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. South Africa’s current claim to infamy lies in its high rates of violent crime. Arguably, it has the highest murder rate in the world.

In South Africa, criminal law remains largely uncodified. This is specifically true of homicide offences, which remain common law crimes. Intentionally causing the death of another human being is classified as ‘murder’, while negligent killing amounts to what is known as ‘culpable homicide’. The definitions and elements of these crimes are established in common law, as interpreted by the courts over many decades. 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

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4 According to Wikipedia it is ranked twenty-fifth both in terms of size and population: [http://en.wikipedia.org/wiki/South_Africa](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.


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 (3ed 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, unless there is legislation in place that specifically governs such sentences. 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 murder

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. Subsequent amendments have created further exceptions. The serious nature of the death penalty, and the fact that it ends human life, has regularly been mentioned in case law. However, the imposition of the death sentence was not consistent – a fact noted by several commentators.

Much of the jurisprudence of this era dealt with the meaning of “extenuating circumstances”, which developed a meaning separate from ‘mitigating circumstances’. This separate meaning has been authoritatively summarised 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? This summary was based on influential judgments such as S v Letsolo, 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.

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 on intent which amounts to putting the deceased in a dire position and then being reckless as to whether death ensues or not. Being an indirect form of intent, it has often been accepted as an extenuating circumstance. Under worldwide pressure to abolish the death penalty, considerable change was effected in 1990. The term ‘extenuating circumstances’ was expunged 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, a fixed term of imprisonment would usually

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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.
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 462 (A) at 469c. See also PM Bekker ‘Die doodvonnis: voor en na 27 Julie 1990’ 1993
be imposed, but rarely more than twenty-five years’ imprisonment.\textsuperscript{26} The last execution in South Africa took place in 1989.\textsuperscript{27}

After this, South Africa had its social revolution, eventually accepting a constitution with a Bill of Rights for the first time.\textsuperscript{28} In one of its first judgments, the newly established Constitutional Court considered the constitutionality of the death penalty in \textit{S v Makwanyane}.\textsuperscript{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.\textsuperscript{30}

\textbf{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,\textsuperscript{31} such as premeditated murder and murder following a rape or armed robbery.\textsuperscript{32} All other forms of murder should carry a sentence of a minimum

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\textsuperscript{26} Cf \textit{S v Skenjana} 1985 3 SA 51 (A) at 55H–I; \textit{S v M} 1993 1 SACR 126 (A) at 134a-I; \textit{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 \textit{SACJ} 207–224.

\textsuperscript{27} \textit{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 \textit{Boston University International Law Journal} 173 at 185.


\textsuperscript{29} \textit{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 -- \textit{ibid.} These principles do not assist to achieve consistent outcomes, which is why the South African Law Commission \textit{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.

\textsuperscript{30} Section 51(1), read with Sch 1.

\textsuperscript{31} 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 used in order to cause the death of the deceased, or any hatred that the murderer might
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’. 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. 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. 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.

The courts have departed from the prescribed sentences in many cases. Examples include cases where the wife of an abusive husband murders him after many years of abuse. In S v Ferreira 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. 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 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.* 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.

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

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. Although the murder...
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

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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)).


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:\textsuperscript{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.\textsuperscript{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.

\textbf{The crime of murder}

Murder, in Botswana, is defined as follows in section 202 of the Penal Code: ‘Any person who of malice aforethought\textsuperscript{54} causes the death of another by any unlawful act or omission is guilty of murder.’ Malice aforethought is an English common law concept\textsuperscript{55} and a technical term for the \textit{mens rea} element in murder.\textsuperscript{56} It should not be interpreted literally. In English law its meaning has been settled since \textit{R v Moloney},\textsuperscript{57} as referring to an intention to kill or to cause serious bodily harm to any person.\textsuperscript{58}

In Botswana the term ‘malice aforethought’ is defined in section 204 of the Penal Code. The malice aforethought or \textit{mens rea} required for the offence of murder is one or more of the following:

\textsuperscript{52} EK Quansah ‘Educating lawyers for transnational challenges: perspectives of a developing country – Botswana’ 2005 \textit{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).

