

Types of Killing Offences and Their Punishments in Malaysian Law: Revisited

Siti Naaishah Hambali*

INTRODUCTION

This article will deal with the structure of killing (homicide) offences and their punishment, with special consideration on the death penalty with case studies. Reference will mainly be made to sections 299 and 300 of the Penal Code.

STRUCTURE OF HOMICIDE OFFENCES

The Penal Code contains three homicide offences:

- (a) murder,
- (b) culpable homicide not amounting to murder; and
- (c) causing death by rash or negligent act.

In addition, the road traffic legislation provides for offences of causing death by dangerous or reckless driving of a motor vehicle. The causation rules with regard to these offences are different from those in the Penal Code but the *actus reus* is common to all forms of homicide, viz. causing the death of a human being.

The difference between the Penal Code offences and that of road traffic legislation is with regard to the *mens rea*.

The Penal Code and the road traffic legislation refer to four different types of *mens rea*, viz: rashness, negligence, recklessness and dangerousness. Although death is caused under any of the four types of *mens rea*, the maximum lower penalties reflect the absence of intentional infliction of violence or knowledge.

As this article is concerned with the death penalty, no further reference will be made to the causes of death.

ACTUS REUS OF HOMICIDE

Although different causative tests have been adopted for sections 299, 300 and 304A of the Penal Code, the *actus reus* rules ought in principle to be the same in other respects but they are not. Under the common law death must occur within a year and a day. There is no such provision in the Penal Code.

Again there are differences in the Penal Code and the common law as to the point at which human life comes into existence for the purpose of homicide. For example, Explanation 3 of s. 299 provides that to cause the death of a child in a mother's womb is not homicide but it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.

Advances in medical science have created uncertainty when human life actually ceases. There is no clearly delineated point in the Penal Code or in English law.

The best test is said to be 'brain death'. The alternative test of 'breathing and heartbeat' can lead to difficulties because by the use of machinery these functions can be kept going although the brain is dead, e.g. patients in comatose condition lasting several years.

S.299 does not have any sub-section. However, for ease of understanding, the author will divide s.299 into several limbs as to demonstrate the elements of mens rea contained in the provision. The elements of s.299 will be compared with those of s.300.

CULPABLE HOMICIDE AND MURDER: MENS REA TERMS COMPARED

1. S. 299.1 and 300(a)

(a) *Proof of intention.*

Intention is what is in a person's mind and it is impossible to open his mind to find out what his intention was. However, intention or mens rea can be inferred from the facts of the case. In deciding whether the accused had the intention to kill, the obvious considerations of the facts are, the nature of the injuries, the place of the injury and the number of injuries inflicted, the method of infliction, and the type of weapon used. If the accused fired a gun at the victim's heart or uses a dagger several times at the heart, then it can be inferred that he had the intention to kill.

In *Tan Buck Tee v PP*¹, Thomson C.J. said that to prove intention it must come within the definition of criminal intention as set out in s. 299 to make out the act to be culpable homicide and further that the act comes within the definition of s. 300 to make the act to be murder. In that case the body had five appalling wounds penetrating the heart and the liver caused by violent blows with an axe clearly showing an intention to kill. S. 299 and s. 300 are defined in such closely related terms, it is often difficult to apply, e.g. whether there was an intention to cause death or merely bodily injury and whether the injury was likely (s 299) or sufficient in the ordinary course of nature (s.300) to cause death.

In *Ismail b. Hussein v PP*² the accused, a member of the Home Guard was convicted of the murder of Omar, also a Home Guard and the attempted murder of Rifin. He claimed to have mistaken them for terrorists. Omar died instantly from his wounds; Rifin was injured in the legs. The evidence was that the accused saw a man and shot him at close range. Obviously he intended to kill. It may be that he did not recognise Omar. It was highly unlikely that he had any premeditated design to kill anyone or even to fire. The most probable explanation is that the accused saw a man and fired at once – on impulse – without any conscious or reasoned thought. But however suddenly the intention was formed, the intention was to kill. That amounts to murder. As regards the shooting of Rifin, it is not unusual to fire a shot gun at a man's legs to prevent escape. Here there is definite intention not to kill. The conviction in respect of the injury to Rifin should have been for causing grievous hurt and not attempted murder.

Maxim : That a person should be deemed to intend the natural and probable consequences of his acts.

Glanville Williams³ says the maxim is erroneous because it does not take into consideration whether there is any interpretations of his actions other than the hypothesis that he intended the consequence. The House of Lords, in *Smith*⁴, applied the probable consequence maxim even to the crime of murder. They held that not merely could intent be inferred from the probability of the consequence but that the presumption of intent in such circumstances was irrebuttable.

