# Sentencing Murder

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## Introduction

Homicide involves the unlawful killing of another human being. This simple definition largely applies universally. Yet, many different offences are involved, following a wide variety of definitions. And then there are the sentences. My paper, which should be posted on the society's website, contains more detail, but today I will be focussing on the sentencing of murder in terms of the laws of South Africa, Botswana and Germany. In the end the idea is not, however, to simply compare. I want to pose a different question, namely whether one could draw any conclusions about the value that the laws of these countries place on the life of human beings – both the victims and the killers.

## South Africa

The Republic of South Africa is situated on the southern tip of Africa. It is quite a big tip. In fact, it is almost 15 times the size of Ireland, and larger than any American state. Incidentally, murder numbers have dropped a lot over the last 15 years and it is now at just over 18 000 per year.

Many of the more serious crimes in South Africa are not to be found in legislation, as its criminal law is, in many respects, still uncodified. This is specifically true of homicide offences. Intentionally causing the death of another human being is known as "murder", whereas negligent killing amounts to "culpable homicide". The definitions of these crimes are determined by common law, as interpreted by the courts over many decades. In practice, little uncertainty remains as far as the exact legal details of these offences are concerned.

Sentencing these offences is determined by the sentencing courts' basic jurisdiction, as augmented by relevant legislation. The current position, as far as murder is concerned, is determined by legislation informally referred to as the "minimum sentences legislation". This legislation came into operation in 1998. The finer details are not of current importance, but it prescribes life imprisonment for certain specifically described aggravated forms of murder, such as premeditated murder and murder accompanying rape or serious robbery. Other instances of murder should be sentenced to at least 15 years' imprisonment. Courts have the discretion, in all these instances, to deviate from the prescribed sentences, if satisfied about the presence of substantial and compelling circumstances, justifying a lesser sentence. The legislation provides no guidance regarding the phrase "substantial and compelling circumstances" and a substantial body of case law has developed as to the practical application of the test. Despite this body of case law outcomes remain largely unpredictable and dependent on the value judgement of the court. In general, the court is required to take into account all relevant aggravating and mitigating factors in

determining whether substantial and compelling circumstances are present. Courts are also expected not to impose sentences that would be unjust, and have departed from the prescribed sentences in many cases. A good example is cases where the wife of an abusing husband eventually murders him after many years of severe abuse.

A sentence of life imprisonment in South Africa does not mean that the offender will be detained for the rest of his life. The Correctional Services Act does provide for release on parole, after having served a term of 20 to 25 years in prison. The parole will however, last for the rest of the parolee's life.

I should mention that the death penalty was available in South African law, until declared unconstitutional by the Constitutional Court in 1995. Sixty years earlier the death penalty was mandatory for murder, but the law went through several phases of relaxation until it was abolished. The last execution took place in 1990. A prerequisite for the finding of unconstitutionality was the introduction of a Bill of Rights, for the first time in South Africa's interim Constitution of 1993. The Constitutional Court found that the death penalty breached rights such as the right to life, to dignity, and not to be punished in a cruel, inhuman or degrading manner. None of these breaches could be saved by the limitations clause in the Bill of Rights.

## Botswana

Botswana is one of South Africa's neighbouring countries. It is better known for its wildlife than its criminal justice system. It is the only southern African country with a criminal code, in the form of the Botswana Penal Code. This Code is virtually a copy of the English law in the 1960s, and Botswana gained its independence from the UK in 1966. The Code came into effect in 1964.

Murder is defined as causing the death of another human being with "malice aforethought". In essence, malice aforethought means the same as intent. The death penalty is the prescribed punishment for murder, and is executed by hanging. A lesser sentence may be imposed if the sentencing court "is of the opinion that there are extenuating circumstances" – s 203(2). Extenuating circumstances are not merely "mitigating" circumstances, but are circumstances that impacted on the feelings or mind of the murderer to such an extent that his blameworthiness for the murder is reduced. In order to establish this, the sentencing court has to ask three questions:

(1) Are there relevant mitigating facts, such as immaturity, drunkenness or provocation?

(2) Did such facts, cumulatively speaking, influence the murderer's actions?

(3) Were such facts sufficient to reduce the moral blameworthiness of the accused?

The constitutionality of the death penalty has been attacked on more than one occasion in the Court of Appeal. The 1995 judgment in *Ntesang v The State* 1995 BLR 151(CA) is still considered the final word

on the matter. Although the Constitution of 1966 sets out certain fundamental rights and freedoms, such as the right to life, it also provides that

> "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." – s 4(1)

Furthermore, although the Constitution includes certain rights and freedoms, the courts do not have the power to test other legislation against it. Parliament is the supreme authority and the courts do not have the power to make or change law.

The death penalty is still being imposed and enforced on a fairly regular basis in Botswana. At times the executions take place with remarkable speed, as in 2001, when a South African woman was executed under secretive conditions, only two months after her appeal was turned down.

## Germany

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 to be a model worth following. Unfortunately, this view does not apply in the case of homicide.

The problem is that the two most serious crimes involving the killing of another human being are not clearly distinguished. The German Criminal Code, the *Strafgesetzbuch*, makes provision for various different kinds of unlawful killing of another human being. The most serious offence is that of murder (*Mord*). A further interesting aspect is that the focus of section 211(2) is not on the criminal act, or the causing of death, but on the person committing the crime. Therefore, a murderer is defined as someone who causes the death of another person out of certain specified unacceptable motives, such as "murderous lust" or the satisfaction of sexual desires, "greed or otherwise base motives", through treacherous or cruel methods or in order to cover up another crime. A lesser degree of murder is known *Tötung* (literally, killing or, as translated in some sources, manslaughter) and is provided for in section 212. The main difference between murder and killing is that none of the unacceptable motives present in the case of murder would be present in the case of killing. The distinction between these offences is an aspect of never-ending debate and criticism from commentators, who argue that the difference is vague and should not be maintained. However, after many decades, this is still the position.

