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Women Who Kill Their Abusive Intimate Partners in Non-Confrontational Circumstances — The Need for German Criminal Law Reform

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Abstract

To acknowledge the lived realities of women who kill their abusive partners when they are sleeping or inattentive, several jurisdictions have reformed or reinterpreted their criminal laws. Some have introduced specific domestic violence defences while others construe existing defences more broadly in recognition of the circumstances under which abused women kill. Germany, however, has not adopted these approaches. Through analysis of the 2003 'family tyrant' judgment by the Bundesgerichtshof (the highest court of ordinary jurisdiction in Germany), this article examines the German criminal justice system's treatment of women who kill their abusers. The article concludes that law reform is necessary to better acknowledge the situation of female victims who kill their abusive intimate partners in non-confrontational circumstances in response to long-term domestic violence.

Keywords: German criminal law; family violence; domestic violence; family tyrant; law reform; lived realities.

Introduction

A growing number of jurisdictions worldwide acknowledge that the application of conventional criminal law does not yield adequate results in cases where women kill their intimate partners in response to domestic violence (Nash and Dioso Villa 2024). Some jurisdictions have introduced specific domestic violence defences, while others construe existing homicide defences more broadly to acknowledge the underlying circumstances based on which abused women kill (see Braun 2017; Fitz-Gibbon 2022; Walker, Temares, Diaz and Gaviria 2023). Neither approach, however, has found application in Germany, where legal responses to abused women who kill remain unchanged.

Cases in which women kill their male intimate partners are rare in Germany (Schneider 2015: 21, 2022; see also for the US context Walker, Temares, Diaz and Shapiro 2023: 5), despite what media coverage might lead one to believe (Hamburger Morgenpost 2022; Reith 2022; Spiegel Panorama 2020). Official German crime statistics on intimate partner violence for 2021 show 80.3% of intimate partner violence victims were female, while 78.8% of persons investigated for committing intimate partner violence were male (Bundeskriminalamt 2022: 3, 23). Overall, 143,016 cases of intimate partner violence were recorded, out of which 0.3% (369 individuals) concerned attempted and completed homicide offences. Out of the 121 individuals who died as a consequence of homicide by an intimate partner, 109 were female and 12 were male. In addition, four females and two males died due to assault causing death. Overall, 113 female and 14 male victims died at the hands of their intimate partner (Bundeskriminalamt 2022: 6). Thus, women in Germany are more likely to be killed by their male intimate partners than they are to kill their male partners.

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Despite these statistics, German courts have decided criminal cases in which women were subjected to domestic violence and killed their abusive intimate partners—with whom they were in a long-term relationship—while they were sleeping or otherwise inattentive (*BGH* 1966, 2003, 2005; Funk 2021b: 241; *Landgericht Offenburg* 2002). These cases are fraught with doctrinally challenging questions concerning the applicability of different types of homicide offences as well as the availability of defences (Hajszan and Germ 2022; Welke 2004). One landmark decision has subsequently become known as the 'family tyrant' case in Germany. This 2003 appeal judgment by the highest court of ordinary jurisdiction, Bundesgerichtshof (BGH), concerned the criminal liability of a female defendant who shot her husband while he was asleep, after decades of abuse.

Following a brief introduction, this article provides in-depth analysis of the 2003 'family tyrant' decision, including an examination of the facts and the legal reasoning of both the trial and appeal courts. It then considers the impact of this judgement on the ordered retrial. Subsequently, the article analyses the main legal issues preventing the adequate treatment of women who kill their intimate partners in response to domestic violence in the German criminal justice system and concludes that law reform is long overdue. Some jurisdictions, such as the Australian state of Victoria, have focused their reform efforts in this space on self-defence laws. For example, the imminence requirement has been removed to broaden the circumstances in which women have access to self-defence in these cases. In contrast, duress or inevitable mistake about the existence of duress may already provide a sufficient defence for women in Germany. For this reason, self-defence law reform may not necessarily be required. This article argues, however, that evidentiary law reform is necessary in Germany to better enable domestic violence evidence to be considered in the context of possible defences.