In *Yeo Ah Seng*⁵ the Federal Court approved the Australian case of *Stapleton*⁶ where it was decided that “the introduction of the maxim is seldom helpful and always dangerous” and concluded that “judges in this country should avoid using the maxim in their summing-up to the jury when dealing with the question of intention in murder trials.”

(b) *Meaning of intention*

It is clear from *Ismail b. Hussain*⁷ that intention may be formed on the spur of the moment and that whilst evidence of premeditation may support a conclusion that the accused intended to kill, it is not essential to the conclusion. What then is the meaning of intention under the Penal Code? Two main meanings may be ascribed. First, the accused’s direct or primary aim or objective. Second, foresight that the prohibited result is, for all practical purposes, inevitable.

Morgan⁸ is of the view that intention under the Penal code should carry only the first meaning as s. 299(3) and s. 300 (d) already provide for cases where the mental state is one of knowledge. It is submitted that there would be no merit in dealing with a case involving foresight of a virtual certainty as one of intention rather than knowledge. Neither would there be sense in attempting to draw a distinction between foreseeing a virtual certainty and the degree of knowledge required by s. 300(d). Furthermore, unless intention is given the first meaning it is hard to see what role is played by s. 300 (b)

2. S.299.2, 299.3, 300 (b)

S. 300 (b) combines the subjective requirements of intention and knowledge in the second and third limbs of s. 299. Consequently, murder under s. 300 (b) is clearly narrower than the generic offence of culpable homicide. Here the accused must not only intend a bodily injury but must also know that the injury is likely to cause the victim’s death.

An example is illustration (b) to s. 300, where the accused “knows that the particular person injured is likely, either from peculiarity of constitution, or immature age, or other special circumstance, to be killed by an injury which would not ordinarily cause death”⁹ : The principle here is that one takes the victim as one finds him. In such a case there is no difficulty in establishing causation and liability hinges on mens rea. Unless it can be inferred that the accused’s direct objective was to cause death, he will not be liable under s. 300 (a).

Further, unless the accused was aware of the victim's disorder to know death was likely, the case does not fall under s. 300 (b).

In cases where the accused causes the death of a particularly susceptible victim but lacks knowledge required for s. 300 (b), liability will depend on whether the case can be brought within ss. 299.2 and 300 (c)

3. S. 299.2 and 300 (c)

S. 299.2 differs from ss. 299.1 and 300(a) and (b) in that it is not only purely subjective but partly subjective and partly objective. That is to say that the accused intended (subjective) to cause a bodily injury of a type which is objectively likely to cause death: it is not necessary that he should have realized or even considered the likely effects of the injuries.

The likelihood clause in s. 292.2 must be given this objective interpretation as a matter of statutory interpretation: to read it subjectively, requiring the accused not only to have intended a bodily injury but also to have realized that such injury was likely to cause death, which would make s. 299.2 identical with s. 300(b). The first clause to s. 300(c) therefore should be read subjectively.

The basic distinction between s. 299.2 and s. 300 (c) lies in the likelihood of death resulting from the injuries: the greater the probability of death resulting, the more likely the case to fall under s. 300.

Thus, an injury intentionally inflicted by the accused may be considered likely to cause death (s. 299.2) but insufficient in the ordinary course of nature to do so (s. 300 (c))

The dividing line between the sections, being based on degrees of probability, is very fine and it will often be extremely difficult to decide on the inferences to be drawn in any given case.

In *Tham Kai Yau v PP*¹⁰. The facts were disputed but it appears that the accused persons had attacked the deceased with choppers, inflicting multiple deep incised wounds, two being serious head wounds.

Raja Azlan Shah F.J. said:.

"It cannot be disputed that intention is a matter of inference. The deliberate use by some men of dangerous weapon at another leads to the irresistible inference that their intention is to cause death. This inference should therefore make it a simple matter to come to a decision in any case such as the present, where the weapon used by the appellants were deadly weapons and where the person killed was struck more than one blow. In actual practice however, it is frequently a matter of considerable difficulty to arrive at a conclusion by application of this principle in view of the close connection that the Penal Code makes between intention and knowledge. The provisions relating to murder and culpable homicide are probably the most tricky in the Code and are so technical as frequently to lead to confusion. Not only does the Code draw a distinction between

intention and knowledge but subtle distinctions are drawn between the degrees of intention to inflict bodily injury"

In that case the appellate court was satisfied that from the nature of the injuries sustained by the deceased and the time and place of incident, there was evidence of an intention on the part of the appellants to cause bodily injury to the deceased. In such circumstances, the fine distinction between s. 299 and s. 300 was very important. It held that the case fell within the second part of s. 299 or the third clause of s. 300. It laid the general rule that if the act must in all probability cause death, the offence falls within s. 299. In the event it was held that the case was the lesser offence of culpable homicide not amounting to murder, falling within the first part of s. 304.

