

LGBTIQ+ lives under colonial shadows: The legacy of German colonial law in today's Tanzania and Namibia

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https://doi.org/10.29053/978-1-0672373-9-4_17

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Abstract: *Colonial legacies have profoundly shaped the post-colonial landscapes of African countries, influencing all aspects of life, including the reinforcement of a singular, heteronormative conception of sexuality. This legacy continues to shape the perceptions of sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC) in Africa today, as ongoing Western influence dictates both legal frameworks and societal norms. This creates serious lasting challenges for lesbian, gay, bisexual, trans, intersex and queer (LGBTIQ+) communities, especially in relation to discriminatory laws that were established in colonial times and continue to persist across many African jurisdictions. Realising the relatively short period of German colonial rule, in this chapter I take a closer look at the role of German colonial legislation in relation to contemporary legal and societal attitudes towards the rights of LGBTIQ+ communities in what today are Namibia and Tanzania. Given that both countries have experienced different legal and societal developments on issues of sexuality and gender until today, this chapter aims to highlight historical injustices and their ongoing repercussions in a comparative approach. In doing this, the chapter offers three key learnings: First, the influence of German colonial rule on contemporary legal frameworks regarding same-sex sexual practices in Namibia and Tanzania is complex and difficult to trace. Nonetheless, the colonial imposition of rigid heteronormative structures and binary gender norms, used as instruments of power, shaped social perceptions of sexuality in ways that continue to disadvantage LGBTIQ+ individuals. Second, both countries illustrate how colonial legacies interact with post-colonial trajectories: despite divergent post-independence paths, inherited societal norms continue to influence approaches to gender and sexuality, reflecting broader African struggles to abolish colonial frameworks. Third, German colonial legal histories not only illuminate internal historical realities, but also inform global debates on law, sexuality and human rights, highlighting specific colonial structures whose effects persist today.*

1 Introduction

The human rights of lesbian, gay, bisexual, trans, intersex and queer (LGBTIQ+) persons, like many other human rights issues, are currently

facing renewed pressure, after long and hard-fought struggles for recognition. In times of growing autocratic tendencies across the globe, it is easy to forget that not long ago, the protection of the human rights of LGBTIQ+ persons has been framed by some as a remaining 'African problem', suggesting that the continent was lagging behind while others have achieved a steady level of protection.¹ This reflects a 'narrative in which the West uses LGBT+ rights in order to reaffirm its own self-image as progressive and modern by contrasting itself to its Other.'² One of the factors pushing the image of the rights of LGBTIQ+ persons as an African problem is the number of countries criminalising same-sex sexual practices in global comparison. As of July 2025, these practices are criminalised in more than half of the 54 African countries, thereby making Africa the continent with the highest number of countries criminalising same-sex sexual practices.³ Yet, this framing obscures the historical origins of these criminal provisions, many of which were imposed through European colonial legal systems, reinforcing the misconception that Europe is the locus of progress.

Yet, the rights of LGBTIQ+ persons are currently again (or better: now more forcefully and visibly than before) under attack worldwide. In this context, they are increasingly used as scapegoats, and as instruments for political mobilisation and narratives of national unity.⁴ For example in Germany – although still relatively restrained in comparison to other countries – these global dynamics are visible, among others, in debates over raising the Pride flag on Parliament (*Bundestag*).⁵ In Hungary, the adoption of the 2021 law banning the portrayal of LGBTIQ+ content to minors, the constitutional amendment defining marriage exclusively as a union between a man and a woman, and the suppression

1 KE Otu & A van Klinken 'African studies keywords: Queer' (2023) 66 *African Studies Review* 509.

2 As above.

3 ILGA World 'Database: A unique knowledge based on laws, human rights bodies, advocacy opportunities, and news related to sexual orientation, gender identity and expression, and sex characteristics issues worldwide', <https://database.ilga.org/en> (accessed 6 July 2025).

4 A Sogunro 'Democracy's canary: What anti-LGBTQ politics tell us about our democratic future' *The Globe and Mail* 9 March 2025, <https://www.theglobeandmail.com/opinion/article-democracys-canary-what-anti-lgbtq-politics-tell-us-about-our/> (accessed 9 July 2025).

5 G Frankenberg 'Eine Republik wird „neutralisiert“: Auf der Suche nach einem parlamentarischen Neutralitätsbegriff' *Verfassungsblog*, 23 July 2025, <https://verfassungsblog.de/neutralitat-klockner-bundestag/> (accessed 28 July 2025).

of public LGBTIQ+ events, reflect a broader repressive climate of legal and social hostility towards LGBTIQ+ persons. Taking into account similar examples from around the world, it becomes clear that, while mainstream 'Western' discourse portrayed sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC) rights as being firmly established and steadily progressing before, particularly in considering the relationality to other geographic contexts, the reality is more complex.

The rights of LGBTIQ+ persons have never been fully or universally accepted.⁶ Rather, their level of acceptance is varying across changing conditions of temporality and locationality and illustrate the persistent challenges in securing these rights. This reveals their status as an intractable problem of human rights, 'so defined because of the seeming impossibility to resolve them' despite growing frameworks dedicated to the promotion and protection of human rights.⁷ The African context continues to experience what has been described by Nyeck as 'double victimisation by [heteronormative] colonial hegemonies and postcolonial'⁸ legacies. While not aiming to romanticise pre-colonial African societal structures for the life of LGBTIQ+ individuals, historical records suggest that societies embodied a certain degree of gender and sexual fluidity. Murray and Roscoe note in the book *Boy-wives and female husbands* that 'there are no examples of traditional African belief systems that singled out the same-sex relations as sinful or linked them to concepts of disease or mental health – except where Christianity and Islam have been adopted'.⁹

The settings of pre-colonial African societies shifted substantially when colonisation imposed a singular, heteronormative conception of sexuality. The legacies of colonialism continue to shape the perception

6 In this context, I Zundel & S Debele 'The notion of the human as an intractable problem of the law: A critical appraisal' in T Kaime & B Dinokopila (eds) *Intractable problems of human rights* (2025) 7.

7 This concept is being developed through the interdisciplinary and collaborative research project (2021-2025) 'When the law is not enough: Tackling intractable problems of human rights – Prospects for integrated approaches' within the Africa Multiple Cluster of Excellence at the University of Bayreuth, funded by the Deutsche Forschungsgemeinschaft (German Research Foundation) under Germany's Excellence Strategy – EXC 2052/1–390713894.

8 SN Nyeck *African(a) queer presence: Ethics and politics of negotiation* (2021) 22.

9 S Murray & W Roscoe (eds) *Boy-wives and female husbands: Studies of African homosexuality* (2001) 270.

of SOGIESC issues across post-colonial African contexts, as ongoing Western influence continues to shape legal systems and societal norms. As a result, LGBTIQ+ communities face enduring challenges, especially in relation to discriminatory laws that were established in colonial times and persist, as demonstrated, across many African jurisdictions today.¹⁰

It is in this context that the call to disentangle from these colonial impositions has gained significant attention. Much of the research and advocacy efforts, however, have focused on former British colonies, with particular emphasis on their model penal code provisions on 'Unnatural Offences' and the ways in which they have travelled and evolved across the world.

In contrast, German law criminalised same-sex sexual practices between men through paragraph 175 of the German Criminal Code, which was in force between 1871 and 1994. Due to the relatively short period of German colonial rule, which ended with the takeover by other colonial powers, such as the British and French after World War I, its impact is largely considered to be minimal. However, off the beaten track, I take a closer look at the role of German colonial legislation in relation to contemporary legal and societal attitudes towards the rights of LGBTIQ+ communities in what today are Namibia and Tanzania. Building on these insights, I reflect on contemporary global debates concerning law, sexuality and human rights.

