STRUCTURING HOMICIDE: BROADER PERSPECTIVES

LINDSAY FARMER
UNIVERSITY OF GLASGOW
THE STANDARD VIEW

Two categories of criminal homicide (murder and culpable homicide).

• *Actus reus* is always the same:
  
  “Any wilful act causing the destruction of life…”
  
  (Macdonald, *Practical Treatise* p.89)

• Differentiation on grounds of *mens rea*:
  
  • Intentional killings more serious (murder)
  
  • Reckless killings (probability + foresight)
PROBLEMS

- Persistence of forms of constructive liability:
  Unlawful act culpable homicide: *MacAngus v HM Advocate; Kane v HM Advocate* 2009 SLT 137

- Not clear how ‘voluntary’ culpable homicide (provocation/diminished responsibility) fits into this model;

- Other ‘statutory’ forms of liability for causing death:
  Road traffic: Causing death by dangerous driving (Road Traffic Act 1988 s.1); causing death by careless driving (s.2B), causing death by driving while under the influence of drink or drugs (s.3A); causing death by driving while disqualified, unlicensed or uninsured (s.3ZB & C)
  Corporate homicide: Corporate Manslaughter and Corporate Homicide Act 2007 s.1

- “Most homicide does not result from a conscious decision to kill … Moreover, the fatal conduct we judge most antisocial is not necessarily the conduct committed with the most deliberation.” (Binder, “Homicide”, p.725)
HISTORICAL PERSPECTIVES I: MURDER

Murder was defined narrowly (‘forethocht felony’)

- ‘Casual’ (accidental) homicide and homicide in self defence not capital (APS 1661, c.22)

- Certain kinds of violent killing were presumptive evidence of murder
  - Use of a weapon
  - Evidence of mutual combat
  - Engaging in commission of another felony
  - No evidence of provocation

- Focused on violent acts/anti-social motives (dole)
HISTORICAL PERSPECTIVES II: THE RISE OF CULPABLE HOMICIDE

• Residual category. Originally a class of culpable killings that were not murder
  Provocation/excessive self defence/some casual homicides
  Punishment “according to the quality of the fault” (Hume, Commentaries, I, p.233)

• Rise of new model of culpably causing death (19th C)
  Culpable homicide first charged 1781 (Crichton, Burnett, Criminal Law, p.26); commonplace by 1820s
  Required proof of intention to do injury or knowledge that another was exposed to risk (Ld J-C Hope in Paton & McNab (1845) 2 Broun 525 at p.532). A question of degree

• Taken as model for homicide law as a whole
  “All unlawful killing or destroying the life of a human being is culpable homicide; but the term murder is technically applied to that culpable homicide which is done maliciously” (Ld Young in HM Adv v Marshall (1897) 4 SLT 217)
## THE MANDATORY LIFE SENTENCE

### Table: Life Imprisonment in Various Countries (2000-2016)

<table>
<thead>
<tr>
<th>Country</th>
<th>Life-sentenced Prisoners</th>
<th>Percentage of Sentenced Prison Population</th>
<th>Per 100,000 of National Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>France</td>
<td>489</td>
<td>0.9</td>
<td>0.7</td>
</tr>
<tr>
<td>Germany</td>
<td>1,863</td>
<td>3.7</td>
<td>2.3</td>
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<tr>
<td>Turkey</td>
<td>7,303</td>
<td>6.0</td>
<td>9.3</td>
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<tr>
<td>England and Wales</td>
<td>7,361</td>
<td>9.9</td>
<td>12.7</td>
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<tr>
<td>Scotland</td>
<td>1,038</td>
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<td>19.3</td>
</tr>
<tr>
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<td>1,766</td>
<td>0.4</td>
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<tr>
<td>Europe</td>
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<td>3.0</td>
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<tr>
<td>South Africa</td>
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<td>India</td>
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<td>5.5</td>
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<tr>
<td>United States</td>
<td>161,957</td>
<td>9.5</td>
<td>50.3</td>
</tr>
</tbody>
</table>

*Data for England and Wales, France, Germany, Scotland, Turkey and the USA are from 2016. Data for India, Russia and South Africa are from 2014.*

(Figures from D van Zyl Smit, University of Nottingham)
Scotland imprisons relatively more people for life than any other European country. Why?

• Non-parole periods imposed by courts are getting longer
  From average 13.8 years in 2004 to average 18 years in 2013

• Low number of releases of life sentenced prisoners by the Parole Board
  In 2015-2016 only 44 of 336 cases before the Parole Board released while 195 rejected and 144 postponed and 13 withdrawn

• Long-term growth in number of life sentenced prisoners returned to prison annually
  Low of 10 in 2000-2003 to 89 in 2016-2017

Are we imprisoning only the “worst of the worst”?
IMPLICATIONS

Is the model of culpably causing death still appropriate?

• Explore *actus reus*:
  
  Killing/causing the destruction of life
  
  Types of killing:
  
  “Any person who kills a person for pleasure, for sexual gratification, out of greed or otherwise base motives, by stealth or cruelly or by means that pose a danger to the public or in order to facilitate or to cover up another offence.” (German Criminal Code, §211)
  
  An act causing death/conduct resulting in death?

• May not be possible to remove mandatory life sentence, but limit its effect?
  
  Degrees of murder? (See Law Commission, No.304 (2006), Pt.II)

• A ladder or a grid?
REFERENCES


L Farmer, Criminal Law, Tradition and Legal Order (Cambridge UP, 1997) ch.5

G Fletcher, Rethinking Criminal Law (Little, Brown & Co, 1978) chs.4 & 5

Law Commission, Murder, Manslaughter and Infanticide (No.304)(2006)