HOW MAY THE DEFINITIONS OF CULPABLE HOMICIDE AND MURDER IN THE PENAL CODE BE REFORMED OR IMPROVED?

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I. The Current System

1 The Singaporean *Penal Code*[1] ("the Penal Code") was adapted from the *Indian Penal Code* of 1860[2] ("the Indian Penal Code"). The application of the law in India after that period was said to be based on notions of racial superiority and on the use of the criminal law as an instrument of colonial coercion.[3] Despite numerous changes made to the Singaporean Code, the substantive murder and culpable homicide provisions remain *in pari materia* to sections 299 and 300 of the Indian Code.

2 Murder is provided for in section 300 of the Singaporean Code. Sections 300(a) and 300(b) expressly require the offender to have had some subjective foresight of death,[4] either in the form of an intention to cause death or knowledge that the death of the particular victim is likely to result. In contrast, section 300(c) is the hybrid provision with both subjective and objective elements and does not expressly require foresight of death.[5] Section 300(d) deals with knowledge and not intentional infliction of bodily injury *per se*. It relates to knowledge – of a somewhat intricate nature[6] – that an act is so "imminently dangerous that it must in all probability cause death."

3 The murder provisions of the Penal Code are part of the broader category of culpable homicide offences under section 299. Hence, every murder is necessarily culpable homicide as well, but not *vice versa*.[7]

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[1] Cap. 224, 2008 Rev Ed.
[2] Act No. 45 of 1860.
[3] Eric Stokes, *The English Utilitarians and India* (New York: Oxford University Press, 1990) at 269.
[4] Victor V. Ramraj, "Murder without an Intention to Kill" [2000] SJLS 560 at 561.
[5] *Ibid.*
[6] *Tan Cheng Eng William v PP*, [1968-1978] SLR(R) 761.
[7] *Tham Kai Yau v PP,* [1977] MLJ 174.

II. Perceived shortfalls of the current system

A. Interpretation of section 300(c)

4 The first area that has been the subject of much controversy is the interpretation of section 300(c). It is seen as introducing an objective element into the definition of murder. This provision has been described as "problematic";[8] "the weakest part of the Indian Penal Code";[9] and being "incurably infirm."[10] The inherent ambiguity of the wording itself has been attributed as the cause of numerous possible yet divergent interpretations,[11] especially where there is a divergence between the actual and intended injuries.[12]

5 Depending on the interpretation one takes, an accused could potentially be found guilty under section 300(c) even though he only intended to inflict a minor injury. Hence the blanket label of "murder" under the current system fails to recognise the difference in culpability between someone who, for instance, has killed intentionally under section 300(a) and "someone who intends only to inflict a *minor* injury."[13]

6 Additionally, this objectivity introduces an element of "moral luck" into the assessment of criminal responsibility, meaning that it depends on luck or chance and on circumstances that are beyond that person's control as a moral agent.[14] One implication of the moral luck argument is that the system must, to be consistent, punish attempts with exactly the measure as the completed offence. This, however, does not appear to be consonant with the way the Penal Code works, empirically based on sections 307 and 308.

B. Distinguishing section 299 from section 300(c)

7 The second clause of section 299 largely corresponds to section 300(c), making it difficult to distinguish between the two. Based on the provisions, the only difference appears to

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[8] Alan Tan Khee Jin, "Revisiting Section 300(c) Murder in Singapore" [2005] 17 SAcLJ 693 at para 1.
[9] Per James Stephen, see Stanley Yeo, *Fault in Homicide* (Sydney: The Federation Press, 1997) at 104 ["Yeo, *Fault in Homicide*"].
[10] Michael Hor, "Managing Mens Rea in Singapore" [2006] 18 SAcLJ 314 at 326.
[11] Tan, *supra* note 8 at para 53.
[12] Ramraj, *supra* note 4 at 577.
[13] Ramraj, *supra* note 4 at 560 (emphasis in original).
[14] Ramraj, *supra* note 4 at 573.

be the degree of probability of death from the act committed[15] – whether it is "likely" or "sufficient in the ordinary course of nature" to cause death.

8 The fine divide is unsatisfactory, as it is overwhelmingly difficult to appreciate any practical distinction in borderline cases or to predict their outcome.[16] It has been argued to the contrary that judicial interpretation has, over the years, made the distinctions much more readily appreciable.[17] However, it is doubtful whether the general public, in an increasingly rights-conscious society,[18] would be able to discern these differences for itself.