For murder section 211 prescribes life imprisonment as punishment. There are no exceptions. *Tötung* is, in terms of section 212, punishable with imprisonment of not less than five years. In particularly serious instances, sentences of up to life imprisonment may be imposed.

The mandatory sentence of life imprisonment for murder has resulted in a lot of constitutional litigation over the years. However, the *Bundesverfassungsgericht* or Constitutional Court has consistently held that

it is not unconstitutional. However, in order to ensure a proportionality between the sentence of life imprisonment and the guilt of the offender, the specific characteristics of murder must be interpreted so restrictively that offenders who do not deserve life imprisonment cannot be convicted of murder.

The German law is particularly notable for its judicial control over the duration of life imprisonment. To begin with, release on parole of a life prisoner is determined by the courts. The terms under which this should happen is provided for in section 57a of the Penal Code, which provides that the court should suspend the remainder of the life imprisonment on probation on condition that the offender has served at least 15 years of the sentence, that the "gravity of the offender's guilt does not necessitate" that he continues the sentence, and that the prisoner shows a good prognoses for leading a law-abiding life outside of prison. The "gravity of the offender's guilt", which actually refers to the extent to which the offender can be blamed for the offence or the consequences thereof, remains constitutionally the most contentious of these provisions. In particular, this is the case because of the risk that the offender is punished for the original offence again. Why? Because "guilt" is one of the main determinants of a sentence in German law. The current position is that the original sentencing court should make a finding of the gravity of the offender's guilt at the time of sentencing. In practice, by far the majority of murderers are released after serving between 15 and 20 years of their sentence in prison.

Life imprisonment would be unconstitutional in German law if it did not leave the prisoner with the hope of one day being released. Following this example, the same position applies in South Africa. At the very least, a contrary position would violate the constitutional right to human dignity, which in German constitutional law informs all other rights.

## The value of human life

As I mentioned at the start, this paper is not mainly intended as a comparison, but to ask questions about the value of human life. Are we to deduce that legal systems that impose the death penalty for murder place a higher value on human life than other systems, as they impose a harsher punishment on the takers of life? Or is it the opposite, that they place a lower value on human life, since they are prepared to extinguish the life of the murderer? It is easy to expand these questions to relate to shorter and longer terms of actual incarceration. I suspect most objective scholars would at least be sceptical about the validity of these questions. And yet, one could hardly blame the relatives of the deceased persons, or the different murderers, if they were to feel that the different sentences do in fact say something about their worth as human beings. And from there is a short step to their human dignity. It violates one's sense of dignity when you are treated differently from other people without good reason. It is no mere coincidence that dignity informs every human right in the German *Grundgesetz*. Equality lies at the heart of so much of what are human rights.

It is not surprising that the idea of equality of treatment has surfaced, sometimes unobtrusively, in many papers at this conference. Usually the main theme of problematic treatment or sentencing of offenders in the international arena is connected to torture or cruel, inhuman or degrading punishment, rather than equality. A good example of this theme is to be found in litigation dealing with extradition, especially when a citizen of one country resists extradition to another where they might be liable to the death sentence. The treaty between the USA and the UK was originally entered into in 1972 and was the object of the well-known judgment in *Soering v United Kingdom*. It is typical of such treaties to include a provision that "extradition may be refused [by the requested party] unless the requesting Party gives assurances satisfactory to the requested Party that the death penalty will not be carried out." As the death penalty is still not outlawed in international human rights law, it is not yet considered cruel or inhuman or degrading per se. But in *Soering's* case the European Court of Human Rights found that its execution in the USA was. The South African Constitutional Court was less ready to interfere in the case of *Kaunda v President of the Republic of South Africa*. "As long as the proceedings and prescribed punishments are consistent with international law," the court found, the laws of those countries will find application. And since the death penalty is, at least implicitly, recognised in instruments such as the European Convention on Human Rights and the African Charter for on Human and Peoples' Rights, 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".

Thus, any investigation of this type runs into what is still the wall of state sovereignty. Every country is entitled to determine for itself what punishments it prescribes for conduct that is illegal within its borders. State sovereignty is a reality, with many good aspects to it. It enables states to be what the culture of the local people needs. But it is my submission that the harshness of punishments imposed on offenders of society's norms is something that drives the issue towards the edge of that society's sovereignty. This is why, perhaps, international conventions and treaties touching on punishment are so common. I understand that a quest for greater consistency of punishment in different countries is not something that will be easy to achieve. In South Africa there is still a struggle to get sentences to be roughly consistent in court rooms across the hall from each other. The danger is always that state sovereignty is used as an argument of convenience. For example, in South Africa, opinion polls indicate that more than 80 percent of the population favours the reinstatement of the death penalty. Yet, it is the government's policy not to do so. This policy, whether one agrees with it or not, is not an expression of the will of the people of South Africa.

And so I get to my submission for this conference, namely that, when it comes to human dignity and the punishments that support or deny such dignity, there is a need to think critically about certain set notions. Intentional forms of homicide are amongst the most serious crimes that are committed, usually deserving of the harshest punishments a civilised society is prepared to exact. This factor alone makes intentional homicide a good place to start the quest for more consistent punishments on an international scale.