Singapore Journal of Legal Studies
[1994] 1 – 28

THE DEFINITION OF MURDER UNDER THE PENAL CODE

This article surveys the law of murder under the Penal Code of Singapore. It looks at the law in a comparative and historical context. It argues that the definition of murder is based on a fine balance between objective and subjective factors and that this balance should not be upset by the courts. It questions the more frequent resort that is being made to section 300 (c) in the drafting of charges for murder.

DESPITE the controversy surrounding the definition of murder in other common law jurisdictions,[1] the law of murder under the Penal Codes of Singapore, Malaysia and India[2] has remained relatively clear. There was some difficulty in the interpretation of the third clause of section 300. The law on the point was stated recently in the judgments of Chief Justice Yong Pung How in *Tan Cheow Bock* v *Public Prosecutor*[3] and Justice LP Thean in *Public Prosecutor* v *Tan Joo Cheng*.[4] The clause has also been considered by the Court of Criminal Appeal in *Tan Chee Hwee* v *Public Prosecutor*.[5] There has been a spate of unreported judgments of the Court of Criminal Appeal involving this provision.[6] Yet, uncertainties as to the exact scope of this particular clause still remain.[7] It is a good stage in the evolution of the law under the Code not only to state the law that has come to be accepted in the Penal Code jurisdictions but also to compare it with the law in the other common law jurisdictions to see whether the law under

1 For the controversy in England, see, *eg*, Lord Goff, "The Mental Element in the Crime of Murder" (1988) 104 LQR 30 and the reply to this article by Professor Glanville Williams, "The Mens Rea for Murder: Leave it Alone" (1989) 105 LQR 387.

2 The Indian Penal Code forms the basis of the Penal Codes of Singapore and Malaysia. With modifications, the Indian Penal Code was adopted in other former colonies of Britain such as Ceylon (Sri Lanka) and parts of the Sudan and Nigeria.

3 [1991] 3 MLJ 405.

4 [1991] 1 MLJ 196.

5 [1993] 2 SLR 657. The Court of Criminal Appeal approved *Tan Cheow Bock* [1991] 3 MLJ 405.

6 *PP* v *Lee Teck Sang* (27 October 1993); *PP* v *Muhammad Rad bin Said* (1 November 1993); *PP* v *Ramasamy* (3 November 1993); *Goh Chong Hoon* v *PP* (Criminal Appeal No 29 of 1993); *Yap Biew Hian* (Criminal Appeal No 18 of 1993) *Muhammad Radi* [1994] 2 SLR 146.

7 In all of the cases reported, evidence showed that conviction under the first clause of intentional murder was maintainable. There was little reason for the prosecution to bring the charge under the third clause.

the Code adequately copes with the problems that have arisen in the other jurisdictions. Such a comparison will also help in the elucidation of the law under the Code.

I. The Technique of Definition of Murder under the Code

The Code borrows a technique of definition of murder from the Scots law in that it first defines the generic concept of "culpable homicide" in section 299, itself a term borrowed from Scots law.[8] It then defines "murder" in section 300, leaving it to deduction the circumstances in which culpable homicide will not amount to murder.[9] Though the outer shell is provided by the Scots law, the definitions of the mental states in murder appear to have been based on concepts advocated by nineteenth century reformers of the English law.[10] These reforms which were largely based on the writings of the English utilitarian philosopher, Jeremy Bentham, did not succeed in England but were transported to the colonies, principally India, by his many disciples.[11] There is no room at all for doubt that the law of murder stated in the Code was miles in advance of the English law existing at the time of codification.[12]

Macaulay, the principal draftsman of the Code had never practised law.[13] As a leading disciple of Jeremy Bentham, he gave expression to many ideas of his master in the Code.[14] The definition of murder in the Code went

8 The standard text on the criminal law of Scotland is CH Gordon, *Criminal Law of Scotland* (1978).

9 The circumstances in which murder is reduced to culpable homicide not amounting to murder are specified in the exceptions. The statement in the text does not refer to these instances.

10 There is one view that the definitions in the Code are the outcome of the "philosophic intelligence" of Macaulay but this view is too adulatory. The concepts in the Code can be traced to English or Scots law. Unfortunately, the Scots law origins of the Code have been largely ignored. It is unclear as to how Scots law influenced the Code, though some of its provisions, like the recognition of excessive self-defence, can be traced to Scots law. Macaulay's training was English and he was admitted to the English bar.

11 E Stokes, *The English Utilitarians in India* (1959). Both Macaulay and James Fitzjames Stephen who drafted the Evidence Act were Benthamites. See L Radzinowicz, *Sir Fitzjames Stephen and His Contribution to the Development of Criminal Law* (1957).

12 The definition in the Indian Penal Code contained no constructive doctrines and there is a delicate balance between subjective and objective factors in the definition of the Code. English law recognized constructive murder until the Homicide Act 1957. The English law has yet to work out the precise scope of murder.

13 For a recent biography of Macaulay, see J Clive, *Macaulay: the Shaping of the Historian* (1987). Some of the papers of Macaulay are available at the library of Trinity College, Cambridge where Macaulay was a Fellow. There is no indication that he had any extensive contact with Scots law.

14 The point is made in many surveys of the history of the drafting of the Indian Penal Code. See MP Jain, *Outlines of Indian Legal History* (1972), at 540.

through further refinements at the hands of Sir Barnes Peacock and other members of a later Indian Law Commission, before it finally became law.[15] Though the outer shell of the definition of murder is Scots law, the definition itself owes much to the rationalization of some concepts of criminal law by Bentham and his followers.[16] It would be an error of understanding to state that the provisions on murder are based on the then existing English law on murder, which was in a state of shoddy mess.

The English law of homicide had developed two categories of unlawful killing by the time of Bentham. It had reached the stage where murder was defined as an unlawful killing with malice aforethought and manslaughter was defined as any unlawful killing. The concept of malice aforethought which was an amorphous concept with moral overtones was the principal basis of the distinction between murder and manslaughter. Parallel with this development, there was always a category of murder that was dependent on the unlawful act alone without the need for the proof of any *mens rea* at all. This was the rule relating to constructive murder under which any killing which took place as a result of an unlawful act was considered murder. The famous example given in Coke was of a person shooting at a fowl. The shot hit a man accidentally and killed him. This was regarded as murder. It was an obnoxious rule as there was liability under it despite the absence of any *mens rea*.[17] There was much preoccupation with the limiting of this rule. By the time of Foster,[18] the rule had come to be limited to situations where the unlawful act involved amounted to a felony.[19] The final abolition of this constructive doctrine was accomplished by the Homicide Act only in 1957. But the ghost of the doctrine still seems to haunt the English law on murder.[20] One major feature in the Penal Code definition of murder is

[15] The exact nature of the changes or the reasons for them remain a mystery. There was apparently a report by Peacock but this report is missing. See R Cross, [1978] Crim LR 524.

[16] Further see M Sornarajah, "The Interpretation of the Penal Codes" [1991] 3 MLJ cxxix at cxxx.

[17] Coke's *Institutes*, c VII. Any killing of a policeman was also considered murder. *Mackalley* (1611) 9 Co Rep 67b; 77 ER 828.

[18] Foster's *Discourse on Homicide*. Malice aforethought according to Foster involved a "heart regardless of social duty". The definition survives in American law on murder. Similar definitions are to be found in East, 1 PC 262.

[19] A felony, like rape and robbery, involved violence and it was easy to rationalize the rule that a killing in the course of such felonies should be considered murder as the killing ought to have been foreseen as possible by the perpetrators of such felonies.

[20] English lawyers have yet to work out the scope of reckless murder as evidenced by the debate between Lord Goff and Professor Williams referred to in note 1. The direction based on *Nedrick* [1986] 3 All ER 1 which is to be given on charges of murder is sufficient only for paradigm cases. It focusses on the realization of the accused of the effects of his act. It does nothing to solve the issue as to reckless murder or the causing of intentional injuries which are fatal. See *Cunningham* [1982] AC 582 and *Hancock* [1986] AC 455.

that it does not admit of any constructive doctrines.[21] It is a fact worth stressing that the Code did away with such constructive doctrines almost a century before the English law was able to do so.