The 2003 BGH 'Family Tyrant' Decision

Facts of the Case

In 2003, the BGH was tasked with hearing the appeal of a criminal case in which the female defendant killed her abusive male partner while he was sleeping (*BGH* 2003). In Germany, the case has become known as the 'family tyrant' case (for an English summary of the case see Dubber and Hörnle 2014: 429; see also analysis in Braun 2017).

In July 2002, the defendant had been convicted by the trial court for aggravated murder. Yet, the court had reduced the sentence for aggravated murder—a mandatory life sentence—to a fixed-term penalty of nine years' imprisonment by relying on an approach developed by the BGH *praeter legem* in an older judgment (*BGH* 1981). As per this approach, life sentences can be averted under certain circumstances, for example, where a mandatory life sentence would be grossly unfair for the defendant. The defendant subsequently appealed to the BGH which handed down its judgment in 2003. The BGH quashed the conviction and ordered a retrial due to an error of law. The appeal was based on the following established facts.

When the defendant met her now deceased husband in 1983, he was already a member of a motorcycle gang. Soon after meeting him, he became violent towards her. They married in 1986 and, by the time their first daughter was born, the deceased had begun to frequently abuse the defendant by hitting her in the stomach and in the face. The abuse persisted throughout the defendant's second pregnancy and her daughter was born with a cleft palate and lip. In May 1988, the violence intensified further, leading the defendant to leave her husband. She moved into a temporary refuge for women. Due to fear of repercussions from the deceased, the defendant's parents were unwilling to help their daughter and take her and her children in. After four weeks at the shelter, the defendant returned to live with her abusive husband after he promised that he would no longer beat her.

Yet, over the years, the degree of violence only increased, with the deceased now beating the defendant with objects, including a baseball bat. On one occasion during the Christmas period in 2000, the deceased forced the defendant to kneel on the floor and say she was a 'whore' and 'filth'. This took place in front of members of the motorcycle gang. Based on the facts of the case, the deceased had also been hitting their children since 2001. Having become aggravated about a door slamming open and shut due to a breeze from an open window, the deceased hit the defendant with such a degree of force that she fell to the ground. He commenced kicking her barefoot while she lay on the ground. He also punched her in the abdomen. After putting on his combat-style boots, he kicked the defendant a minimum of 10 times. He then proceeded to punch her in the face.

On 21 September 2001, the deceased returned from the pub in the early hours of the morning. He spat at, insulted and punched the defendant, causing her to bleed from her mouth. Subsequently, the deceased fell asleep. After the defendant sent the children off to school, she commenced cleaning the house. During the process, she discovered a gun and some bullets. The gun had been unlawfully acquired by the deceased and was not usually kept at their residence. The defendant testified that, after she found the gun, she could no longer see other options to save her and her children's life other than to kill her husband. According to her testimony, she did not think that leaving her abusive partner and relocating to a refuge for women was an alternative that

would ultimately save their lives. On prior occasions, when the defendant had returned from the refuge, she had been continually threatened by the deceased that if she were to ever leave him again, he would hurt the children. She testified further that she had been told by the deceased that she would never be safe, even if he was incarcerated. She believed this would be the case following his release as well as during his incarceration, because she knew he could rely on his motorcycle associates to hurt her and the children. Around midday, the defendant took the gun and, from about 60 cm away, fired an entire round of bullets at her sleeping husband, causing his immediate death. The courts' legal reasoning in this case is analysed below.

Legal Reasoning

In the 'family tyrant' case, the trial court and, on appeal, the BGH had to decide initially what offence applied, prior to contemplating whether the defendant could rely on any excuses or defences.

