

Sentencing murder and the ideal of equality

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Abstract

This article compares the legal principles governing the sentencing of murderers in terms of the laws applicable in South Africa, Botswana and Germany. Considerable differences in the typical sentences are noted, ranging from the death penalty, to terms of imprisonment, with further differences in the length of the sentences that are served. The last part of the article argues that this situation is contrary to the concepts of human dignity and equality, as understood in terms of international human rights principles.

INTRODUCTION

Homicide involves the unlawful killing of another human being.¹ This simple definition applies almost universally. However, internationally, many different criminal acts are termed homicide, in one form or another, and often crimes with the same names bear different definitions in different jurisdictions. And if the definitions of the crime of homicide vary, then this variation is even more evident in the sentences that may be and are imposed for this act.

This article considers sentencing for murder as one of the most severe variants of homicide,² and provides an overview of the sentences imposed for this crime under the laws of South Africa, Botswana and Germany,³ as these jurisdictions follow very different approaches. The aim of the article is not simply to compare; I also wish to consider whether it is possible to draw from the comparison, any conclusions on the value that the laws of these jurisdictions place on the lives of human beings – both victims and murderers.

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¹ See *eg*, R Card Card, Cross & Jones criminal law (16ed 2004) 240 at 245.

² See *eg*, EL Glaeser & B Sacerdote 'Sentencing in homicide cases and the role of vengeance' 2003 *Journal of Legal Studies* 363–382 (the position in the USA).

³ As different considerations apply in the case of child offenders, this contribution is limited to adult offenders.

SOUTH AFRICA

Introduction

The Republic of South Africa is situated at the southern tip of Africa. With a size of over 1,2 million square kilometres and a population approaching fifty million, it is one of the bigger countries in the world.⁴ South Africa's current claim to infamy lies in its high rates of violent crime.⁵ Arguably, it has the highest murder rate in the world.⁶

In South Africa, criminal law remains largely uncodified.⁷ This is specifically true of homicide offences, which remain common law crimes.⁸ Intentionally causing the death of another human being is classified as 'murder', while negligent killing amounts to what is known as 'culpable homicide'.⁹ The definitions and elements of these crimes are established in common law, as interpreted by the courts over many decades.¹⁰ In practice there is little uncertainty as to the exact legal details of these crimes. Sentencing of murderers depends on the basic jurisdiction of the court in which the

⁴ According to Wikipedia it is ranked twenty-fifth both in terms of size and population: http://en.wikipedia.org/wiki/South_Africa (accessed 6 November 2010).

⁵ See R Mattes 'How does SA compare? Experiences of crime and policing in an African context' (Dec 2006) *SA Crime Quarterly* 17–19 (explaining that, when the same things are measured, South Africans have amongst the highest concerns about violent crime and actual experience thereof in Africa); A Altbeker, 'Puzzling statistics: Is South Africa really the world's crime capital?' (Mar 2005) *SA Crime Quarterly* 1 at 5.

⁶ R Turrell 'Murder and capital punishment after apartheid' in B Dixon & E van der Spuy (eds) *Justice gained? Crime and crime control in South Africa's transition* (2004) 83 at 88–90. The data is equivocal *eg*, according to the United Nations Office on Drugs and Crime *International homicide statistics* (2004) the data on intentional homicide in South Africa range from forty per 100 000 (official data) to sixty-nine per 100 000 (World Health Organisation); the latter figure is the highest in the world (compared to the next highest: Colombia sixty-one, El Salvador fifty-eight, Jamaica fifty-five, Ivory Coast forty-six, *etcetera*) available at: <http://www.unodc.org/documents/data-and-analysis/IHS-rates-05012009.pdf> (accessed on 6 November 2010). According to the latest South African Police Service data the murder rate in the country has dropped to thirty-four per 100 000, with substantial differences within the country (by province it ranges from fourteen in Limpopo to fifty in the Eastern Cape) – see C Gould, J Burger & G Newham 'Fact sheet: what the crime stats tell us, and what they don't' (2010) 2, available at: <http://www.issafrica.org/uploads/FactSheet.pdf> (accessed on 6 November 2010); see also United Nations Office on Drugs and Crime, *Crime and development in Africa* (2005) 55 (South Africa's homicide rate has been dropping since 'consolidation of democracy'). See in general, M Shaw *Crime and policing in post-apartheid South Africa: Transforming under fire* (2002) 15–18, 42–62.

⁷ CR Snyman *A draft criminal code for South Africa* (1995) xxvii.

⁸ See J Burchell *Principles of criminal law* (3ed 2005) 54. It is trite that the common law of South African criminal law is the Roman-Dutch law – see *eg*, CR Snyman *Criminal law* (5ed 2008) 6.

⁹ See *S v Ntuli* 1975 SA 429 (A) at 435–437 for an exposition of the different forms of intent and negligence and how they are linked to and distinguished from one another.

¹⁰ See in general, Snyman n 8 above at 447–453; Burchell n 8 above at 667–677.

offender is tried and sentenced,¹¹ unless there is legislation in place that specifically governs such sentences.¹² Before the relevant factors are discussed in greater detail, it is useful briefly to consider the development of sentencing for murder over the last sixty years, especially as this development has also affected the law in Botswana.

The historical development of sentences for murder¹³

Capital punishment was mandatory for murder until the General Law Amendment Act 46 of 1935 authorised the imposition of different sentences where ‘extenuating circumstances’ were found to exist.¹⁴ Subsequent amendments have created further exceptions.¹⁵ The serious nature of the death penalty, and the fact that it ends human life, has regularly been mentioned in case law.¹⁶ However, the imposition of the death sentence was not consistent – a fact noted by several commentators.¹⁷

Much of the jurisprudence of this era dealt with the meaning of ‘extenuating circumstances’,¹⁸ which developed a meaning separate from ‘mitigating circumstances’. This separate meaning has been authoritatively summarised

¹¹ See eg, JJ Joubert (ed) *Criminal procedure handbook* (9ed 2009) 34, 40–41.

¹² As is currently the case with the minimum sentences legislation: see the discussion below.

¹³ For a scholarly review of the historical development of the death penalty in South Africa, see E Kahn ‘How did we get our lopsided law on the imposition of the death penalty for common-law crime? And what should we do about it?’ 1989 *SACJ* 137–163. See also E Kahn ‘The death penalty in South Africa’ 1970 *THRHR* 108–141.

¹⁴ Whether this amendment afforded the sentencing court with a discretion is discussed by D Van Zyl Smit ‘Judicial discretion and the sentence of death for murder’ (1982) *SALJ* 87 at 88–92. See also A Goldfarb ‘The dilemma of discretion: a US perspective on the proposal for reform of the South African death penalty for murder’ (1990) *SAJHR* 266–288.

¹⁵ Such as, if the murderer was a woman convicted of the murder of her new-born baby, or when the murderer was under 18 years of age at the time of the murder: cf s 277 of the Criminal Procedure Act 51 of 1977. The death sentence was discretionary for a number of other offences, including treason, rape, and robbery with aggravating circumstances – see s 277(1)(b) and (c).

¹⁶ See eg, *S v Letsolo* 1970 3 SA 476 (A) at 477 (an ‘incomparably utter extreme’ sentence); *S v V* 1972 3 SA 611 (A) at 614; *S v Pietersen* 1973 1 SA 148 (A) at 151; *S v Maimela* 1976 2 SA 587 (A) at 595; *S v Dlamini* 1991 2 SACR 655 (A) at 668; *S v Selemale* 1994 1 SACR 481 (A) at 485.

¹⁷ See JH van Rooyen ‘Toward a new South Africa without the death sentence – struggles, strategies, and hopes’ 1993 *Florida State University Law Review* 737 at 743–747; B v D van Niekerk ‘...Hanged by the neck until you are dead’ (1970) *SALJ* 60 at 71–73; J Lund ‘The decision to kill: discretionary death sentences purposes, principles and the courts’ 1989 *SACJ* 189, 203; Turrell n 6 above at 101. Also, specifically regarding the arbitrary nature of the sentence, *S v Makwanyane* 1995 3 SA 391 (CC) (1995 2 SACR 1) at pars 51, 157–166.

¹⁸ See eg, DM Davis ‘Extenuation – an unnecessary halfway house on the road to a rational sentencing policy’ 1989 *SACJ* 205–218.

in the question: were there circumstances that impacted on the feelings or mind of the murderer so severely that his blameworthiness for the murder was reduced?¹⁹ This summary was based on influential judgments such as *S v Letsolo*,²⁰ in terms of which those imposing the sentence were required to ask three questions:

- Are there relevant mitigating facts, such as immaturity, drunkenness or provocation?
- Did such facts, considered cumulatively, influence the murderer's actions?
- Were such facts sufficient to reduce the moral blameworthiness of the accused?