Apart from this major change to the common law, two other refinements contained in the Code antedate developments in other common law jurisdictions. The first was the dissection of the mental element necessary for murder. The second was the distinct preference shown by the draftsman of the Code for basing liability on subjective theories of criminal liability.[22] There came about a delicate balance between the subjective and objective theories of liability as a result of the clashes between the proponents of the two camps.[23] It is necessary that these two changes be explored in some detail.[24]

The Benthamites were inclined towards the codification of the law. Being positivists,[25] they were also inclined to dispense with moral factors in the definition of legal principles. There was a distinct preference on their part to confine murder to intentional killings.[26] The concept of intention that they had in mind was not confined to what the actor desired and foresaw as a result of his conduct but included what was referred to as an oblique intention. Oblique intention involved what the actor could have foreseen as a result of his conduct. It is interesting to note that the present English

[21] It is obvious that illustration (c) to s 299 is taken from Coke *Institutues*. It is made very clear that an accidental killing could not be any form of culpable homicide.

[22] The subjective theory of liability focussed on the mental state of the offender himself. For Benthamites, who stressed deterrence as the main aim of punishment, it was important to identify the precise state of the offender's mind so that punishment could be measured to fit the crime and serve as deterrence to him. The objective theory on the other hand stressed the crime and its prevention and was less concerned with the offender's state of mind. It readily attributed to the offender the state of mind of any reasonable person in the same situation as he and committing the same act in order to achieve through his punishment the social objective of reduction of crime.

[23] The writer assumes, without proof, that the clash took place in the period between Macaulay's draft and the revised version of the Code which became law.

[24] A third major change was that the Indian code did away with a mandatory capital sentence for murder, giving the judge the discretion to choose between a life sentence and capital punishment.

[25] John Austin, a disciple of Bentham was the founder of English positivism. See his *Lectures on Jurisprudence* (Chs VII to X). He was a member of the Commission which was given the task of reforming the law of homicide in England. He was able to incorporate his views into the report of the Commission. See Fourth Report of Her Majesty's Commissioners on Criminal Law, (1939) 19 Parl Papers at xix. His views on supplanting malice aforethought with intention and recklessness as the basic elements of murder had an influence on both the draftsmen of the Indian Code as well as on the subsequent development of the common law.

[26] The view that is currently supported in England by academics like Glanville Williams that murder must be confined to intentional killings can be traced to Benthamite writings.

debate on the definition of murder is along the lines that was initiated by the positivists in the early nineteenth century.

The second change flowed from the penal philosophy of the Benthamites that punishment should fit the criminal rather than the crime. The Benthamites made a dramatic change to the existing penal philosophy. One facet of this change was the discarding of all constructive doctrines which involved the imposition of liability without any reference at all to the actual mental state of the offender and the stress placed on the subjective theory of liability.

The objective theory of liability permitted the imposition of liability on the basis of inferences drawn as to the offender's state of mind and on the basis of what a reasonable person in the offender's position would have intended or realized. Once the objective mental state of the reasonable person was established, there was an imputation of that mental state to the offender and his liability was then assessed accordingly. Further inquiry as to what the offender did intend was foreclosed and he was not permitted to show that he never did intend or realize what the reasonable person in his position would have realized. There was a sound aim in the application of the objective theory. This aim was to indicate the standards of conduct that persons should aspire to, particularly in regard to activity that is potentially dangerous to others and it should not be permitted for persons who deviate from these standards to plead that they had not realized the consequences of their conduct. In a period when society was fast becoming industrialized and there was much potentially hazardous activities as a result of the newly invented machinery, the need for the formulation and maintenance of external standards of behaviour and care to control such activities was obviously desirable. Deterrence of conduct that deviates from accepted standards of conduct was the obvious philosophy underlying the objective theory. Its use in the law of murder is that potentially hazardous activities which are threatening to human life must be carried out with extreme caution and failure to recognize and abide by these standards of caution will involve liability for murder.[27]

But the contrary argument was that the maintenance of this theory led to the punishment of the innocent to ensure that standards were maintained. There were obvious human rights arguments against adopting a course which sacrificed the individual so that the greater good of the many could be assured. The penal philosophy itself was shifting away from the crime to the criminal and reformation of the offender rather than deterrence or retribution became the catchword in penal philosophy. These trends gave the subjective theory

[27] The best analysis of the rationale for the law of murder still remains, the article by Michael and Wechsler in (1937) 37 Columbia LR 701.

which emphasized the punishment of the criminal on the basis of his exact mental state great impetus.

The criminal law has maintained a balance between these approaches. It is unfortunate that in the English scene an acrimonious tussle has broken out between the subjectivists and the objectivists which befuddles the law to a great extent. This tussle clouds the definition of murder in that system. Fortunately for the law under the Code, the conflict between these theories was resolved at the outset in the formulation of the definition of murder in section 300. That section contains a delicate balance between the two theories. Initially, the first two clauses of section 300 indicate subjective requirements. The offender must have intended to kill or to cause a grievous bodily injury. The next two clauses contain objective elements. It is obvious that the latter clauses are to be used only in the more extreme cases where sufficient justification exists for a charge of murder. It is unfortunate that some of the more recent judgments in the Code jurisdictions ignore this balance which has been carefully worked out in the Code.

As a prelude to the discussion of the interpretation of the clauses in section 300, it will be useful to indicate the general attitude of courts in the Code jurisdictions to the interpretation of the Penal Code. There is evidence that Macaulay drew many ideas for his draft of the Indian Penal Code from the French Penal Code, the draft Penal Code prepared for Louisiana by a fellow Benthamite, Edward Livingstone,[28] and Scots Law. It is only a predisposition of the colonized legal mind which accepts facilely the myth that the Indian Code is a codification of the English law. The nature and extent of the influence of English law, which at the time was in a mess, on the Indian Code, is difficult to fathom. Bentham himself had poured scorn on the English criminal law of his times. There was a belief that English law served the interests of the propertied classes and was inimical of the interests of the rising industrial class in Britain.[29] Bentham, Brougham and Mill who were associated with the reform of the criminal law in England in the first half of the nineteenth century clearly wanted to sweep away the biases in the criminal law in favour of the land-owning classes. Their attention to the creation of a fairer system bore little fruit in England but was diverted to the Asian colonies.[30] Their efforts were not characterized by any sense of colonial or racial domination but by a genuine sense of adventure in devising a universally acceptable system of criminal law which embodied a sense of fairness.

[28] Livingstone's Code was praised by Bentham. See Bentham, *Works*, Vol XI, at 23, 35-38, 51. It embodied many of his ideas.

[29] J Hostettler, *The Politics of Criminal Law: Reform in the Nineteenth Century* (1992), at 165-174.

[30] E Stokes, *English Utilitarians in India* (1959).

Both Bentham and his disciples were intent on creating general jurisprudence acceptable not only in England but in other parts of the world. Bentham's tract on the principles of morals and legislation for different times and places recognized that law cannot be introduced into different places without making adaptations to suit different cultural and religious conditions prevailing in those states.[31] There is every indication that Benthamites approached law-making in India without too many feelings of racial superiority. The prevailing sentiment in India, among its more enlightened governors, was that account must be taken of the religions and habits of the people. It is this spirit of the Benthamites which characterized law-making in India before the First War of Indian Independence (otherwise known as the Indian Mutiny of 1857). On this historical view of the drafting of the Indian Penal Code, English law has little relevance to the interpretation of the Code.