\textsuperscript{53} See also FIDH (International Federation for Human Rights) and Ditshwanelo \textit{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.

\textsuperscript{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 \textit{A sourcebook of the criminal law of Africa} (1966) 175–177.


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

\textsuperscript{57} [1985] All ER 1025, [1985] AC 905. See also \textit{Matthews and Alleyne} [2003] 2 cr app R 30.

• 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;\(^\text{59}\)
• 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 \textit{S v Okgopegile}\(^\text{60}\) 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 penalty\(^\text{61}\) carried out by hanging.\(^\text{62}\) Death is mandatory, unless the sentencing court ‘is of the opinion that there are extenuating circumstances’,\(^\text{63}\) 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,\(^\text{64}\) 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’.\(^\text{65}\) In other words as explained by Nsereko,\(^\text{66}\) “...extenuating circumstances are

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


\(^{61}\) 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 \textit{S v Gofhamodimo} (High Court, Criminal Trial 48 of 1983) specifically stating that South African judgments are to be treated as persuasive).


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.'

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.’ 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 S70 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,

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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.
70 (Criminal 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 Fundakabi 1948 3 SA 810 (A), S v Ndlovu 1970 1 SA 430 (A), Lekolwane v The  State [1985] BLR 245 (CA) and Keleletswe 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.\textsuperscript{73}

The death penalty from a constitutional perspective

Botswana has a written constitution with a justiciable Bill of Rights.\textsuperscript{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):

\begin{quote}
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.
\end{quote}

In addition, the constitution provides that ‘[n]o person shall be subjected to torture or to inhuman or degrading punishment or other treatment’,\textsuperscript{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.\textsuperscript{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 \textit{Ntesang v S.}\textsuperscript{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.\textsuperscript{78}

\textsuperscript{73} At par 42.
\textsuperscript{75} Section 7(1).
\textsuperscript{76} The courts have invalidated parliamentary legislation when it was held to be inconsistent with the Constitution: see \textit{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); \textit{Matlho 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); \textit{S v Letshabo} (CLCLB–022–08) [2009] BWCA 20 (27 Jan 2009) par 6. See also \textit{Fombad} n 45 above at 302.
\textsuperscript{77} [1995] BLR 151 (CA). It is still considered the final word on the matter – see \textit{eg, Khobedi v The State} crim app 25 of 2001; [2003] BWCA 22 (19 March 2003).
\textsuperscript{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

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\(^80\) 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.


\(^82\) 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* 995 (CC) (2005 1 *SACR* 1) at par 96; *Thatcher v Minister of Justice* 2005 4 *SA* 235 (C) (2005 1 *SACR* 228) at par 33.

\(^83\) 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. In southern and central Africa, apart from Botswana, the following countries retain the death penalty: Lesotho, Zimbabwe, Zambia, Burundi, Rwanda and Tanzania. In Malawi the last execution took place in 1992.

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. Germany is a federal state and its Criminal Code (Strafgesetzbuch or StGB) is a federal code with countrywide application. The responsibility of the states (Länder) lies in the application of the criminal law and its resultant sentences. The general court structure is as follows: the Amtsgericht is generally the local court, while the Landgericht is the court of first instance at state level. Each state has at least one Oberlandesgericht (Regional Appeal Court).
A murder trial would normally be instituted in a Landsgericht, as these courts are specifically given this responsibility by the Gerichtsverfassungsgesetz. The highest German court is the Federal Constitutional Court (Bundesverfassungsgericht) which normally considers only constitutional matters. This court is in many respects similar to the South African Constitutional Court, 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). Interestingly, the act of murdering someone is not defined in the Criminal Code, the focus rather falling on the person committing the crime:

A murderer is someone who kills another human being out of murderous lust, to satisfy his sexual desires, from greed or otherwise base motives,
treacherously\textsuperscript{98} 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.\textsuperscript{99}

Some examples of these characteristics are appropriate. In a case heard by the Federal High Court of Justice early in 2006,\textsuperscript{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.\textsuperscript{101}

\textsuperscript{98} Alternately ‘by stealth’ Bohlander n 97 above, or ‘with insidiousness’ (Bohlander, ‘German Federal Court of Justice (Bundesgerichtshof—BGH) 4\textsuperscript{th} Criminal Senate: Homicide: Insidiousness; Withdrawal from attempt’ 2006 The Journal of Criminal Law 29).