In this regard, the chapter is structured into eight parts. After this introduction, the second part serves as a preface, shortly outlining the methodology, terminology and my positionality guiding this research. The third part introduces Germany's legal approach to SOGIESC issues from the past to today and puts emphasis on highlighting two disillusioning remarks. After that, the fourth part offers a short and fragmented overview of SOGIESC issues in pre-colonial African societies, aiming to complement the broader analysis by highlighting the sexual and gender diversities that existed prior to colonial rule and to challenge the well-known claim that homosexuality is un-African. Parts 5 and 6 focus on the legal developments related to sexual orientation

10 See a comparative analysis between British and Portuguese colonial legacies on that topic, GG da Costa Santos & M Waites 'Comparative colonialisms for queer analysis: Comparing British and Portuguese colonial legacies for same-sex sexualities and gender diversity in Africa – Setting a transnational research agenda' (2019) 29 *International Review of Sociology* 297.

in today's Tanzania and Namibia respectively, each tracing distinct historical and contemporary trajectories. The seventh part brings together the insights from the parts before to define broader learnings from the historical and comparative analysis. The chapter will then end with some concluding remarks.

2 Preface¹¹

Before going into the analysis, it seems important to highlight a few aspects, namely, research methods, positionality and terminology.

2.1 Research methods and sources

The following analysis was developed using library-based doctrinal methods of law alongside (decolonial) comparative legal approaches¹² through a historical legal analysis.¹³ A decolonial comparative analysis not only critically challenges the hegemonic position of so-called 'Western' legal systems but also foregrounds a collaborative decolonial learning process. It centres scholarship that challenges Western-dominated narratives and generates novel insights, such as into the relationship between law, sexuality and human rights. These insights attend to their diverse articulations across time, legal frameworks and lived experiences as a basis for more effective protection of rights. Such approach is, among others, essential to strengthening the global legitimacy of international human rights law in addressing contemporary global tensions.¹⁴

The two case studies, Namibia and Tanzania, are used to trace convergences and divergences in the regulation and social understanding of sexuality over time, situated within and analysed against their shared German colonial histories. The criminalisation of same-sex sexual practices provides a central analytical lens for assessing how

11 Certain parts of this section I have intentionally phrased in a similar way in other publications due to the nature of my research. These elements are essential and are repeated to ensure that all readers approach this work with the necessary context and understanding.

12 L Salaymeh & R Michaels 'Decolonial comparative law: A conceptual beginning' (2022) 86 *Rabel Journal of Comparative and International Private Law* 166.

13 MD Dubber 'New historical jurisprudence: Legal history as critical analysis of law' (2015) 2 *Critical Analysis of Law* 1.

14 On lived experiences as a basis for effective protection of rights, K de Feyter 'Localising human rights' (2006) 5 *Journal of Human Rights* 1.

colonialisation has shaped, and may continue to shape, both legal frameworks and societal understandings, and for identifying patterns of continuity and change.

The comparative analysis takes as its functional starting point each country's normative codification of the criminalisation of same-sex sexual practices and its evolution over time. These developments are examined through selected systematic points of comparison, particularly legal inheritance and political mobilisation, drawing on published case law, legislation, secondary literature, and selected policy and advocacy materials. In this context, it is important to acknowledge the scarce availability of archival sources, which necessitates the reliance on secondary literature as well as selected policy documents and advocacy materials.¹⁵ This constraint may have affected the depth and comprehensiveness of certain historical or contextual insights.

2.2 Positionality

In doing this cross-cultural research, I fully acknowledge my positionality as 'only' white German heterosexual cis woman, an identity that inevitably raises important and completely justified questions regarding my role in undertaking this work. I have made a conscious effort to critically engage with my own background, including my embedded Western perspectives, and the privileges associated with my identity. My intention in this research has been to develop a perspective that is not only guided by self-awareness but is also responsive to the broader ethical implications of cross-cultural research. I have committed to grounding my analysis in the local contexts, and to ensuring that my research contributes meaningfully and respectfully to existing scholarship. I do this by the sustained engagement with African scholarship, literature and advocacy, seeking to learn from, and be accountable to, the individuals, communities and institutions whose experiences, work and scholarship inform this research. Nevertheless, I fully recognise that I may not always be able to fully capture or do justice to this goal.

15 See H Schmidt 'Colonial intimacy: The Rechenberg scandal and homosexuality in German East Africa' (2008) 17 *Journal of the History of Sexuality* 25, 31.

2.3 Terminology

Finally, throughout this chapter, I use the term ‘LGBTIQ+ individuals’ and SOGIESC rights and issues, with a particular emphasis on the criminalisation of same-sex sexual practices between persons of the same sex.¹⁶ Thereby, it seems important to emphasise that SOGIESC rights must not be misinterpreted as additional or special rights; they are simply the human rights of LGBTIQ+ individuals. In action, the aforementioned criminalisation impacts LGBTIQ+ individuals beyond questions of sexual orientation, with the nature of rights violations and their connection to state responsibilities varying significantly. In this regard, I do not aim to generalise or group LGBTIQ+ individuals within one category but instead wish to acknowledge the broader effects that the criminalisation has on LGBTIQ+ people, extending beyond sexual orientation.

3 Germany: In the past and today

This part begins with two rather disillusioning remarks: First, although often overlooked in public discourse and frequently perceived, particularly by the German public itself, as a ‘less brutal’ or ‘not-so-bad’ part of history in relation to other countries, Germany was indeed a colonial power. Its colonial rule extended across various regions worldwide, including African territories of present-day Togo, Cameroon, Rwanda, Burundi, Tanzania and Namibia. The profound atrocities committed in these places during that period¹⁷ underscore the extent to which mainstream narratives in Germany reflect an incomplete and insufficient reckoning with its colonial past. The second remark is one already mentioned above. Germany’s current ‘progressive’ stance on SOGIESC rights is a

16 In terms of terminology, I refer to Centre for Human Rights, Faculty of Law, University of Pretoria ‘A guide to LGBTIQ+ rights in the UN and African human rights systems’ (2022), https://www.chr.up.ac.za/images/researchunits/sogie/documents/A_Guide_to_LGBTIQ_Rights_in_the_UN_and_Africa_V3_27.09.2022_1.pdf (accessed 6 July 2025).

17 Eg. J Zimmerer ‘Colonial genocide: The Herero and Nama War (1904-8) in German South West Africa and its significance’ in D Stone (ed) *The historiography of genocide* (2008) 323-343; NO Oermann ‘The law and the colonial state: Legal codification versus practice in a German colony’ in G Eley & J Retallack (eds) *Wilhelminism and its legacies: German modernities, imperialism, and the meanings of reform, 1890-1930* (2003) 191-204.

relatively recent development and one that, in light of global autocratic trends, is increasingly under pressure.¹⁸

With this being said, this part will shortly explore Germany's colonial administration and its position on SOGIESC rights, with a particular focus on the criminalisation of same-sex sexual practices, in the past and today.

3.1 Introduction to German colonial rule

The incorporation of different regions, as German colonies (*deutsche Schutzgebiete*) into the imperial system was framed by the Protectorate Act (*Schutzgebietsgesetz*) of 1900, building on an earlier version of 1886. This law established the legal basis for governing Germany's overseas territories, granting the German Emperor (*Kaiser*) broad legislative and executive powers over the colonies.¹⁹ As was typical of colonial systems, the *Kaiser* retained nearly unlimited authority in administrative matters, with the colonial governance characterised by a highly centralised structure and little to no separation of powers.²⁰ According to section 2 of the Protectorate Act (adapted version of 1900), certain codified German laws, including the German Criminal Code, were directly applicable in the colonies. However, section 4 together with section 3 (adapted version of 1900) stipulated that these laws did not apply to the colonised population unless their application had been explicitly ordered by the *Kaiser*. This order was never issued. As a result, codified German laws, such as the German Criminal Code did not directly apply to the colonised population, 'because they were thought to be too "uncivilised" to fall under German law',²¹ but primarily to German and other European residents, such as British traders and Swiss or French missionaries, of these protectorates.²²

18 Tagesschau 'Kritik an CSD-Absage aus der Bundestagsverwaltung', 18 June 2025, <https://www.tagesschau.de/inland/innenpolitik/csd-regenbogennetzwerk-absage-100.html> (accessed 6 July 2025).