The onus of proving extenuating circumstances rested on the accused on a preponderance of probabilities.²¹

A number of factors regularly surfaced in relation to extenuating circumstances. One relates squarely to the criminal law requirement that murder is committed with intent, or *dolus*, as required in Roman law. One form of *dolus*, namely *dolus eventualis*, is intent based not on the desire to kill, but of intent which amounts to putting the deceased in a dire position and then being reckless as to whether death ensues or not.²² Being an indirect form of intent, it has often been accepted as an extenuating circumstance.²³ Under worldwide pressure to abolish the death penalty, considerable change was effected in 1990.²⁴ The term 'extenuating circumstances' was dispensed with as was the onus of proof resting on the offender. A new guideline was formulated to the effect that, when the death penalty was not considered the 'only appropriate' sentence,²⁵ a fixed term of imprisonment would usually

¹⁹ V Hiemstra *Suid-Afrikaanse strafproses* (4ed 1987) 619; Van Zyl Smit n 14 above at 87, 89.

²⁰ 1970 3 SA 476 (A).

²¹ Since *R v Lembete* 1947 2 SA 603 (A). This position has been confirmed repeatedly: see *S v Theron* 1984 2 SA 868 (A).

²² *Cf S v Ngubane* 1985 3 SA 677 (A) at 685: 'The distinguishing feature of *dolus eventualis* is the volitional component: the agent (the perpetrator) 'consents' to the consequence foreseen as a possibility, he 'reconciles himself' to it, he 'takes it into the bargain'. ... Our cases often speak of the agent being 'reckless' of that consequence, but in this context it means consenting, reconciling or taking into the bargain ... and not the 'recklessness' of the Anglo-American systems nor an aggravated degree of negligence.' See also MM Loubser and MA Rabie 'Defining *dolus eventualis*: a voluntative element?' 1988 *SACJ* 415–436; R Whiting 'Thoughts on *dolus eventualis*' 1988 *SACJ* 440–446.

²³ *Cf S v Mazibuko* 1988 3 SA 190 (A) at 199–200; *S v Sethoga* 1990 1 SA 270 (A); *S v Rapitsi* 1987 (4) SA 351 (A) at 358–359. See also Loubser and Rabie n 22 above at 432.

²⁴ Van Rooyen n 17 above at 747ff; E Grant and L Angus 'Capital punishment' in M Robertson (ed) *South African Human Rights and Labour Law Yearbook (vol 2)* (1991) 1–18; JH van Rooyen 'South Africa's new death sentence: Is the bell tolling for the hangman?' 1991 *SACJ* 79–85.

²⁵ *S v Masina* 1990 4 SA 709 (A) at 713 *et seq.* See also *S v Nkwanyana* 1990 4 SA 735 (A) at 743I–744C; *S v Machasa* 1991 2 SACR 308 (A) at 315f–g; *S v Motsepa* 1991 2 SACR

be imposed, but rarely more than twenty-five years' imprisonment.²⁶ The last execution in South Africa took place in 1989.²⁷

After this, South Africa had its social revolution, eventually accepting a constitution with a Bill of Rights for the first time.²⁸ In one of its first judgments, the newly established Constitutional Court considered the constitutionality of the death penalty in *S v Makwanyane*.²⁹ The court was unanimous in finding that the death sentence was unconstitutional. The result was that life imprisonment became the most severe punishment that could be imposed for murder, and interestingly, sentencing for murder became entirely discretionary, subject only to the basic sentencing principles.³⁰

The legislature takes over

Since 1998, however, sentences for murder have been prescribed by legislation. In an attempt by the government to address high crime rates in the country, the Criminal Law Amendment Act 105 of 1997 was passed. This Act prescribes life imprisonment for specified aggravated forms of murder,³¹ such as premeditated murder and murder following a rape or armed robbery.³² All other forms of murder should carry a sentence of a minimum

462 (A) at 469c. See also PM Bekker 'Die doodvonnis: voor en na 27 Julie 1990' 1993 *SACJ* 57–71; L Angus 'How are we to treat the sentence of death since the Criminal Law Amendment Act 107 of 1990?' 1992 *SACJ* 51–57; AJ Middleton 'Death penalty: an interpretation of the new provisions' 1992 *SACJ* 58–71.

²⁶ *Cf S v Skenjana* 1985 3 SA 51 (A) at 55H–I; *S v M* 1993 1 SACR 126 (A) at 134a–i; *S v Nkosi* 1993 1 SACR 709 (A) at 717b–c (providing an overview of previous authority cited); PM Bekker 'The maximum length of imprisonment imposed by South African courts: life, dangerous criminal or 60 years?' 2002 *SACJ* 207–224.

²⁷ *S v Makwanyane* 1995 3 SA 391 (CC) at par 201; A Novak 'Guilty of murder with extenuating circumstances: Transparency and the mandatory death penalty in Botswana' 2009 *Boston University International Law Journal* 173 at 185.

²⁸ The Constitution of the Republic of South Africa, 1993 (Act 200 of 1993), ch 3.

²⁹ 1995 3 SA 391 (CC). For a discussion of this judgment see eg, J Milton *et al* 'Demise of the death penalty: the Constitutional Court pronounces' 1995 *SACJ* 188–204; MS Kende, 'The constitutionality of the death penalty: South Africa as a model for the United States' 2006 *Human Rights Law Review* 209–250; PM Maduna, 'The death penalty and human rights' (1996) *SAJHR* 193–213.

³⁰ These principles are trite, judge-made principles that developed over the last 60 years. They briefly amount to the following: 'Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances': *S v Rabie* 1975 4 SA 855 (A) at 862G–H. In addition, the court is expected to give expression to the main purposes of punishment, namely the 'deterrent, preventive, reformatory and retributive' purposes – *ibid*. These principles do not assist to achieve consistent outcomes, which is why the South African Law Commission *Report: Project 82: Sentencing* (A new sentencing framework) (2000) pars 3.1.1 to 3.1.12 proposed a new set of basic principles, which have not yet been adopted.

³¹ Section 51(1), read with Sch 1.

³² See Part I to Sch 1. There are several examples of aggravating features accompanying a murder that are not included in the Act, such as the extent or gravity of the violence

of fifteen years' imprisonment in the case of a first offender, increasing to twenty-five years imprisonment for '...a third or subsequent offender of any such offence'.³³ Courts have a discretion, in all these instances, to depart from the prescribed sentences when satisfied that there are 'substantial and compelling circumstances' justifying a lesser sentence.³⁴ A substantial body of case law has developed around the practical application of the substantial and compelling circumstances test. The classic judgment is *S v Malgas*.³⁵ In terms of this judgment, the court is required to take into account all relevant aggravating and mitigating factors in deciding whether substantial and compelling circumstances exist. Courts are also expected to impose sentences that would be just. When they depart from the prescribed sentences, the courts must impose sentences based on the general sentencing principles mentioned earlier.³⁶

The courts have departed from the prescribed sentences in many cases.³⁷ Examples include cases where the wife of an abusive husband murders him after many years of abuse. In *S v Ferreira*³⁸ the accused contracted two men to kill her husband. The facts pointed towards sustained severe abuse. The trial court imposed the prescribed life imprisonment but the Supreme Court of Appeal expressed the view that a non-custodial sentence would have sufficed.³⁹ Also in the *Malgas* case (above), the appellant was a friend of the deceased's wife. The appellant's youth and the manner in which she was

used in order to cause the death of the deceased, or any hatred that the murderer might have for a particular race or political grouping, or murder as a political tool. In fact, none of the features that would normally aggravate a crime of violence is included (see SS Terblanche *A guide to sentencing in South Africa* (2ed 2007) at 186: 'In crimes of violence major factors which may aggravate the crime include the degree and extent of violence used, the nature of any weapon, the brutality and cruelty of the attack, the nature and character of the victim, whether the victim was unarmed or helpless, and so on').

³³ Section 51(2). Since the prescribed sentences are minimum sentences, longer terms of imprisonment can be imposed (see *Director of Public Prosecutions, Transvaal v Venter* 2009 1 SACR 165 (SCA) at par 19; V killed his children and attempted to kill his wife, but without premeditation; sentenced to 18 years' imprisonment).

³⁴ S 51(3).

³⁵ 2001 1 SACR 469 (SCA). See eg, *Director of Public Prosecutions, Transvaal v Venter* 2009 1 SACR 165 (SCA); *S v Nel* 2007 2 SACR 481 (SCA); *S v Nkomo* 2007 2 SACR 198 (SCA); *S v Mahomotsa* 2002 2 SACR 435 (SCA). Also Terblanche n 32 above at 64–69.

³⁶ See n 30 above.

³⁷ Unfortunately data on the use of the minimum sentences is not available. It is not known to what extent courts impose the prescribed sentences, depart from them or, when they depart, to what extent.

³⁸ 2004 2 SACR 454 (SCA). See also *S v Engelbrecht* 2005 2 SACR 163 (W).