Type of Homicide Offence

Intentional homicide offences are enshrined in Section 211 of the *German Criminal Code*, entitled 'Murder under specific aggravating circumstances' ('aggravated murder') and Section 212 of the *German Criminal Code*, entitled 'Murder'. While the former carries a mandatory life penalty, the latter attracts a sentence of imprisonment of no less than five years and imprisonment for life in particularly serious cases. Where a less serious case of murder can be established, the penalty is imprisonment for a minimum of one and a maximum of 10 years (*German Criminal Code*, s. 213).

Section 211 of the *German Criminal Code* provides that, to be criminally liable for aggravated murder, the perpetrator's intent to cause death must be established and they must have completed one of the listed aggravations. These include killing out of lust, for 'sexual gratification' and 'out of greed or otherwise base motives.' The section further states that aggravated murder is established where a person kills 'perfidiously or cruelly' or if they kill 'by means constituting a public danger or to facilitate or cover up another offence.' This shows that, under German criminal law, a mandatory life sentence is reserved for those types of killings which are committed under circumstances the law considers particularly reprehensible and appalling.

In the 'family tyrant' case, the trial court held that the killing had occurred in aggravating circumstances as it was carried out perfidiously (*heimtückisch*). This was the case, the trial court explained, as the deceased had been asleep when he was shot. According to the trial court, a sleeping person is generally unsuspicious. A person kills perfidiously where they are aware of the factors which constitute perfidy. In addition, a person must have the necessary intent to exploit the victim's defencelessness. Past BGH jurisprudence has continuously affirmed that an exploitative intent exists where a perpetrator kills a person who is sleeping (*BGH* 1969). In the case at hand, the BGH did not see any errors in the application of Section 211 of the *German Criminal Code* and the aggravating circumstance of killing perfidiously (*BGH* 2003: 11).

It cannot be dismissed that the ongoing domestic violence may have caused the defendant severe emotional stress. For this reason, she may not have had the required intent when killing the deceased, who was asleep at the time. Yet, neither the original trial court nor the BGH on appeal entertained this argument. Consequently, aggravated murder with a mandatory life penalty was held applicable in this case. The result of this jurisprudence is that women who are in abusive relationships and end the lives of their inattentive or sleeping domestic partners are likely to be found criminally liable for aggravated murder, which attracts a mandatory life sentence. This is as opposed to the lesser offence of murder, attracting a fixed-term penalty, or even a less serious case of murder with a reduced sentence.

The BGH's considerations concerning the availability of defences and their legal consequences in this case are analysed next.

Self-defence

Section 32 of the *German Criminal Code* provides that a person must be acquitted where self-defence applies. Self-defence can be raised where there is an 'unlawful, imminent attack' on the perpetrator's individual rights or the rights of another, including life and physical integrity (*German Criminal Code*, s. 32). An attack requires human contact which ultimately threatens to harm the rights or protected interests of a person (Reimann and Zekoll 2005: 395). German scholarship and jurisprudence consider an attack 'imminent' when the attack is about to start, has already commenced or is currently underway (Foster and Sule 2010: 348).

The trial court held that self-defence did not apply in this case as no imminent attack by the deceased took place. The court found that the husband had been shot while he was asleep and not, for example, during any ongoing conflict once he had woken up (*BGH* 2003: 9). The BGH did not consider the trial court's assessment erroneous (*BGH* 2003: 10; Funk 2021a: 154).
The two courts did not consider whether the imminence of an attack required for self-defence could be broadly interpreted to include likely future attacks from the deceased. This aligns with past jurisprudence in Germany where courts have not allowed

self-defence claims in these cases. Self-defence is understood as a right that is intentionally narrowly formulated. Expanding this right to include future attacks runs the risk of counteracting the obligation to seek prior help from authorities, including the police, before taking matters into one's own hands (see Hajszan and Germ 2022: 231). Consequently, in non-confrontational situations (for example, where the abuser is asleep or inattentive) defendants are generally unable to rely on self-defence. In these cases, a defendant is also unable to successfully raise excessive self-defence. Section 33 of the *German Criminal Code* states that excessive self-defence only applies in situations where excessive force was used to defend against an imminent attack.