19 JR Steinkröger *Strafrecht und Strafrechtspflege in den deutschen Kolonien von 1884 bis 1914. Ein Rechtsvergleich innerhalb der Besitzungen des Kaiserreichs in Übersee* (2019) 71.

20 Steinkröger (n 19) 72.

21 U Schaper 'Law and colonial order: Legal policy in German Cameroon between civilising and public peace' (2009) 19 *Comparativ* 17.

22 Steinkröger (n 19) 73.

For the colonised population the legal regime was different. Rather than being subject to a codified set of legal rules, justice was administered through decrees²³ and delegation authority, albeit within the limits imposed by the hierarchy of legal norms. The *Kaiser* was able to delegate part of his powers, especially the right to pass decrees to the Imperial Chancellor (*Reichskanzler*), who issued a decree on the criminal jurisdiction of the colonised populations in today's Togo, Cameroon and Tanzania (1893), followed by a similar one in today's Namibia (1896).²⁴ The decree established, among others, district officials as judicial authorities over the colonised population, which created in practice a 'laird's style' system, where local officials exercised significant discretion in determining what actions warranted punishment.²⁵ While the German Criminal Code served as benchmark for the applied penalties and indirectly influenced the decisions, this regime nevertheless encouraged arbitrary and unequal treatment under the law.²⁶

In essence, as Schaper argues in the Cameroonian context, law, especially criminal law, served two main purposes in the colonial project: the 'transfer of European ideas and the maintenance of order.'²⁷ Law thus functioned as 'an instrument of civilising efforts.'²⁸ At the same time, the production of order was pursued largely through the creation and preservation of difference between the coloniser and the colonised.²⁹ In this sense, law became one of the key domains through which a rigid, racialised division between coloniser and colonised was actively produced and maintained.³⁰

In analysing the German colonial influence on today's approaches to SOGIESC issues in today's Tanzania and Namibia, especially same-sex sexual practices, both the imposed legal *system* and the imposition of certain moral perceptions are determining factors. The moral perception enforcing a strict binary understanding of sex and gender, in turn, was both enforced and entrenched through the colonial system. In line with

23 Steinkröger (n 19) 77.

24 AJ Knoll & JH Hermann (eds) *The German colonial experience: Select documents on German rule in Africa, China, and the Pacific 1884-1914* (2010) 135.

25 Steinkröger (n 19) 80.

26 Steinkröger (n 19) 92.

27 Schaper (n 21) 18.

28 Schaper (n 21) 21.

29 Schaper (n 21) 22.

30 As above.

the established structure, paragraph 175 of the German Criminal Code, which criminalised same-sex sexual practices between men, applied to the Europeans in the protectorates while the colonised population was subject to punishment guided by the codified law but implemented through the discretionary 'laird's system'.

Most of the historical records accessible today focus on Europeans or cases involving at least one European. In the same vein, the European Centre for Constitutional and Human Rights (ECCHR) notes in relation to pre-colonial sources on this topic in Namibia that 'the written archival sources tend to represent primarily or exclusively the perspectives of, mostly male, European coloni[s]ers.'³¹ There are several possible reasons for this. As Walther suggests in the context of today's Tanzania, 'this focus reflects both the priorities of colonial authorities and the nature of the surviving archival material.'³²

3.2 Paragraph 175

Germany has a long and complex legal history concerning same-sex sexual practices, which was significantly shaped by paragraph 175 of the German Criminal Code. The provision criminalised same-sex sexual practices between men from 1871 until its final repeal in 1994. The Arolsen Archives provide the following translation of an excerpt from this legal provision: 'An unnatural sex act committed between persons of male sex or by humans with animals is punishable by imprisonment; the loss of civil rights might also be imposed.'³³

This provision not only made so called 'unnatural sex act[s] between persons of male sex or by humans with animals' which, according to Beachy, 'was [initially] understood as sexual penetration of one man by

31 European Centre for Constitutional and Human Rights 'Submission to Independent Expert on sexual orientation and gender identity: Report on Colonialism and SOGI', 26 May 2023, <https://www.ohchr.org/sites/default/files/documents/cfi-subm/2308/subm-colonialism-sexual-orientation-cso-ecchr.pdf> (accessed 9 July 2025).

32 DJ Walther 'Same-sex relations, German colonial authority, and masculinity in German East Africa' (2008) 17 *Journal of the History of Sexuality* 82.

33 Arolsen Archives 'Paragraph 175: The long road to legal reform', <https://arolsen-archives.org/en/news/the-long-road-to-legal-reform-2/> (accessed 8 January 2026).

another, or the sexual acts of man and beast',³⁴ a criminal offence, but imposed severe penalties including imprisonment of varying duration (which repeatedly included mandatory labour) and the possible discretionary loss of certain civil privileges. Although attempts to expand paragraph 175 to include same-sex sexual practices between women were proposed in 1907, and efforts to nullify the provision entirely were made in 1898 and 1929, all these initiatives were unsuccessful.³⁵ As Plant famously and impressively elaborates, the Nazi regime intensified the law in 1935 by broadening the scope from a more narrow interpretation during the German Empire and Weimar Republic to require 'sex-like acts' (typically anal penetration) towards including all 'lewd' acts (including non-penetrative contact), by removing the word 'unnatural' from the new version of section 175 and increasing sentences to up to five years' imprisonment. This enabled the persecution and deportation of thousands of men and transgender women, which were marked with pink triangles, to concentration camps.³⁶ After World War II, East and West Germany followed two different approaches towards the enforcement of the law: East Germany came back to the pre-1935 version in 1950, ceased most prosecutions by 1957, and fully nullified the law in 1968.³⁷ In contrast, West Germany maintained and enforced the version established in 1935 until 1969, when it was partially decriminalised. However, unequal age of consent laws and the criminalisation of same-sex sex work persisted.³⁸ After the reunification of East and West Germany in 1990, paragraph 175 was fully nullified in 1994. In 2017, efforts to acknowledge and make up for the past injustices caused by paragraph 175 were initiated through the Law on the Criminal Rehabilitation of Persons Convicted of Consensual Homosexual Acts after 8 May 1945, which provides financial compensation to affected individuals. In 2021, the German government further acknowledged institutional discrimination with the Law on the Rehabilitation and Compensation of Homosexual

34 R Beachy 'The German invention of homosexuality' (2010) 82 *Journal of Modern History* 801, 808.

35 More conflicting details on the efforts to nullify the provision in 1929, L Marhoefer *Sex and the Weimar Republic: German homosexual emancipation and the rise of the Nazis* (2015) 112-145.

36 R Plant *The Pink Triangle: The Nazi war against homosexuals* (1986) 39-41.

37 Marhoefer (n 35) 212-214; L Goodwin 'Gay emancipation: The Effort to delete paragraph 175' (2023) 27 *Vulcan Historical Review* 17.