In *Chong Kum Moey v PP*¹¹ the deceased suffered five bullet wounds, three to his body and two on his right arm. It was disputed whether the five bullets were fired or whether one or both of the shots that went through the arm may then have penetrated the body. The trial judge told the jury that in his view it was a "reasonable possibility" that in firing the shots the accused was intending to intimidate the deceased and to prevent him phoning the police, by hitting him in the arm and that therefore he did not intend to kill or to cause bodily injury falling within s. 300 (c). However, he said, it was "impossible to believe" that the accused did not have the requisite knowledge of s. 300 (d).

The Privy Council held that the judge had misdirected the jury. It went on to hold that it is not possible to define with precision the meaning to be given to the word "likely" but the contrast between the use of that word in s. 299 and the words in the third limb of s. 300 indicates that a higher degree of certainty is required to justify conviction under that limb for murder – the contrast between the word "likely" in s. 299 and the words "sufficient in the ordinary course of nature" in s. 300.

Section 300 (c) : subjective or objective

Morgan¹² suggest that as a matter of interpretation, the likelihood clause of s. 299.2 can only be read objectively. Logic suggests the same approach to s. 300 (c).

The suggestion is based on the Indian case of *Virsa Singh v State of Punjab*¹³. In that case the deceased suffered one injury and there was no dispute that it was caused by a spear thrust by the accused. He died 21 hours after the injury after peritonitis intervened. The accused appealed against his conviction under s. 300 (c).

It was argued that the prosecution had not proved that there was an intention to inflict a bodily injury that was sufficient to cause death in the ordinary course of nature. The court held that the two clauses are disjunctive and separate. The first is subjective to the offender, viz. if the act was done with the intention of causing bodily injury to the victim. This can be easily shown by the wound inflicted, the nature and place of the wound. These are purely objective facts and leave no

room for inference or deduction. To that extent the inquiry is objective. But when it comes to intention, that is subjective to the offender and it must be proved that he had the intention to cause the bodily injury that is found to be present. Once that is found the inquiry shifts to the next clause i.e. the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.

To prove a case under s. 300 “thirdly” the prosecution must establish-

1. That a bodily injury is present – quite objectively.
2. The nature of the injury –purely objective investigations.
3. An intention to inflict that particular bodily injury, that is to say, that it was not an accident or unintentional, or that some other kind of injury was intended.
4. That the injury is of the type made up of the three elements set out above is sufficient in the ordinary course of nature to cause death. This part of the inquiry is purely objective and inferential and has nothing to do with the intention of the offender.

On a subjective reading s. 300 (c) would cover cases where the direct aim was not to kill but to cause bodily injury which the accused himself recognised to be sufficient in the ordinary course of nature to cause death. This is close to but not identical with the intention to kill.

The reason why the first clause of s. 300 (c) should be read subjectively is because of the existence of s. 300 (b). It is narrower than s. 300 (b) since it would require knowledge that the injury was sufficient in the ordinary course of nature to cause death; by contrast s. 300 (b) only requires knowledge of the likelihood of death.

An important limitation of *Virsa Singh* is that the accused must have intended the particular type of injury found present. Thus, even if death is caused by a bodily injury which is sufficient in the ordinary course of nature to cause death and it is shown that the injury was caused by the accused, he will not be liable under s. 300 (c) unless he intended that type of injury. In *Mohamad Yassin bin Hussain v P.P*¹⁴ the accused was convicted of murder. Along with another person he had gone to the victim’s hut at night intending to burgle it. The accused grabbed the victim (a 58 year old Chinese woman weighing 112 lbs) and threw her to the ground; during the struggle, her trousers slipped off and the accused, overcome with desire, raped her. When he finished, he discovered she was dead.

According to the medical evidence the victim had received a number of superficial injuries, i.e. bruises and abrasions, including bruises on both her knees consistent with her legs having been forced apart and abrasions on the vaginal wall. None of these injuries were sufficient in the ordinary course of nature to cause death.

The fatal injuries, according to the pathologist, consisted of fractures of second to fifth ribs on the left and of the second to sixth ribs on the right, in the front portion of her chest. These fractures caused congestion of the lungs, resulting in

cardiac arrest. These injuries were consistent with someone sitting with force on her chest as she was lying on the floor on her back and were sufficient in the ordinary course of nature to cause death.