Next, the BGH contemplated whether the defence of necessity applied in this case.

Necessity

Section 34 of the *German Criminal Code* states that necessity (*Notwehr*) differs from self-defence in that it requires an imminent danger, not an imminent attack. While the trial court failed to consider this defence entirely, the BGH concluded that it was clear from the established facts that the defence of necessity was not available in this case (*BGH* 2003: 11–12).

Under German criminal law, necessity can only arise where the interests the offender aims to protect through their actions outweigh those impinged upon (see also Reimann and Zekoll 2005: 396). In the 'family tyrant' case, the BGH explained that the protection of the health and safety of the defendant and her children did not outweigh the deceased's right to life. Additionally, the Court emphasised that necessity would not apply even if the lives of the defendant and her children were at stake (*BGH* 2003, 12). This is the case as the law does not deem one life more worthy than another. For this reason, one life cannot legally be sacrificed to save another (Hajszan and Germ 2022: 233; Reimann and Zekoll 2005: 396).

After having rejected the availability of the defence of necessity, the BGH considered whether duress or the excuse of inevitable mistake about the availability of duress could apply in this case.

Duress and Inevitable Mistake about Duress

Duress is defined as an excuse, rather than a justification like self-defence. Thus, in order to establish duress under Section 35 of the *German Criminal Code* (*Entschuldigender Notstand*), an imminent attack is not required. Instead, duress can be raised when there is an imminent danger to one of the defendant's protected interests—namely, 'life, limb or liberty'—that is likely to occur in the near future. German courts define imminent danger as a situation that is likely to persist into the future and which will lead to, or increase, harm (*BGH* 1963). According to Rengier (1984), duress may arise in cases like the 'family tyrant' case. Successfully relying on duress results in an acquittal for the defendant. An acquittal must also follow where a defendant is under an inevitable mistake about the availability of duress.

The trial court failed to consider the availability of the excuse of duress and mistake about the availability of duress. This was considered by the BGH as an error of law warranting a retrial. Regarding duress, the BGH found that the abuse perpetrated by the deceased constituted an imminent danger to the defendant's health and possibly even her life, as well as those of the children (*BGH* 2003: 13).

The Court commented that the key question in relation to the applicability of duress was whether the danger arising from the deceased husband could have been averted by a method other than killing him (*BGH* 2003: 15). In other words, courts in these cases must assess whether killing the sleeping husband was the least intrusive means capable of putting a stop to the danger (Schramm 2011). As such, defendants cannot 'choose the path of least resistance but must make every effort to evade the danger' (Bohlander 2011: 255). Courts appear to assess the level of danger and whether it could have been averted by other means on a case-by-case basis.

The BGH specifically noted that the defendant in this case failed to ask for help from the police or a voluntary organisation to relocate to a shelter with her two daughters. It also noted that she did not report her situation to police so charges could be laid against the husband (*BGH* 2003: 15). For her act to meet the requirements of duress, the Court explained that the defendant must have reasonably believed that no effective safe escape was possible. The BGH clarified that this could be the case if authorities had not effectively intervened despite being informed about past abuse, leading the defendant to doubt whether they would be able to do so on this occasion. The Court noted that, although it could not determine this based on the facts established by the trial court, it seemed unlikely that the defendant was without effective options to stop the danger from her husband (*BGH* 2003: 16–17; Funk 2021a: 154; see also discussion in Schramm 2011: 155).