38 Goodwin (n 38) 16.

Soldiers, granting one-time payments to those excluded from the armed forces (*Bundeswehr*) due to their sexual orientation.³⁹

3.3 Recent developments

As of June 2025, Germany has ratified various international human rights frameworks, including the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and is a party to the European Convention on Human Rights (ECHR). In fulfilling its international legal obligations, Germany has introduced national normative frameworks respecting, protecting and fulfilling the rights of LGBTIQ+ persons. For example, in 2017 the *Bundestag* passed legislation giving same-sex couples full marital and adoption rights.⁴⁰ As of November 2024, individuals over the age of 18 years are able to change their legal gender through a process of self-determination.⁴¹ This reform followed a constitutional ruling that considered the requirement of surgical genital modification for the amendment of key identity documents unconstitutional.⁴² Further, Germany became the fifth country worldwide to implement a nationwide ban on conversion practices for minors, a law that came into effect in May 2020.⁴³

Despite these positive developments, scholars and practitioners highlight areas where Germany must take further steps to ensure full equality and non-discrimination for LGBTIQ+ persons. For example, a report published by the Organisation for Economic Co-operation and

39 ILGA World 'Database: LGBTI Rights in Germany', <https://database.ilga.org/germany-lgbti> (accessed 6 July 2025).

40 See a constitutional and comparative legal analysis of the *Ehe für alle*, F Wollenschläger & D Coester-Waltjen *Ehe für Alle: Die Öffnung der Ehe für gleichgeschlechtliche Paare aus verfassungsrechtlicher und rechtsvergleichender Perspektive* (2018).

41 Bundesministerium für Bildung, Familie, Senioren, Frauen und Jugend 'Pressemitteilung: Das Selbstbestimmungsgesetz tritt in Kraft', <https://www.bmfsfj.de/bmfsfj/aktuelles/presse/pressemitteilungen/das-selbstbestimmungsgesetz-tritt-in-kraft-247982> (accessed 9 July 2025).

42 LC Wurthmann 'The German transgender self-determination law: Explanatory factors for support within the population' (2023) 7 *European Journal of Politics and Gender* 1.

43 'Germany bans gay "conversion therapy"' *Deutsche Welle* 8 May 2020, <https://www.dw.com/en/germany-bans-gay-conversion-therapy-for-minors/a-53367140> (accessed 9 July 2025).

Development (OECD) in 2023 recommends explicitly including sexual orientation and gender identity as protected grounds in the Basic Law (*Grundgesetz*), closing loopholes in the General Equal Treatment Act that leave sexual and gender minorities vulnerable to discrimination in employment and services, and granting automatic co-parent recognition for lesbian couples using assisted reproductive technology.⁴⁴

This overview of the German legal developments on SOGIESC rights serves as a foundation for the subsequent analysis. Building on the initial remarks, especially the first, the following parts explore whether, and how, German (colonial) approaches to SOGIESC issues influenced legal and societal developments in Tanzania and Namibia, both during the colonial era and in its aftermath. These two former German colonies illustrate divergent contemporary trajectories in relation to SOGIESC issues, prompting a closer look at the scope and nature of German colonial influence in this domain.

4 Insights into SOGIESC in pre-colonial African societies⁴⁵

Before examining the legal and societal developments in the today's Tanzania and Namibia, this part offers a brief and fragmented overview of SOGIESC in pre-colonial African societies. The aim is twofold: to complement the broader analysis of this chapter by highlighting the sexual and gender diversities that existed prior to the imposition of colonial legal frameworks and to challenge the well-known and frequently cited claim that homosexuality is *un-African*. Thereby, it is important to stress that pre-colonial African societies did not operate in a single, uniform way and, therefore, cannot serve as one overarching counter-narrative but were (much like today) characterised by pluralism and contestation. In this sense, the coming exploration on pre-colonial African societal structures does not seek to replace one essentialist cultural narrative with another, but rather to highlight the diversity and plurality of African cultures and practices.

44 OECD 'The road to LGBTI+ inclusion in Germany', https://www.oecd.org/content/dam/oecd/en/publications/reports/2023/02/the-road-to-lgbti-inclusion-in-germany_a05b91c8/977b463a-en.pdf (accessed 9 July 2025).

45 Significant parts of this section on SOGIESC in pre-colonial African societies have been developed in the doctoral thesis and will be published in the associated monograph, I Zundel *Claiming SOGIESC rights through the African human rights system* (forthcoming).

4.1 Same-sex sexual practices in pre-colonial Africa

First, same-sex sexual practices and relationships existed in pre-colonial African societies. Namwase and others categorise sexuality as a human condition without geographical reference and conclude that if homosexuality, which is characterised as just a form of sexuality by the authors, indeed were 'un-African', pre-colonial Africa would not have had inhabitants.⁴⁶ Same-sex sexual practices have never been alien to African societies, but Africa has experienced different phases of influence in terms of sexuality. Knowledge of same-sex sexual practices and the linguistic means to refer to them are evidence of this. For example, in their comprehensive book *Boy wives and female husbands: Studies in African homosexualities*, Murray and Roscoe gather extensive evidence for same-sex sexual practices in pre-colonial African societies.⁴⁷ Mawerenga also demonstrates that some societies had the vocabulary to describe same-sex sexual practices; for example, the Shangaan used the term *into Shane* (male-wife).⁴⁸ Thus, an understanding is gained regarding how homosexuality was embedded in pre-colonial African societies.

Acknowledging the existence of same-sex sexual practices, scholars have argued that they did not take place in public but existed in a 'culture of discretion'.⁴⁹ Ambani analyses the regulation of sexuality in African societies in three historical phases, namely, pre-colonial, colonial and post-colonial Africa.⁵⁰ He sees two main factors as a basis for understanding sexuality in pre-colonial Africa. First, 'pre-colonial African systems were predominated by religion'.⁵¹ Religious beliefs and customs, whether indigenous religions or Muslim and Christian influences, differed in each society and determined the rules of social

46 S Namwase, A Jjuuko & I Nyarango 'Sexual minorities' rights in Africa: What does it mean to be human; and who gets to decide?' in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 9.

47 Murray & Roscoe (n 9).

48 H Mawerenga *The homosexuality debate in Malawi* (2018) 197-198.

49 Eg, M Epprecht 'The "unsaying" of indigenous homosexualities in Zimbabwe: Mapping a blindspot in an African masculinity' (1998) 24 *Journal of Southern African Studies* 635.

50 J Ambani 'A triple heritage of sexuality? Regulation of sexual orientation in Africa in historical perspective' in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 14-51.

51 Ambani (n 50) 18.

conduct. Every aspect of life was seen and understood in the context of the dominant religious beliefs. Tessmann concludes that sexual orientation cannot be examined in isolation but only in the social context of a specific society.⁵² Second, most African societies cherished the idea of a 'fertile marriage', focusing on producing many children as the leading purpose of sexuality. Heterosexual relations and fertility were thus the accepted social standard.⁵³ The social determination of the purpose of sexuality created a situation in which divergent forms, such as same-sex sexual practices and relations, were often concealed by a *culture of discretion*.

If not hidden, same-sex sexual practices often came with different explanatory tactics and institutions. Some societies created institutional mechanisms, such as women-to-women marriages or relationships. These institutions could hide instances of impotence or same-sex sexual practices,⁵⁴ but may also have been created for reproductive, economic and diplomatic reasons.⁵⁵ For instance, a woman unable to conceive was paired with another woman who had children, leading to her recognition as a parent and societal acknowledgment. This, therefore, was an institution that served to hide barrenness.⁵⁶ In Cameroon, same-sex sexual practices between two Pangwe men were considered 'wealth medicine'.⁵⁷ The existence of explanations other than sexual pleasure for same-sex sexual practices, or the employment of mechanisms to cover them up, are found in many different pre-colonial societies.

Epprecht argues that the mechanism of hiding was also reflected in some indigenous languages. For example, several languages in what today is Zimbabwe had no specific terminology to refer to same-sex sexual practices. In Shona, for example, innocent descriptions such as *sahwira* (intimate male comrade) were used.⁵⁸ These terms were not immoral but did have a categorising effect. Apparently, more specific terms were borrowed from other languages only at a later point.