The trial judges found that the injuries which resulted in her death were caused by the accused sitting forcibly on the victim's chest in the course of a violent struggle when she was resisting his attempt to rape her. They found that the fatal injury was intentionally caused by the accused and that it was not caused accidentally or otherwise unintentionally. Consequently the act of the accused in causing the fatal injury was an act which clearly falls within the third limb of the definition of murder.

Lord Diplock in the Privy Council said the judges in so finding failed to give effect to the distinction drawn in ss. 299 and 300 in cases where the accused did not deliberately intend to kill, between the act by which death is caused and the bodily injury resulting from that act. The act of the accused which caused death, viz. sitting forcibly on the victim's chest, was voluntary on his part. He knew what he was doing; he meant to do it, it was not accidental or unintentional. This, however, is only the first step towards proving an offence under s. 300 (c). Not only must the act of the accused which caused the death be voluntary in this sense; the prosecution must also prove that the accused intended, by doing it, to cause some bodily injury to the victim of a kind which is sufficient in the ordinary course of nature to cause death.

Lord Diplock held that the lacuna in the prosecution's case which the trial judges 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 sufficient medical knowledge to be aware that its gravity was such as to make it likely to prove fatal.

The judges' finding was based on medical opinion evidence only. There was no evidence that the accused sat on the victim's chest. Neither was there an admission by the accused that he did so. Even then sitting on someone's chest may cause temporary pain and it is unusual to cause internal injuries let alone fatal injuries.

To establish that an offence had been committed under s. 300 (c) or under s. 299 it would not have been necessary for the trial judges in the instant case to enter into an inquiry whether the accused intended to cause the precise injuries which in fact resulted or had sufficient knowledge of anatomy to know that the internal injury which might result from his act would take the form of fracture of the ribs, followed by cardiac arrest.

Lord Diplock referred to *Virsa Singh* which said;

"that is not the kind of inquiry. It is broadbased and simple and based on commonsense."

It was, however, essential for the prosecution to prove, at the very least, that the accused did intend by sitting on the victim's chest to inflict upon her some internal, as distinct from mere superficial injuries or temporary pain. The trial judges did not find this to be proved. There was no evidence upon which such a finding could be based, had they directed their minds to the question. It followed that the accused's conviction for murder could not be upheld. For similar reasons a conviction under s. 299 could not be substituted for the conviction under s. 300 (c), since and intention on the part of the accused to inflict such bodily injury as is likely to cause death is a necessary ingredient of an offence under the relevant part of s. 299. The conviction and sentence were set aside.

In *P.P v Visuwanathan*¹⁵ the accused stabbed the deceased in the chest with a knife. The deceased suffered a fatal stab wound; an 8 c.m deep cut through the third and fourth ribs which penetrated the left lung and produced a 2 c.m cut at the anterior surface of the heart. The prosecution relied on s. 300 (c). The defence argued for a fully subjective approach to s. 300 (c) and on Lord Diplock's judgment in *Mohamad Yassin b. Hussain*. The trial judges approved both the tests and the reasoning in *Virsa Singh* and rejected Lord Diplock's test:

“that the prosecution must also prove that the accused intended to cause some bodily injury to the victim of a kind which is sufficient in the ordinary course of nature to cause death.”

was untenable because such a requirement would make clause (c) otiose in view of the provisions of clause (a).

Lord Diplock's dictum was factually appropriate in *Mohamad Yassin's* case but it is not of universal application. In the present case the act of the accused in stabbing the deceased in the chest was an act which fell squarely within clause (c) of s. 300. The fatal injury was an intended injury and was not caused accidentally or unintentionally. It was also sufficient in the ordinary course of nature to cause death. Here from the weapon used and the nature of the injury clearly showed that the accused intended to cause such bodily injury of the kind which is sufficient in the ordinary course of nature to cause death. With respect I submit that the accused was rightly convicted of murder.

In *Bharat Singh v Emperor*,¹⁶ the deceased died several days after being attacked. The post mortem report stated the cause of death to be asphyxia and heart failure brought on by the injuries. The evidence disclosed that he was suffering from an enlarged heart which increased the probability of heart failure even from minor injuries. The accused appealed against his conviction for culpable homicide not amounting to murder. It was held that as the accused had no knowledge that the deceased was suffering from a bodily enlarged heart he could not be convicted for culpable homicide not amounting to murder. Conviction for voluntarily causing grievous hurt was substituted.

