea* in an offence stems from the fact that a man traditionally seen as a moral agent exercising reason control and will over his acts should only be punished when that choice, reason and control is exercised in committing a crime.[32]

The rationale being that in exercising his free will a man voluntarily assumes responsibility for what is willed as he has chosen his behavior and *its consequences*, whether intentionally or knowingly risked or brought out.[33] For those who see law as a moral force, this basis of liability arises from only punishing what Roscoe Pound would term as "vicious will".[34] It has been said that the principle of autonomy may be sidestepped only in instances where the act of the offender is said to have significantly crossed the moral threshold.[35]

Clause (c) of section 300 punishes an offender for unintended, unknown or unforeseen consequences of his act.[36] The principle of autonomy prescribes the need to deal with an offender appropriately to the extent he has exercised the 'vicious will'. Would mere intention to cause bodily injury without appreciation of the fatality of the wound constitute vicious will sufficient to result in a conviction for murder warranting the death penalty? Punishment in this context is seen as a statement of collective morality and/or an embodiment of current sensibilities or a signal failure as some would call it.[37]

Can the existence of clause (c) of section 300 be justified on the basis that it seeks to deal with criminal acts that have crossed the moral threshold?

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32. This concept is based on the principle of autonomy, which espouses the idea of respect for individuals as rational, choosing individuals.

33. *Supra* note 29.

34. Often known as the malice.

35. *Supra* note 29 at 158-63.

36. It would appear that the accused is being punished for not foreseeing the fatal consequences of his act.

37. David Garland, *Punishment and Modern Society* 287 (Oxford Publications, Clarendon, 1990).

Can the offender be regarded as having crossed the moral threshold where he chooses to use force on another by causing bodily injury and his lack of knowledge of the fatal consequences does not count as sufficient moral weight? If so, it would appear that moral threshold is benchmarked against harm against society as opposed to offender's state of mind or foresight of consequences, reflecting the Latin maxim, "*versari in re illicita*".[38] This position was clearly endorsed in *Virsa Singh*,[39] by Vivian Bose J when he stated that none should have the license to go round inflicting bodily injury which results in death and then to assert that he did not intend death as a consequence. This concept of morality appears to be even a deviation from the then French Penal Code, the Livingston Code of Louisiana, English law and perhaps Scots law[40] from where the authors of the Code supposedly drew their inspiration.

There are a couple of issues with section 300(c) *versari in re illicita* reasoning: *Firstly*, it takes a narrow view of criminal responsibility or moral culpability in that an offender is responsible for murder when he only intended bodily injury and did not intend or knowingly risk a fatal consequence. It was not a conscious choice. Concept of morality only make sense if reference is made to the act of the individual as opposed to the consequences of that act, unless one is asserting that the accused ought to have foreseen or known that his act/s will result in fatal consequences and hence should have abstained. Seen in this way, section 300(c) seems to punish an accused for not foreseeing the consequences of his criminal act/s. This is unsatisfactory given that the Code signaled a movement from the foresight issues that plagued the English law then. Besides, if the juridical basis of section 300(c) was really one of deterrence, educative or otherwise, the public or the individual wanting to commit a crime within the meaning of section 300(c) must have knowledge, intention or foresight of consequences of their act so as to be able to desist from such conduct. One cannot be deterred from committing murder if one does not know, intend or foresee the consequences of the act.

Secondly, this is not an argument for exoneration of the accused as the accused may still be under a charge of culpable homicide or for voluntarily

38. Anyone who transgresses criminal law should take responsibility for consequences not expected.

39. *Virsa Singh* v. *State of Punjab*, AIR 1958 SC 465.

40. Scots law does cover reckless murder. Current interpretation of s. 300(c) does bear resemblance to this.

causing injury[41] or grievous hurt.[42] To charge an individual with voluntarily causing injury or grievous hurt would be consistent with the correspondence principle discussed hereafter. In failing to take into account the principle of autonomy, section 300(c) fails to give fair warning to an offender the possibility of conviction for murder where *mens rea* is merely that of an intention to cause bodily injury. Fair warning of an offence allows a potential offender an opportunity to regulate his conduct accordingly.[43]

The need to deviate from traditional notions of criminal liability to such an extent may have been necessitated by the Machiavellian theory and/or, as in the case of Singapore, the need for a crime free society to build a strong economic substratum to facilitate the nation's growth. Even if so, could these be labeled as possible moral arguments to justify dilution of the traditional concepts of *mens rea* for an offence of murder that carries mandatory death penalty? The Machiavellian theory, though may have some moral weight, fails to deal with the issue of proportionality in sentencing. Besides, in the case of Singapore, the nation having achieved an advanced status economically and socially, is it still possible to defend the morality, if any, of 300(c)?