52 G Tessmann 'Homosexuality among the Negroes of Cameroon and a Pangwe tale' trans B Rose in S Murray & W Roscoe (eds) *Boy-wives and female husbands: Studies in African homosexualities* (2021) 145.

53 Ambani (n 50) 20.

54 As above.

55 S Tamale *Decolonisation and Afro-feminism* (2020) 201-202.

56 Epprecht (n 49) 639.

57 Tessmann (n 52) 151.

58 Epprecht (n 49) 636.

4.2 Structures and fixed concepts of SOGIESC in pre-colonial Africa

Ambani has shown that while in some societies there were institutional mechanisms in place to conceal the presence of same-sex sexual practices, there were other societal structures and established concepts based on same-sex relationships and embodying gender roles within communities.

Several reported cases show not only that same-sex relationships existed in various pre-colonial African societies, but also that these societies were characterised by some gender fluidity and more nuanced relations and kinships. For example, the Akamba in Kenya practised women-to-women marriages,⁵⁹ as in many other African societies. In some Nigerian communities, post-menopausal women chose to take on roles as sons, kings or 'honorary men'.⁶⁰ In some communities in Cameroon, men who have sex with men (MSM) have been married,⁶¹ in addition to accepting and living the status of a heterosexual family.

What is particularly intriguing are the likely factors that have contributed to the emergence of these social structures and how they have been realised in society. According to Von Hesse, same-sex relationships were not necessarily connected to biological sex, but were often associated with adopting specific gender roles.⁶² It has been argued that the justification for concepts such as same-sex marriage or cross-dressing practices might be rooted in securing social protection systems, such as family structures, even in cases where a suitable partner is lacking, rather than being solely driven by sexual desire or changing gender identities.⁶³

59 G Nyamongo 'Woman to woman marriage: The case of female husbands among the Akamba of Kenya' (2020) 7 *Strategic Journal of Business & Change Management*, <https://www.strategicjournals.com/index.php/journal/article/view/1874> (accessed 15 July 2024).

60 HW von Hesse 'Gender, flexible systems in Africa' in H Chiang (ed) *Global encyclopedia of lesbian, gay, bisexual, transgender, and queer history* 595.

61 RA Odoyo 'From Russia with love: An impact assessment of resolution A/HRC/21/L2 on sexual minorities in Africa' (2013), <https://repository.gchumanrights.org/server/api/core/bitstreams/0822bfcd-c0bb-463f-9132-2d6a269fb2b0/content> (accessed 17 March 2026).

62 Von Hesse (n 60) 595, 600.

63 See, eg, M Kareithi & F Viljoen 'An argument for the continued validity of woman-to-woman marriages in post-2010 Kenya' (2019) 63 *Journal of African Law* 304.

4.3 Fluidity of sex and gender in pre-colonial Africa

Regardless of the extent to which same-sex sexual practices were concealed or their existence required a special explanation, and the fact that institutions that are considered SOGIESC-friendly today, such as same-sex marriage, were established only to uphold societal structures, the fundamental point persists: Most pre-colonial African societies exhibited some degree of pluralism, flexibility and inclusiveness concerning matters of sex and gender. This was the case independently of, or even despite, potential societal constraints or restrictions.

Tamale claims that colonialism imposed a dual system of sex and gender on Africa that is arranged along heterosexual and patriarchal lines.⁶⁴ It is clear, however, that the understanding of gender in pre-colonial African societies was more 'pluralistic, elastic and accommodating'.⁶⁵ Murray and Roscoe argue that

[t]he colonialists did not introduce homosexuality to Africa but rather intolerance of it – and systems of surveillance and regulation for suppressing it ... these systems were not successful as long as the reaction of the colonised was simply to hide or deny such practices. Only when native people began to forget that same-sex patterns were ever a part of their culture did homosexuality become truly stigmatised.⁶⁶

Overall, the fragmented overview shows that efforts to undermine the recognition and protection of SOGIESC rights in Africa lack any legal or anthropological foundation. Same-sex sexual practices existed in pre-colonial Africa, contrary to the notion that 'homosexuality is un-African'. Building on these insights into pre-colonial African societies, the next two parts now take a closer look at the legal and societal developments in today's Tanzania and Namibia, starting with the colonial era.

64 Tamale (n 55) 100. In Zundel & Debele (n 6), Debele and I question this general statement by Tamale to some extent.

65 Tamale (n 55) 100.

66 Murray & Roscoe (n 9) xvi.

5 Tanzania: In the past and today

5.1 Tanzania under German colonial rule

The territory that is now Tanzania was under German colonial rule from 1885 until 1919. During this period, the established dual system of governance and legal principles, described above, shaped the experience of both European settlers and the colonised population. Through paragraph 175 of the Criminal Code, present-day Tanzania encountered, directly and indirectly, for the first time, the criminalisation of same-sex sexual practices between men. As discussed in the previous part, this shift in the governance of same-sex sexual practices necessarily challenged and altered pre-existing societal understandings of and structures towards sexuality and gender. In terms of the application of section 175, Schmidt highlights that ‘most violations of Paragraph 175 in German East Africa were brought by African men who charged European men, usually their employer, with rape,’⁶⁷ which already points to how the racialised separation between the coloniser and the colonised intersected with sexual violence.

In contrast, the well-known Rechenberg scandal, a ‘series of intersecting court cases’ involving Governor Albrecht von Rechenberg and, among others, his male servant, Max, in present-day Tanzania, was driven entirely by complaints brought by Germans, beginning with Rechenberg’s defamation charges against Willy von Roy, editor of the *Deutsch-Ostafrikanische Zeitung*, for insinuating that German government officials, first and foremost Rechenberg, engaged in sodomy.⁶⁸ The proceedings exposed exploitative power dynamics of colonial hierarchies that operate both within and beyond the framework of the law, and already exposed how *homosexuality* can serve as a political tool to discredit opponents in conflicts that otherwise seemed impossible to resolve.⁶⁹ Therefore, the case has become a focal point for numerous socio-political and legal analyses within the colony and

67 H Schmidt ‘Colonial intimacy: The Rechenberg scandal and homosexuality in German East Africa’ (2008) 17 *Journal of the History of Sexuality* 25, 54.

68 Schmidt (n 67) 33.

69 H Schmidt ‘“The German vice”: Male same sex desire in East Africa’ 25, 34, <https://unireadinghistory.com/2022/02/25/the-german-vice-male-same-sex-desire-in-east-africa-by-dr-heike-i-schmidt/> (accessed 9 July 2025).

beyond, illuminating the tensions and asymmetries inherent in the dual legal system as well as the entangled nature of *colonial intimacies*, which linked spheres that the colonial order sought to separate as fundamentally distinct.⁷⁰ Schmidt further argues that while colonial officers and other members of colonial society mobilised rumours of ‘homosexuality’ to undermine one another, the colonised population also deployed such claims strategically, revealing how the language and legalities of same-sex criminalisation could be appropriated from below as well as imposed from above.⁷¹

5.2 Subsequent developments

However, as is well known, Germany’s colonial rule over today’s Tanzania was short. Following World War I, control of the territory was transferred to the British. Under British colonial administration, the German colonial dual criminal system was dismantled and replaced with a standardised penal code, which is a legal framework that was replicated and adapted across many of its colonies.⁷² In 1930, this resulted in the adoption of the Penal Code of Tanganyika (now Tanzania), which was fully embedded in the British colonial legal tradition. Among its provisions, section 154 punishes ‘carnal knowledge against the order of nature’ with up to 14 years’ imprisonment. Section 155 imposes a sentence of up to 7 years’ imprisonment for attempts to commit such acts. Furthermore, section 157 prescribes a penalty of up to 5 years’ imprisonment for acts of ‘gross indecency’ between males. After independence, the penal code inherited from British colonial rule largely remained in force, and same-sex sexual practices continue to be criminalised under section 154 of the Tanzanian Penal Code until today.