4. Sections 299.3 and 300 (d) Sections 299.3 and 300 (d) (i)

Section 299.3 requires knowledge of the likelihood of death; Section 300 (d) (i) is narrower as it requires the accused to know that his conduct is so imminently dangerous that it must in all probability cause death. Both clauses require the accused to have contemplated death; they are different by the subjectively perceived risk of death ensuing. The cases have scarcely considered the meaning of knowledge but it may be taken to mean being aware that something exists or being almost certain that it exists or will exist or occur.

In *William Tan Cheng Eng v P.P.*,¹⁷ the accused was charged with murder under section 300 (d). He was driving his car when he saw his ex-girl friend sitting in another man's car. He gave chase. The cars touched and the accused's car zig-zagged across the road into a motor-cyclist coming in the other direction. The rider died almost instantaneously. It was held that it was not sufficient for an act to amount to murder under s. 300 for it to be so imminently dangerous that it must in all probability cause death. Such an act becomes murder only if the person who commits the act and death results, knew, when committing the act, that it was so imminently dangerous that it would in all probability cause death; or such bodily injury as was likely to cause death.

Here there was no other traffic on the road except the other man's car and the accused only intended to cause harm to the passengers of the other car. The conviction for murder was set aside and conviction for causing death by dangerous/reckless driving substituted.

In this case the Appellate Court stressed the importance of the accused's subjective knowledge of the risk of his conduct.

In *Emperor v Dhirajia*,¹⁸ the accused, aged 20, was frequently ill-treated by her husband. Late one night, after a quarrel, she slipped out of the house. Hearing footsteps behind her, she panicked and jumped down a well with her baby in her arms. The baby died. She was convicted of murder but acquitted of attempted suicide. The Appellate Court held that she had no intention to cause the death of her baby but went on to consider whether she had knowledge that by jumping into the well she was likely to cause the baby's death. Her appeal was allowed on the basis that she had an 'excuse' for jumping into the well under the last clause of s. 300 (d). Here the court's approach was more objective. It is submitted that if the accused gave no thought to the risk because of her panic her case should have been considered under the negligence head of s. 304A rather than the knowledge limbs of ss. 299 and 300.

Sections 299.3 and 300 (d) (ii)

Under s. 300 (d) (ii) the accused must know that his conduct is so imminently dangerous that it must in all probability cause bodily injury which is likely to cause death. The first part is subjective: the accused himself must know that he will in all probability cause a bodily injury. The question is whether the likelihood of death clause is an objective or subjective requirement.

S. 299.3 requires the accused to have contemplated the possibility of death whereas s. 300 (d) (ii) only requires contemplation of bodily injury. The accused may know that his conduct is so imminently dangerous that it must in all probability cause bodily injury, but he may not contemplate death as a likely or even a possible consequence. It would therefore not fall under either s. 299.3 (or s. 300 (d) (i)) However, such a case would fall under an objective interpretation of s. 300 (d) (ii), provided the bodily injury was assessed to be likely to cause death. Since the objective view of s. 300 (d) (ii) must therefore be rejected in view of the structure of the Penal Code, the subjective interpretation must be adopted. The prosecution must prove not only that the accused knew his act was so imminently dangerous that it would in all probability cause a bodily injury but also that he knew such a bodily injury was likely to cause death. This interpretation renders s. 300 (d) (ii) no wider than s. 299.3 since both sections now require knowledge of the likelihood of death. However, s. 300 should, as a species of culpable homicide, be narrower than s. 299 and not merely coextensive with it.

The question arises whether there is any case which would fall under s. 299.3 but not under the subjective interpretation of s. 300 (d) (ii). Clearly the subsections are very close in scope but they may lead to different results on the facts of some cases.

Let us take *Nedrick's*¹⁹ case. A poured paraffin through the letterbox of a woman's house and set it alight. His aim was revenge and he did not aim to hurt anyone. However, one of the woman's children died in the ensuing fire.

If such a case fell to be considered under the Penal Code, each limb of ss. 299 and 300 should be analysed. If intention means direct objective, A would not be liable under s. 299.1 and s. 299.2 or s. 300 (a) (b) or (c) as he did not intend causing either bodily injury or death.

Under ss. 299.3 and 300 (d); the case would fall under s. 299.3 only if A was regarded as having knowledge that he was likely to cause not merely a bodily injury, but death.

Under s. 300 (d) (i) although A might be regarded as having knowledge that he was likely to cause death, it could be inferred that he did not know that his conduct was so imminently dangerous that it would in all probability cause death, his assessment of the risk might fall short of the level required by s. 300 (d) (i)

By applying the subjective interpretation of s. 300 (d) (ii) A's assessment of the risk might fall short of that required to satisfy the sub-section. Even though he saw death as likely, it might be inferred that he did not know that any type of injury would in all probability result.