C. Distinguishing between the provisions of section 300

9 Related to this is the difficulty in distinguishing between the provisions of section 300. Viscount Dilhorne, in *Chung Kum Moey v Public Prosecutor for Singapore*,[19] cautioned against viewing the four clauses as describing four mutually exclusive categories of mental elements. Yet, the practice of the court has been to treat these clauses as creating distinct categories, under the canon of statutory interpretation presuming that the Legislature does not legislate in vain and that no provision should be otiose. In a 2006 article, Professor Hor noted that having discovered that different meaning to section 300(c), the court ironically "rendered all other limbs otiose."[20]

10 Hence, the proposals aim to reduce the ambiguity and to distinguish the provisions further in a pragmatic manner. This would provide greater clarity and certainty to the public, reinforcing the rule of law, while considering practical limitations in implementation.

III. Competing philosophies

11 Before considering the various policy options, it is worth mentioning the competing philosophies of homicide law as they will undoubtedly guide our inclinations for certain choices.

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[15] *Criminal Law*, Halsbury's Laws of Singapore vol 8 (Singapore: LexisNexis, 2008) at para 90.205.
[16] K.L. Koh, C.M.V. Clarkson & N.A. Morgan, *Criminal Law in Singapore and Malaysia: Text and Materials* (Singapore: Malayan Law Journal, 1989) at 424.
[17] Yeo, *Fault in Homicide*, *supra* note 9 at 136.
[18] Law Society of Singapore's Criminal Law Conference Programme (http://www.lawsociety.org.sg/Conference/CLC2011/Topic3.htm) ["Conference Programme"].
[19] [1967] 2 AC 173.
[20] Hor, *supra* note 10 at 326.

A. Deterrence theory

12 The deterrence theory holds that social harmony is best served by the prevention of future harm and that the justification for punishment lies in its ability to minimise the likelihood of future transgressions.[21] Utilitarian and consequentialist in nature,[22] it is often referred to as the act-centred way of dealing with crime. Even in defining offences, the emphasis on the act has meant that subjective elements are downplayed.

13 For instance, it may be argued that constructive liability based on the objectivity in section 300(c) is justified for reasons of deterrence based on utilitarian grounds.[23] Indeed, the policy argument cited in *Virsa Singh v The State of Punjab*[24] was to deter people from "run[ning] around inflicting injuries that are sufficient to cause death in the ordinary course of nature."[25]

14 One major shortfall of this theory is the assumption that people are rational actors who consider the consequences of their behaviour before deciding to commit a crime.[26] However, this is not always the case, as exemplified by the defences of provocation and diminished responsibility, for instance.

B. Retributivist theory

15 In contradistinction, the retributivist or just deserts theory holds that when an individual harms society by violating its rules in some normatively unallowable way, the scales are out of balance, and sanctions against the individual restore this balance.

16 Under this perspective, the perpetrator deserves to be punished in proportion to the harm he committed. Punishment here is more tailored to the actor, thus emphasising the subjective intention of the accused in committing the act. In the context of sentencing, the move to introduce a discretionary death penalty for certain murder cases is broadly in line with this theory, with more justice being done in individual cases.

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[21] Kevin M. Carlsmith, John M. Darley & Paul H. Robinson, "Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment" (2002) 83(2) Journal of Personality and Social Psychology 284 at 284.
[22] *Ibid.*
[23] Ramraj, *supra* note 4 at 573.
[24] [1958] SCR 1495 ["*Virsa Singh*"].
[25] *Ibid.* at 1501.
[26] Valerie Wright, *Deterrence in Criminal Justice* (Washington D.C.: The Sentencing Project, 2010) at 2.

17 One could perhaps relate the guiding principles in determining the fault element – the correspondence and subjectivity principles – suggested by the Law Commission for England and Wales[27] ("Law Commission") to this perspective.

18 Under the correspondence principle, the fault element should relate to the harm done for which someone is being held liable.[28] The subjectivity principle advocates that the fault element should be concerned with the defendant's state of mind at the time of his actions,[29] rather than on objective facts to construct his liability.

19 The criminal justice system should aim to strike a balance between both theories. Deterrence keeps crime rates low. Yet, the deterrence theory in its extreme leads to injustice, as it is relatively unconcerned with the magnitude of harm or the mitigating circumstances.[30] In my view, introducing more elements of the retributive theory to the current law of homicide would not necessarily compromise the broader goal of crime control.