Nevertheless, Tanzania’s criminal legal system did undergo certain changes relating to SOGIESC issues over time.⁷³ The Sexual Offences Special Provisions Act of 1998, through section 16, modified section 154 of the Penal Code by significantly increasing the penalty for engaging

70 Schmidt (n 69) 37.

71 Schmidt (n 69) 34.

72 E Han & J O’Mahoney ‘British colonialism and the criminalisation of homosexuality’ (2014) 27 *Cambridge Review of International Affairs* 268.

73 This following overview of developments in Tanzania after independence is guided by the well-composed overview of ILGA World Database, <https://database.ilga.org/criminalisation-consensual-same-sex-sexual-acts> (accessed 9 July 2025).

in ‘carnal knowledge against the order of nature.’ The revised provision established ‘imprisonment for life and in any case to imprisonment for a term of not less than 30 years.’ Attempted acts of the same nature were set to a minimum of 20 years in prison. Furthermore, section 12 of the Act introduced section 138A, which applies to acts of ‘gross indecency’ and uses gender-neutral language. By doing so, the scope of the provision also includes women, with penalties of up to five years’ imprisonment and a fine. This provision remains in force in the current 2022 version of the Penal Code.

The autonomous region of Zanzibar holds legislative power over its own criminal law. The Penal Decree (Act 6 of 2004) set out several relevant provisions: Section 150 punishes ‘carnal knowledge against the order of nature’ with 14 years’ imprisonment. Section 151 prescribes penalties of up to seven years for attempts to commit such ‘unnatural offences’. Moreover, section 153 explicitly targets ‘acts of lesbianism’, penalising any woman involved, regardless of whether the act occurs in public or in private, or whether she plays an active or passive role, with up to five years’ imprisonment and a fine. Section 154 extends criminal liability for ‘gross indecency’ to both men and women, whether in public or in private, with penalties of up to 5 years’ imprisonment and a fine.⁷⁴

5.3 Recent developments in Tanzania

Beyond these post-independence changes in criminal law, Tanzania has, especially in recent years, witnessed developments related to SOGIESC, which reflect strong political and religious influences on these issues. These developments mirror trends in neighbouring countries, such as Kenya and Uganda,⁷⁵ where debates around the rights of LGBTIQ+ individuals have intensified and often serve as distraction manoeuvres from political, economic and societal difficulties.⁷⁶ In this regard, a well-

74 Outright International ‘Country overview: Tanzania’, <https://outrightinternational.org/our-work/sub-saharan-africa/tanzania> (accessed 9 July 2025).

75 T Kaime & I Zundel ‘(No) news from East Africa: How human rights defenders should address homophobic and transphobic politicking’ *Verfassungsblog* 14 April 2023, <https://verfassungsblog.de/no-news-from-east-africa> (accessed 9 July 2025).

76 Human Rights Watch ‘Tanzania: Govt should change its tune on LGBTIQ health and rights’, 13 February 2020, <https://www.hrw.org/news/2020/02/13/tanzania-govt-should-change-its-tune-lgbtqi-health-and-rights> (accessed 9 July 2025).

known practice is the deliberate misinterpretation and misuse of the Penal Code provisions: The Minister of the Interior in 2017 declared that authorities would ‘arrest whoever is involved [in LGBTIQ+ advocacy] and charge them in courts of law.’⁷⁷ In similar vein, two years later, the Deputy Home Affairs Minister, speaking in Zanzibar, called for the arrest of anyone ‘promoting’ homosexuality.⁷⁸ Even though, as outlined above, the Penal Code does not recognise the ‘promotion of homosexuality’ as a criminal offence, authorities have nevertheless wrongly used the Penal Code (or, more broadly, the law) as a basis to justify the arrest of activists and the suppression of civil society organisations working in this human rights space.⁷⁹

Beyond that, in early 2023, a heated debate emerged in the Tanzanian government, Parliament, and among other political and religious leaders concerning the possible further criminalisation of consensual same-sex sexual practices between adults.⁸⁰ The head of the women’s wing in the Tanzanian government advocated for severe punishments, going so far as to call for castration for those engaged in same-sex sexual practices.⁸¹ Others echoed extreme positions, proposing the death penalty and advocating physical examinations to determine whether the respective person is ‘homosexual.’⁸² Again, interestingly, the timing of this debate falls into larger developments in the region and on the continent.⁸³

2025); Human Dignity Trust ‘Tanzania’, <https://www.humandignitytrust.org/country-profile/tanzania/> (accessed 9 July 2025).

77 C Stewart ‘Tanzania threatens to arrest all gay rights activists’ 27 June 2017, <https://76crimes.com/2017/06/27/tanzania-threatens-to-arrest-all-gay-rights-activists/> (accessed 9 July 2025).

78 Human Dignity Trust (n 76).

79 The legal struggle of civil society organisations working on SOGIESC issues to claim their right to freedom of association is a well-documented phenomenon across numerous African contexts. See, eg, Kaime & Zundel (n 75).

80 R Igual ‘Tanzania: MPs seek to tighten anti-LGBTQ+ laws with extreme measures’, 13 April 2023, <https://www.mambaonline.com/2023/04/13/tanzania-mps-seek-to-tighten-anti-lgbt-laws/> (accessed 9 July 2025).

81 I Kaledzi ‘East Africa’s LGBTQ community under siege’ 21 March 2023, <https://www.dw.com/en/east-africas-lgbtq-community-under-siege/a-65068984> (accessed 9 July 2025).

82 Human Dignity Trust (n 76).

83 See Kaledzi arguing in the same vein; Kaledzi (n 81).

5.4 Comparative legacies in Tanzania

Within the comparative approach of German colonial inheritances adopted in this analysis, the presented developments in Tanzania are examined through the two chosen points of comparison: legal inheritance and political mobilisation. First, the ongoing influence of British colonialism on Tanzania's legal system today, in this analysis, especially its criminal law, is clearly visible. Like many countries in the region, Tanzania continues to struggle to entangle from the legacy of the British colonial penal code. Such a clear continuity in the legal provisions directly inherited from the German legal system is absent. However, the historical influences on today's legal dimensions of SOGIESC issues reflect only one aspect, while the larger history of ideas and principles, with its societal dimensions today, also plays an important role in shaping lived realities. Coming back to the earlier quote from Murray and Roscoe, they emphasise that colonialism did not introduce same-sex practices to Africa, but rather imposed intolerance and systems of surveillance to suppress these. These mechanisms only became fully effective, they suggest, once local societies began to forget that same-sex relations had historically been part of their own cultures, allowing deeper stigma to take hold.⁸⁴

Ibrahim adds that 'homophobia had been entrenched in African ethical and legal systems by the time colonialism ended.'⁸⁵ In line with this, the German colonial presence introduced a legal and moral framework of intolerance towards LGBTIQ+ persons, which has significantly contributed to the legacy that persists and continues to aggravate today. This colonial influence has forcefully shaped the societal attitudes in present-day Tanzania, where inherited forms of intolerance continue to strongly and tragically impact the lived realities of LGBTIQ+ individuals.

Second, Schmidt's analysis on the Rechenberg scandal reveals how accusations of 'homosexuality' under section 175 served as a political tool, strategically deployed by both colonisers against rivals and the colonised, primarily against European employers, exposing

⁸⁴ Murray & Roscoe (n 9) xvi.