The Court further contemplated whether a safe escape may not have been available to the defendant in this case because, according to her testimony, her husband had threatened to harm her and the children should she ever leave him again. The BGH

noted that it was necessary to consider how seriously these threats could really be taken. Without reference to specific supporting evidence, however, the Court declared that abused women and family members who seek help from authorities and voluntary organisations in Germany will receive effective help (*BGH* 2003: 16). The BGH noted that a 'permanent danger stemming from a "family tyrant's" continuing aggression towards his family members is generally avoidable … by other means than killing the "tyrant"; i.e., by obtaining help from third parties, namely public authorities' (*BGH* 2003: 17). Consequently, the Court concluded that the defendant could not rely on duress in this case and suggested it was unlikely available to defendants in similar circumstances in future cases.

Next, the BGH contemplated whether the defendant could have been under an inevitable mistake about the existence of duress under Section 35(2) of the *German Criminal Code*. If this is successfully argued, the defendant is acquitted. In family tyrant cases, a person is under a mistake about duress where they subjectively believe they cannot effectively avert the danger stemming from their sleeping intimate partner in any other way than by killing him. The test for this assessment is subjective (see Hajszan and Germ 2022: 236). It follows that the mistake is avoidable if the defendant could have identified, after careful consideration, that duress was not available to them.

With a view to a future retrial, the BGH outlined factors relevant to determining whether a mistake was avoidable in the case at hand. It noted that an avoidable mistake existed if the facts of the retrial established that the defendant had had a lengthy time period to consider and obtain advice on possible alternatives to killing her husband (*BGH* 2003: 19). The BGH commented that it was unlikely that the defendant's physical or mental state, caused by ongoing domestic violence, could be considered relevant in evaluating whether she was able to realistically assess alternatives to killing (*BGH* 2003: 19).

Avoidable Mistake about Duress

The BGH explained that if, during the retrial, the trial judge concluded that the defendant could have avoided her mistake about the availability of duress, she could not be acquitted. Rather, an avoidable mistake about duress could only result in a sentence reduction of the mandatory life penalty to a fixed-term sentence (*German Criminal Code*, ss. 35(2), 49(1)).

Impact on the Retrial

German trials are not officially transcribed, and the District Court Hechingen's judgment of the retrial is unreported. However, it has been reported in academic scholarship that the defendant was sentenced to four years and six months' imprisonment for aggravated murder upon retrial (Rengier 2004: 239). The court found that duress was not available to the defendant as the defendant and her children could have left their home and, thus, avoided the danger stemming from the abusive husband in ways other than killing him. Therefore—in line with the guidance provided by the BGH—during the retrial, the trial court did not find that the defendant was under an inevitable mistake about the existence of duress. It is unclear whether the trial court based their sentence reduction on an avoidable mistake (Rengier 2004: 239–240). The comments provided by the BGH in its judgment on avoidable mistakes and duress make it likely, however, that this was indeed the reason for the sentence reduction during the retrial.

In other jurisdictions, the convictions of women who kill their abusive intimate partners have recently caused a public outcry (see Johnston 2016 noting the public outcry in France caused by the murder conviction of Jacqueline Sauvage who killed her husband in 2012 after decades of being subjected to domestic violence; see further on the Jacqueline Sauvage case Fitz-Gibbon and Vannier 2017). This, however, has not been the case in Germany. The judgment of the BGH and the significant impact it has on female defendants who have killed in response to domestic and family violence has been criticised by some (Braun 2017). Yet, such criticism has neither impacted court practices nor successfully driven relevant criminal law reform in Germany (Dubber and Hörnle 2014: 419).

The 2003 'family tyrant' case illustrates the legal challenges faced by women who kill in non-confrontational circumstances (in this case while the abuser was sleeping) due to the narrow interpretation of the criminal law by German courts, thus indicating a need for law reform.

Legal Issues Preventing Adequate Treatment and Law Reform Avenues

Applicable Homicide Offence

Legal Issue

When a woman kills her male intimate partner who is asleep or otherwise inattentive at the time of the homicide, in response to domestic abuse, they are likely prosecuted for aggravated murder as German courts consider this type of killing perfidious.