It is common knowledge that clause (c) of section 300 is a commonly invoked provision.[44] Clause (c) only requires a basic intent to commit bodily injury. Evidentially, it is easier to prove the intention of a broader offence than a specific intent to cause death[45] or intent to cause bodily injury, which an accused knew, is likely to cause death.[46]

(c) The correspondence principle

Thirdly, section 300(c) morally fails on Hart's logic as it fails to adhere

41. See s. 321 of the Singapore Penal Code and the Indian Penal Code, 1860.

42. See s. 322 of the Singapore Penal Code and the Indian Penal Code, 1860.

43. This position was taken in *Sunday Times* v. *UK* (1979) 2 EHRR 245, where it was stated that, "[A] norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if needed be with appropriate advice – to foresee, to a degree that it is reasonable in the circumstances, the consequences which a given action may entail."

44. For instance, in Singapore, in *Ow Ah Cheng, supra* note 12, though the prosecution charged the accused under s. 300(c), it was stated in evidence that the accused person had the requisite intention to kill the victim. However notwithstanding prosecutorial assertions, the accused was charged with s. 300(c) as opposed to s. 300(a) of the Singapore Penal Code as the latter is more difficult to prove.

45. S. 300(a) of the Singapore Penal Code and the Indian Penal Code, 1860.

46. S. 300(b) of the Singapore Penal Code and the Indian Penal Code, 1860.

to the correspondence principle. By this principle, *mens rea* of an offence must correspond with the *actus reus* of that offence. Put it simply, to constitute the offence of murder under this principle, the accused must have the *mens rea* to kill and the *actus reus* to cause death. Once again, the basis for such an argument stems from subjectivist ideology that an individual should only be responsible for a fatal consequence that he had intended, known or foreseen.

Needless to say that conduct and the fault element in section 300(c) do not correspond. Section 300(c) actually allows the operation of the felony-murder rule through the back door. A rule once in existence in England has since been abolished by the Homicide Act, 1957. By this rule, an accused was responsible for murder if he killed someone in the process of committing a serious offence even if death was not intended or the same was accidental. The criminal responsibility for felony-murder rule is measured in terms of harm as opposed to the culpability of an accused, which is consistent with the maxim "*versari in re illicita*".

According to the ideal of the rule of law, law must be such that people will be guided to act in accordance with it. In order to be so guided, there must be certainty of law**.** Given the standing of section 300(c), it would appear that any accused who decides to inflict bodily injury on another runs the risk of being responsible for murder if death is so caused in the ordinary course of nature. This is demonstrated in cases where bodily injuries were inflicted at the spur of the moment to frighten[47] or subdue a struggling victim[48], whilst attempting to flee a crime scene[49]or to prevent escape of victim.[50] Short of educating the accused not to embark on such conduct, there is little room for guidance.

As indicated above, we do not always have control over the outcome of our actions, hence the correspondence principle really seeks to limit the liability for harm done. Section 300(c) fails to recognize this. Notions of choice and control, *inter alia*, are fundamental to the foundation of criminal law's attitude towards responsibility. This must be reflected in the liability we ascribe to a particular act that has criminal consequences. A failure to do so derogates from the substantive, ethical and political role of the law.

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47. *Mohammed Ali Bin Johari* v. *PP* (2008) 4 SLR 1058.
48. *Tan Chee Hwee* v. *PP* (1993) 2 SLR 657; *Tan Cheow Bock* v. *PP* (1991) SLR 293.
49. *Tan Joo Cheng* v. *PP* (1992) 1 SLR 620.
50. *PP* v. *Lim Poh Lye* (2005) SGCA 31.

V Ascertaining intention to cause bodily injury under section 300(c)

The *mens rea* for section 300(c) is simple. It is an intention to cause bodily injury. This would require examination of two components, intention and bodily injury. For intention, generally legal theorists have identified two types: direct and oblique. Direct intention is said to be manifested in the commission of a crime if A had the specific intention to do an act that is criminalized. For instance, section 300(a) would be a classic example of direct intent where A manifests the specific intention to cause death. Oblique intent, on the other hand, is intention extended by foresight. Thus, where A only intended x act and y act resulted,[51] he would have oblique intent if he had the foresight[52] of y act resulting from his x act though he had not intended. For ease of reference, this can be called 'subjective oblique intent'. In contrast for direct intent, the y act would have been intended as an end or as a means to an end. It has also been suggested that oblique intent would cover cases where A's foreseen consequence is so immediately and intricately connected to the criminal act that the difference between the two is merely conceptual.[53] This type of intent can be regarded as a variant of oblique intent as it seems to deal with a situation where foresight is imputed (objective foresight) to the accused simply because the consequence is so immediately and intricately connected to the act that it *should have reasonably been foreseen* by the accused when the act was committed. This is called 'objective oblique intent'. Accordingly, in both types of oblique intent, A is deemed to have intended the consequence regardless of whether he had foresight, subjective or objective. Following the above analysis, the formula for direct or oblique intent would be as follows:

Intended act + Intended consequence as an end = Direct Intent
Intended act + Intended consequence as a means to an end = Direct Intent
Intended act + subjective foresight of consequence = Subjective Oblique Intent
Intended act + objective foresight of consequence = Objective Oblique Intent

Moreover, the idea of intention under the law is different from the ordinary use of the word. Outside the law, one would not speak of the

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51. This would be the consequence of x act.

52. It would appear that this relates to subjective foresight and would cover cases where the consequence is not intricately and immediately connected to the act.