But this view was soon discarded after the Indian War of Independence (the "Indian Mutiny"). The Penal Code was introduced in 1860. The application of the law after that period was based on notions of racial superiority and on the use of the criminal law as an instrument of colonial coercion.[32] It became convenient to regard the Indian Penal Code "as nothing but English law, shorn of its technicalities." Judges who administered the criminal law found it convenient to treat it as such, for they were trained in the English law and either did not want to cope with the philosophical baggage that accompanied Benthamite codification or were not intellectually equipped to understand it. Hence, the convenient myth was created that the Penal Code was based on the English law. The myth has come to dominate the teaching and application of the law even in post-colonial times in the Code jurisdictions. The time may now be ripe to rid the law of its colonial antecedents, revive the Benthamite spirit which motivated the making of the Penal Code and make the criminal law more tuned to the needs of the people who live in the Code jurisdictions. The reason why there is resistance to such an approach may well be that the minds of the Asian lawyers are still crippled by the legacy of colonialism. With this introductory background, the different clauses of section 300 may now be explored.

[31] There is much evidence of this in the Code. *Eg*, Macaulay took the Indian caste system into account in dealing with issues of provocation.

[32] Stokes, *English Utilitarians in India* (yr), at 269.

II. The Clauses of Section 300

SECTION 300 defines murder. It is useful to set it out in full.

> 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
>
> (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 case death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

The four clauses in the section may now be examined in turn. Viscount Dilhorne, in *Chung Kum Moey* v *Public Prosecutor of Singapore*,[33] cautioned against viewing the four clauses in the section as describing four mutually exclusive categories of mental elements. The practice of the courts in the Code jurisdictions has been to treat these clauses as creating distinct categories.

(i) *Intention to kill*

There can be little doubt as to the fact that intention to kill is the most important mental element in murder. Intention is normally inferred from the conduct of the offender though this inference can be rebutted by the accused.[34] Frequent use of inferences in obvious instances has led to the concretization of certain rules in connection with the inference of the intention to kill. Thus, courts have frequently stated that where lethal weapons are used by the offender in the killing, an intention to kill may be inferred.

[33] [1967] 2 AC 173.

[34] In the unfortunate case of *DPP* v *Smith* [1961] AC 290, the House of Lords treated the inference as conclusive. The much criticized case led to s 8 of the Criminal Justice Act 1967, which established the inference as a rebuttable presumption.

So too, where the offender had attacked a vital part of the body of the victim, the inference of the intention is readily made. The cumulative presence of the two instances, that is, where a vital part of the body is attacked with a lethal weapon leads to a very strong inference of an intention to kill. The tenor of the judgments in the Code jurisdictions is that where the inference in drawn in such instances the onus on the accused to refute the inferences would be a heavy one. Because of the importance of these accretions to the law made in the decisions, it is best that these inferences be dealt with at a later stage.

The term "intention to kill" was a Benthamite innovation. It was a term which the Benthamites used with a degree of precision. But, unfortunately, in the nineteenth century English law, the phrase became coterminous with the old concept of malice aforethought and assumed a use quite unintended by the Benthamites, further adding to the confusion of the law of murder in England. This makes English precedents of no use for the interpretation of the Code.

(ii) *Intention to cause such bodily injury as the offender knows is likely to cause death*

The second clause did not exist in the original draft of Macaulay and does not have its basis in the then existing English law. It requires the assessment of the intention of the actor in relation to the awareness of the actor of the circumstance of the case as well as his awareness of the condition of the victim.[35] The purpose of the clause was to provide for the situation where the offender had some special knowledge of the condition of the victim which would lead to his death where some injury was caused to him. Thus, if the accused knew that his victim was a haemophiliac and that the causing of grievous hurt to him would necessarily result in his succumbing to the injuries because of his peculiar condition, he would be guilty of murder under this clause because of his awareness of the special conditions.[36]

A peculiar physical condition widely prevalent in the Indian subcontinent elucidated the use of the clause. It was also incidentally a factor that led to much nationalist sentiment during the colonial times. Due to the wide

[35] Though an intention to cause grievous bodily harm was recognized as a mental element of murder in English law, grievous bodily harm was so loosely defined that almost any bodily injury qualified for the purpose. So it was possible to contemplate the possibility of murder by a pin prick in English law, at least until the Criminal Justice Act was passed. The Code defines the precise types of grievous bodily harm that has to be intentionally inflicted for there to be a conviction for murder.

[36] It may be possible to trace this element of awareness in the definition of an intention to Bentham, *Principles,* at 83.

prevalence of malaria on the subcontinent, the poorer classes in India suffered from enlarged spleens. A diseased spleen was liable to rupture upon slight force being used. This, added with the penchant of the English for the use of the foot[37] on their Indian servants, led to many killings caused by Englishmen in colonial India. As the judges in cases where these Englishmen were charged were also Englishmen, the refusal of the courts to punish the offenders for murder led to charges of partiality and prejudice.[38]

Despite the political furor caused, the decisions in most of these cases to convict the Englishmen involved for grievous or sometimes simple hurt were unexceptional and were based on the proper interpretation of the Code. Unless the offender had the knowledge that the victim had an enlarged spleen, he could not have known that his blow or kick was likely to kill.[39] The decisions of various Indian courts have confirmed this view.[40] The law was stated correctly by Stuart CJ in an early case and remains a valid statement of the interpretation of the second clause of section 300.[41] He said that in the law under the Code, the connection between the blow and the killing was of no consequence, "the material and vital question being, not whether the killing did in fact result from the blow but whether the accused had such a guilty knowledge of the probable consequences as to make him really responsible for the fatal occurrence." The second clause requires both a subjective intention to inflict grievous bodily harm and a subjective knowledge of the physical condition of the victim which would make him succumb

[37] According to Bayley J in *Thorpe* (1829) 168 ER 1001, "the foot was a lethal weapon".

[38] An Indian has recorded these cases, obviously for political reasons. Sanyal, *The Record of Criminal Cases as between Europeans and Natives for the Last Hundred Years* (1896). (This tract is available in the Library of the British Museum.) Also see Sir Cecil Walsh, *Crime in India* (1930): "The vernacular journals say the Almighty has endowed the Indian with an enlarged spleen in order to save the European from conviction for murder". The Governor-General was concerned and wrote a letter on the subject (7 July 1876) which stated: "Bad as it is from every point of view, it is made worse by the fact, known to all residents of India, that all Asiatics are subject to internal diseases which often renders fatal to life even a slight external shock. The Governor-General in Council considers that the habit of resorting to blows on trifling provocation should be resisted by adequate legal penalties and those who indulge in it should reflect that they would be put in jeopardy for serious crime". The incident interestingly portrays the need for an objective theory of liability in these circumstances and the political sensitivities the definition of murder could create.

[39] It is possible to argue on the basis of the letter of the Governor-General referred to in the note above that such knowledge should be credited to the offender. But the interpretation of the clause does not mandate such a course.

[40] *O'Brien* (1880) ILR 3; *Rhandir Singh* (1881) ILR 3 All 597; *Idu Beg* (1881) ILR 3 All 766; *Bai Jiba* (1917) Bom LR 823; *Pleydel* AIR 1926 Lah 313; *Pameshri Das* AIR 1934 Lah 332. For Ceylon, see (1898) 3 NLR 109. In *Ismail* AIR 1918 Sind 60, a weak heart was involved.