Some courts may reduce the mandatory life penalty of aggravated murder to a fixed-term sentence based on the different considerations discussed above. Nevertheless, the conviction is for aggravated murder, which is reserved for the most reprehensible and appalling types of homicide. In the 2003 decision, the BGH did not consider the trial court's application of aggravated murder to be erroneous, noting that 'ultimately, the defendant shot her husband while he was asleep because she did not dare to confront him openly' (*BGH* 2003: 11).

Characterising this type of killing as aggravated murder—the most serious offence with the highest penalty under German criminal law—does not seem warranted, considering the circumstances of defendants who kill in response to long-term domestic violence. Women who are frequently the physically weaker party in a relationship may not be able to openly confront their abusers due to fear of being harmed or killed during an open confrontation. They may, therefore, resort to killing their partners while they are sleeping or inattentive. Consequently, German criminal law punishes physically weaker persons—frequently females—more harshly in the context of homicide than those who kill in open confrontations, who are frequently males (Molitorisová and Burke 2020). To better understand why this is the case, it is necessary to consider the legislative history of the current homicide offences.

The current homicide offences were originally drafted and introduced in 1941 under the Nazi regime. However, they were later subject to law reform that removed the mandatory death penalty (Haas 2016: 318). Maas (2014: 1030) notes that the aggravating factors in murder cases, typically referring to circumstances that increase the severity of the crime, 'fit well with the Nazi ideology on criminal law'. As such, the offence of aggravated murder does not contain specific elements but rather refers to certain types of offenders. This ambiguity, as Maas (2014: 1030) explains, enabled Nazi courts to order harsh punishments for defendants who the courts deemed particularly deserved it. He concludes that this is the reason why German criminal law 'became the gateway to despotism'. Concurring, Mitsch (2020: 2) notes that the catalogue of aggravations contained in Section 211 of the *German Criminal Code* appears to be lacking a clear structure and to be 'random and ambiguous'.

Killing perfidiously is subject to the harshest penalty under German criminal law because the victim is unable to defend themselves due to their state (see explanations considered in Haas 2016: 334; Schramm 2011: 141–142). Haas (2016) points out, however, that the aggravation of killing perfidiously yields particularly unfair results in the legal system for women who kill in response to abuse. The current German homicide law, therefore, does not adequately acknowledge the lived experiences of women who kill in response to domestic violence, and is in urgent need of reform.

Avenues for Law Reform

To better accommodate the situation of women who kill in response to domestic violence, law reform regarding the aggravation of 'perfidious' killings is warranted. It should be clarified that homicides committed by women who kill as a result of long-term domestic abuse do not fall into this category (see for the Austrian context Hajszan and Germ 2022: 237). Such law reform would mean that these defendants would only be charged with murder with a fixed-term sentence or, depending on the circumstances of the individual case, with a less serious case of murder which attracts a penalty of a minimum of one and a maximum of 10 years.

In 2014, Heiko Maas, the then Federal Minister of Justice and Consumer Protection, acknowledged the need to reform German homicide offences. This need was particularly necessary in cases where abused women killed their intimate partners in non-confrontational circumstances (Maas 2014: 1031). Maas established the Expert Group on the Reform of Homicide Offences in Germany ('Expert Group') with a view to drafting a law reform proposal.

The Expert Group considered the aggravation of acting perfidiously and did so also in relation to the consequences for women who kill in response to long-term domestic violence. In its 2015 final report, the majority of the Expert Group argued that this aggravation should be amended (Expertengruppe zur Reform der Tötungsdelikte 2015: 44). However, the reform suggested by the Expert Group in 2015 never became law as Parliament could not agree on several other points, including whether the mandatory life penalty for murder should be abolished (Mitsch 2020).

Consequently, there continues to be a need for law reform of current homicide offences in Germany.