53. H.L.A. Hart, *Punishment and Responsibility : Essays in the Philosophy of Law* 120 (Oxford Publications, 2nd ed., 2008).

consequences as having been intended or unintended in ordinary parlance as mere foresight of consequences does not mean that it was intended. The consequence could have been unwanted. In ordinary parlance, the aforementioned foresight would equate with knowledge and not intention.

The intention to cause a particular bodily injury rarely confessed is often an inference exercise. The courts decide on hindsight whether a man intended an injury by reference to the circumstances surrounding the crime including but not limited to the number of injuries,[54] the nature of the weapon used,[55] the degree of force used, the site of the wound, *etc.* It is a deductive exercise. Hence, where a machete is used to hit a vital part of the human body such as the head, a natural assumption is made that the doer of the act must have intended that particular bodily injury.[56] Given the nature of the weapon and its use against a vital part of the body, the court makes a presumption that the accused intended that injury. It would appear as such to any other including the accused on hindsight.

There are issues with this deductive exercise. In cases, where rationality is lost and the mind has ceased to think during the commission of the crime, the act done may not necessarily have been intended in the ordinary sense of the word. Besides, inferring intention in this way makes the assessment of intention objective when it is supposed to be subjective.[57]

Having regard to the above, it is indubitable that the intention to cause bodily injury in section 300(c) has the capacity to fall within any one of the intent categories formulated above. [58] That would mean that an accused can be found guilty of murder where the intent is oblique. In case of India, the accused would be held to have intended if he falls within the first three categories.[59] In *Tan Joo Cheng*,[60] there was only one

54. The court has consistently ruled that the fact that the injury is solitary does not mean there is no intention to inflict that particular injury.

55. Where a deadly weapon is used, it is usually presumed as a rule of evidence that the offender had intended to cause death. Oberer, "The Deadly Weapon Doctrine – The Common Law Origin", 92 *Harvard LR* 72 (1962).

56. The hit on the head resulting in death in the normal course of nature.

57. *Supra* note 3 at 26-27.

58. This is especially so when there is a distinction between the act and the consequence, *albeit* conceptual, when there is uncertainty as to the precise degree of injury intended and/or where death is caused by one determining act.

59. *Rama alias Dhaku Worak* v. *State*, AIR 1969 Goa 122; *Harjinder Singh* v. *Delhi Administration*, AIR 1968 SC 867. In Singapore, it is arguable that all four categories of intention would satisfy a s. 300(c) finding.

60. *PP* v. *Tan Joo Cheng* (1990) SLR 743. Numerous articles have been written in

injury on the victim and the court found that it was caused by the definite thrusting of the knife blade into the neck in the course of struggle. Death was caused by severance of the innominate vein. It was argued that the stab wound was inflicted in the course of struggle and, therefore, unintended. Given the depth and track of the wound and the fact that it was inflicted on the neck, the court found that the injury was intended.

Firstly, it would appear that in reality, the defence was contending that even if he did intend to stab the neck, the consequence of his act, the severance of the innominate vein was not intended.[61] Hence, this would fall under subjective or objective oblique intent. *Second*, it appears,[62] that the court regarded the consequence as so immediately and intricately connected to the criminal act that the difference between the act and the consequence was merely conceptual. This is consistent with *Virsa Singh*, where Vivian Bose J stated that "No one has a license to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced, that the injury was accidental or otherwise unintentional."[63] Intending the act amounts to intending the consequence. This would be the variant, oblique intent discussed above.[64]

Likewise, in *Tan Cheow Bock*,[65] the court held that stab wound to the mouth, severing the internal carotid artery was intended by the appellant.

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this area which more than aptly discusse the trials and tribulations of a s. 300(c) finding. See M Sornarajah, *supra* note 3; Victor V Ramraj, "Murder without an intention to kill", *supra* note 17**;** Stanley Yeo, "Academic Contributions and Judicial Interpretations of Section 300(c) Murder", 21 *Singapore Law gazette* (April, 2004). Chan Wing Cheong, "What is wrong with section 300(c) murder?", 462 *Sing JLS* (2005); Alan Tan Khee Jin, "Revisiting section 300(c) murder in Singapore", 17 *SACLJ* 693 (2005).

61. Definite thrusting of the knife is not always indicative of an intention to inflict that bodily injury. In struggle cases, a greater degree of force is always used and though the bodily injury may have been knowingly caused, it may not have been intended in the ordinary sense.

62. This was not expressly articulated by the court in the judgment.

63. *Supra* note 39 at 467.

64. The broad based approach advocated in *Virsa Singh*, *id.*, is capable of encompassing both the act (the stab wound) and the consequence (severance of innominate vein) as intended bodily injury.

65. *Supra* note 11 at 300.