³⁹ This was a two-one majority decision. The minority thought that at least eight years' imprisonment was required despite the mitigating factors. See also SS Terblanche and JV Roberts 'Sentencing in South Africa: lacking in principle but delivering justice?' 2005 *SACJ* 187–189.

pressured by the wife to kill the deceased, were held to amount to substantial and compelling circumstances justifying a departure from the prescribed life imprisonment. She was sentenced to twenty-five years' imprisonment. A final, somewhat different, example is that of *S v Thebus*.⁴⁰ A group of vigilantes decided to take the law into their own hands against suspected drug dealers operating in their township. At one point a suspected drug dealer fired a shot at the motorcade of these vigilantes, and when the vigilantes returned fire, an innocent girl was killed and two other people wounded. The trial court convicted two of the accused of murder and attempted murder, and sentenced them to eight years' imprisonment, fully suspended on condition that they perform community service. On appeal to the Supreme Court of Appeal (by the state), the majority found that although substantial and compelling circumstances were indeed present, the trial court's sentence was grossly inadequate. It increased the sentence to fifteen years.⁴¹

The future of the minimum sentences legislation is unclear. It was originally promulgated as a temporary measure,⁴² but a recent amendment has made it permanent⁴³ with the result that any change will now have to be through legislative amendment or by new legislation.⁴⁴

Whatever happens in future, life and long fixed terms of imprisonment are unlikely to lose their central role in the sentencing of murderers.

BOTSWANA

Introduction

The Republic of Botswana is situated in southern Africa, between South Africa and Namibia. Botswana is widely considered one of Africa's most successful examples of a free and open democracy.⁴⁵ Although the murder

⁴⁰ 2002 2 SACR 566 (SCA).

⁴¹ Again the judgment was not unanimous and a minority considered no substantial and compelling circumstances to be present, with the result that the prescribed life imprisonment should have been imposed – at paras 30–34. In terms of s 73(6) of the Correctional Services Act 111 of 1998, at least half of such a sentence must be served before the prisoner could qualify for release on parole.

⁴² Section 53(1), as originally passed. See with respect to its short-term character, *eg, S v Malgas* 2001 1 SACR 469 (SCA) at par 7; *S v Nkosi* 2002 1 SACR 135 (W) at 139; *S v Zitha* 1999 2 SACR 404 (W) at 409e; D van Zyl Smit, 'Sentencing' in S Woolman *et al Constitutional law of South Africa* (2ed 2006) 49–14; D van Zyl Smit 'Mandatory sentence: a conundrum for the new South Africa?' in C Tata & N Hutton (eds) *Sentencing and society: international perspectives* (2002) 90 at 104.

⁴³ Section 3 of the Criminal Law (Sentences) Amendment Act 38 of 2007.

⁴⁴ S Terblanche & G Mackenzie 'Mandatory sentences in South Africa: lessons for Australia?' 2008 *Australian and New Zealand Journal of Criminology* 402 at 410.

⁴⁵ See CM Fombad 'The separation of powers and constitutionalism in Africa: the case of Botswana' 2005 *Boston College Third World Law Journal* 301 at 302 (it remains, 'by

rate in Botswana is substantially lower than in South Africa, it is high by international standards.⁴⁶

Botswana is the only southern African country with a criminal code, in the form of the Botswana Penal Code.⁴⁷ Before adoption of the Code, Botswana's criminal law was Roman-Dutch law, as in all its neighbouring countries.⁴⁸ The origin of the Penal Code is explained in the following terms by Brewer:⁴⁹

The pedigree of this code follows closely that of the East and Central African penal codes which were based on a Colonial Offence model code prepared in the 1920s. The Colonial Office draftsman of the model penal code took the Nigerian Criminal Code as his principal source, which itself was based on the Queensland Criminal Code of 1899... [It took into account various statutes enacted in the UK, as well as the Codes of Italy and New York.] The Botswana Penal Code was simply based on the latest versions of these East and Central African Codes and was, therefore, founded largely, though not exclusively, on English law... .

Botswana gained its independence from the United Kingdom in 1966.⁵⁰ Despite the English origin of its new Penal Code, the Roman-Dutch legal heritage continued to affect legal developments in Botswana for a considerable time after independence.⁵¹

and large, Africa's most successful example ...'); DDN Nsereko 'Extenuating circumstances in capital offenses in Botswana' (1991) *Criminal Law Forum* 235.

⁴⁶ According to the United Nations Office on Drugs and Crime 'International Homicide Statistics' (2009) the data on intentional homicide in 2004 in Botswana range from a 'low estimate' of fourteen per 100 000 (Interpol) to 22 per 100 000 (World Health Organisation); see also United Nations Office on Drugs and Crime *Crime and development in Africa* (2005) 55 (Botswana's homicide rate is above the international average). There is also growing concern in Botswana that the rate of violent crime is rising (see *S v Sekati* (CLCLB-063-08) [2009] BWCA 45 (28 Jan 2009) at par 21: 'This court has noted with increasing concern that Botswana appears to be passing through a period of violent crimes which is atypical to the peaceful nature of the citizens of this country.')

⁴⁷ The Penal Code was enacted into law as Law No 2 of 1964 and came into operation on 10 June 1964 (*Ntesang v S* [1995] BLR 151 (CA)).

⁴⁸ K Frimpong & A McCall-Smith *Criminal law in Botswana* (1992) 4. Cf also, B Otlhogile, 'Criminal justice and the problems of a dual legal system in Botswana' (1993) *Criminal Law Forum* 521–522; B Connolly 'Non-State justice systems and the state: proposals for a recognition typology' 2005 *Connecticut Law Review* 239 at 281–282 (more Botswana legal history).

⁴⁹ IG Brewer 'Sources of the criminal law of Botswana' 1974 *Journal of African Law* 24 at 28. See also S Coldham, 'Criminal justice policies in Commonwealth Africa: trends and prospects' 2000 *Journal of African Law* 218–219; Frimpong & McCall-Smith n 48 above at 5.

⁵⁰ The Constitution came into operation as Legal Notice 83 of 1966, with effect from 30 September 1966. See *eg* Brewer n 49 above at 29.

⁵¹ Brewer n 49 above at 31; Nsereko n 45 above at 237.

As far as the jurisdiction of the criminal courts in Botswana is concerned, the following quotation suffices:⁵²

The Court of Appeal has mainly appellate jurisdiction and as the guardian of the Constitution has the final word as to the constitutionality of legislation enacted by Parliament or any act done by the Executive.⁵³ The High Court has unlimited original jurisdiction in both civil and criminal matters as well as in the enforcement of the fundamental human rights provisions of the Constitution. It also exercises appellate jurisdiction in cases originating from the magistrates' and customary courts. Customary courts, on the other hand, deal with customary law matters but may also exercise criminal jurisdiction in accordance with the limits set in the warrant establishing the particular court.

The crime of murder

Murder, in Botswana, is defined as follows in section 202 of the Penal Code: 'Any person who of malice aforethought⁵⁴ causes the death of another by any unlawful act or omission is guilty of murder.' Malice aforethought is an English common law concept⁵⁵ and a technical term for the *mens rea* element in murder.⁵⁶ It should not be interpreted literally. In English law its meaning has been settled since *R v Moloney*,⁵⁷ as referring to an intention to kill or to cause serious bodily harm to any person.⁵⁸

In Botswana the term 'malice aforethought' is defined in section 204 of the Penal Code. The malice aforethought or *mens rea* required for the offence of murder is one or more of the following:

⁵² EK Quansah 'Educating lawyers for transnational challenges: perspectives of a developing country – Botswana' 2005 *Journal of Legal Education* 528. The law of Botswana is not always readily accessible. The Botswana Law Reports are not up to date. However, a substantial database of recent cases from the Court of Appeal and the High Court is available from the Southern African Legal Information Institute at: <http://www.saflii.org> (accessed on 6 Nov 2010).

⁵³ See also FIDH (International Federation for Human Rights) and Ditshwanelo *The death penalty in Botswana: hasty and secretive hangings* (2007) 13. The majority of the judges sitting on the Court of Appeal are from neighbouring countries.

⁵⁴ Section 202 of the Penal Code. See also Frimpong & McCall-Smith n 48 above at 71. On the history of 'malice aforethought' see RB Seidman *A sourcebook of the criminal law of Africa* (1966) 175–177.

⁵⁵ See in general L Blom-Cooper & T Morris, *With malice aforethought: a study of the crime and punishment for homicide* (2004).

⁵⁶ David Ormerod *Smith and Hogan: criminal law* (11 ed 2005) 436; Frimpong & McCall-Smith n 48 above at 71.

⁵⁷ [1985] All ER 1025, [1985] AC 905. See also *Matthews and Alleyne* [2003] 2 cr app R 30.

⁵⁸ Cf M Jefferson *Criminal law* (7 ed 2006) 416; A Ashworth *Principles of criminal law* (5 ed 2006) 257–258; *A-G's Reference (No 3 of 1994)* [1998] 1 Cr App Rep 91, 93; *R v Woollin* [1999] 1 Cr App Rep 8, 13.

- an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;⁵⁹
- knowing that the act or omission causing death is likely to cause the death of some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death is caused or not, or by a wish that it may not be caused;
- an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit such an offence.