Interpretation of Defences Without Reference to Domestic Violence Evidence

Legal Issue

In order to improve access to defences for women who kill their abusive intimate partners, some jurisdictions have focused on reforming their self-defence laws. For example, Victoria has amended its self-defence law in the context of family violence such that the harm a person responds to no longer needs to be immediate (*Crimes Act 1958* (Vic), s. 322M(1)(a)). Moreover,

the response does not have to be proportionate to the use of force to which a person is responding (*Crimes Act 1958* (Vic), s. 322M(1)(b)). Germany could better accommodate women who kill in response to domestic violence by reforming self-defence laws in a similar way as has been the case in Victoria. However, as analysed above and contrary to the situation in other jurisdictions, in Germany the excuse of duress or inevitable mistake about the existence of duress may already be available as an excuse for women in these situations. Yet, the way German criminal courts have interpreted this excuse is frequently not reflective of the lived realities of women who kill their abusive partners.

The elements of duress may require an objective assessment of the availability of a safe escape. Meanwhile, inevitable mistake about the existence of duress, which if successfully argued also results in an acquittal, requires a subjective assessment of the mindset of the accused. The question must be addressed as to whether the defendant mistakenly believed that they were acting under duress, and that their mistake was inevitable.

In relation to an inevitable mistake about duress, the BGH doubted that the psychological and physical impacts of long-term abuse in the 'family tyrant' case were relevant in determining whether the defendant was able to realistically assess alternatives to killing the deceased in order to avert the danger. The BGH noted that this would particularly be the case if it was found at the retrial that her cognitive capacity had not been significantly reduced. Rather, to assess whether an inevitable mistake existed, the Court stated that it was necessary to consider whether the defendant had had a lengthy period of time to contemplate alternatives to killing her husband, such as seeking outside help (*BGH* 2003: 19–20). This view demonstrates a limited understanding of the dynamics and effects of domestic and family violence. The BGH did not hear, and was under no evidential obligation to hear, expert evidence on the impact of domestic violence as it related to the accused in the 'family tyrant' case.

Regarding another German case in which a woman killed her partner in response to abuse, Dubber and Hörnle (2014: 418) comment that if the BGH judges had heard expert testimony on domestic violence 'they might not have so easily embraced the idea that "just go" might be an easy option for women in problematic and violent marriages'. They concluded that greater 'sensitivity to battered women's situation would be advisable for German courts' (Dubber and Hörnle 2014: 418–419). As Mechanic (2023: 201) explains, 'inaccurate beliefs held by many, including legal system actors, such as, "leaving the abuser ends the violence,"' compound the hurdles abused women face when they find themselves in the criminal justice system.

Avenues for Law Reform

When contemplating whether defendants were under an inevitable mistake about the existence of duress—namely whether they thought no effective outside help was available to end the danger stemming from the sleeping abuser—German courts should be required to take into account domestic violence evidence contextualising the actions of the defendant.

The psychological problems women face in the cycle of domestic violence and the great risks associated with leaving an abusive partner have become increasingly documented in research and scholarship. Yet, the jurisprudence of the BGH in this area appears increasingly out of touch with the experiences of abused women. The guidance offered by the BGH regarding the assessment of inevitable mistake neglects to consider evidence of domestic violence and its effects on women's responses. Mechanic (2023: 202) points out:

> Biases against battered women defendants are most pernicious when left unrebutted, when factfinders (i.e., judge or jury) remain uneducated about the nature and impact of IPV [Intimate Partner Violence], and when myths and stereotypes about IPV are accepted as facts. Expert witnesses can educate the court in battered women's homicide cases.

Expert evidence can assist in explaining why women in long-term abusive relationships do not end the relationship but make the decision to kill their partner to preserve their own life and that of their children. Evidence of domestic violence can assist the judge and/or jury to contextualise 'a battered woman's actions (or failures to act) in the context in which they occurred – one dominated by fear, actual and threatened violence, forced, or coerced compliance, and the necessity of engaging in survival behavior' (Mechanic 2023: 204).