In so doing, it took into account the tremendous force used,[66] the surrounding circumstances of the crime and all other relevant evidence. It was argued that the appellant only stabbed the victim's mouth to stop her from screaming and the injury was not intended. Though the court noted the rarity of the particular injury and the difficulty of duplicating the same path of injury, it took a logical and deductive approach and stated, "[W]hat other intention could there be in thrusting a knife with a sharp cutting edge blade of 14 cm with the force he did at the deceased's open mouth?"[67] This approach is akin to the "deadly weapon theory", whereby it is presumed, as a rule of evidence, that where a deadly weapon is used, the offender intends to cause death, only that in this case, it is presumed that the offender intended to cause the bodily injury. The judge's reasoning appears to follow the maxim, "*a man intends the natural and probable consequences of his act.*" In *Yeo Ah Seng*,[68] the Malaysian Federal Court stated affirmatively that this maxim should be avoided as it is seldom helpful. A close analysis of the court's finding of intention in *Tan Cheow Bock* would demonstrate that such an intention falls within the variant oblique intent or perhaps even culpable negligence within the meaning of *Re Nidamarti Nagabhushanam*.[69] Since section 299(3) and 300(d) provide for the *mens rea* of knowledge, one can reasonably infer that the intention for section 300(c) should be confined to the first two categories of intent formula stated above.

In *Lim Poh Lye*,[70] the court found that the appellants intended the stab wound to the thigh which severed the femoral vein and caused death of the victim as a result of uncontrolled and continuous bleeding. The appellants stabbed the victim on the thigh to prevent him from escaping. The appellants contended that they did not intend that degree of injury. The court held that so long as the accused intended that type of bodily injury, it is irrelevant that he did not appreciate the gravity of the

66. It was the evidence of the forensic pathologist that the injury was inflicted when the victim was in a lying position on the floor which would provide necessary resistance which would have been absent if the victim was upright or in a sitting position. That probably explains the tremendous force used.

67. *Ibid.*

68. *Yeo Ah Seng* (1967) 1 MLJ 231.

69. [1872] 7 MHC 119. The High Court of Madras, India, acting without the consciousness that the illegal and mischievous effect will follow, but in the circumstances which show that the actor had not exercised the caution incumbent upon him, and that if he had, he would have had the consciousness.

70. (2005) 4 SLR 582

consequences of his act. The Singapore Court of Appeal, following the reasoning of *Virsa Singh*, stated that for section 300(c) to be satisfied, it is the "*particular injury"* and not the "*precise injury*" that must be intended. Whether the precise bodily injury is consistent with the intent to cause that particular bodily injury becomes irrelevant.

In *Virsa Singh*, the court held that ascertaining bodily injury of the victim is *objective* and purely *factual* and *leaves no room for inference or deduction*.[71] Vivian Bose J advocated a broad based and commonsensical approach. The reason is simple. Otherwise "a man who has no knowledge of anatomy could never be convicted."[72] However, where death is caused by one determining act and there is a variance between the act and the consequence resulting in death or there is uncertainty as to the precise degree of bodily injury intended, it is important to define bodily injury narrowly or limit the intention to cause bodily injury to that of direct intent.

In the aforementioned cases, the criminal acts and the consequences of the acts, were so immediately and invariably connected[73] that it appears that presumptions were made that the accused persons by doing the criminal acts intended the consequences though not in the ordinary sense of the word. Thus, the intent in section 300(c) to cause bodily injury covers direct intent, oblique intent or where accused is reckless as to the consequences of the act.

In *Public Prosecutor* v. *AFR*,[74] the victim, a little girl, one year and 11 months old, died of haemopericardium, due to ruptured inferior vena cava caused by the punching, kicking and stamping by the accused father. The pathologist noted that the injury was rare. Having regard to the accused person's knowledge and intellect with regard to the bodily injury inflicted, his loving relationship with the child, that he only wanted to teach the child a lesson and got "[*C*]*arried away in the heat of passion…",* the Singapore High Court held that the father did not have the requisite intention to cause that unusual particular bodily injury, rupture of the

71. *Supra* note 63.

72. *Ibid.*

73. This is particularly so on the facts of *Lim Poh Lye* and *Tan Cheow Bock*.

74. (2010) SGHC 82. The accused father in the process of reprimanding his child for playing with his cigarettes kicked, punched and stamped on the child. The pathologist found that the abuses resulted in the rupture of the *intra vena cava* causing death of the child. The accused father maintained throughout that he only wanted to teach his daughter a lesson as she had previously played with his cigarettes and had not learnt from the previous admonishment.

inferior vena cava. In arriving at this conclusion, Lee Seiu Kin J noted the remote nature of the injury and stated that there "[I]*s a clear dichotomy between the act carried out by the accused and the intention to cause the bodily injury actually found to be present. There must be evidence that in carrying out the act proved against him, accused had the intention to cause the injuries that caused the death of the deceased."* This manner of inferring intention is consistent with the first two categories of the intent formula discussed above.

One must be mindful of the fact that once having ascertained the bodily injury under the first limb of *Virsa Singh* that bodily injury must be sufficient in the ordinary course of nature to cause death. For section 300(c), the emphasis *lies in the intention to execute the action* which results in the bodily injury and not the effect of the intention to cause the bodily injury. This was clearly recognized by the court in *PP* v. *AF*R.