Lack of excuse

The clause restricting liability to cases where there is no 'excuse for incurring the risk of causing death' is designed to attract a wider meaning so that culpable homicide with knowledge will not amount to murder where the accused has an excuse for incurring the risk even where, on the facts of the case, none of the special exceptions apply.

In *Emperor v Dhirajia* (supra) the court after having held that the accused had the requisite knowledge under s. 300 (d) proceeded to deal with the further requirement that “such act” must be “without any excuse for incurring the risk of causing death.” It concluded that she had excuse and that excuse was panic or fright or whatever. It is clear on the facts of this case none of the special exceptions to s. 300 applied but the court was nevertheless able to hold that the offence fell only under s. 299 and imposed a lenient sentence (six months) to reflect the strong mitigating factors of the case.

It would appear that s. 300 (d) should not impose liability on those who take risks which society treats as ‘acceptable’ or ‘reasonable’ even though they have recognised the dangers in their conduct.

In *Govinda*²⁰ the judge described the dividing line between the different limbs of ss. 299 and 300 as ‘fine and appreciable’. The consequences of falling on one side of the line as opposed to the other are significantly different. In cases of murder the judge has no choice but to impose the death penalty; in cases falling under s. 299 he has a broad discretion. It is therefore submitted that in cases which carry the death penalty such as murder, the law should state clearly what exactly are the ingredients of the offence.

In *Selvaraj Subramaniam v PP*,²¹ the accused, a police inspector was charged with culpable homicide not amounting to murder, punishable under s. 304 (b). The cause of death was asphyxia by smothering. The accused had immobilized the deceased (his wife) so that she could not put up any struggle. He then smothered her with such force that the deceased was deprived of any air and death ensued within ten minutes.

The judge held that the accused knew that his act was likely to cause death. He also said that it was a borderline case of murder. With respect I submit that it was a clear case of murder. However, he was charged under s. 304(b) and not even under s. 304A. It appears that in Singapore plea bargaining is practised whereby charges under s. 302 are reduced to s. 304 if the accused is prepared to plead guilty to the lesser charge.

THE SPECIAL EXCEPTIONS

The special exceptions to s. 300 provide formal mitigation in that they reduce cases which would otherwise be murder to simple culpable homicide. They therefore allow reduced punishment where the death penalty is considered undeserved.

The special exceptions are:

1. **Provocation** : where the offender whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident.
2. **Exceeding private defence** : where the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the

power given to him by law, and causes the death of the person against whom he is exercising such right of defence, without premeditation and without any intention of doing more harm than is necessary for the purpose of such defence.

3. **Exceeding public powers** : where the offender, being a public servant, or aiding a public servant acting in the advancement of public justice, exceeds the powers given to him by law and causes death by doing an act which he, in good faith, believes to be lawful and necessary for the due discharge of his duty as such public servant, and without ill-will towards the person whose death is caused.
4. **Sudden fight** : where the offender causes the death of another committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner.
5. **Consent** : where the person whose death is caused, being above 18 years of age, suffers death, or takes the risk of death with his own consent.

In cases where any of the above five exceptions apply the death penalty will not be imposed. As this paper is concerned with the death penalty it is submitted that there is no necessity to elaborate further on the exceptions.

PUNISHMENT

1. The punishment for culpable homicide (s 299) is provided for in s. 304 which states:

“Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment for life, or imprisonment for a term which may extend to twenty years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or with imprisonment for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death”.

2. The punishment for murder (s. 300) is provided for under s. 302 which states:

Whoever commits murder shall be punished with death.”

S. 277 of the Criminal Procedure Code ²² provides:

“When any person is sentenced to death the sentence shall direct that he be hanged by the neck till he is dead, but shall not state the place where nor the time the sentence is to be carried out.”

S. 275 of the Criminal Procedure Code, however provides that where a woman convicted of an offence punishable with death is with child the sentence to be passed upon her shall be a sentence of imprisonment of life instead of sentence of death. By s. 3 of Ordinance 14 of 1953 a sentence of imprisonment for life shall be deemed to be a sentence of imprisonment for twenty years.

LEGALITY OF CAPITAL PUNISHMENT

Although the Malaysian Penal Code was originally derived from the Indian Penal Code, the Indian Code has since been amended to provide in s. 302 the alternative punishment of life imprisonment instead of death. S. 354 (3) of the Criminal Procedure Code of India (1973) provides that when the conviction is for an offence punishable with death or, in the alternative with imprisonment for life or imprisonment for a term of years, the judgement shall state the reason for the sentence awarded and in the case of sentence of death, the special reasons for such sentence. Thus in India the sentence of death can only be awarded in "rarest of the rare" cases.²³

There is no such equivalent provision in Malaysia, except as indicated earlier under s. 275 of the Criminal Procedure Code in respect of a pregnant woman at the time of conviction.