[41] In *Fox*. The case is not found in the reports but the publication by Sanyal referred to in note 32 contains the judgment.

to the harm that is inflicted. There are no reported instances of the use of the clause in Singapore and Malaysia.[42]

(iii) *Intention to cause bodily injury which is sufficient in the ordinary course of nature to cause death*

The third clause of the section has caused much controversy. Like the second clause, the origin of the clause is not to be found in English law.[43] The Penal Code seeks to define with precision the types of intention to cause grievous hurt which could result in a conviction for murder in the event of a homicide being caused by an accused.[44] Under the Indian Code where death results from an intentional infliction of an injury, the offence could fall within a broad spectrum, the lowest of which is simple hurt[45] and the highest of which is murder.[46] For the killing to amount to culpable homicide and murder, there should have been an intention to cause bodily injury, the bodily injury should have been caused and the intention must be of the three types described in sections 299 and 300. The intention must first qualify as an "intention of causing bodily injury likely to cause death" in which case the killing will amount to culpable homicide (s 299). Where this is satisfied, the prosecution may be able to proceed further and establish that there is "an intention of causing such bodily injury as the offender knows to be likely to cause death" (clause 2 of s 300) or where there is "an intention of causing bodily injury to any person and the bodily injury is sufficient in the ordinary course of nature to cause death" (clause 3) in which case the requirement for murder will be satisfied. Clause 2 has already been considered and it was pointed out that it depends on the subjective intention of the accused to cause bodily injury and the subjective

[42] In the English law which existed at the time, such a result could not have been arrived at. A murder conviction on these facts was a distinct possibility on the basis of constructive malice.

[43] In English law, grievous bodily harm was defined broadly as anything "as sensibly to interfere with health or comfort. In times when constructive doctrines were recognized, an intentional causing of grievous hurt resulting in a killing was murder."

[44] Here again the Scots law origin of the clause is more plausible. In Scots law, the injury inflicted should be of "such a kind as indicates an utter recklessness as to the life of the sufferer whether he live or die" Gordon, *The Criminal Law of Scotland* (1978), at 681. This requirement restricts the type of grievous harm that has to be caused and is an advance of the English law as it then existed on the point.

[45] There cannot be murder by a pin prick under the Penal Code. So in the situation where there is a pin prick on a haemophiliac who dies as a result, there can only be conviction for simple hurt as this is all that was intended (unless, of course, the offender knew of the victim's condition and intentionally exploited it, in which case the killing.

[46] *Public Prosecutor* v *Somasunderam* AIR 1959 Madras 323; *Inder Singh* (1928) ILR 10 Lah 477.

knowledge of the accused that in view of the condition of the victim he will die as a result of the bodily injury caused. There is little doubt that subjective considerations dominate clause two.

The interpretation of the third clause of section 300 presented the Indian courts with difficulties. In the early cases, the two phrases in the clause were read conjunctively as involving an entirely subjective test. On this interpretation not only should the accused have intended to cause grievous bodily harm but he should also have known that the specific injury that he inflicted would result in death. Thus in *Aung Nyung*,[47] a Full Bench of the Rangoon High Court said:

> Where no higher intention can be imputed than to inflict an injury which is in fact likely to cause death, there is the graver degree of guilt in culpable homicide, but there are no elements which bring the case under section 300; section 300 would apply only if it were possible to go a step further and say that the offender intended the injury to be sufficient in the ordinary course of nature to cause death.

But this view as to the entirely subjective nature of the third clause has been consistently rejected in a string of cases by the Indian Supreme Court.[48] The effect of these judgments is that once it is proved that the accused intended to inflict the injury in fact inflicted, whether or not the injury was sufficient to cause death is a matter for objective assessment.[49] To put it in another form, the courts should apply a subjective test to determine whether the injury was intentionally inflicted.[50] Once this determination is made against the accused, purely objective factors take over. The question whether the injury was of the type that would be ordinarily fatal is usually a matter of medical evidence.[51] Alternatively, it would be sufficient to show that ordinary people would have known that the injury would prove fatal. But, the subjective factor that the accused intended to inflict the type of fatal injury that was in fact inflicted must be established.[52]

The most frequently cited of them is the case of *Virsa Singh* v *The State of Punjab*.[53] The Indian Supreme Court interpreted the clause and identified

47 (1940) Rang LR 441.

48 *Virsa Singh* AIR 1958 SC 465; *Rajwant Singh* AIR 1966 SC 1874.

49 *Jaspal Singh* AIR 1986 SC 683; *Padla Veera Reddy* AIR 1990 SC 79; *Jagtar Singh* AIR 1988 SC 628; *Vinod Kumar* AIR 1991 SC 300; *Subran* (1993) 3 SCC 722; *Kirkar Singh* (1993) 4 SCC 238.

50 An English commentator characterized these decisions as a "triumph for objectivity". Cross in [1967] *Annual Survey of Commonwealth Law* 233.

51 *Basappa Bimappa Doddamani* AIR 1961 Mys 21; *Dadi Abdul Gaffor* AIR 1955 Andhra 24; *Yohanan 1958 ILR Kerala 544.*

52 *Jai Prakash* [1991] 2 SCC 32.

53 [1958] SCR 1495. The Supreme Court has followed this case in a series of cases. The more

the essential elements necessary for the establishment of the case for the prosecution under the clause in the following terms:

> First, it must establish, quite objectively, that a bodily injury is present; Secondly, the nature of the injury must be proved. These are purely objective investigations. Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended. Once these elements are proved to be present, the enquiry proceeds further, and Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender. Whether an injury is or is not sufficient in the ordinary course of nature is a question of fact and it does not cease to be sufficient merely because the person who inflicts the injury does not know that it is sufficient.

But there is an evident distaste in the Indian courts for the conviction of a person under the third clause for murder because of the fact that it uses an objective theory, this despite the fact that there is no mandatory capital punishment for murder under the Penal Code. The present writer's survey of the reported Indian judgments in which the third clause was used shows that the capital sentence was not imposed in these cases. There is also a tendency to wriggle out of using the clause by focussing on the circumstances of the case.[54] One major restriction that the Indian courts have placed is to focus on the first phrase in the third clause which emphasizes the need for a subjective intention to cause grievous bodily injury.

There is a situation in which the harshness of the application of section 300 is obvious.[55] The offender cuts the victim on his foot with the specific idea of avoiding the causing of a fatal injury. But an artery is severed and the medical evidence is that in the ordinary course of nature the injury will prove to be fatal. He could be liable for murder under the third clause

recent of them are *Tholan* v *State of Tamil Nadu* [1984] 2 SCC 133; *Jagrup Singh* v *State of Haryana* [1981] 3 SCC 616; *Randhir Singh* v *State of Punjab* [1981] 4 SCC 484; *Kulwant Rai* v *State of Punjab* [1981] 4 SCC 245; *Hari Ram* v *State of Haryana* [1983] 1 SCC 193. *Jagtar Singh* v *State of Punjab* [1983] 2 Scc 342.

54 In *Tholan* v *State of Tamil Nadu*, there are dicta that a single blow that proves fatal cannot attract the use of the third clause. This case and others which contain similar views are explained on the basis of the circumstances contained in them in *Jaiprakash* v *State (Delhi Administration)* [1991] 2 SCC 32.

55 This situation was adverted to by Professor Gledhill in an article published in India. Gledhill, "The Indian Penal Code in the Sudan and Northern Nigeria" (1960) *Yearbook of Legal Studies* (Madras).

on the basis that there was an intentional causing of bodily injury and that the bodily injury so caused was fatal in the ordinary course of nature. Such a result would obviously be unjust.

The Indian courts have circumvented this difficulty, firstly, by emphasizing the subjective element in the first phrase in the third clause of section 300 and, secondly, by stressing that the consequences that are known to follow from the injury are to be judged, not only in the light of expert evidence, but in the light of the knowledge of the ordinary man. Thus, in *Laxman Kalu Nikalje* v *the State of Maharashtra*,[56] a superficial injury on the chest of the victim had severed an artery and caused the victim's death. Hidayatulla CJ held that the injury that the accused intended to cause did not include the severance of the artery. It would appear from the Chief Justice's judgment that for the second phrase of the third clause to be satisfied, the injury must be of a substantial nature and be caused to a vital part of the body which is known by ordinary persons to be susceptible to fatal wounds. Again, in *Harjinder Singh* v *Delhi Administration*,[57] the injury caused on the thigh of the victim proved fatal as a femoral artery had been severed and a great loss of blood caused. The trial judge, purporting to follow *Virsa Singh*, had found the accused guilty of murder on the basis that the injury was intentionally inflicted and that medical evidence showed that the injury would be fatal in the ordinary course of nature. The High Court affirmed conviction, but the Supreme Court held that the conviction for murder under the third clause of section 300 was not tenable on the facts. According to the Court, the accused had intended to cause an injury on the thigh but he had not intended to cut the artery. Therefore, the requirement of the first phrase in clause three had not been satisfied. The effect of these decisions is to avoid an unnecessary reliance on objectivity by stressing the subjective requirements of the first phrase. It is in the most obvious instances that a conviction under the third clause will be permitted to stand.[58]

The third clause is very much a part of the law of murder in India. It is, however, to be used with considerable caution. The statement of the law in *Virsa Singh* has been consistently followed by the Indian Supreme Court[59] that it is now settled in that country that it is the leading case on the interpretation of the third clause. A recent affirmation of *Virsa Singh* by the Indian Supreme Court was in *Jaiprakash* v *State (Delhi Adminis-*

[56] [1968] 3 SCR 685.