It can be evinced from the cases above that defining bodily injury is perhaps not as objective and factual as indicated in *Virsa Singh* case. Does the broad classification of bodily injury really answer what is the bodily injury intended by the accused especially where the consequence of an act is so immediately and invariably connected to the criminal act?[75]

Defining bodily injury and inferring intent in the absence of foresight of consequence is revealing. The subtext of section 300(c) is ethical. Whether the accused wanted to kill the victim or had knowledge that the victim would die, or only intended bodily injury which was sufficient in the ordinary cause of nature to cause death, or did an act that would in all probability result in the death of the victim, he would be a murderer nonetheless, along with intentional killers though morally less culpable. The fact of the matter is that some cases demonstrate that moral ground has been taken to include "reckless behavior" within section 300(c).

Scots law provides expressly for reckless murder. Where an accused displays "such wicked recklessness as to imply a disposition depraved enough to be regardless of the consequences" hence resulting in a willful act causing destruction of life it will constitute murder.[76] If this is the position we would want to adopt with respect to murder and recklessness, perhaps we should consider implementing the Scots law version of reckless

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75. There appears to be a clear signal that where death ensues due to bodily injury inflicted in the course of robbery, it may be unfathomable to find the accused guilty of voluntarily causing harm or grievous bodily harm under s. 321 or 322 of the Singapore Penal Code or the Indian Penal Code, 1860. The moral standard is benchmarked against "*versari in re illicit*"

76. *Cawthorne* v. *HMA,* 1968 JC 32.

murder in section 300(c). This would enable fair labeling of the offence and fair notice of its implications.

Traditionally, offences made a distinction between direct and oblique intent for the purposes of sentencing. For the former, severe sentences were imposed to reflect presence of vicious will. However, that distinction is ignored given the various permutations of possible intent in section 300(c). Not all cases of causing bodily injury with fatal consequences deserve the label of murder, especially in solitary injury cases where death is caused by one determining act and there is uncertainty as to the precise degree of bodily injury intended.[77] However, currently given the inclination towards classifying bodily injury broadly, construing intent to include objective oblique intent which includes reckless behavior, the aforementioned type of cases would come within section 300(c). The label of murder carries with it an assumption about the moral gravity of the criminal act in question and looses its appeal when it covers criminal acts of varying degrees of moral character. Perhaps one way to limit its ambit would be to confine section 300(c) to cases where the injuries are directly intended[78].

The Code framers gave motive a fenced role for the purposes of ascertaining intention.[79] That position was likewise adopted in Singapore. In *Mohammed Ali Bin Johari* v. *Public Prosecutor*,[80] the court indicated that motive was only one of the relevant factors that may be taken into account for the purposes of inferring intention. The Court of Appeal was

77. The position at the Indian side is mixed. There are cases where caution is exercised in cases of solitary injury resulting in death or where there is doubt as to the precise degree of bodily injury intended. *Laxman Kalu Nikalje* v. *State of Marashtra* (1968) 3 SCR 68; *Harjinder Singh* v. *Delhi Administration*, *supra* note 59; *Kulwant Rai* v. *State of Punjab* (1981) 4 SCC 245.Other cases have taken the stand that not all cases of solitary injury on a vital part of the body necessarily results in culpable homicide: *Jagrup Singh* v. *State of Haryana*, AIR 1981 SC 1552; In Singapore, cases do not make a distinction between solitary injury cases resulting in death and where there are multiple wounds. Where it is a solitary injury resulting in death, it is a factor to be considered against the factual matrix of the case and all other relevant factors: *PP* v. *Lim Poh Lye* (2005) 4 SLR (R) 582; *Tan Chee Wee* v. *PP* (2004) 1 SLR (R) 479; *Tan Cheow Bock* v. *PP* (1991) SLR 293; *Tan Joo Cheng* v. *PP* (1992) 1 SLR (R) 219.

78. As opposed to cases where internal injuries are caused by external acts that could not have been in the contemplation of the accused when the act was committed.

79. Sir Hari Singh Gour, *The Penal Law of India* 235 (Law Publishers, 10th ed., 1982).

80. (2008) 4 SLR (R) 1058.

of the view that though motive was not an essential element of the crime, it can bolster the inference that an intention to commit the offence was existent. In *PP* v. *Tharema Vijayan*,[81] when considering the intention under section 300(a) and (c), Tay Yong Kwan J rightly stated that intention should be distinguished from motive and all that is required in a murder trial is proof of act and it is not necessary to establish motive. Though one does not need to establish motive, where present it may be instrumental in ascertaining section 300(c) intention in solitary injury cases where there is uncertainty as to the precise degree of bodily injury intended.[82] This must follow.

The Indian courts have on occasions exercised caution in cases of solitary injury resulting in death or where there is doubt as to the precise degree of bodily injury intended.[83] Much depends on how the bodily injury is defined, narrowly or broadly. Defining bodily injury in a certain way becomes a tool for defining improper human behavior, enforcing moral standards, addressing changing needs of society, justice and concept of fairness.

The *Lim Poh Lye* rationalizes section 300(c) in another way. Section 300(c) criminalizes acts resulting in fatal injuries. To come within section 300(c), the injury must be one that is sufficient in the ordinary course of nature to cause death. If so, one can only naturally infer that the bodily injury is serious whether or not so realized by the accused. Hence, section

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81. (2009) SGHC 144 @ 100.