In *S v Okgopegile*⁶⁰ the court found the necessary ‘malice’ to be present based on the size and weight of the axe with which the accused struck the deceased. In fact, the handle itself could have been a lethal weapon, and the court found that it was used at least with the intention to cause grievous harm and with the knowledge or foresight that it could also cause the deceased’s death.

The sentence for murder

The prescribed punishment for murder is the death penalty⁶¹ carried out by hanging.⁶² Death is mandatory, unless the sentencing court ‘is of the opinion that there are extenuating circumstances’,⁶³ in which case a lesser sentence may be imposed. In determining how to establish ‘extenuating circumstances’, the courts in Botswana have generally followed South African case law,⁶⁴ which has described extenuating circumstances as ‘any facts, bearing on the commission of the crime, that reduce the *moral blameworthiness* of the accused, as distinct from [his] *legal culpability*’.⁶⁵ In other words as explained by Nsereko,⁶⁶ ‘...extenuating circumstances are

⁵⁹ These ‘intentions’ are discussed in some detail by Frimpong & McCall-Smith n 48 above at 72–74.

⁶⁰ Criminal Tr No F17 of 2002) [2003] BWHC 14 (4 Sep 2003).

⁶¹ Section 203(1) of the Penal Code.

⁶² Section 26(1) of the Penal Code.

⁶³ Section 203(2). The term ‘extenuating circumstances’ also appears elsewhere in the Penal Code. Section 27 was amended by the Penal Code (Amendment) Act, 2004 to permit lesser punishment than any statutory minimum period of imprisonment where ‘extenuating circumstances’ were present. Such provisions are considered quite common in Botswana law – KN Bojosi & EK Quansah, ‘Recent legal developments: Botswana’ 2005 *University of Botswana Law Journal* 140.

⁶⁴ Frimpong & McCall-Smith n 48 above at 77 (referring to *S v Gofhamodimo* (High Court, Criminal Trial 48 of 1983) specifically stating that South African judgments are to be treated as persuasive).

⁶⁵ *S v Letsolo* 1970 3 SA 476 (A); *S v Apadile* [2007] BWHC 89 (12 Oct 2007) par 51; *Bosch v The State* (Crim App 37 of 1999) [2001] BWCA 4; [2001] 1 BLR 71 (CA) (30 Jan 2001); *Koitsiwe v S* (Crim App 01 of 2001) [2001] BWCA 20 (20 Jul 2001).

⁶⁶ Nsereko n 45 above at 246. See also *S v Khobedi* (crim app 25 of 2001) [2003] BWCA 22 (19 March 2003); Novak n 27 above at 175; R Murray ‘Developments in the African human rights system 2003–04’ 2006 *Human Rights Law Review* 160, 171.

facts that influence the accused's mental faculties or mind in such a way that he, insofar as his crime is concerned, can be treated with less blame.⁶⁷

Intoxication and youthfulness are the most common examples of extenuating circumstances in Botswana.⁶⁷ Intoxication is used as a good example by Frimpong and McCall-Smith: 'the person who kills while intoxicated is likely to regret his action; it is not what the "real he" would have done.'⁶⁸

It is useful to consider some examples of sentencing for murder in Botswana. In *Ntesang v S*,⁶⁹ N made certain allegations regarding the business of the deceased, who instituted legal proceedings against him. When N could not afford an attorney to defend him, he lost the case and later received notice of attachment of his house. In reaction N obtained a gun, two bullets and balaclavas, and went to the deceased's compound at night where he eventually shot and killed him. The trial court found that the murder was premeditated: 'He had planned to murder the deceased without detection...', with a 'diabolic design'. The Court of Appeal agreed, based on authority, that any emotional distress that N might have suffered as a result of his legal predicament could not be accepted as an extenuating circumstance.

In *Ping v S*⁷⁰ a mother and her child were found dead in her yard. Both had their throats cut with such force that their windpipes and the muscles at the front of the necks had been severed. P was convicted of these murders based on circumstantial evidence. For murdering the mother, he was convicted of murder with extenuating circumstances and sentenced to fifteen years' imprisonment. The extenuating circumstances were found in P's evidence that he had been stabbed by the mother before he killed her.⁷¹ However, in the case of the child there were no extenuating circumstances and P was sentenced to death. The Court of Appeal stressed that extenuating circumstances had to be found on the available evidence, and could not be based on speculation.⁷² P had denied any knowledge of the murders and provided no motive. The child had been killed in a gruesome manner,

⁶⁷ Frimpong & McCall-Smith n 48 above at 76. See also Nsereko n 45 above at 247–261 (a full discussion of the various factors, including such others as belief in witchcraft, provocation, *etcetera*); Novak n 27 above at 191–192.

⁶⁸ Frimpong & McCall-Smith n 48 above at 76.

⁶⁹ [1995] BLR 151 (CA).

⁷⁰ (Crim App 045 of 2005) [2006] BWHC 8 (26 January 2006).

⁷¹ At par 37. The appellant and the mother were in a relationship marked by frequent fights and misunderstandings (at par 3).

⁷² Paragraphs 38–39. The court referred to various authorities in this connection, including *S v Letsolo* 1970 3 SA 476 (A), *R v Fundakubi* 1948 3 SA 810 (A), *S v Ndlovu* 1970 1 SA 430 (A), *Lekolwane v The State* [1985] BLR 245 (CA) and *Kelaletswe v The State* [1995] BLR 100 (CA). No onus rests on either the prosecution or the accused to prove or disprove extenuating circumstances – the court has to make a finding on the available evidence.

without any provocation. There was ‘no factual basis for finding any extenuation’, and the appeal was dismissed.⁷³

The death penalty from a constitutional perspective

Botswana has a written constitution with a justiciable Bill of Rights.⁷⁴ Chapter 2 (sections 3 to 19) of the constitution sets out and protects the fundamental rights of individuals in Botswana. Section 3 provides that every individual is entitled to the right to ‘life, liberty, security of the person and the protection of the law’, but subject to limitations designed to ensure that the enjoyment of these rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest. The right to life is further qualified in section 4(1):

No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of an offence under the law in force in Botswana of which he has been convicted.

In addition, the constitution provides that ‘[n]o person shall be subjected to torture or to inhuman or degrading punishment or other treatment’,⁷⁵ again providing, in section 7(2) specifically, that a punishment that was lawful before the constitution came into operation shall not be considered inconsistent with this provision.⁷⁶

The constitutionality of the death penalty has been attacked on more than one occasion in the Court of Appeal. The classic judgment in this respect is *Ntesang v S*.⁷⁷ The court found the wording of the constitution clear. All authority required it to interpret the constitution in a way that gives meaning to each of its provisions. In the end, the court held that it could not ignore the express wording of sections 4(1) or 7(2) of the constitution.⁷⁸

⁷³ At par 42.

⁷⁴ Quansah n 52 above at 528. ‘The Constitution came into operation as Legal Notice 83 of 1966, with effect from 30 September 1966’ – *Khobedi v The State* (Crim App 25 of 2001) [2003] BWCA 22 (19 March 2003) 33.

⁷⁵ Section 7(1).

⁷⁶ The courts have invalidated parliamentary legislation when it was held to be inconsistent with the Constitution: see *Petrus v State* [1984] BLR 14 (CA) (the court declared s 301(3) of the Criminal Procedure and Evidence Act void on the grounds that it breached the prohibition against inhuman or degrading punishment); *Mailho v S* CLCLB–019–07 (unreported) (s 142(5) of the Penal Code was unconstitutional; it provided that the minimum sentence prescribed for rape may not be ordered to be served concurrently with any other sentence); *S v Letshabo* (CLCLB–022–08) [2009] BWCA 20 (27 Jan 2009) par 6. See also Fombad n 45 above at 302.

⁷⁷ [1995] BLR 151 (CA). It is still considered the final word on the matter – see eg. *Khobedi v The State* Crim App 25 of 2001; [2003] BWCA 22 (19 March 2003).

⁷⁸ The court added that it did not have the authority to rewrite the Constitution.

The Court of Appeal has also on occasion considered whether the so-called death row phenomenon could render the execution of the death penalty unconstitutional in individual cases. In *Kobedi v The State*⁷⁹ the court accepted that this possibility existed and that the prohibition on the imposition of inhuman or degrading punishment could be violated in such circumstances. However, this would depend on the facts of the case and a determination of whether any delay was inordinate. If the delay was due to the actions of the offender, this fact would count against him. On the other hand, if the offender was subjected to inhumane conditions or treatment in prison, such facts would count in his favour.⁸⁰

The death penalty in Botswana is not in conflict with the African Charter on Human and Peoples' Rights. This Charter, whilst prohibiting cruel, inhuman or degrading punishment,⁸¹ nevertheless permits African states to impose the death penalty.⁸² At the same time, the African Commission has discouraged member states from imposing the death penalty.⁸³ Still, almost all Commonwealth countries in Africa retain capital punishment for murder and many have actually extended it to other serious crimes.⁸⁴ In 2006 the death penalty could be imposed for certain serious crimes in twenty African

⁷⁹ (Criminal app 25 of 2001) [2003] BWCA 22 (19 March 2003). See also Bojosi 'The death row phenomenon comes to Botswana: *Lehlohonolo Bernard Kobedi v The State*' 2005 *CILSA* 305–311.