[57] [1968] 2 SCR 246.

[58] This line of reasoning goes against a sentence in the *Virsa Singh* case: "Whether an injury is or is not sufficient in the ordinary course of nature is a question of fact and it does not cease to be sufficient merely because the person who inflicts the injury does not know that it is sufficient."

[59] In *Jagrup Singh*, *Virsa Singh* was referred to as the *locus classicus* on the point.

tration).[60] Since there is a good survey of the law in the judgment of Reddy J in that case it is useful to state the facts of the case and the explanation of the clause in some detail.

The facts were that the accused had a relationship with the wife of the deceased. On the day of the killing, the accused had visited the woman at her home. The deceased who had come in then had remonstrated with the accused regarding his visit. Thereupon the accused pulled out a knife (a kirpan) and stabbed the deceased on his chest. The medical evidence was that the stab wound was sufficient in the ordinary course of nature to cause death. The trial court found the offender guilty and the conviction was affirmed by the High Court and the Supreme Court. Reddy J, after referring to *Virsa Singh* and the judgment of the Divisional Bench of the Supreme Court in *Jagrup Singh* observed:

> In both these cases it is clearly laid down that the prosecution must prove (1) that the bodily injury is present, (2) that the injury is sufficient in the ordinary course of nature to cause death, (3) that the accused intended to inflict that particular injury, that is to say, it was not accidental or unintentional or that some other kind of injury was intended. In other words clause thirdly consists of two parts. The first part is that there was an intention to inflict the injury that is found to be present and the second part that the said injury is sufficient to cause death in the ordinary course of nature. Under the first part the prosecution has to prove from the given facts and circumstances that the intention of the accused was to cause that particular injury. Whereas the second part whether it was sufficient to cause death is an objective enquiry and it is a matter of inference or deduction from the particulars of the injury.

Reddy J saw a limiting factor in the second phrase of the third clause. The second phrase refers to the "injury *intended to be inflicted*". He explained the significance of the presence of this clause in the second phrase in the following terms:[61]

> from the mere fact that the injury caused is sufficient in the ordinary course of nature to cause death it does not necessarily follow that the offender intended to cause the injury of that nature. However, the presumption arises that he intended to cause that particular injury. In such a situation the court has to ascertain whether the facts and circumstances cannot be laid down in an abstract rule and they will

[60] [1991] 2 SCC 32.
[61] [1991] 2 SCC at 43.

> vary from case to case. However, as pointed out in *Virsa Singh*, the weapon used, the degree of force released in wielding it, the antecedent relations of the parties, the manner in which the attack was made, that is to say sudden or premeditated, whether the injury was inflicted during a struggle or grappling, the number of injuries inflicted and their nature and the part of the body where the injury was inflicted are some of the relevant factors. These and other factors have to be considered and if on a totality of these circumstances a doubt arises as to the nature of the offence, the benefit has to go to the accused.

Hence, in Indian law, in addition to the subjective element in the first phrase, there is also an element of intention that is involved in the second phrase. The prosecution is required to establish that the type of injury that caused death in the ordinary course of nature was the type of injury that the offender intended to inflict. The Indian courts have adopted a cautious approach to section 300 because of the objective approach involved in its use. In addition, there is the safeguard that the Indian courts have a discretion to choose between capital punishment and life imprisonment and have generally exercised the choice in favour of life imprisonment in circumstances where the conviction has been under the third clause.

Developments in Singapore Law

There may be a preference for the use of the third clause of section 300 if the facile view is taken of the clause that all that it requires is the proof of a subjective intention and then objective factors based largely on medical evidence take over. This probably flows from the perception that once the subjective intention is proved, objective considerations take over and that all that has to be satisfied thereafter is to show that the injury caused was of such a character that it would ordinarily prove fatal. This can be satisfied through medical evidence. This perception has not been corrected by the courts which have been preoccupied with the interpretation of the third clause by the Privy Council in a case on appeal from Singapore. The courts in Singapore have purported to follow the Indian cases but it would appear that, in reacting to the Privy Council decision which veers the law towards subjectivity, there has been a tendency to favour objective notions to a greater extent. The course of the development of the law in Singapore may be detailed.

The Singapore case in which the Privy Council considered the third clause was *Mohamed Yasin b Hussin* v *Public Prosecutor*.[62] The facts of the case as detailed in the reports were that the accused, a young man, and another

[62] [1976] 1 MLJ 156.

person had entered the hut of an elderly Chinese woman of slight build to commit burglary. In the course of a struggle with the woman, the accused had formed a desire to rape her. The nature of the injuries showed that he used extreme force on her. Her ribs were broken and had caused congestion of her lungs, leading to cardiac arrest. Medical opinion was that the injuries were caused by someone sitting with force on the chest of the victim.[63] The trial judge had found the accused guilty of murder under the third clause of section 300. The High Court of Singapore affirmed the conviction. The accused appealed to the Privy Council.

The advice of the Privy Council on the case was written by Lord Diplock. It is interesting to keep in mind that Lord Diplock had in the same year that he was hearing *Mohamed Yasin* sat in the House of Lords when it decided the English case, *Hyam*.[64] His speech in that case was clearly moving the English law towards subjectivity.[65] His analysis of the history of the English law of murder in that case was in itself an interesting example of the use of history by a distinguished judge to favour his own predisposition towards changing the direction of the law of homicide, heavily dependent on objectivity throughout its formation, towards subjectivity. Lord Diplock was in a frame of mind that disposed him to the preference of subjective formulations. In his opinion in the *Mohamed Yasin* case, there are passages which may be taken as giving expression to his preference for subjective views.[66] In acquitting the accused of murder, Lord Diplock stated the deficiency in the prosecution's case in the following terms:

> The lacuna in the prosecution's case which the trial judge overlooked was the need to show that, when the accused sat forcibly on the victim's chest in order to subdue her struggles, he intended to inflict upon her the kind of bodily injury which, as a matter of scientific fact, was sufficiently grave to cause the death of a normal human being of the victim's apparent age and build even though he himself may not have had sufficient medical knowledge to be aware that its gravity was such as to make it likely to prove fatal.

63 The case is discussed in greater detail by the pathologist who gave expert evidence. See Chao Tze Cheng, *Murder Is My Business* (1990).

64 [1975] AC 55.

65 Unlike the other Law Lords who sat with him, Lord Diplock was prepared to overrule *DPP* v *Smith* [1961] AC 290. It was on the basis of his speech that the later Privy Council decision on appeal from the Isle of Man, *Frankland and Moore* v *R* refused to follow *Smith*.

66 For example, his view that it was "essential for the prosecution to prove, at the very least, that the appellant did intend by sitting on the victim's chest to inflict upon her some internal, as distinct from mere superficial, injuries or temporary pain." It is possible to argue that this requires proof of a subjective intention as to the type of injury inflicted.