IV. Overview of the proposals

20 Three alternative approaches will be considered in this paper:

	First-tier murder	**Second-tier murder**	**Culpable homicide**
Approach One	Section 300(a)	Sections 300(b),(c),(d)	Gross negligence; Partial defences
Approach Two	Sections 300(a),(b),(d)		"Causing death by doing an act with the intention of causing such bodily injury as is likely to cause death"; Partial defences

[27] Law Commission for England and Wales, *A New Homicide Act for England and Wales?* (Consultation Paper 177, 2005) at para 2.101 ["Law Commission, *A New Homicide Act*"].
[28] *Ibid.* at para 3.15.
[29] *Ibid.*
[30] Carlsmith, Darley & Robinson, *supra* note 21 at 286.

Approach Three	Sections 300(a),(b),(c),(d); Define "intention" OR codify the *Virsa Singh* test		Section 299; Partial defences

21 The guiding principle behind the first two approaches is the "ladder" principle. Approach One proposes the creation a third tier in the hierarchy and restricting first-tier murder to the current section 300(a). A gross negligence provision will be added to culpable homicide. As with Approach Two, the provisions are mutually exclusive. Approach Two retains the two-tier structure.

22 Finally, Approach Three proposes some refinements while largely preserving the current system.

V. The "ladder" principle

23 As mentioned, under the "ladder" principle, individual offences of unlawful killing should exist within a hierarchy of offences reflecting the offence's degree of seriousness.[31] As Lord Bingham enunciated in *R v Coutts*,[32] "the interests of justice are not served if a defendant who has committed a lesser offence is either convicted of a greater offence, exposing him to greater punishment than his crime deserves, or acquitted altogether, enabling him to escape the measure of punishment which his crime deserves."[33] Hence, this principle "ensure[s] defendants are neither over-convicted nor under-convicted."[34]

24 Determining how the fault elements should be ordered involves a ranking exercise based on moral culpability. Within each tier of the "ladder" there should also be a "moral equivalence" of fault elements.[35]

[31] Law Commission for England and Wales, *Murder, Manslaughter and Infanticide* (Law Com No. 304, 2006) at para 1.64 ["Law Commission, *Murder, Manslaughter and Infanticide*"].
[32] [2006] WLR 2154.
[33] *Ibid.* at para 12.
[34] *Ibid.*
[35] Law Commission, *Murder, Manslaughter and Infanticide*, *supra* note 31 at paras 2.60 – 2.62.

25 It also follows that the overlap between individual offences be kept to a minimum – a marked departure from our current system where murder is a subset of culpable homicide. Therefore, although the first two approaches each propose a rebalancing of the current provision to varying degrees, they both entail having mutually exclusive provisions.

A. Approach One

(1) The first aspect: a third tier in the hierarchy

26 A middle tier should be added to the current two-tier[36] structure while the elements of the section 300 offences retained. This may appear to be a major departure from our current regime, though the idea is not entirely new. The 2012 introduction of the discretionary death penalty for convictions under section 300(b), (c), and (d) could be seen as having embarked on a shift, and that creating a third tier is a follow-through.

27 There is moral justification for placing intent to kill at the top tier. The doctrine of double effect distinguishes between intended results and side effects – a distinction between what one intends in acting and what one brings about as a side effect of an intentional action.[37] This distinction has moral significance: it is sometimes permissible to bring about as a side effect of one's intentional action what it would be wrong to bring about intentionally.[38]

28 For instance, it was held in the UK that the doctrine of double effect permits a doctor, acting in good faith, to administer painkilling drugs in appropriate quantities for the purpose of relieving that patient's pain, even though the doctor knows that a side effect is to hasten death.[39]

29 In Singapore, while such an act could constitute an offence under section 300(d), the doctrine could be used to explain the difference in moral culpability between section 300(a) and the other murder provisions.

30 During the 2012 parliamentary debates, the Minister for Law did not cite any moral arguments *per se* but justified the changes as reflecting "what the majority of the society want".[40]

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[36] For the purposes of this paper, I do not consider s304A to be part of the main homicides framework.
[37] Joseph Boyle, "*Who is Entitled to Double Effect?*" (1991) 16(5) Journal of Medicine and Philosophy 475 at 476.
[38] *Ibid.*
[39] *In re A (children) (Conjoined Twins: Surgical Separation)* [2001] 1 Fam 147 at 216G.
[40] Sing., *Parliamentary Debates*, vol. 89 (14 November 2012) (Minister for Law, Mr. K Shanmugam).