Article 5(1) of the Federal constitution provides:

"No person shall be deprived of his life or personal liberty save in accordance with law."

In *P.P v Lau Kee Hoo*²⁴ where a challenge was made as to the constitutionality of the mandatory death penalty under s. 57(1) of the Internal Security Act, 1960, the Federal Court (in a quorum of five judges) held that it is clear from Article 5 (1) of the Federal Constitution that the Constitution itself envisages the possibility of Parliament providing for the death penalty so that it is not necessarily unconstitutional. It further held that capital punishment is not unconstitutional per se. In their judicial capacities, judges are in no way concerned with arguments for or against capital punishment. Capital punishment is a matter for Parliament. It is not for judges to *adjudicate* upon its wisdom, appropriateness or necessity if the law prescribing it is validly made.

Indeed in *Lim Hang Seah v. PP*²⁵, the Federal Court held that the trial Court had no alternative but to pass the mandatory sentence of death although the offender was a boy of 14 years found in possession of a pistol and ammunition under s. 57 of the Internal Security Act, 1960 read with regulation 3 of the Essential (Security Cases) Regulations, 1957, as there was only one sentence authorised by law for each of the offences and that is the sentence of death.

CONSIDERATION FOR AND AGAINST DEATH
SENTENCES IN MALAYSIA

The death penalty is imposed in Malaysia under the Internal Security Act; the Firearms (Increased Penalties) Act, the Dangerous Drugs Act in addition to offences under the Penal Code.

As this paper is concerned with the death penalty for killing, further discussion will be confined to this aspect of the matter only.

The Indian experience is worth noting on this aspect of the topic. According to Ratanlal²⁶ both in *Bachan Singh* (supra) and *Machhi Singh's*²⁷ cases guidelines have been indicated by the Supreme Court as to when the extreme sentence should be awarded and when not. In fine, a balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and mitigation circumstances before the option is exercised to award one sentence or the other.

The cardinal questions to be asked and answered are –

- (a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence.?
- (b) Are the circumstances of the crime such that there is no alternative but to impose the death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender.

If after taking into consideration all these circumstances, it is felt that death sentence is warranted, the Court would proceed to do so. Thus where murder is premeditated or by a hired assassin or by a lawyer or where it is gruesome or is committed with utmost depravity death sentence seems to be the proper sentence in all such cases.

Bhagwati J. (later Chief Justice of India) said in *Bachan Singh v State of Punjab*²⁸ to the effect that the death sentence was bad morally as well as constitutionally, it would appear that the Indian courts are reluctant to impose the death sentence and find ways to avoid it even to the extent of developing the theory of 'excuse' in addition to the many exceptions provided for in the offence of murder.

Thus in *Kannan and Ors. V. State of Tamil Nadu*²⁹ where 31 persons were prosecuted for killing 9 Harijans, some of them being acquitted, some sentenced to life imprisonment and three sentenced to death, the Supreme Court held there was no ground to single out the three and converted their death sentences to life imprisonment.

In *Moorthy v State of Tamil Nadu*³⁰ where the 'lover' of a woman killed her together with her 12 year old son because the grown up children protested to the relationship but in the course of assaulting the daughter he was challenged by the police and he immediately surrendered, the Supreme court held the sentence of death was not appropriate.

But in *Kehar Singh v State*³¹ where the accused was charged with the murder of the Prime Minister (Indira Gandhi) the Supreme Court held this was a proper case for the "rarest of the rare" category because as the security guard and duty bound to guard the Prime Minister had himself turned to be the assassin the death penalty was the appropriate punishment.

PROVISIONS OF PARDON IN MALAYSIAN LAW

S. 281 of the Criminal Procedure Code provides as to the execution of sentence of death that the following steps have to be complied with. The normal practice is :