⁸⁰ Bojosi n 79 above at 311 criticises this 'land mark' judgment for failing to provide a principled justification for following the course it decided upon.

⁸¹ Article 5. See Umozurike *The African Charter on Human and Peoples' Rights* (1997) 30–31; Manby, 'Civil and political rights in die African Charter on Human and People's Rights: articles 1–7' in Evans & Murray (eds) *The African Charter on Human and People's Rights* (2ed 2008) 171 at 191–193.

⁸² See Murray n 66 above at 169–170; Nyanduga 'Working groups of the African Commission and their role in the development of the African Charter on Human and People's Rights' in Evans & Murray (eds) n 81 above at 397. See also *Kaunda v President of the Republic of South Africa* 2005 4 SA 235 (CC) (2005 1 SACR 111) at par 98; *Thatcher v Minister of Justice* 2005 4 SA 543 (C) (2005 1 SACR 238) at par 33. Much the same situation applies internationally. Article 6 of the International Covenant on Civil and Political Rights does not outlaw the death penalty: see *S v Makwanyane* 1995 3 SA 391 (CC) (1995 2 SACR 1) at pars 63–67. See for an overview of the origins and uniqueness of human rights documents such as the International Covenant, Moravcsik 'The origins of human rights regimes' in Simmons & Steinberg (eds) *International law and international relations* (2006) 622–626.

⁸³ Manby n 81 above at 190; Curry, 'Cutting the hangman's noose: African initiatives to abolish the death penalty' (2006) 13(2) *Human Rights Brief* 40 at 43.

⁸⁴ Coldham n 49 above at 230. See also Novak n 27 above at 176 (there are many developing countries with constitutional provisions similar to s 4(1) of the Botswana Constitution).

countries.⁸⁵ In southern and central Africa, apart from Botswana,⁸⁶ the following countries retain the death penalty: Lesotho, Zimbabwe, Zambia, Burundi, Rwanda and Tanzania. In Malawi the last execution took place in 1992.⁸⁷

GERMANY

Introduction

German law provides an interesting counterpoint to the discussion so far. Not only is Germany in many respects one of the most developed nations in the world, but its criminal law is often considered a model worth emulating. As will be seen below, this view does not necessarily apply in the case of homicide.

Germany is situated in central Europe and is about two-thirds the size of Botswana, but houses more than forty times the population of the latter.⁸⁸ Germany is a federal state and its Criminal Code (*Strafgesetzbuch* or StGB) is a federal code with countrywide application.⁸⁹ The responsibility of the states (*Länder*) lies in the application of the criminal law and its resultant sentences.⁹⁰ The general court structure is as follows: the *Amtsgericht* is generally the local court, while the *Landsgericht* is the court of first instance at state level. Each state has at least one *Oberlandesgericht* (Regional Appeal

⁸⁵ Curry n 83 above at 40. Capital punishment has also been declared to be constitutional whenever the issue has been raised – see *Mbushuu v Republic* [1995] LRC 216 in Tanzania (death sentence was lawful and in the public interest).

⁸⁶ See also Schreiber ‘States that kill: discretion and the death penalty – a worldwide perspective’ 1996 *Cornell International Law Journal* 263 at 271 (Botswana is one of 93 countries identified by Amnesty International that retain and use the death penalty for ‘ordinary crimes’).

⁸⁷ Amnesty International *Death sentences and executions in 2008* (2009) 16–18 (obtained from: <http://www.amnesty.org/en/library/info/ACT50/003/2009/en> (accessed on 23 Sep 2009)).

⁸⁸ Botswana extends over 581 730 km² and Germany over 357 022 km². The population of Botswana is just more than 2 million against that of Germany which is more than 82 million: Central Intelligence Agency *The world factbook* (2010) available at <http://www.cia.gov/library/publications/the-world-factbook/> (accessed on 29 July 2010).

⁸⁹ See Robbers *An introduction to German law* (4ed 2006) 65–66; Joecks in von Heintschel-Heinegg (ed), *Münchener Kommentar zum Strafgesetzbuch (vol 1)* (2003) 23 rn 78 (this applies since the *Reichsstrafgesetzbuch* (Criminal Code of the German Empire) was passed in 1871, although with some ‘loss of unity’ during the existence of the German Democratic Republic from 1949–1990: Eser ‘Hundred years German penal legislation – developments and trends’ (1989) *De Jure* 1 at 11.

⁹⁰ Nestler ‘Sentencing in Germany’ 2003 *Buffalo Criminal Law Review* 109 at 110.

Court).⁹¹ The highest criminal court is the *Bundesgerichtshof* (Federal High Court of Justice) in Karlsruhe.⁹²

A murder trial would normally be instituted in a *Landsgericht*, as these courts are specifically given this responsibility by the *Gerichtsverfassungsgesetz*.⁹³ The highest German court is the Federal Constitutional Court (*Bundesverfassungsgericht*) which normally considers only constitutional matters.⁹⁴ This court is in many respects similar to the South African Constitutional Court,⁹⁵ and has on many occasions adjudicated constitutional issues surrounding sentences for murder and the execution of these sentences.

Murder in terms of German law

The German Criminal Code makes provision for various forms of unlawful killing of another human being. The most serious offence is that of murder (*Mord*).⁹⁶ Interestingly, the *act* of murdering someone is not defined in the Criminal Code, the focus rather falling on the *person* committing the crime.⁹⁷

A murderer is someone who kills another human being out of murderous lust, to satisfy his sexual desires, from greed or otherwise base motives,

⁹¹ Freckmann & Wegerich *The German legal system* (1999) 182. See also Fisher *The German legal system and legal language* (4ed 2009) 306. There are some differences in these sources.

⁹² Freckmann & Wegerich n 91 above at 182. See the *Gerichtsverfassungsgesetz* (Court Constitution Act), §12; Kissel & Mayer *Gerichtsverfassungsgesetz: Kommentar* (4ed 2005) 194–239.

⁹³ The *Gerichtsverfassungsgesetz* (GVG) or Court Constitution Act §74(2) 4. The legislation in this respect is highly detailed: see Diemer in Hannich (ed) *Karlsruher Kommentar zur Strafprozessordnung* (6ed 2008) 2477–2488. The penal jurisdiction of the *Amtsgericht* is limited to four years' imprisonment per charge (Court Constitution Act, §24).

⁹⁴ Freckmann & Wegerich n 91 above at 97–103; Fisher n 91 above at 20–22.

⁹⁵ Seedorf 'Jurisdiction' in Woolman *et al Constitutional law of South Africa* (2ed 2006–2008) 4–4 to 4–5. See also Grupp *Südafrikas neue Verfassung* (1999) 125; Holle *Das Verfassungsgericht der Republik Südafrika* (1997).

⁹⁶ Compared to the murder rates in South Africa and Botswana (ranging between fourteen and sixty-nine per 100 000 – see ns 6 and 46 respectively), the rate in Germany in 2004 was only one per 100 000: UN Office on Drugs and Crime n 6 above.

⁹⁷ §211(2). All translations of the StGB are my own. Throughout use was made of current English translations, such as Bohlander *The German Criminal Code: a modern English translation* (2008) and Federal Ministry of Justice *Criminal Code*, available on the website of IUSCOMP: The Comparative Law Society at: <http://www.iuscomp.org/gla/index.html> (accessed 7 Oct 2009). The original text reads: '... aus Mordlust, zur Befriedigung des Geschlechtstriebes, aus Habgier, oder sonst aus niedrigen Beweggründen, heimtückisch oder grausam oder mit gemeingefährlichen Mitteln oder um eine andere Straftat zu ermöglichen oder zu verdecken...'.

treacherously⁹⁸ or cruelly or with means dangerous to the public, or to facilitate or cover up another crime.

Therefore, murder is an act committed by someone who causes the death of another person based on the specified unacceptable motives, or performed in one of the specified manners. Each of the specific characteristics or unacceptable motives has been dealt with in great detail in German judgments and legal writing.⁹⁹

Some examples of these characteristics are appropriate. In a case heard by the Federal High Court of Justice early in 2006,¹⁰⁰ the defendant completely overreacted to a prank played on him after a soccer match. At around 03:30 he took the family car and intentionally drove down the wrong lane of a motorway without headlights. It was his intention to commit suicide by crashing into oncoming traffic. Just before he was to hit an oncoming car he had a change of heart and switched on the headlights. However, he was too late to prevent the collision and three people in the other car were killed. The court found that the actions of the accused amounted to murder and involved two special characteristics, namely 'with means dangerous to the public' and 'treacherousness'. Although the former is normally specifically aimed at bombing or the use of biological agents, it includes any situation where the lives of people are threatened under conditions where the offender has no control over the effect of the means applied. In the present circumstances the court found that the offender had no control over the number of people he could endanger. Treacherousness is normally taken to be present where the offender knowingly exploits the fact that the victim does not suspect the attack and is consequently defenceless. In this case, the offender needed the other driver to be unsuspecting in order to achieve his original intent of crashing into another car.¹⁰¹

⁹⁸ Alternatively 'by stealth' Bohlander n 97 above, or 'with insidiousness' (Bohlander, 'German Federal Court of Justice (*Bundesgerichtshof*—BGH) 4th Criminal Senate: Homicide: Insidiousness; Withdrawal from attempt' 2006 *The Journal of Criminal Law* 29).