Nonetheless, members of society surely use moral yardsticks in coming to these conclusions themselves.

31 In its final report, the Law Commission reasoned that the existing structure had to accommodate a whole variety of different fault elements without being able to rely, as in the past, on the inherent flexibility or vagueness of "malice aforethought" as an umbrella term capable of covering them all.[41] This was due to the judiciary's conspicuous shift away from the term "malice aforethought" in favour of "intention".[42]

32 Consequently, cases that would have been treated as murder 50 years ago when the term "malice aforethought" was in use would now be treated as cases of manslaughter because there was no actual "intention" to kill or to inflict serious injury.[43] This left the offence of manslaughter with an unacceptably broad scope.[44]

33 The Law Commission felt a "three-layer cake" structure help distinguish between wrongs and hence respect the principles of fair labelling in a more sophisticated way.[45]

34 In our context, although the problem is probably less acute, a three-tier approach would nonetheless be beneficial. Parity between moral culpability and sentencing on the one hand and labelling on the other can be achieved.

35 As an aside, in Canada, a conviction of murder carries a mandatory sentence of life imprisonment.[46] Interestingly, the distinction between first and second-tier murders is only made in determining when a convict becomes eligible for parole.[47] However, if the goal is indeed to achieve clarity and distinguish offences based on moral culpability, the distinction should be made at the outset.

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[41] Law Commission, *Murder, Manslaughter and Infanticide*, *supra* note 31.
[42] See, for instance, *R v Moloney* [1985] 1 AC 905 at 920 and *R v Vickers* [1957] 2 QB 664.
[43] Jeremy Horder, ed, *Homicide Law in Comparative Perspective* (North America: Hart Publishing, 2007) ["Horder, *Homicide Law*"] at 21.
[44] *Ibid.*
[45] *Ibid.*
[46] *Criminal Code*, RSC 1985, c C-46, s 235(1).
[47] *Ibid*, ss 745(a) and 745.4.

(2) The second aspect: mutually exclusive provisions

36 As mentioned, the wording of section 299 and the murder provisions makes it difficult to distinguish between them. Yet, subtle differences in wording give rise to very different consequences in terms of conviction and sentencing options, at times entailing a life-or-death question for the accused.

37 Indeed, in India, where sections 299 and 300 are *in pari materia* with the Singapore provisions, the academic distinction between them has "vexed the Courts for more than a century."[48] This has resulted in the courts being drawn into "minute abstractions".[49]

38 The solution appears to be mutually exclusive provisions. This involves a conceptual shift, where the various tiers of homicide would henceforth be understood as involving different wrongs rather than different degrees of the same wrong. To do this, it is suggested that the current section 299 be completely removed.

39 One pertinent question is what the likely effects in terms of prosecuting accused persons would be. Is the difference in burdens of proof between the current sections 299 and 300 so great that removing section 299 would create a huge lacuna in the law, resulting in significant under-conviction?

40 This issue appears to have been scarcely examined in case law thus far. Nonetheless, in *Yap Biew Hian v PP*,[50] the court reproduced two passages from an Indian treatise[51] which stated that the distinction between clause 2 of section 299 and section 300(c) lay in the degree of probability of death from the act committed. If the probability was high, section 300(c) would be satisfied, and if there was "probability in a less degree" of death ensuing, only clause 2 of section 299 would be satisfied.

41 The passage further stated that in order to make this determination, many factors would have to be considered. They include the nature of the weapon used, and part of the body where

[48] V.R. Manohar, ed, *Ratanlal & Dhirajlal's the Indian Penal Code (Act XLV of 1860)*, 33rd ed (Nagpur: LexisNexis Butterworths Wadhwa Nagpur, 2011) at 466.
[49] *Ibid.*
[50] [1994] SLR(R) 270.
[51] *Ibid.* at paras 14 and 15.

injury was caused.[52] Hence, as Professor Tan notes, cases end up turning on subjective factors.[53] In my view, given the very fact that cases are often one-of-a-kind, it is immensely difficult to achieve an objective, fair, and uniform standard on whether the probability of death is indeed high or in a "less degree".