The meaning of this long sentence is hardly clear. The first part of the sentence seems to imply that the accused should be shown to have intended the precise injury that he inflicted and the effect it would produce. The second part seems to imply that this is not necessary and that if the injury was objectively sufficient to be fatal, there would be murder. Yet, Lord Diplock purported to follow the Indian Supreme Court's decision in *Virsa Singh* and established that case as the basis of the interpretation of the third clause.

Faced with the difficult opinion of Lord Diplock, Singapore courts have sought to avoid it and formulate their own interpretation of the third clause and it is respectfully submitted that they may also have gone awry. In *Public Prosecutor* v *Visuvanathan*,[67] where the accused had stabbed the victim on the chest, the court was faced with an argument based on the dictum of Lord Diplock. The court sought to confine the dictum to the precise facts of the case before the judge. This, it is well known, is a technique that the lower courts adopt when they feel that the higher court's view is incorrect. The court then proceeded to interpret the third clause in a manner that gave broad scope for the objective element in the second phrase. The relevant passage containing the interpretation reads as follows:

> The cases show that clause (c) is meant to apply in the circumstances where the assailant had no intention of causing death but has nevertheless intentionally (and not accidentally) inflicted a bodily injury sufficient in ordinary course of nature to cause death. Under clause (c) once the intention to cause bodily injury actually found to be present is proved, the rest of the enquiry ceases to be subjective and becomes purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. It is irrelevant and totally unnecessary to enquire what kind of injury the accused intended to inflict. The crucial question always is was the injury found to be present intended or accidental.

The judges in *Visuvanathan* also purported to follow *Virsa Singh* in making this formulation of the law.[68]

The formulation of the law in the passage cited is not exact. It misses several steps indicated in *Virsa Singh* and the subsequent Indian cases which have applied it. It dispenses with the need to prove that the accused intended to cause the injury of the type that was in fact caused. It dispenses with the need to show that the injury was not accidental. An oral judgment

[67] [1978] 1 MLJ 159 (*per* Choor Singh and Rajah JJ).

[68] *Virsa Singh* had been followed earlier in Singapore by Wee Chong Jin CJ in *Mimi Wong* v *The Public Prosecutor* [1972] 2 MLJ 75.

delivered by Rajendran J is more in accord with the Indian authorities than the test formulated in *Visuvanathan*. In *Public Prosecutor* v *Phuah Siew Yen*,[69] Rajendran and Karthigesu JJ were concerned with a situation in which the accused had strangled the victim with a towelling sash. The medical evidence was contradictory and this evidence showed the possibility that asphyxia could have been caused by the accused sitting on the victim's chest. The question was whether on these facts, the accused could be found guilty of murder. In his oral judgment, Rajendran J said:

> Whether your conduct falls within section 300 (c) of the Code is a matter that is somewhat more difficult. The bodily injury that you intended to inflict was the strangulation at the neck. It is clear that when you sat on the chest of the deceased, it was not your intention to inflict any injury on her by so sitting. The medical evidence however, is that the strangulation of the neck was augmented by the pressure on the chest as a result of your sitting on the chest. It must, therefore, remain in doubt whether the bodily injury you intended to inflict (*ie*, the strangulation at the neck) would in this case be sufficient in the ordinary course of nature to cause death.

It is implicit in this dictum that the court was conscious of the fact that the accused had not intended to cause the type of injury that was inflicted. The dictum does not support the facile conclusion that once there had been an intention to cause bodily injury and the first limb of the clause is satisfied and thereafter, entirely objective factors take over.[70] There is the further requirement to show that the accused had intended the type of bodily injury that was inflicted and this is a subjective factor that is contained in the second clause. Unfortunately, the other recent judgments of the Singapore courts do not make this clear. The view that may exist in Singapore that gives a greater scope to the objective theory on the basis that once the first limb of the clause requiring a subjective intention to cause bodily injury is satisfied, purely objective considerations take over thereafter needs to be corrected. It would be unsatisfactory, particularly in a jurisdiction that retains a mandatory capital sentence to murder to permit greater scope for objective theories than is permitted by the reading of the legislation. It will be shown at a later stage that there is no need for the prosecution to rely on an objective theory in using the third clause of section 300. In all the cases that have recently been decided on section 300 (c) a conviction for murder seems to have been possible on the basis of the first clause.[71] In

[69] [1991] CLAS News No 3 at 30.

[70] Compare Karthigesu J in *Tan Chee Hwee* [1993] 2 SLR 657 at 666.

[71] In some of the cases, the court pointed out that the facts showed an intention to kill. In

such circumstances, there is hardly any need to resort to a charge under a clause the interpretation of which has presented problems to courts.

(iv) *Knowledge that the act was so imminently dangerous that it must in all probability cause death*

The fourth clause of section 300 is based on knowledge whereas the other three clauses are primarily based on intention. Knowledge, as the English positivists at the time of the drafting of the Code had it, was foresight of the consequences of the conduct without any desire to bring the consequences about. In its use in homicide, the absence of desire is demonstrated by the fact that there is no victim chosen by the accused in the cases in which the concept has been used.[72] Where there was a desire, the state of mind amounted to intention.[73] The Code required the knowledge to be subjective. The accused could escape liability by showing that in view of his particular circumstances, he did not have the requisite knowledge of the consequences of his conduct. Likewise, the prosecution could establish guilt by showing that the experience and the background of the accused was such that he did have the requisite knowledge.[74]

But the requirement of subjective knowledge can easily be subverted for the ordinary tendency is to impute to the accused what others in circumstances could have foreseen. Such a course could also have a theoretical justification in that the purpose of punishing a reckless person is that others are deterred from deviating from accepted standards of avoiding risk to human life. The subversion of the requirement of a subjective recklessness is not only practically convenient but is also theoretically justifiable.

It is for this reason that courts in applying the fourth clause have resorted to inferences from objective standards. But it should not be forgotten that the law is stated in subjective terms and it must always be open to the accused to prove that he did not have the requisite knowledge. The law under the Code also makes a distinction between the degree of the foresight of the likelihood of the consequences, the higher degree alone being sufficient for a conviction for murder.[75]

these circumstances, there is hardly any reason, apart from the convenience of the prosecutor, to rely on s 300 (c).

72 Early Indian cases refer to the absence of victim selection as the basis for the application of the fourth clause. *Gora Chand Gope* (1866) 5 WR (Cr) 45; *Mahindra Lal Das* AIR 1934 Cal 432; *Bhagat Singh* AIR 1930 Lahore 266.

73 Bentham included such foresight in his definition of "oblique intention".

74 See, *eg*, the facts of the Australian case, *Boughey* (1986) ALR 768.

75 In the event of a lower degree of likelihood the conviction could be for culpable homicide not amounting to murder under s 299. There cannot be any mathematical precision in

In the leading Indian case on recklessness, *Ram Prasad*[76] the Supreme Court focussed on the intrinsic quality of the act of the accused rather than on his subjective awareness of the consequences. Such an approach is a capitulation to objectivity but the formulation seems inevitable provided the avenue is kept open to the accused to establish that his circumstances were such that it was not possible for him to be credited with the awareness of the risks. In *Ram Prasad*, the accused had set fire to his wife's clothing after having poured oil on her. Hidayatulla J (who later became Chief Justice of India) said: "although clause *fourthly* is usually invoked in those cases where there is no intention to cause death of any particular person, the clause may on its terms be used in those cases where there is such callousness towards the result and the risk taken is such it may be stated that the person knows that the act is likely to cause death." He went on to observe: "no special knowledge is needed to know that one may cause death by burning if he sets fire to the clothes of a person". So formulated, the fourth clause depends on external standards such as the callousness involved in the risk, the objective assessment of the risk involved in the act and the imputation of what is ordinarily foreseeable to the offender. In obvious situations as the one involved in *Ram Prasad* (a case which could as well have been decided on the basis of intention), there is little harm in the formulation of the law by reference to purely objective standards. There are obvious instances, such as the placing of a bomb in a crowded market place,[77] where the formulation of the law by reference to objective and external standards cannot cause concern. In these instances, there would be difficulty in distinguishing between intention and knowledge. A terrorist who places a bomb aboard an aircraft has an obvious knowledge of the consequences of his conduct.