1. After the sentence of death has been pronounced the court issues a warrant to the officer in charge of the district prison to detain the convicted person in prison until further orders of the court.
2. The judge in passing sentence of death shall state his opinion in written form the reasons why the sentence of death should or should not be carried out. This report is kept by him in a sealed envelope.
3. There are two appeals, first to the Court of Appeal and finally to the Federal Court.
4. If the sentence of death is confirmed the judge presiding in the Federal Court shall state the reasons of the court why the death sentence should or should not be carried out together with the court's comment on the opinion expressed by the trial judge who makes available his confidential report to the Federal Court at this stage.
5. The presiding judge then forwards to the Menteri Besar/ Chief Minister/ Minister in charge of the Federal Territory the report of the Court; copy of the notes of evidence at the trial and notes of proceedings in Court of Appeal and the Federal Court.
6. The Menteri Besar / Chief Minister / Minister submits the same to the Ruler of the State or the Yang di-Pertuan Agong.
7. (i) Article 42 of the Federal Constitution provides for the Yang di Pertuan Agong the power to grant pardons, reprieves and respites in respect of all offences which have been tried by court-martial and offences committed in the Federal Territories of Kuala Lumpur and Labuan. The Ruler or Head of State of a State has similar powers in respect of all other offences committed **within the respective States**.
(ii) The Pardons Board constituted for each State shall consist of the Attorney-General of the Federation, the Menteri Besar/Chief Minister of the State and three other persons appointed by the Ruler who are not State Assemblymen or Members of the Dewan Rakyat.
(iii) The Pardons Board meets in the presence of the Ruler
(iv) Similar provisions apply to the Pardons Board of the Federal Territories.
8. (i) The Menteri Besar shall after the decision of the Pardons' Board communicate to the Court of the judge that passed the sentence the

- order, if the death sentence is to be carried out, the place where the execution is to be held and if the sentence is commuted to any other punishment shall so state and if the person sentenced is pardoned shall so state.
- (ii) The Ruler may also order a respite of the execution and afterwards appoint some other time or place of execution.
 - (iii) The judge that passed the sentence shall issue a warrant to the prison authorities and appoint the time of execution of the death sentence as ordered by the Ruler of the State.
9. (i) At the execution there shall be present the Medical Officer of the prison, the Superintendent of Prisons and other prison officers, any Minister of Religion in attendance at the prison and such relations of the prisoner or other person the Superintendent thinks proper to admit.
- (ii) Immediately after the execution, the Medical Officer shall examine the body and ascertain the fact of death and certify it to the officer in charge of the prison.
 - (iii) A Magistrate of the district shall within 24 hours after the execution, hold an inquiry and satisfy himself of the identity of the body and whether judgment of death was duly executed and shall report thereof to the Menteri Besar of the State.

In Malaysia, although the death penalty is mandatory in respect of murder, and although the Court of Appeal and the Federal Court may affirm the sentence, whether the accused is finally executed or commuted to life imprisonment rests finally with the Pardons Board. Not all death sentences are carried out. It is in the Pardons Board that factors which determine whether the sentence should be carried out are considered – factors which are considered by the trial courts and the Supreme Court in India.

With respect I submit that the Malaysian system of one trial and two appeals followed by the deliberations of the Pardons Board ensures that the death sentence is carried out only after every material factor has been fully considered by all concerned.

NOTES

- * Lecturer, Faculty of Law, Universiti Kebangsaan Malaysia
1. [1961] MLJ.176
 2. [1953] MLJ. 48
 3. Glanville Williams, *Textbook of Criminal Law* (1983) 81
 4. *DPP v Smith* [1961] AC 290.
 5. [1967] 1 MLJ 231
 6. (1952) 86 CLR 358
 7. *Supra*, note 2
 8. KL Koh, CMV Clarkson, N.A. Morgan, *Criminal Law in Singapore and Malaysia*, Edn. page 406
 9. *Govinda* (1876) 1 Bombay 342
 10. [1977] 1 MLJ174 F.C.
 11. [1967] 1 MLJ. 205 P.C.
 12. opt. Cit. 409
 13. (1958) SC 465 (H.C Punjab)
 14. (1976) 1 MLJ 156 P.C.
 15. [1978] 1 MLJ. 159
 16. (1933) 34 Cr. L.J. 99 (Oudh Chief Court, India)
 17. [1970] 2 MLJ. 244 (C.A. Singapore)
 18. [1940] All 647 (H.C.Allahabad, India)
 19. *Nedrick* [1986] 3 All ER 1.
 20. *Govinda* (1876) 1 Bombay 342 —
 21. [1985] 1 MLJ 190 (H.C. Singapore)
 22. FMS Cap. 6
 23. *Bachan Singh* (1980) Cr. L.J. 636 (S.C)
 24. [1983] 1 MLJ. 157.
 25. [1978] 1 MLJ. 68
 26. *Ratanlal and Dhirajlal's The Indian Penal Code* (27th. Edtn. 1992) p. 347
 27. (1983) Cr. L.J. 1457 (SC)
 28. (1983) 1 scr 145 AT P. 221
 29. AIR 1989 SC 396.
 30. (1988) 3SCC 207
 31. (1988) 3SCC 609