42 Indeed, in *PP v Ow Ah Cheng*[54] for instance, in convicting the accused for a lesser charge of culpable homicide, the court appeared to have been influenced by the fact that there was a solitary injury, and that the accused would have caused more serious injuries had he intended to kill the victim.[55]

43 Under Approach One, removing the current section 299 is likely to result in these borderline cases being classed as second-tier murder cases instead. This is especially for cases where previously, the combination of a closely worded lesser offence and the mandatory death penalty for murder convictions prompted judges to convict accused persons of culpable homicide where the circumstances of the case – or a gut feeling perhaps – seemed to warrant it.

44 Therefore, some may argue these changes will lead to over-conviction and that the correspondence principle is violated. However, this is mitigated by the new possibility of life imprisonment rather than the mandatory death penalty.

45 One trade-off of having mutually exclusive – as opposed to overlapping – provisions is possibly the reduced scope of prosecutorial discretion. However, in my view, the advantages of greater clarity and ease of understanding significantly outweigh this potential downside.

(3) Addition of a gross negligence clause to culpable homicide

46 Culpable homicide should continue to result where a partial defence applies with respect to a first or second-tier murder conviction. Apart from this, a gross negligence limb should be included. This stems from the inadequate nature of the current provisions in ensuring justice for the whole range of negligence cases.[56]

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[52] *Ibid.* at para 15.
[53] Tan, *supra* note 8 at para 43.
[54] [1992] 1 SLR(R) 307.
[55] Tan, *supra* note 8 at para 19.
[56] Chan Wing Cheong, "What's Wrong with Section 300(c) Murder?" [2005] SJLS 462 at 465.

47 The provision for causing death by negligence is found in section 304A. In determining the standard of negligence, several interpretations were taken. One was the "gross negligence" test as exemplified by *Cheow Keok v PP*,[57] where the Court of Appeal held that section 304A was a codification of the English common law offence of manslaughter by gross negligence. Gross negligence is difficult to define[58] but is described as a "very high degree of negligence indeed",[59] or as "conduct that is deserving of punishment and not merely a matter of compensation between private individuals."[60]

48 While this interpretation of section 304A was subsequently abandoned, the principles could be applied to the context of a gross negligence limb of culpable homicide. This is likely to reduce the strain on the other provisions for certain factual matrices.

49 Negligence requires an objective assessment, asking whether the accused has fallen so far beneath the standards expected by ordinary people – or their "civil duty of circumspection"[61] – that criminal liability should be imposed.[62] Some may argue that this violates the subjectivity principle.

50 However, the countervailing policy argument of upholding these standards and ensuring people are accountable for significant breaches outweighs this trade-off, even if it is not proved that they realised that they were falling below those standards.[63]

(4) Addition of a reckless indifference clause to culpable homicide

51 In its consultation paper on a proposed new Homicide Act, the Law Commission proposed including an element of "reckless indifference". An accused is recklessly indifferent if he realises that there is an unjustified risk of death being caused by his conduct, but goes ahead with that conduct, causing the death.[64]

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[57] [1940] MLJ 103.
[58] Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore*, 2d ed (Singapore: LexisNexis, 2012) at para 10.33 ["Yeo, *Criminal Law*"].
[59] *Ibid.* at para 10.33, citing *Andrews v Deputy Public Prosecutor* [1937] AC 576 and *Bateman v R* (1925) 19 Cr App R 8.
[60] *Ibid*.
[61] *Nidamarti Nagabhushanam* (1872) 7 MHCR 119 at 120.
[62] Yeo, *Criminal Law, supra* note 58 at para 8.20.
[63] Yeo, *Criminal Law, supra* note 58 at para 10.25.
[64] Law Commission, *A New Homicide Act*, *supra* note 27 at para 3.1.

52 One difficulty with this definition is the relevance of the accused's assessment of the justifiability of the risk.[65] If the accused's conduct is not in fact justifiable, how can his wrongful assessment that it is justifiable exonerate him?

53 Also, being reckless suggests one is inherently aware of a risk of causing death,[66] but chose not to care. Such cases are already covered under the current sections 300(b) or (c), and hence, there is no need for a provision for reckless indifference in the Singapore framework.

B. Approach Two

(1) The first aspect: removal of section 300(c)

54 The starting point here is that since an accused found guilty under section 300(c) may not have had an intention for death to occur and that death was not foreseen, he is less morally culpable.[67] With less moral culpability, section 300(c) should not be in the same category as the other murder provisions under the correspondence principle and concept of moral equivalence. However, given that the second limb of section 299 is broader than section 300(c) as discussed earlier, it would serve no purpose to retain and downgrade the latter.