But there are circumstances in which the formulation of the law in objective terms may seem harsh and it is these formulations which have caused concern in the courts of the Commonwealth. The English debate on whether recklessness should be considered a mental element in murder focusses on such hard cases. The issue has been raised in other jurisdictions as well. In view of the fact that the law under the Code has been formulated in subjective terms but the courts which have interpreted it have sought objective formulations, it is interesting to look at some of the debate on the issue that has taken place in other jurisdictions.

calculating these degrees of likelihood. For an interesting American case involving Russian roulette where mathematical calculations were made, see *Malone* (1946) 354 P2d 180.

76 (1968) 2 SCR 522. Compare *Dhirajia* [1940] All 647.

77 See the English case, *Desmond and Barrett* where a bomb was used to effect a jail break. The explosion killed a passer-by and the accused was held guilty of murder.

In England, the House of Lords has grappled with the issue in a series of cases, shedding little light on what the law on the question in England is and generating much academic discussion which further confounds the legal position. The judges in England seem to be inclined towards objectivity in the definition of reckless murder though academic opinion is averse to the acceptance of this view. The English position is befuddled with the old notion of constructive malice that existed in the common law. Under the felony-murder rule that had been evolved in the common law, if a killing occurred in the course of the commission of a felony, it was considered murder. In a sense, the rule was the progenitor of reckless murder for felonies such as rape or robbery involved violence and the perpetrators of such violent crimes should be taken to have foreseen the possibility of a killing in the course of the commission of the crime. Though constructive doctrines were abolished by the Homicide Act, the logic of the old rule seems to still linger on.[78] The Australian position is no better than the English position. In Australia too, objective principles have been articulated by the High Court in defining reckless murder.[79]

The logical justification for the recognition of a category of reckless murder is that a man who consciously disregards a homicidal risk and manifests an extreme indifference to human life should be morally condemned as a murderer where his conduct does result in a fatality.[80] The American lawyers express the moral condemnation that attends such behaviour by referring to the mental state involved as "a heart regardless of social duty".[81] As long as the basis of reckless murder is found in moral standards, it would be difficult to avoid its definition except on external standards as involving standards of conduct so dangerous to human life that society is prepared to condemn a person who engages in them as a murderer in the event of a fatality resulting from the conduct.

[78] It is most evident in cases where there are joint offenders involved in felonies such as robberies. Where a killing occurs, all become equally responsible as the killer as it should have been foreseen that such a consequence was a probable result of their joint venture.

[79] See *Boughey* (1986) ALR 768. This was a case on the Tasmanian Criminal Code which recognizes that there could be a conviction for murder on the basis of objective recklessness.

[80] The argument against this is that conviction depends on chance as a person who does the same act will escape such condemnation where the risk does not eventuate.

[81] This notion is traceable to Scots law where intentional killings included "killings with such wickedness as to imply a disposition depraved enough to be regardless of the consequences." Smith, *Scotland: The Development of Its Laws and Constitution* (1962), at 181. Compare the definition in the American Model Penal Code which refers to "circumstances manifesting an extreme indifference to the value of human life" (s 201.2.(1) b). The moral overtones of the concept are clear. The English positivists did not favour the idea that legal concepts should contain such moral bases. Some of the difficulty in the area could be traceable to this aversion to the mixing of law and morality in English law.

Yet, the formulation of the Code seeks to achieve fairness in leaving open the possibility of many defences to liability to murder which are inherent in the definition that is contained in the fourth clause. Firstly, the Code requires a high degree of probability of a killing as a result of the conduct of the offender. This results from the contrasting of the third clause of section 299 with the fourth clause of section 300. It is generally recognized that the fourth clause of section 300 can be used only in a situation where there is a probability as opposed to a mere possibility of a killing resulting from the act.[82] It is interesting to note that the American Model Penal Code adopts a similar solution. Under the Model Penal Code, a person acts recklessly, "when he consciously disregards a substantial and unjustifiable risk that death will result from his conduct."[83] The requirement of substantiality ensures that there is a high degree of likelihood of fatality before there could be a conviction for murder.

The second internal mechanism for avoidance of liability for murder is that there must be a subjective awareness of the risk. Though the courts make an inference of knowledge from the objective circumstances, the wording of the clause in the section is such that they cannot justify the imposition of liability on an accused who can show that he was unable to appreciate the risk involved. The possibility of this liability avoiding mechanism exists though it is difficult to see how a normal offender can avoid the imposition of guilt on this basis.[84] Where the offender can prove mental deficiency or some such factor, then there is a great possibility of the court will consider whether there was subjective awareness of the risk.[85]

A third internal mechanism for avoiding liability for murder provided in the third clause is that it must be shown that the act was committed without any excuse for incurring the risk involved in its commission. The excuse need not be a lawful excuse. Where a lawful excuse exists, no liability can arise. What is referred to is some moral or social excuse or even an excuse resulting from human frailty[86] for the taking of the risk. The social utility of the act may justify the taking of the risk. Thus, an ambulance

[82] The making of this comparison between s 299 and s 300 is well established. See *Tham Kai Yau* v *PP* [1977] 1 MLJ 174.

[83] S 2.02 (2) c of Tentative Draft, No 4.

[84] For a statement of the subjective knowledge required by the clause, see Wee Chong Jin CJ in *William Tan Cheng Eng* v *PP* [1970] 2 MLJ 244.

[85] In *Dhirajia* [1940] All 647 a mother jumped into a well with her baby in fear of her husband. The baby died. She was charged under the fourth clause of s 300 and the judges held that she had the relevant knowledge as the "act could only have one conclusion". This is an objective formulation of the law. The woman may not have addressed her mind to the risk in the state of panic. However, the judges found that she had a lawful excuse for incurring the risk. The facts raise an interesting issue on causation as to whether the accused or her husband was responsible for the events.

[86] The best example of this is provided by the facts of *Dhirajia*.

driver or a driver of a fire engine going at great speed at a time of an emergency is aware of the risk but can be deemed to be excused in taking the risk because of the fact that he is on a life-preserving mission. The formulation of the law in the Code is superior to the notions of reckless murder found in other jurisdictions. If murder must be extended outside the sphere of intentional killings to reckless killings, then it must be done with caution and the Code does adopt an approach that is sensitive to the need for such caution.[87]

III. Judicial Accretions to the Code Definition of Murder

Though the definition of murder is wholly contained in section 300 of the Code, in the course of time, courts formulated evidentiary rules which affect the manner murder is proved and these have an effect on the definition of murder. Unlike the Code which shows little traces of English law, the judicial accretions were imported into the practice of the law in Code jurisdictions largely in reliance of developments in the English law. This section seeks to identify these rules and to indicate the manner in which they impinge upon the existing definition of murder in the Code.

(i) *The dangerous weapons doctrine*

The rule that a person who attacks the human body with dangerous weapons must be taken to have intended to cause death is a rule that existed in the common law for a long period of time.[88] Though stated as a rule, this was no more than an evidentiary presumption. But there are judgments in which the rule has been stated in terms which indicate that it is more than a presumption of evidence.[89]

[87] One other factor in the cautiousness of the approach is that the Indian Codes seldom use the fourth clause and where a conviction is entered the courts choose the option of imposing a life sentence than a capital sentence. This option of course is not open in Malaysia or Singapore where the capital sentence is mandatory for murder.

[88] The doctrine is traced to the so-called correction cases. In East, 1,5,234, the discussion of the correction cases states: "much depends on the instrument or the manner of chastisement. If a dangerous weapon is used, this is murder." Further see Oberer, "The Deadly Weapon Doctrine – The Common Law Origin" (1962) 72 Harv LR 92.