82. *PP* v. *AFR* was not a solitary injury case. As a matter of fact, there were at least 22 injuries found on the victim. However, there was a dispute as to whether the accused intended to inflict that particular degree of injury, the rupture of the *intra vena cava*. Hence, motive becomes a relevant factor to consider. Lee Seiu Kin J in this case stated that, "Just as motive may be relevant in determining whether a person had the intention to do an act, it must be equally relevant in determining if he did not have any such intention": (2010) SGHC 82.

83. *Laxman Kalu Nikalje* v. *State of Marashtra*, *supra* note 77; *Harjinder Singh* v. *Delhi Administration*, *supra* note 59; *Kulwant Rai*, *supra* note 59; *Randhir Singh* AIR 1982 SC 55. Other cases have taken the stand that not all cases of solitary injury on a vital part of the body necessarily results in culpable homicide. *Jagrup Singh* AIR *supra* note 77; In a more recent case of *Satish Narayan Sawant* v. *State of Goa*, JT 2009 (12) SC 224, the accused stabbed the victim a couple of times on the back during an altercation. This was a case of multiple injuries with one fatal injury. The Supreme Court held that since there was only one fatal injury, factually there was only one main injury caused due to stabbing and that being on the back side of the victim, therefore, it cannot be said that there was any intention to kill or inflict an injury of a particular degree of seriousness.

300(c) seeks to impose criminal responsibility on individuals who intend those kinds of injuries whether they are mindful of the consequences. That must have been the intention of the Code framers and hence section 300(c) is meant to capture those injuries that result in death in the ordinary course of nature. Hence, the equation of section 300(c) to section 300(a) and (b) type of murders. However, to avoid unnecessary broadening of criminal responsibility for murder, it is a necessary pre-condition that the accused must have intended that particular injury. Seen in this light, it becomes imperative that reference is made to all the relevant circumstances to ascertain whether the accused had the requisite intention to cause that particular injury. If bodily injury is construed widely, the abovementioned rationale behind section 300(c) would be lost and murder would lose its sting.

The *Virsa Singh* case advocates a broad based approach. This is a double edged sword. On one hand, the court is at liberty to take a broad approach of the injury inflicted or it can be seen to allow enough moral elbow room within which the judges can decide whether A did intend the consequence in the ordinary sense of the word where (i) death is caused by one determining act; (ii) there is uncertainty as to the precise degree of bodily injury intended; and/or (iii) the criminal act and the consequence are so immediately and invariably connected that the difference is conceptual and there is no foresight of the consequence.

VI A comparative analysis

It has been often said that the Code framers used the then English criminal law, the French Peal Code and the draft Code of Louisiana as an inspiration to draft the Penal Code. However a perusal of the three laws would reveal that none have an equivalent of section 300(c) murder.

Under English Law, an act is classified as murder where there was a direct intent to kill or where an accused intended serious bodily injury and knew or had foresight that it would result in death or serious bodily harm.[84] English law requires direct or oblique intent for murder. This would fall within the subjective oblique intent in the intent formula. Where however an accused has manifested an intention only to cause bodily injury, killing in such cases can only amount to a lesser offence of causing bodily harm. The rationale being, murder seen as a heinous offence should only be reserved for the morally guilty with the requisite intention

84. *R.* v. *Nederick* [1986] 3 All ER 1.

to kill or cause serious bodily injury.

As a matter of fact, the Law Commission in its final Report[85] had proposed a three-tier structure for homicide. Murder will be divided into first and second degree with the former carrying a mandatory life sentence whereas second degree murder will carry a discretionary life sentence. Intentional killing or killing with intention to do a serious injury in the awareness that there is a serious risk of causing death would come under first degree. Second degree would cover cases where there was a killing with intention to do serious injury or killing with the intention to cause injury or fear or risk of injury, in the awareness that there is a serious risk of causing death or where there has been a successful partial defence plea. Third-tier manslaughter would cover all those cases where death is caused by gross negligence or death is caused through a criminal act intended to cause injury, or in the awareness of a serious risk that injury may be caused. There were various reasons for this proposal one of which is to facilitate proper labeling of murder and to confine mandatory sentence to an offence with the highest degree of fault. Singapore's section 300(c) would come under the second degree murder or manslaughter.

The French Penal Code of 1810, on the other hand, makes it very clear that an act is only murder if committed willfully.[86] This offence carried the punishment of death.[87] The present French Penal Code defines murder as willful causing of the death of another person.[88] It also provides for aggravated forms of murder.[89] In summary, the French Penal Code's definition of murder now or then is even more restrictive than that of the English definition in that it only covers cases where direct intention to kill is present. Besides, in the current version of the French Penal Code, murder does not even carry a mandatory term. Hence, an accused can even be subjected to a suspended sentence under certain circumstances.[90] There is a fundamental difference between the French approach and Singapore law in that for the former killings through assault and/or criminal acts of non-fatal type would be treated as aggravated forms of assault and not as distinct homicide offences.[91]

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85. The Law Commission for England and Wales, A New Homicide Act for England and Wales? Consultation Paper no 177 (London, 2005).