⁹⁹ For a summary see Gropengießer *Der Haustyrannenmord: eine Untersuchung zur rechtlichen Behandlung von Tötungskriminalität in normativer und tatsächlicher Hinsicht* (2008) 28.

¹⁰⁰ Case No 4 StR 594/05 (German case law references do not include the name of the accused or defendant).

¹⁰¹ See Bohlander n 98 above at 31–32.

A lesser form of murder is known as *Totschlag* (literally, killing¹⁰²). Killing differs from murder in that none of the unacceptable motives present in the case of murder would be present in the case of killing. Again, the definition of killing focuses on the perpetrator.¹⁰³

Someone who kills a person without being a murderer is sentenced as a killer to imprisonment of not less than five years. In particularly serious instances, sentences of up to life imprisonment may be imposed.

The distinction between *Mord* and *Totschlag* is an issue of never-ending debate and criticism from commentators, who argue that the difference is vague and should not be maintained.¹⁰⁴ The courts, and in particular the Federal High Court of Justice, consider the two offences as clearly separate offences, each with its own *actus reus*. However, most academic commentators see *Totschlag* simply as a lesser form of murder, included under the more serious offence.¹⁰⁵ Despite copious scholarly contributions on this issue, the position remains unaltered.¹⁰⁶

¹⁰² Some sources translate this as manslaughter – cf Van Zyl Smit, ‘Is life imprisonment constitutional? – the German experience’ (1992) *Public Law* 263 at 264, quoting from Darby *The American series of foreign penal codes vol 28* (1987); Harfst & Schmidt *German criminal law* (vol I) (1989) 97. The problem with such a translation is that there is a specific provision for the negligent killing of a person in §222 StGB, which could also be manslaughter (see *Oxford English Dictionary*: ‘A type of criminal homicide of a lower degree of criminality than murder... According to modern interpretation, *manslaughter* is committed in English law when one person causes the death of another unintentionally by culpable negligence ...’).

¹⁰³ §212.

¹⁰⁴ The fact that the distinction was introduced in 1941 and is considered to reflect Nazi assumptions about what should be regarded as murder appears to play a lesser role in these comments – see Van Zyl Smit n 102 above at 264; Bohlander n 98 above at 30; Gössel ‘Empfiehl sich eine Änderung der Rechtsprechung zum Verhältnis der Tatbestände der vorsätzlichen Tötungsdelikte (§§ 211 ff StGB) zueinander?’ 2008 *Zeitschrift für Internationale Strafrechtsdogmatik* 153–162. In terms of the proposals by an influential study group, murder would become the standard crime of intentional killing, while *Totschlag* would become far more limited to situations where the offender kills under severe provocation (Heine *et al* ‘Alternativ-Entwurf Leben’ (2008) *Goldammer’s Archiv für Strafrecht* 193 at 200–201).

¹⁰⁵ Fischer *Strafgesetzbuch und Nebengesetze* (56ed 2009) 1447 [vor § 211 rn 1]; Bohlander n 97 above at 147. However, Gössel n 104 above at 153–162 argues that the BGH, in its decision of 10 January 2006, contradicted, *obiter*, its previous stance.

¹⁰⁶ Recent data on the prevalence of murder is that in 2006 there were 2 500 instances of completed or attempted murder or killing, or 0,04% of the total reported crimes: *Statistisches Bundesamt Datenreport 2008: ein Sozialbericht für die Bundesrepublik Deutschland* (2008) 298 (obtained at <http://www.destatis.de> accessed on 6 October 2009). These offences constitute 0,1% of the total percentage of convicted offenders, a figure that has been constant since 1980 (at 299). See also Nestler n 90 above at 125.

Again, an example gives a sense of how the courts deal with the distinction. In its judgment of 21 June 2007¹⁰⁷ the Federal High Court of Justice upheld the appellant's appeal against his conviction for *Mord*. The deceased N was killed by O and his co-perpetrator M. The three, who lived together, became involved in an alcohol-induced fight one night. After things had settled down, O and M were talking and became so angry with N that they attacked him. When N fell, O, who was wearing combat boots, kicked him viciously on the head and ribs about ten times. M's contribution to the attack was minor. N died as a result of his injuries, and O accepted that the death had been caused by his (O's) actions. The trial court convicted O of *Mord*, based on the cruelty of the attack and the 'base motives' involved. The case was taken on appeal where, as far as the cruelty was concerned, the appeal court confirmed the principle that killing 'cruelly' is when the murderer attacks his victim, whether physically or psychologically, in an insensitive and merciless manner, which is in magnitude or duration more than was needed to kill the victim.¹⁰⁸ In the present case it could not be said that the actual action of killing N lasted a long time or that O knew that N was dead but continued the attack. As far as the 'base motives' are concerned, what is required is that from an objective perspective the motive for the murder should have been despicable and of the lowest imaginable order. In this case the trial court misdirected itself regarding the facts and the court of appeal found that N's killing amounted not to *Mord* but to *Totschlag*.¹⁰⁹

The Criminal Code provides for a variety of other forms of intentional and negligent killing,¹¹⁰ but a discussion of these forms falls outside the scope of this article.

Sentencing murder in German law

The Criminal Code prescribes life imprisonment as the sentence for murder.¹¹¹ This sentence is mandatory, as lesser forms of murder are not known when the specific characteristics or unacceptable motives are present.¹¹² *Totschlag* is punishable with imprisonment of not less than five

¹⁰⁷ BGH, 3 StR 180/07, HRRS 2007 Nr 933.

¹⁰⁸ At 1(a).

¹⁰⁹ The BGH remitted the case to the trial court for sentencing by a different judge.

¹¹⁰ Such as 'less serious cases of killing' providing mostly for intentional killing following provocation or maltreatment of the perpetrator, with a prescribed punishment of imprisonment of one year to ten years (§213); homicide on request, punishable with imprisonment from six months to five years (§216); negligently causing the death of a human being, which may be punished with imprisonment of not more than five years, or a fine (§222).

¹¹¹ §211. Life imprisonment is executed, as any other sentence of imprisonment, in terms of the law relating to prisons. The main legislation is the *Strafvollzugsgesetz* of 16 March 1976: see Joecks n 89 above at 8 rn 14.

¹¹² Schneider in Miebach & Sander (eds) *Münchener Kommentar zum Strafgesetzbuch* (vol 3) (2003) 464 rn 218.

years,¹¹³ although in particularly serious instances, which are considered very rare, sentences of up to life imprisonment may be imposed.¹¹⁴ For most commentators, the fundamental problem with this situation is that the prescribed sentences differ greatly in severity, although the crimes are often virtually indistinguishable.¹¹⁵ It is not surprising that a restrictive interpretation of the specific characteristics of murder is generally favoured in German law.¹¹⁶

The courts are considered to have ‘manufactured’ their own way out of this difficulty. To start with, the Federal High Court of Justice has made it clear that the offender must generally have directly intended the relevant murder characteristic.¹¹⁷ Secondly, the courts are very generous in accepting reduced culpability in the case of *Mord*, which enables them to impose a shorter determinate prison sentence.¹¹⁸

As in South Africa, someone serving life imprisonment in Germany must be considered for release at some point.¹¹⁹ German law is actually notable for its judicial control over the duration of all sentences of imprisonment, including life imprisonment.¹²⁰ To this end most *Landsgerichte* have a specific chamber of the court, termed the *Strafvollstreckungskammer*, which oversees how sentences of imprisonment are carried out.¹²¹ These chambers have jurisdiction over decisions taken on the release of life prisoners on what effectively amounts to parole.¹²² The decisions that the court may take, and the requirements and principles that must be complied with, are mainly provided for in section 57a of the Criminal Code, which reads as follows:

(1) The court conditionally suspends the execution of the remainder of a sentence of life imprisonment, when (1) 15 years of the sentence have been served, (2) the gravity of the offender’s guilt does not necessitate the further execution of the sentence, and (3) the requirements of § 57(1) sentence 1

¹¹³ §212 of the StGB.

¹¹⁴ Fischer n 105 above at 1478 (§ 212 rn 19) refers to the examples of someone who acts particularly brutally, or tries to hide a history or happening that, although morally reprehensible, is not criminal.

¹¹⁵ See Gropengießer n 99 above at 29–30.

¹¹⁶ *Id* at 30; Schneider n 112 above at 362–364; BVerfGE (1977) 45, 187 at 222.