⁸⁵ AM Ibrahim 'LGBT rights in Africa and the discursive role of international human rights law' (2015) 15 *African Human Rights Law Journal* 269.

early asymmetries in the dual legal system. This pattern of political mobilisation, the deliberate utilisation of the criminalisation of same-sex sexual practices to discredit opponents or consolidate power, persists in post-colonial Tanzania, where elites invoke colonial-inherited provisions amid crises to deflect from economic and/or political failures, amplified by religious rhetoric framing non-heteronormativity as against religious and moral values. While the German colonial period leaves no direct traces in today's penal code, the societal weaponisation of criminalisation for political mobilisation endures as clear continuity.

6 Namibia: In the past and today

6.1 Namibia under German colonial rule

Former German South-West Africa, today known as Namibia, was under German colonial rule between 1884 and 1915, when South African forces, operating under the British Empire, defeated the German colonial administration and took control of the territory.⁸⁶ The legal incorporation of the territory into the German Empire through the Protectorate Act, along with the establishment of the dual system between Europeans and the colonised population, followed the standardised model outlined above. This standardised approach extended to the normative and moral regulation of same-sex sexual practices, which is also consistent with the frameworks outlined above.

With regard to legal proceedings under paragraph 175, Severin notes that in German South-West Africa 'there were around twenty-five trials against men who were accused of violations of section 175 during the German colonial period. All these trials took place between 1900 and 1915.'⁸⁷ The records of these trials, mainly court files, are available in the National Archive of Namibia.⁸⁸ While Severin contextualises this seemingly limited number of trials, he also observes the following with regard to the colonised population:

86 See the overview into colonialism, genocide and reparations in the Namibian context, H Melber 'Colonialism, genocide and reparations: The German-Namibian case' (2024) 55 *Development and Change* 773.

87 J Severin 'Male same-sex conduct and masculinity in colonial German Southwest Africa' in U Lindner & D Lerp (eds) *New perspectives on the history of gender and empire* (2018) 155.

88 European Centre for Constitutional and Human Rights (n 31).

The German penal code was only applied in cases where white people were part of a trial, as victims or as perpetrators, while so-called 'indigenous law' was applied when solely indigenous people were affected. Seemingly, the latter was less concerned with penali[s]ing sexual contacts between men, and no official decrees were issued which targeted these contacts. There are no documented legal persecutions of indigenous men because of sexual activities with other men. This was a striking difference to colonial jurisdiction in some other colonial contexts in southern Africa.⁸⁹

Severin suggests that one possible explanation for this difference in the persecution of same-sex sexual conduct involving the colonised population, as compared to other colonial jurisdictions, lies in the 'particularly strict' segregation between 'white and indigenous persons in the German colonial law system.' This observation raises further questions about perceptions of Black masculinity and sexuality, and how these were structurally embedded in the organisation and operation of German colonial laws. It is particularly significant when later considering the potential influences and continuities of the specificities of German colonial rule in contemporary legal systems and practices.⁹⁰

A famous case, similar to the one in former German East Africa, involved a European man, Victor von Alten, who was accused of engaging in same-sex sexual practices with colonised men and of sexually abusing Black girls and boys. According to Tobin, the legal proceedings surrounding the Von Alten case offer 'important insights into the legal terrain for male homosexuality in the German-speaking world.'⁹¹ The ECCHR analyses:

[T]he case of Victor von Alten is exemplary for the complex, contradictory intersections of discrimination and power in the colony. It is also exceptional, because of the publicity it received and the extensive medical expert testimonies in the colony and Germany (including the advocate for the decriminalization of homosexuality, Magnus Hirschfeld). Between 1904 and 1906, the German colonist, van Alten, received three short jail sentences under Section 175 for sexual acts (likely rape) of indigenous boys and young men.⁹²

89 Severin (n 87) 153.

90 As above.

91 RD Tobin 'Sexology in the Southwest: Law, medicine, and sexuality in Germany and its colonies' in V Fuechtner, DE Haynes & RM Jones (eds) *Global history of sexual science, 1880-1960* (2017) 141.

92 European Centre for Constitutional and Human Rights (n 31).

The ECCHR further identifies ambivalence of the legal norms and their application in different trials involving same-sex sexual practices during German colonial rule and rightly links it with the

primary importance attributed to the protection of white German colonial masculinity and the disregard for the harm and suffering experienced by indigenous Namibians but also the inability to consider their active participation in any same-sex acts.’⁹³

These practices were considered a threat to ‘the legitimacy of German rule and, by extension, the project of German nation building’, especially when they departed from the sexual and racial norm of the European heterosexual man.⁹⁴

6.2 Subsequent developments

After World War I, Namibia became a mandated territory under South African administration, which replaced the German colonial legal system with Roman-Dutch common law and remained in place until the country gained independence in 1990.⁹⁵ Following this transition, the criminalisation of same-sex sexual practices persisted. Under the Roman-Dutch common law framework, which was the main procedural criminal law, sodomy was generally defined as ‘unlawful and intentional sexual relations *per anum* between human males’.⁹⁶ Subsequently, this framework was reinforced through the Criminal Procedure Act of 1977 and the Combating Immoral Practices Act of 1980, both enacted under South African rule, which continued the legal practice of criminalisation. Evidently, the normative framework criminalising same-sex sexual practices in Namibia was not enacted by democratically elected representatives of the Namibian people. Instead, it was imposed under South African rule, drawing from Roman-Dutch law, which was introduced by Dutch settlers in the 1600s and subsequently shaped by British colonial interpretations. This legal framework, including

93 As above.

94 As above.

95 SK Amoo & I Skeffers ‘The rule of law in Namibia’ in N Horn & A Bösl (eds) *Human rights and the rule of law in Namibia* (2008) 17.

96 R Collins ‘The movement to repeal a colonial-era sodomy law in Namibia’, <https://sites.bu.edu/dome/2022/07/28/the-movement-to-repeal-a-colonial-era-sodomy-law-in-namibia/> (accessed 9 July 2025).

the criminalisation of same-sex sexual practices between men through sodomy, was inherited by Namibia at independence in 1990 and, under the Namibian Constitution, remains in force unless repealed by Parliament or declared unconstitutional by a Namibian court.⁹⁷

Following independence, Namibia first retained the colonial era laws. In 2004 Namibia's Parliament passed the Criminal Procedures Act to replace the existing 1977 version. However, as the Act was never brought into force, it was eventually repealed by the Criminal Procedure Act Repeal Act 14 of 2018. Beyond these normative changes, recent years have witnessed manifold and partly opposing legal and political developments around SOGIESC rights. In the following, I will provide a non-comprehensive overview of these developments.⁹⁸

6.3 Recent developments in Namibia

Starting with 2016, Namibia's Ombudsman at that time questioned the continued relevance of Namibia's legislation against same-sex sexual practices, stating: 'I think the old sodomy law has served its purpose. How many prosecutions have there been? I believe none over the past 20 years. If we don't prosecute people, why do we have the Act?'⁹⁹

In the same vein, the Law Reform and Development Commission in May 2021 submitted two reports to the Minister of Justice which, among other reform proposals, recommended the decriminalisation of consensual same-sex sexual practices. Shortly thereafter, the Minister announced plans for decriminalisation and promised that she would submit these recommendations to the cabinet for consideration, however, further updates were never shared publicly.¹⁰⁰

97 JM Matetoa-Mohapi 'Human rights violations and sodomy laws in Africa: A study of the discriminatory laws and inhumane legislation and its impact on the health and safety of the LGBTI community within the criminal justice cluster' (2021) 77 *HTS Teologiese Studies/Theological Studies* 8.

98 This following overview of developments in Namibia after independence is guided by the well-composed overview from ILGA World Database, <https://database.ilga.org/criminalisation-consensual-same-sex-sexual-acts> (accessed 9 July 2025).