86. Article 295 of French Penal Code 1810..

87. *Id.*, art.304.

88. *Id.*, art. 221-1.

89. *Id.*, arts. 221-2, 221-3.

90. *Id.*, art.132-29.

91. *Id.*, arts. 222-227.

Livingston's Louisiana Code[92] defines murder as being committed willfully and where any person commits the crime of willful murder,[93] such person shall suffer the death penalty.[94] Section 1 of the supplementary Act categorizes murder into first degree and second degree. Willful, deliberate and premeditated killing falls within the first degree whilst all others fall within second degree. First degree murder carries the death penalty whereas the second degree carries an imprisonment term of not less than 5 years or more than 14 years. Similar in context to the French code, a direct intention to kill is required.

In contrast, manslaughter is only punished with a fine not exceeding five hundred dollars and may also be punished with imprisonment not exceeding 12 months.[95] Interestingly section 24 states that where a person assaults with intention to kill, he shall be imprisoned for a term not exceeding two years. This is quite similar to the French approach. In the current Louisiana Code, murder likewise has a graded classification: first degree and second degree murder. For the first degree, the accused must have the specific intent to kill or cause serious bodily injury whilst engaged in the perpetration of certain aggravated offences such as kidnapping, escape, arson, rape, burglary, armed robbery, *etc.*[96]

This definition of murder is even more restrictive than English law in that there is an added need for the perpetration of an aggravated offence in addition to the mental element of causing serious bodily injury. Commission of first degree murder is punished with death or life imprisonment at hard labor without parole or probation.[97] Perusal of the three reveals that the law of murder in these jurisdictions then and now is different from section 300(c). As a matter of fact, there is a distinct preference for specific intent and presence of aggravating factors before a crime is classified as murder. Even within murder, there is recognition to classify different degrees of murder. Hence, the first and second degree murder reflect the different intentions. Section 300(c) is not reflective of the murder laws of the abovementioned jurisdictions. The murder provisions in these jurisdictions have tightened labeling an offence

92. Passed from the year 1804 to 1827.
93. What constitutes willful murder is not defined in the statute.
94. S. 1, crimes and misdemeanor, 1805.
95. S. 22 of the Acts of Legislature of Louisiana: passed from 1804 to 1827.
96. S. 30(1) of Louisiana Code.
97. S. 30C of Louisiana Code.

as murder. Section 300(c) of Singapore and India has remained static in its development.

VII Going back to the beginning

A perusal of ancient history would reveal that in a primitive society punishment is synonymous with retribution. Section 300(c) is reminiscent of the laws that existed in some parts of ancient civilization. Law as a system of rules regulating human behaviour had an interesting beginning. The principle of retribution found in the laws of Hammurabi, of Assyria and of the Hebrews, reflects the unmodified practice of less civilized Amorites and other West Semites.

King Hammurabi, 2000 B.C who was sixth in line of the Amorite kings was the first to start codification of existing laws. A prominent principle, expressed throughout the whole Code of laws, is that punishment of the same kind as his injury to others is inflicted upon the culprit. The rationale was founded upon the principle that the culprit must realize the effects of his own acts, by experiencing it. He must come to know what his acts produced and it was not enough merely to punish him because of his evil. This bears a stark resemblance to section 300(c). The principle enunciated in the laws of Hammurabi was observed in Babylonia, even more than a millennium after Hammurabi's time.[98]

Again, the Mosaic laws which came into being more than 500 years later correspond closely to the code of Hammurabi. The fundamental principle of these Mosaic laws like that of the Hammurabi code, is that each must experience the effect of his own acts. This is famously coded in *Exodus 21:23-25*, where it is stated that "[T]hou shalt give life for life, eye for eye, tooth for tooth,…wound for wound,…" By now perhaps, we may be able to evince the origins of the moral philosophy of section 300(c). Fundamentally retributive it appears ancient civilization was molded on that basis to make men better beings. Perhaps, that may have worked then given the incipient stage of human evolution. However, given the current evolution of mankind, should we not move on from our past methods of regulating human behavior?

Egyptians likewise have endorsed the principle that a culprit must experience the effects of his acts or causes. This is evidenced in, '*The*

98. Driver G.R and Miles J.C, *The Babylonian Laws* (Oxford Publications, 2 Vols 1952, 1955).

Egyptian book of the Dead'.[99] This book relates the experiences which a person must expect in the afterworld, their obligations and manner of preparing for the future life and so forth. In one of the myriad papyri, there is a scene called the Final Judgment.[100] This scene discloses a large hall with a great scale supported by a beam. By this beam is seated an ape which in Egyptian mythology has always been associated with God, Thoth, the God of Wisdom. One of the scales contains a feather representing truth, purity and righteousness and the other containing what appears to be a little vessel called Ab, symbol of the heart. The whole scene is symbolic of the weighing of human virtues after death, by the God of Wisdom. The God of Wisdom presides in Judgment of the individual by considering how far the acts/conduct of the departed fell short of a positive good, namely defined in terms of truth and righteousness. Consequently, the individual will be made to experience the judgment of the *effects* of his acts. This judgment is beautifully portrayed by this scene. As of today, it is still the practice of Egyptians to have this scene painted in their tombs to remind them that they will be made to experience the effects of their acts.[101]