¹¹⁷ Gropengießer n 99 above at 31–33.

¹¹⁸ Fischer n 105 above at 180 (§ 21 rn 23).

¹¹⁹ This consideration is a requirement for the constitutionality of life imprisonment, as will be explained below.

¹²⁰ See Van Zyl Smit n 102 above at 278.

¹²¹ Set up in terms of §78a of the GVG. See in general Kissel & Mayer *Gerichtsverfassungsgesetz: Kommentar* (4ed 2005) 885–892.

¹²² §462a(1) of the StPO. See in general, Appl in Hannich (ed) *Karlsruher Kommentar zur Strafprozessordnung* (6ed 2008) 2210–2212 (on §454 of the StPO, which sets out the procedure that should be followed) and 2270–2281 (on §462a of the StPO).

numbers 2 and 3 are complied with. The provisions of §57(1) sentence 2 and subsection (6)¹²³ apply with the necessary changes.

When read together with the cross-references to section 57 (which provides for the conditional release of prisoners serving *fixed* terms of imprisonment), the decision whether or not to release the prisoner rests on the following:

- the prisoner must have served fifteen years of the sentence;
- the ‘gravity of the offender’s guilt’ must not require continued incarceration;
- release of the prisoner must be appropriate from the perspective of public safety;
- the prisoner must consent to the release and its conditions; and
- the decision should, in particular, be based on the following considerations:
 - the personality, previous (criminal) history, and personal circumstances of the offender;
 - the circumstances of the crime;
 - the interests that will be endangered in case of re-offending;
 - the conduct of the prisoner during his imprisonment; and
 - the likely effect that release would have on him.

In essence, the prisoner should show a good chance of leading a law-abiding life outside of prison.¹²⁴ Section 57a gives effect to the intention of the legislature that a time should be fixed for the decision on the conditional release of the prisoner, considering the harm done and the blameworthiness of his action.¹²⁵

The ‘gravity of the offender’s guilt’ refers to the extent to which the offender can be blamed for the offence or its consequences, and on constitutional grounds it remains one of the most contentious of these provisions, mainly because of the risk of punishing the offender twice for the original offence. The current position is that the sentencing court must make a finding of the offender’s guilt at the time of sentencing, and this finding must be included in its verdict.¹²⁶ A determination that the offender’s guilt requires continued incarceration is an exceptional finding¹²⁷ which requires a balancing of the seriousness of the crime against the personality of the offender, coupled with

¹²³ The requirement in §57(6) relates to false or incomplete explanations regarding the goods that are involved in the crime, but is of little practical importance to the current enquiry.

¹²⁴ Fischer n 105 above at 507 (§ 57a rn 19).

¹²⁵ Detter *Einführung in die Praxis des Strafzumessungsrechts* (2009) 43 rn 86.

¹²⁶ Van Zyl Smit *Taking life imprisonment seriously* (2002) 155; Schneider n 112 above at 465 rn 220; Detter n 125 above at 43 rn 86. However, the trial court does not make a recommendation on the additional number of years that the prisoner should be in detention – *ibid.*

¹²⁷ For example, in BGH, decision of 14.3.2007 – 2 StR 36/07, such a finding was made where the murderer threw the conscious, but helpless, victim off a 50m high bridge.

the conclusion that the offender's blameworthiness is particularly high.¹²⁸ In effect, what is required is that the court determine the 'gravity of the offender's guilt' with reference to the ordinary sentencing principles in section 46.¹²⁹

In practice, the majority of murderers are released after serving approximately nineteen years of their sentence in prison.¹³⁰ The period of conditional release is always five years.¹³¹

Although the prescribed sentence for murder is life imprisonment, the sentencing court may also order that the offender be sentenced to measures for 'improvement' and 'incapacitation' provided for in chapter 6 of the Criminal Code.¹³² These measures include detention in a psychiatric hospital¹³³ or a treatment centre,¹³⁴ and preventive detention for habitual or dangerous offenders.¹³⁵ However, extensive preconditions must be satisfied before these measures may be implemented. The Criminal Code also specifically provides that a preventive detention order may be issued prior to the end of a sentence of imprisonment if new evidence shows that the prisoner represents a significant danger to the public.¹³⁶

Constitutional challenges presented by the law and practice of life imprisonment

The mandatory sentence of life imprisonment for murder has resulted in extensive litigation over the years, with claims that the provisions governing this sentence are unconstitutional. However, the Federal Constitutional Court has consistently held that this is not the case. Claims of unconstitutionality would usually be founded on the right to human dignity,¹³⁷ which in German constitutional law informs all other rights.¹³⁸ In addition, the rights to

¹²⁸ Detter n 125 above at 43 rn 86.

¹²⁹ Detter n 125 above at 44 rn 86. See in general, Van Rooyen 'Doelgerigte straffoemeting: 'n regsvergelykende ondersoek na wyses om straffoemetingsdiskresie te reguleer (2)' 1992 *THRHR* 575, 578–579.

¹³⁰ Van Zyl Smit n 126 above at 138.

¹³¹ §57a(3). See also Leiß and Weingartner (eds) *Isak/Wagner: Handbuch der Rechtspraxis: Vol 9: Strafvollstreckung* (7ed 2004) 100.

¹³² Or the 'Sixth Title'. It covers §§61–72. See Finger *Vorbehaltene und nachträgliche Sicherheitsverwahrung* (2008) 35.

¹³³ As provided for in §63 of the StGB.

¹³⁴ *Eine Entziehungsanstalt*, as provided for in §64 of the StGB.

¹³⁵ *Sicherungsverwahrung*, as provided for in §66 of the StGB.

¹³⁶ §66b of the StGB.

¹³⁷ §1(1) of the *Grundgesetz*.

¹³⁸ BVerfG, Decision of 15.12.2008 – 2 BvR 1656/08 par 21; Van Zyl Smit n 126 above 157.

freedom and bodily integrity,¹³⁹ the prohibition against inhuman or degrading punishment,¹⁴⁰ and the right to development of one's own personality,¹⁴¹ are often raised.¹⁴²

Section 57a was introduced into the Criminal Code¹⁴³ to give effect to the 1977 judgment by the Federal Constitutional Court that human dignity requires that an offender who has been sentenced to life imprisonment should retain the opportunity one day again to enjoy freedom.¹⁴⁴ In addition, in order to ensure proportionality between the sentence of life imprisonment and the offender's guilt, the specific characteristics of murder must be interpreted restrictively so that offenders who do not deserve life imprisonment are convicted of *Totschlag* rather than of *Mord*.¹⁴⁵

The requirement of proportionality (*Verhältnismäßigkeit*) also influences the duration of detention, even for a person who remains a danger to society: the longer the detention, the stricter the proportionality required. In addition, as the period that an offender is kept incarcerated increases, so does the claim to freedom. However, the claim to freedom is limited when the threat of danger to the general public would make release unreasonable.¹⁴⁶

THE VALUE OF HUMAN LIFE

Introduction

The discussion so far raises the following obvious questions: Do legal systems that impose the death penalty on those who murder innocent victims show a greater concern for human life than systems where the punishment is less severe?¹⁴⁷ Or is the opposite true: Do they have a lower regard for

¹³⁹ §2(2) of the *Grundgesetz*, in particular sentences no 2 and 3 which state that freedom is inviolable, except as far as a statute limits these rights. Further detail is provided in §104, *eg* (1) adds that prisoners may not be abused, whether physically or mentally; (2) states that only a judge may decide on the permissibility and continuation of any form of limitation of liberty.

¹⁴⁰ §3 of the *Grundgesetz*.

¹⁴¹ §2(1) of the *Grundgesetz*.

¹⁴² See *eg*, BVerfG, Decision of 20.7.2009 – 2 BvR 328/09; BVerfG, Decision of 30.4.2009 – 2 BvR 2009/08; BVerfG, Decision of 15.12.2009 – 2 BvR 1656/08, for just a few very recent examples.

¹⁴³ Through the 20. *Strafrechtsänderungsgesetz* (1981) (the '20th Criminal Law Amendment Act').

¹⁴⁴ BVerfGE 45 (1977) 187, 229. See also BVerfG, Decision of 08.11.2006 – 2 BvR 578/02 ('Vollstreckung einer lebenslange Freiheitstrafe' (2007) *Neue Juristische Wochenschrift* 1933); BVerfG, Decision of 15.12.2009 – 2 BvR 1656/08 par 21.

¹⁴⁵ BVerfGE 45 (1977) 187, 267.

¹⁴⁶ BVerfG, Decision of 15.12.2009 – 2 BvR 1656/08 par 22.