55 Removing section 300(c) would also mean the subjectivity principle is given greater effect to among the remaining murder provisions – section 300(a) relates to the accused's subjective intent to kill; section 300(b) relates to the accused's subjective intent to inflict an injury coupled with his knowledge that it is likely to cause death; and section 300(d) relates to the accused's subjective knowledge.

56 Several arguments against a fully subjective approach to murder were raised in the Law Commission of Western Australia's report. In essence, a fully subjective approach requires proof that an accused was at the very least aware that the injury he intended was life threatening.[68]

57 However, it was contended that the failure of an accused to appreciate the life-threatening nature of the injury does not necessarily reduce moral culpability. Focusing on the subjective

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[65] Victor Tadros, "The Homicide Ladder" (2006) 69(4) Modern LR 601 at 610 and 611.
[66] Law Commission, *Murder, Manslaughter and Infanticide*, *supra* note 31 at para 2.99.
[67] Law Reform Commission of Ireland, *Homicide: Mental Element in Murder* (Consultation Paper No. 17, 2001) at para 4.083.
[68] Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report* (Project 97, 2007) at 49.

awareness of the accused ignores the fact that severe moral condemnation is merited by a failure to foresee. Thus, the failure to appreciate the risk of death may be just as blameworthy as actual awareness.[69]

58 In my view, this argument is flawed, as one who commits an act with the awareness that death may occur is unequivocally more blameworthy than another who commits an act without such awareness. Nevertheless, even where the accused's lack of awareness is blameworthy, the law should aim to account for this lack of awareness, rather than punish indiscriminately based on the fact of the deceased's death.

(2) The second aspect: mutually exclusive provisions

59 The reasons for mutually exclusive provisions were discussed in the previous section.

60 For Approach Two, this could be achieved by cancelling the words "with the intention of causing death" and "with the knowledge that he is likely by such act to cause death" from the current section 299 provision as they overlap with sections 300(a), (b), and (d) respectively.

(3) Overall effects

61 With these changes, cases such as *PP v Lim Poh Lye*[70] are likely to be classed under culpable homicide. In that case, the accused stabbed the deceased in the thigh whilst robbing him. The deceased died from stab wounds. It was accepted at paragraph 37 that the accused did not know that there was a main artery running through the leg and that the bleeding, if unattended to, would, in the normal course of nature, cause death. Hence, he would not have known that the injury was likely to cause death – a requisite of section 300(b).

62 One question to ponder is whether section 300(b) is likely to end up becoming the "new section 300(c)" in light of the latter's removal (*i.e.*, being prone to divergent interpretations due to inherent ambiguity in the wording).

63 It has been suggested that section 300(b) is rarely invoked in practice as cases involving "such a high culpability" will often generate the inference that the accused actually intended to

[69] *Ibid.*
[70] [2005] 4 SLR(R) 582.

kill or an inference of knowledge under section 300(d).[71] The purpose of this provision is apparently to cover "pin-prick murder cases", 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.[72]

64 Several early India decisions have adopted this view,[73] though the lack of local case law has, to my mind, rendered the position in Singapore far from settled. On a plain reading of section 300(b) and the illustrations, nothing appears to suggest it 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 to the harm that is inflicted" as advocated.[74]

65 In fact, it is not inconceivable to construe "knows to be likely to cause" in a wider sense, taking it to mean general awareness and intuition rather than intricate knowledge of the victim's condition – an interpretation that does not seem to violate the subjectivity principle. It would, however, be unsatisfactorily broad and harsh for first-tier murder, and must be avoided.

VI. Preserve yet refine the existing provisions: Approach Three

66 Assuming that the current system sufficiently satisfies the correspondence, subjectivity, and fair labelling principles, the largest refinement it probably needs is with regard to section 300(c).[75] The quagmire appears to be in reconciling the intention of the wrongdoer and the actual injury inflicted.[76] How different and far-removed must the actual injury be from the intended injury to absolve the accused? There are several ways to answer this question, with varying emphases on the subjective element.