[89] In Scotland, there are references to the rule as a rule of the law. *Eg,* in *HM Advocate* v *M'Guiness* [1937] JC 37, the judge said: "People who use knives and pokers and hatchets against a fellow citizen are not entitled to say "we did not mean to kill" if death results. If people resort to the use of deadly weapons of this kind, they are guilty of murder whether or not they intend to kill." Put this way, the rule becomes more than a presumption as the mere use of the weapons will be sufficient for conviction for murder.

There are no references to the doctrine in modern English text-books on the criminal law. But there are references to it in reports. In *Smith,*[90] Byrne J referred to a "class of cases where the act of the accused must obviously cause grievous bodily harm, as where a blow with a sharp and heavy hatchet is deliberately aimed at and strikes the victim." In this class of cases, the judge observed that in the absence of evidence rebutting the presumption, "a direction to the jury that a man intends the natural consequences of his act could be apposite." Clearly, the dangerous weapons doctrine was considered as no more than a presumption in this case.

But Lord Denning has considered it to be a rule of law in an extra-judicial pronouncement.[91] He said:

> Suppose a man hits his enemy on the head with an iron bar and kills him, he is guilty of murder... or suppose a thief who is being chased by a policeman, shoots at his leg and the shot, by mistake, goes high and kills the policeman, no one can doubt that he is guilty of murder.[92] The law cannot permit the thief to get away by saying 'I did not shoot to kill'. If such an excuse were permitted, it would be easy to plead it dishonestly and difficult to rebut the plea... so the law of England, which is essentially a practical law administered by practical men, says it is no excuse at all.[93]

Lord Denning's formulation is erroneous and has no regard at all to the mental state of the offender.[94]

Where the use of a particular weapon becomes frequent in the course of violence resulting in fatalities (like the use of the *parang* in Malaysia

[90] [1960] 3 WLR 97.

[91] Lord Denning, *Responsibility under the Law* (Lionel Cohen Lecture, 1964).

[92] Though a conviction for murder is possible in the first example, if there was only an intention to shoot at the leg and this intention is clear on evidence, both in English law as at present, and more so under the Indian law, a conviction for murder will not be maintainable. Lord Denning erred in concentrating on the evidentiary factor that such an intention, which the accused used in his defence, would be difficult to establish.

[93] But compare with this illustration, *Chun Kum Moey* [1967] 1 MLJ 205 where a robber fired a gun at point blank range at the victim who was reaching for the telephone. The explanation that the robber intended to shoot only at the hand of the victim was accepted. But in the Indian case, *Rajendra Prasad Singh* AIR 1933 Patna 147, the shooting of a gun at close range was held to be murder.

[94] Compare the Privy Council in the Singapore case, *Chung Kum Moey* where the use of a gun at close range was treated as indicating at least recklessness. Also see *Rajendra Prasad Singh* AIR 1933 Patna 147. Also see Yong Pung How CJ in *Suradet* [1993] 3 SLR 265 at 271 who observed: "[Counsel] submitted that a wooden stick, unlike a knife or gun, is not inherently a deadly weapon. We need only say that it was not the wood *per se* but the manner in which it was used to attack the victim which made it a deadly weapon."

and Singapore), the courts may show an inclination to treat the rule as more than a presumption in that they may see a deterrent value in applying the rule as an inflexible proposition to prevent similar use of such weapons in the future. But, despite this, it is best to treat the rule as a presumption and the Indian cases have generally treated the rule as nothing more than a presumption.[95]

(ii) *The vital part of the body doctrine*

Another presumption that is used in Indian law is that a man who attacks a part of the body which is known to be susceptible to fatal injury has an intention to kill. The cases which state the rule state it merely as a presumption.[96]

(iii) *The cumulative effect of the two doctrines*

There is little doubt that a court which recognizes both rules even as presumptions only will draw strong inferences of guilt where the evidence shows that deadly weapons were used to attack a vital part of the body.[97] The relative sizes of the victim and the offender, the infirmity or age of the victim and the duration of the attack will increase the weight of the inference.[98] The Indian Supreme Court stated the inference almost as if it were a rule in *Srikantiah.*[99] Referring to the location of the injuries, the Supreme Court observed: "All these are vital parts of the body and anybody who causes injuries with weapons of the kind the appellants used *must* be fixed with the intention of causing such bodily injury or injuries as would fall within section 300." The justification for such a position can only be found in an objective theory of responsibility. Stephen J once justified a similar view by observing that "if a man once begins attacking the human

95 *Inder Singh Bagga Singh* [1955] SC 439 but as usual in the case of Indian law, there are cases that support the contrary view. See, *eg*, *Sarwad* ILR 1960 Mys 446,

96 *Ratan* (1932) ILR Luck 634. *Ramasamy Nadar* AIR 1940 Mad 745. *Jaya Chandra Reddy* AIR 1993 SC 400.

97 *Yap Bew Hian* (Criminal Appeal No 18 of 1993) contains reference to a passage from an Indian book where the significance of the weapon and the part of the body attacked are stated.

98 *Solagar* AIR 1942 Madras 219; *Samat Kala* AIR 1934 Bombay 156. The Supreme Court in *Srikantiah* AIR 1958 SC 672 formulated the presumption in inflexible terms, observing: "All these are vital parts of the body and anybody who causes injuries with weapons of the kind the appellants used *must* be fixed with the intention of causing such bodily injuries as would fall under s 300." This formulation may not be consistent with the subjective requirements of the section.

99 AIR 1958 SC 672.

body in such a way, he must take the consequences if he goes further than he intended when he began."[100] Such a rationalization is inconsistent with the nice analysis of the exact state of mind of the offender that subjective theories of responsibility require. But the law under the Code, which may have once involved a nice balance between objective and subjective theories, now has been taken in the direction of the objective theory, in the belief that the provision of a deterrence against the aggressive use of deadly weapons against the human body is a value that justifies the taking of such a course.

IV. Conclusion

In view of the presumptions that have been judicially created, the proof of murder becomes an easier task for the prosecution. It is unnecessary for the prosecution to rely on the view that the second part of the third clause of section 300 involves purely objective factors. In a clear situation where a dangerous weapon has been used and a vital part of the body had been attacked, it is preferable for the prosecution to establish murder by showing that there was an intention to kill under the first clause or an intention to cause the bodily injury which the offender knew will cause fatal results as required by the second clause than resort to the third clause. The task is even more easy where a dangerous weapon was used to attack a vital part of the body. Where a mandatory penalty for murder exists, it is more satisfactory if murder is established on the basis of subjective intention whenever possible than on some objective external standard established by esoteric medical science.[101]

The definition of murder in the Penal Code consists of a delicate balance between the objective and subjective theories of liability. Unfortunately, prosecutors in several jurisdictions have sought to emphasize the features of the definition based on objective considerations. Courts must be conscious of the balance which the provision seeks to effect between subjective and objective factors. This should be particularly so in jurisdictions where there is a mandatory capital sentence for murder.[102] The frequent use of the third clause in section 300 should be avoided. It is a provision that Indian courts

[100] *Serne* (1887) 16 Cox CC 311.

[101] The temptation would be great where there is strong expert evidence available for the prosecutor to rely on such evidence in framing charges. A practice of so doing could grow up in small jurisdictions where such a technique had succeeded in the past. The biographies of famous pathologists indicate the effect their evidence has had on murder trials. See Sir Sydney Smith, *Mostly Murder* (1959).

[102] The Indian Penal Code provides for a discretionary sentence for murder. But this discretion was removed when the Codes were introduced into Ceylon and the Straits Settlements.

are loath to use except in the most clear instances of an intention to cause a specific injury which the offender obviously knows will result in a killing. It is best that other courts follow the Indian practice.

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The author wishes to thank Mr Peter English of the University of Exeter and Dr Geoffrey Marston of Sidney Sussex College, Cambridge, for their comments on an earlier draft of this article. He, alone, is responsible for any errors and for the opinions in the article.