¹⁴⁷ It is clearly understood that the value of human life is not necessarily a consideration for jurisdictions that still impose the death penalty. Their main considerations are more likely to be aspects such as the deterrent value of the death penalty, or populist in the sense that it is what the people want, and so on.

human life as they are prepared to end the life of the murderer? Could one argue that the murderer in Botswana is, in principle, less valuable or less entitled to dignity than the murderer in South Africa or Germany; or that the life of the deceased victim in Germany, is of less value than that of the deceased in Botswana? Could one draw any conclusion regarding the value of life in general, or the value of the person, in either country from the fact that a German prisoner will qualify for release on parole sooner than a South African prisoner?¹⁴⁸

Instinctively one would tend to answer that this is not a question of human dignity or the value of human life. And yet, one could hardly blame the families of either those murdered or the murderers, if they were to feel that the disparate sentences do in fact say something about their value as human beings. There is at least some direct evidence that disparate sentences for what effectively amounts to the same criminal act are considered unjust. One example flows from the fact that the International Criminal Tribunal for Rwanda (ICTR) has a maximum penal jurisdiction of life imprisonment for genocide committed during the Rwandan war, whereas the national courts may impose the death penalty for capital crimes such as murder. As noted by Rudolph,¹⁴⁹ ‘Rwandan diplomats have expressed the common belief that those tried by the tribunal “would get off more lightly than ordinary Rwandans who faced the death penalty in local courts”’. This ‘common belief’ is located in the common-sense notion that it is unfair to punish people differently for the same criminal behaviour; that it is an affront to any claim that people across jurisdictions are treated with anything approaching human dignity.

Much has been written in international law in general, and in German and South African human rights discourse in particular, about the close relationship between dignity, equality, and the prohibition against cruel, inhuman and degrading punishment. It is sufficient for present purposes to repeat that the right to dignity is at the heart of the right not to be punished in a cruel, inhuman or degrading way.¹⁵⁰ In the same vein, dignity is central

¹⁴⁸ Prisoners sentenced to life imprisonment in South Africa has to serve at least 25 years of their sentence (or 15 years once they have reached the age of 65) before they can be considered for release on parole: Correctional Services Act 111 of 1998, s 73(6). Following an amendment which came into operation in 2010 (the Correctional Services Amendment Act 25 of 2008, s 48) this period is now determined by the National Council of Correctional Services.

¹⁴⁹ Rudolph ‘Constructing an atrocities regime’ in Simmons & Steinberg (eds) n 82 above 594 at 605.

¹⁵⁰ Currie & de Waal *The Bill of Rights handbook* (5ed 2005) 276, referring to *S v Makwanyane* 1995 3 SA 391 (CC) par 111; *S v Dodo* 2001 1 SACR 594 (CC) (2001 3 SA 382) par 35 (‘While it is not easy to distinguish between the three concepts “cruel”, “inhuman” and “degrading”, the impairment of human dignity, in some form and to some degree, must be involved in all three’); *S v Williams* 1995 2 SA 632 (CC) (1995 2 SACR

to the idea of equality.¹⁵¹ Although many would agree that both dignity and equality should be hallmarks of sentencing, most would deny that it is possible to strive for equality of treatment when it comes to sentencing. It is more likely, in fact, that sentencing will be used as an example of why equality can never be absolute.

This leaves one with a fairly typical situation when it comes to arguments on sentencing, namely that of competing principles. There are indications in the law of certain European countries that disparity in the sentences of different offenders might justify challenges based on the rights to equality and dignity, and against degrading punishment.¹⁵² However, these instances relate to discrimination in a particular country and not across international borders. Across borders, states are largely considered sovereign to decide their own criminal justice policies.¹⁵³

State sovereignty

Dugard explains state sovereignty from a South African perspective, as follows:¹⁵⁴

Sovereignty empowers a state to exercise the functions of a state within a particular territory to the exclusion of other states. ... South Africa, like other states, zealously guards against any attempt on the part of other states to exercise their governmental functions within its territorial limits. ... Any intervention in the domestic affairs of South Africa by other states or international organizations will be resisted¹⁵⁵ as a violation of the

251) pars 76–77.

¹⁵¹ *National Coalition of Gay and Lesbian Equality v Minister of Justice* 1998 2 SACR 556 (CC) par 120; *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) par 41; *Prinsloo v Van der Linde* 1997 3 SA 1012 (CC) pars 31–33; *Harksen v Lane NO* 1998 1 SA 300 (CC) par 50.

¹⁵² Emmerson, Ashworth & Macdonald *Human rights and criminal justice* (2ed 2007) 688–689.

¹⁵³ See Bohlander ‘International criminal tribunals and their power to punish contempt and false testimony’ 2001 *Criminal Law Forum* 91 at 112 (‘... criminal law has always been one of the most jealously guarded domains of state sovereignty. It would therefore be highly unlikely that any state would easily confer criminal powers over its own citizens to an international entity it cannot control’).

¹⁵⁴ Dugard, *International law: a South African perspective* (3ed 2005) 148. See also, for more general discussions on sovereignty, Moravcsik n 82 above at 633–635; Armstrong et al *International law and international relations* (2007) 48–49; Chatterjee *International law and diplomacy* (2007) 36–65; Krasner ‘Problematic sovereignty’ in Williams et al (eds) *Classic readings and contemporary debates in international relations* (3ed 2006) 660, 664–665.

¹⁵⁵ As happened, in particular, during the years of apartheid: Dugard n 154 above at 312–313; Chatterjee n 154 above at 58. See also, in connection with the DRC, Englebert ‘Why Congo persists’ in FitzGerald et al *Globalization, violent conflict and self-determination* (2006) 132–138.

prohibition on foreign intervention that receives recognition in art 2(7)¹⁵⁶ of the Charter of the United Nations.

The South African Constitutional Court found in *Kaunda v President of the Republic of South Africa*¹⁵⁷ that when a South African citizen faces a sentence of death in another country (in this case Equatorial Guinea) the protection that can be afforded is limited to an engagement of foreign relations between the two countries,¹⁵⁸ and

...as long as the proceedings and prescribed punishments are consistent with international law, South Africans who commit offences in foreign countries are liable to be dealt with in accordance with the laws of those countries, and not the requirements of our Constitution, and are subject to the penalties prescribed by such laws.¹⁵⁹

However, state sovereignty is not cast in stone and has already seen substantial change over the last sixty years.¹⁶⁰ Not only are states bound by international treaties, but the globalisation of recent years will inevitably affect human rights as well, as is increasingly acknowledged.¹⁶¹ However, although the world has become much smaller, it would be naïve to argue that criminal justice systems are close to a less disparate approach.¹⁶²

¹⁵⁶ This provision prohibits any interference in the domestic affairs of any state. Interventions are only possible in the case of massive human rights abuses – see *eg*, *Armstrong et al* n 154 above at 131–136.

¹⁵⁷ *Kaunda v President of the Republic of South Africa* 2005 4 SA 235 (CC) (2005 1 SACR 111).

¹⁵⁸ Paragraph 98.

¹⁵⁹ Paragraph 100. In this case it was held to be sufficient that it is the South African government's policy to make 'representations concerning the imposition of such punishment only if and when such punishment is imposed on a South African citizen' – par 99. There are many examples of these considerations in cases dealing with extradition proceedings, including the well-known *Soering v United Kingdom* (1989) 11 EHRR 439.

¹⁶⁰ See *eg*, Dugard n 154 above at 308–309: States were originally largely autonomous, but the atrocities committed during World War II had the result that states are no longer free to 'treat its own nationals as it pleased'.

¹⁶¹ See *eg*, Mahlmann, 'Theorizing transnational law – varieties of transnational law and the universalistic stance' 2009 *German Law Journal* 1325, 1326–1327: 'The rights of individuals are thus a material yardstick of public international law, increasingly taken to limit state sovereignty, and thus challenging the building block of the Westphalian System. In addition, human concerns are not only central to the material content of objective law, but individuals are emancipating themselves from their role as objects of legal norms, as they have become increasingly legal subjects of public international law.'

¹⁶² See Moghalu *Global justice: The politics of war crimes trials* (2006) 171–172: 'Contrary to popular perceptions about the "end" of sovereignty in a globalizing world, sovereignty is not in decline. It has become contextualised.'

CONCLUSION

The philosophical question that arises is consequently whether it is acceptable that each of these countries imposes such divergent sentences for essentially the same criminal act? It is my submission that as punishment gets harsher, a point should be reached where a state can no longer claim sovereignty over such punishment. This submission is supported by the fact that there are numerous international conventions and treaties relating to punishment. One understands that greater consistency in punishment in different countries will not be easy to achieve, especially not when, as in South Africa, there is still a struggle to get sentences roughly consistent in courtrooms in the same building!

The danger is always that state sovereignty will be used as matter of convenience. When it comes to human dignity and the punishments that support or deny such dignity, there is an increasing need to think critically about certain set notions. Intentional forms of homicide are amongst the most serious crimes that are committed, often deserving of the harshest punishments a civilised society is prepared to exact. If all people were in fact equal, then the killer of one person should receive the same sentence as the killer of another person, provided the offenders show the same level of blameworthiness. The jurisdiction in which the act takes place should not, at a fundamental level, make a difference. These factors in themselves make intentional homicide a good starting point in the quest for more consistent punishment across international borders.