67 First, the wider approach in *PP v Visuvanathan*[77] meant that it was irrelevant to enquire what kind of injury the accused intended to inflict, as long as it was not accidental. Anything that was not accidentally caused or involuntary was intended, regardless of how minor. Next, under the "commonsensical" approach in *Virsa Singh,* the enquiry of intention necessarily proceeded

[71] Yeo, *Criminal Law, supra* note 58 at para 9.42.
[72] *Ibid* and M Sornarajah, "Definition of Murder under the Penal Code" [1994] SJLS 1 at 9.
[73] See, for instance, *Empress of India v O'Brien* (1880) ILR 2 All 766.
[74] Sornarajah, *supra* note 72 at 10 and 11.
[75] *Supra* section V(B).
[76] Tan, *supra* note 8 at para 37.
[77] [1975–1977] SLR 564.

on broad lines without the need to enquire into every last detail. Finally, a stricter – and hypothetical – approach is where intention to cause the most proximate or ultimate medical cause of death to be the fatal injury must be proven.

68 Given the fact that most of case law has been tilted towards the *Virsa Singh* approach, one way of refining the current system could be to define "intention" in section 300(c) and to provide illustrations based on the factual scenarios of past cases where the *Virsa Singh* test was successfully applied. One other option is to codify the four-step test in paragraph 12 of *Virsa Singh*.

69 However, the usefulness of these changes is uncertain. It has been noted that the *Virsa Singh* test finds its limits in cases where the accused intends a certain injury (typically relatively minor), but ends up inflicting a different but serious injury that leads to death.[78] While these changes provide some clarity on the current decision-making process, they fail to address this root cause of the problem that plagues these difficult cases.

VII. Weighing the options

70 Among the three, Approach One is favoured as it strikes a good balance between the deterrence and retributivist theories. The deterrence goal is upheld, as the section 300 provisions are in substance not changed. Further, the addition of a gross negligence provision into the framework serves to deter a different type of conduct.

71 Additionally, it gives the greatest effect to the correspondence and subjectivity principles under the retributivist theory. This ensures more justice in individual cases. The principle of fair labelling is also reinforced without succumbing to "particularism,"[79] where moral differences between offences are not significant enough as to warrant reflection by the substantive law.

72 Approach Two retains the two-tier system at the expense of moral equivalence within each tier and the fair labelling principle. Having an outright intention to kill is indeed more morally culpable – a notion already expressed in the current penalty regime.

[78] Tan, *supra* note 8 at para 5.
[79] Jeremy Horder, "Rethinking Non-fatal Offences Against the Person" (1994) 14(3) OJLS 335 at 340.

73 Those who favour the current system would probably prefer Approach Three, which uses a pyramid structure rather than the "ladder" principle *per se*. Though it provides more clarity to the current system, it fails to address the root cause of the ambiguity in section 300(c).

VIII. Conclusion

74 Given that the criminal law is a communicative enterprise, the labelling and structuring of offences should assist, rather than obscure, communication.[80] Having examined the frameworks of various jurisdictions, along with proposals of several law commissions, I conclude that there is no universal best practice. Systems differ vastly between countries – and between states in federations such as the US and Australia – with the permutations being endless. The law reform mission is perhaps to prioritise jurisdiction-specific policy objectives and to engineer a system to achieve those goals.

75 In our context, with stabilising murder rates[81] and a changing society,[82] a new balance between the various policy goals should be struck. Deterrence and crime control remain crucial, though there is room for more individual justice.

76 The process began with the 2012 amendments. Creating a third tier in the system and introducing a gross negligence provision would follow this process through, also giving rise to fairer labelling in the process.

77 Good governance and the rule of law necessitate legislation that is clear in terms of specifying, with sufficient precision and clarity, conduct that is unacceptable and the applicable sanctions; this is so people would know the consequences of certain acts in advance, and can arrange their lives accordingly. This cannot be achieved if the current pyramid system of overlapping provisions is retained. While having mutually exclusive provisions is not without its trade-offs, these are outweighed by the potential benefits of more clarity and certainty.

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[80] Andrew Ashworth and Barry Mitchell, eds, *Rethinking English Homicide Law* (Oxford: Oxford University Press, 2000) at 143.

[81] Based on publicly-available data from http://sprs.parl.gov.sg/search/resource/NonPDF/1994/19940523/19940523-HA-0630085.htm and http://data.gov.sg/Agency_Data/SPS/0807010000000011419E.xls, there were an average of 11.75 judicial executions per year between 1990 and 1993, compared to 1.6 between 2007 and 2011.

[82] Conference Programme, *supra* note 18.