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

\textsuperscript{101} See Bohlander n 98 above at 31–32.
Sentencing murder and the ideal of equality

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

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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 and 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 ‘Empfiehlt 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 nn 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, if 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 2007\textsuperscript{107} 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, got into 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.\textsuperscript{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.\textsuperscript{109} The Criminal Code provides for a variety of other forms of intentional and negligent killing,\textsuperscript{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.\textsuperscript{111} This sentence is mandatory, as lesser forms of murder are not known when the specific characteristics or unacceptable motives are present.\textsuperscript{112} Totschlag is punishable with imprisonment of not less than five years.

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\textsuperscript{107} BGH, 3 StR 180/07, HRRS 2007 Nr 933.
\textsuperscript{108} At 1(a).
\textsuperscript{109} The BGH remitted the case to the trial court for sentencing by a different judge.
\textsuperscript{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).
\textsuperscript{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 nn 14.
Sentencing murder and the ideal of equality

113 Although in particularly serious instances, which are considered very rare, sentences of up to life imprisonment may be imposed. 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. It is not surprising that a restrictive interpretation of the specific characteristics of murder is generally favoured in German law.

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. 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.

As in South Africa, someone serving life imprisonment in Germany must be considered for release at some point. German law is actually notable for its judicial control over the duration of all sentences of imprisonment, including life imprisonment. To this end most Landgerichte have a specific chamber of the court, termed the Strafvollstreckungskammer, which oversees how sentences of imprisonment are carried out. These chambers have jurisdiction over decisions taken on the release of life prisoners on what effectively amounts to parole. 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

114 Fischer n 105 above at 1478 (§ 212 rm 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 31–33.

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) at 180 (§ 21 rm 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, Appi 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) 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. 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.

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. A determination that the offender’s guilt requires continued incarceration is an exceptional finding which requires a balancing of the seriousness of the crime against the personality of the offender, coupled with the conclusion that the offender’s blameworthiness is particularly high. In effect, what is required is that the court determine the ‘gravity of the

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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. Fischer n 105 above at 507 (§ 57a nn 19).
125 Van Zyl Smit Taking life imprisonment seriously (2002) 155; Schneider n 112 above at 465 nn 220; Detter n 125 above at 43 nn 86. However, the trial court does not make a recommendation on the additional number of years that the prisoner should be in detention – ibid.
126 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. Detter n 125 above at 43 nn 86.
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’ the Strafvollstreckungskammer 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 freedom and bodily integrity,139 the prohibition against inhuman or degrading

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130 Van Zyl Smit n 126 above at 138.
131 §57a(3). See also Lein and Weingartner (eds) Isak/Wagner: Handbuch der Rechtspraxis: Vol 9: Strafvollstreckung (7ed 2004) 100.
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.
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
punishment, and the right to development of one’s own personality, are often raised.

Section 57a was introduced into the Criminal Code 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. 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.

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.

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? Or is the opposite true: Do they have a lower regard for 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 to the idea of equality.\(^{151}\) Although many would agree that both dignity and

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\(^{148}\) 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.

\(^{149}\) 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 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
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. 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.

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

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 resisted as a violation of the prohibition on foreign intervention that receives recognition in art 2(7) of the Charter of the United Nations.

41; Prinsloo v Van der Linde 1997 3 SA 1012 (CC) pars 31–33; Harken v Lane NO 1998 1 SA 300 (CC) par 50.
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’).
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.
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.
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.\(^{162}\)

**CONCLUSION**

The philosophical question that arises is consequently thus, ‘whether it is acceptable that each of these countries imposes such divergent sentences’ for essentially the same criminal act? thus arises. 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

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\(^{157}\) *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.’
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 place to start the quest for more consistent punishment across international borders.