Expert evidence concerning 'battered women syndrome' (BWS) (for an overview of BWS see McPherson 2019) and evidence outlining the context and effects of domestic violence is admissible at trial to varying degrees in several common law jurisdictions (Edgely and Marchetti 2011: 134; Mechanic 2023; Nash and Dioso-Villa 2024: 2279). BWS is not a free-standing defence. Rather, as Terrance, Plumm and Rhyner (2012: 925) explain, where battered women are charged with murdering their intimate partners, 'expert witness testimony is usually proffered to provide a framework from which battered women's experiences and actions may be understood'. Evidence concerning BWS can be relevant in the context of partial defences, such as provocation (see discussion in McColgan 2000: 145), and in the self-defence context as it assists decision makers in

reconciling 'seemingly discrepant self-defense criteria with cases where they would not otherwise do so' (Terrance, Plumm and Rhyner 2012: 925).

Alongside the reforms to self-defence outlined above, Victoria permits evidence relating to the 'social context of family violence' in homicide cases involving family violence (Tyson, Kirkwood and McKenzie 2017: 562). Hopkins and Easteal (2010: 132) note that family violence evidence enhances court responses because judges must 'walk in the shoes' of abused women when evaluating whether their actions were reasonable. Yet, the BGH has neither relied on evidence relating to domestic violence nor commented on its possible relevance and admissibility in German criminal trials (see concerns outlined in Welke 2004: 18). It is obvious that this type of evidence is important to the successful operation of defences in these cases.

The retrial's outcome shows that, despite the 'family tyrant' case involving decades of escalating physical violence and threats to kill the defendant, the trial court did not recognise duress or an inevitable mistake about the existence of duress, based on the narrow interpretation by the BGH. Consequently, the defendant was not acquitted but convicted for aggravated murder and given a fixed-term sentence.

In conclusion, evidentiary law reform is required in Germany so that domestic violence evidence is considered in the context of possible defences. Similarly, Fitz-Gibbon and Vannier (2017: 324) argue that the French justice system must also undergo evidentiary law reform to improve legal responses to women who kill in response to domestic violence and 'to ensure that women's experiences of violence are brought within the confines of the legal system'.

Conclusion

While statistically rare, cases where women kill their abusive partners in non-confrontational circumstances (when asleep or inattentive) occur in jurisdictions around the world. Some states have reformed their criminal laws and allow the introduction of evidence of a broad understanding of the nature and dynamics of domestic violence to better acknowledge the circumstances in which abused defendants kill. Yet, this has not been the case in Germany. While law reform has been repeatedly contemplated in relation to homicide offences, no law reform attempt has been successful thus far.

As per current German criminal law, defendants who kill their abusive partners while they are asleep are likely to be charged with aggravated murder which carries a mandatory life penalty. Moreover, due to the narrow interpretation of defences by German courts, defendants in these cases are unlikely to successfully rely on duress or inevitable mistake about the existence of duress, which would lead to an acquittal. At best, they will receive a reduction of the mandatory life sentence to a fixed-term sentence. To better protect defendants who kill in response to domestic violence, law reform is required in Germany. This article identified two areas ripe for law reform in this context: 1) reform of the material law to remove these types of killings from the scope of aggravated murder, and 2) evidential reform requiring courts to take into account domestic violence evidence.

The current classification of killing an abusive inattentive intimate partner as aggravated murder—the most reprehensible offence under German criminal law—is not a fair reflection of the circumstances which cause women to kill their abusive partners. Moreover, findings by criminal courts as to what abused women can or cannot be expected to do prior to killing their partner to be able to rely on a defence are speculative only. The expectations are based on ideas, rather than evidence on domestic violence and the lived realities of these defendants.

If the law remains unchanged, women in Germany who kill their abusers to defend themselves against further victimisation will continue to be tried in a justice system that does not understand the impact of domestic violence, particularly in their circumstances.

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