Even the scriptures of Confucius reflect the principle of retribution. Confucius scriptures follow the simple rule of reciprocity when it comes to dictating how a man should live. By this principle it is made plain that a culprit shall by way of punishment suffer the exact nature of injury he had inflicted upon his victim.[102]

The principle of retribution has similar resonance in Hinduism[103] and Buddhism[104] both of which are firmly based on the law of moral cause

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99. This has been given by Archaeologists and Egyptologist to a collection of funerary texts compiled and prepared for the dead by Egyptian priests of many centuries. See E.A. Wallis Budge, *The Egyptian Book of the Dead (The Papyrus of Ani) Egyptian text Transliteration and Translation* 259-67 (Dover publications, New York, 1967).

100. Also known as the Great Reckoning.

101. *Supra* note 99.

102. Fung Yu-Lan translated by Derk Bodde, *A History of Chinese Philosophy*, Vol 1, *The Period of Philosophers* 43-73 (Motilal Banarsidass publishers Pte Ltd, Delhi, 1994).

103. See S Radhakrishnan, *Indian Philosophy*, Vol 1, pp. 137-267 (Oxford University Press, Delhi, 1994).

104. See S Radhakrishnan, *id.* at 341-475; see also David J. Kal Upahana, *A history of Buddhist Philosophy, Continuities and Discontinuities* 85-110 (Motilal Banasidass Publishers Pte Ltd, Delhi, 1994).

and effect, famously known as the law of *Karma*. The extent of the evil of the act determines the consequence or effect. Of course, the suffering must always be proportionate to the deed itself. This is slightly tempered in that we are not so concerned with effect but rather the deed of the culprit. Of course, Buddhism dates about 580 B.C., hence one sees a tempering of the effect of pure retribution.

Given the above, it appears making an individual experience the exact effects of his evil act appears to have been the order of the day during ancient times of King Hammurabi and the less civilized societies. Purpose and effect of section 300(c) is rooted in history when civilization was primitive. Given the mandatory death penalty for an offence with minor intent it may not be out of reason to temper the interpretation of bodily injury with wisdom by construing it narrowly where appropriate. Retribution as a penal philosophy may have been the way at a time when society was primitive. Should that continue as a basis when we have evolved in terms of civilization?

VIII Conclusion : The way forward

Section 300(c) is an anomaly. The myopic view of deterrence premised on punishment must be corrected. To ensure moral credibility, the punishment level of section 300(c) must refer to the offender's moral culpability and be proportionate. One should strive to achieve fair labeling of an offence. Should we wish to cover reckless murder than we should move in the direction of Scots law and provide for reckless murder in section 300(c) and call a spade a spade?

It is obvious from a perusal of the cases of both jurisdictions that the enquiry as to whether the accused intended the bodily injury inflicted is not an enquiry that one could readily appreciate and understand.[105] Neither is the definition of bodily injury simply objective and factual leaving any room for inference or deduction. Though the problems are inimical to the wording of section 300(c), the effects can be contained if we limit the intent in section 300(c) to direct intent, respecting the distinction between direct and oblique intent. The penal philosophy of section 300(c) should be revisited. The offence of murder should be confined to cases of intentional killing and where death is occasioned unintentionally, the liability should be one of culpable homicide. It is not unfathomable to consider abolishing 300(c) and leaving section 299(2) of the Penal Code to deal

105. *Virsa Singh* v. *State of Punjab*, *supra* note 39.

with intention to cause bodily injury resulting in fatality given that the *mens rea* for both is coterminous. This would have the effect of restoring murder to its original version and leave causing death by a non-fatal offence to one of culpable homicide. This approach is consistent with the three-tier structure proposed by the Law Commission in England. Granted this does not ameliorate the problems encountered in ascertaining intention to cause bodily injury, at the least it seeks to reserve the death penalty for intentional killings. This may be a radical departure, but not unfathomable.

Ultimately, one should consider the philosophy behind section 300(c). If the penal philosophy behind section 300(c) is really general deterrence then one must ask whether it is an effective deterrence at this day and age, given the circumstances under which such crimes are committed which is usually, at the heat of the moment, without much thought. If the underlying philosophy of the objective theory is really to deter unreasonable conduct, how does one establish standards of conduct in cases where it cannot be guided by reason? Seen from that perspective, the argument for general deterrence fails miserably.

At the end of the day, one must be mindful of taking societies conventions, customs, its notions of good and ideals for granted. Are these conventional notions of the good indeed good? We must examine our conventional opinions and conditionings which are very often the basis for crafting punishments and law in a certain way. Besides the meaning attributed to "fault" is historically contingent. The essence of any criminal justice theory is to know what causes the responses to crime and whether those causes remain today. If they do not, we should seriously reconsider our social control systems which decide and shape the criminal sanctions in response to behavior so that there is effective governance.

Law can only be effective in its governance if it evolves with time and addresses the society's changing needs and issues. It cannot be effective if it remains shackled to the past.