99 ILGA World 'Database: LGBTI rights in Namibia', <https://database.ilga.org/namibia-lgbti> (accessed 9 July 2025).

100 R Salerno 'Namibia justice minister announces plan to decriminalise gay sex this year' 26 May 2021, <https://76crimes.com/2021/05/26/namibia-justice-minister-announces-plan-to-decriminalize-gay-sex-this-year/> (accessed 9 July 2025).

One year later, in June 2022, Friedel Dausab, a gay activist, brought a case to the Windhoek High Court against several government ministries, including the Minister of Justice, Minister of Defence, the Attorney-General and several other government bodies to challenge the constitutionality of the common law offences of 'sodomy' and 'unnatural sexual offences.' In February 2023, the Attorney-General submitted an affidavit to the High Court, arguing that the majority of Namibians would 'still reject homosexuality' and that, therefore, same-sex sexual practices should continue to be criminalised by the respective laws remaining in force.¹⁰¹ The case was heard in October 2023, and on 21 June 2024, the Windhoek High Court delivered its judgment in *Dausab v The Minister of Justice* (2024). The Court found that 'the prohibition of sex *per anum* between a man and a man, but not a woman and a man, to be an unconstitutional discrimination on the basis of sex.'¹⁰² With this landmark decision, the court effectively decriminalised consensual same-sex sexual practices between men and aligned itself with Botswana's High Court decision in *Letsweletse Motshidiemang v Attorney General* (2019).¹⁰³ Using a similar argumentation as the Botswana High Court, the Windhoek High Court rejected arguments that criminalising laws should remain in force because of the moral beliefs of the (alleged) majority of society. It critically asked:

Can it be said that to criminalise consensual anal intercourse between consenting males in private, simply because we consider it to be immoral ... is so important an objective, as to outweigh the protection against unfair discrimination? What threat does a gay man pose to society, and who must be protected against him? We are of the firm view that the enforcement of the private moral views of a section of the community (even if they form the majority of that community), which are based to a large extent on nothing more than prejudice, cannot qualify as such a legitimate purpose.¹⁰⁴

101 ILGA World (n 99).

102 *Dausab v Minister of Justice* (HC-MD-CIV-MOT-GEN-2022/00279) [2024] NAHC 331 (21 June 2024); S Gupta 'Growing the living tree' *Verfassungsblog* 28 June 2024, <https://verfassungsblog.de/namibia-queer-rights-constitution/> (accessed 9 July 2025).

103 T Esterhuizen 'Decriminalisation of consensual same-sex sexual acts and the Botswana Constitution: *Letsweletse Motshidiemang v The Attorney-General* (LEGABIBO as *amicus curiae*)' (2019) 19 *African Human Rights Law Journal* 843.

104 *Dausab v Minister of Justice* (HC-MD-CIV-MOT-GEN-2022/00279) [2024] NAHC 331 (21 June 2024).

In response to the court decision, the government of Namibia submitted an appeal to the Supreme Court arguing that the Court 'did not duly consider the social or cultural sentiments of the majority of Namibians.'¹⁰⁵ The decision of the Supreme Court is pending in July 2025.

Beyond the judicial struggle over decriminalisation, Namibia has seen a number of SOGIESC-friendly judgments in areas such as marriage, parenthood and immigration.¹⁰⁶ For example, in relation to same-sex marriages, in 2023, the Supreme Court ruled that such same-sex marriages legally concluded abroad must be recognised in Namibia.¹⁰⁷ However, in response to this Supreme Court ruling, Namibia's Parliament passed the Marriage Act of 2024, explicitly banning same-sex marriage by stating in article 1: 'In this Act, unless the context otherwise indicates ... marriage means a marriage ... but excludes – (i) a marriage or marital union between persons of the same sex wherever concluded.'

Additionally, in 2024, a further Bill aimed at criminalising same-sex marriage and related advocacy was passed by Parliament,¹⁰⁸ but the President refused to sign it into law. Similar to developments in countries such as Ghana,¹⁰⁹ the President officially cited concerns about the Bill's adherence to constitutional and procedural requirements, stating: 'In considering the Bills, the President was concerned about whether they had gone through a proper law-making process' and 'whether it meets the constitutional test and the additional procedural requirements.' However, this presidential refusal seems to only be a small venture in

105 Human Dignity Trust 'Namibia: Case before the High Court', <https://www.humandignitytrust.org/what-we-do/cases/namibia-case-before-the-high-court/> (accessed 9 July 2025).

106 D Hubbard 'Current issues in gender and the law', <https://ippr.org.na/wp-content/uploads/2024/12/Current-Issues-In-Gender-And-The-Law-Web-1.pdf> (accessed 9 July 2025).

107 *Digashu & Another v GRN & Others; Seiler-Lilles & Another v GRN & Others* (SA 6/2022; SA 7/2022) [2023] NASC 14 (16 May 2023).

108 L Kojoué 'Namibia court decriminalises consensual same-sex conduct' Human Rights Watch 25 June 2024, <https://www.hrw.org/news/2024/06/25/namibia-court-decriminalizes-consensual-same-sex-conduct> (accessed 9 July 2025).

109 Read more about Ghana's Human Sexual Rights and Family Values Bill written in April 2024 in T Kaime, L Schlotterer & I Zundel 'Will Ghana's Supreme Court toss Africa's newest anti-gay law?' *African Legal Studies Blog* 12 April 2024, <https://africanlegalstudies.blog/2024/04/12/will-ghanas-supreme-court-toss-africas-newest-anti-gay-law/> (accessed 9 July 2025).

a much larger ongoing legal, political and societal ‘tug of war’¹¹⁰ over SOGIESC rights in Namibia.

6.4 Comparative legacies in Namibia

Returning to the comparative analysis of German colonial inheritances, the presented developments in Namibia are also examined through the two chosen points of comparison: legal inheritance and political mobilisation. First, while Namibia shows key differences to the recent developments in Tanzania, there are also similarities between the two countries. As in the Tanzanian context, direct traces of German colonial legal patterns are no longer visible in Namibia’s current normative frameworks. However, as argued above, this does not mean that German colonialism has not left behind lasting traces. The German colonial presence introduced a legal and moral framework of intolerance towards LGBTIQ+ persons, which has also significantly contributed in Namibia to the legacy that can be seen today in the ambivalent developments surrounding SOGIESC issues in the country. Second, the recent developments in Namibia differ from those in Tanzania and at the same time offer a compelling constitutional law case study, highlighting tensions between legislature and judiciary. This is exemplified by the Supreme Court’s ruling to recognise same-sex marriages legally concluded abroad, which was shortly after followed by the enactment of the Marriage Act of 2024. This law, in turn, explicitly prohibits the recognition of same-sex marriages, regardless of where they have been concluded. With this clear but rather stand-out act of political mobilisation, Namibia embodies two broader trends that can otherwise be observed across different countries on the African continent: on the one hand, tentative steps towards the legal protection of LGBTIQ+ communities; on the other, increasingly punitive legal and non-legal measures against individuals on the basis of their sexual orientation, gender identity, gender expression or sex characteristics.

What remains particularly interesting is why the two countries have experienced such significantly different developments: While hostility towards LGBTIQ+ communities appears to persist in both societies,

110 M Reiss & M Tabengwa ‘Tug-of-war: LGBTIQ+ rights in the African human rights architecture’ (2024) 24 *African Human Rights Law Journal* 472.

only Namibia's judiciary, and partly its legislature, have demonstrated commitment to upholding constitutional and international human rights standards. I will discuss open questions such as these together with comparative reflections from both case studies in the following part.

7 Learnings

After outlining the historical, legal and political developments in both countries, the question arises of what shared insights can be drawn from these trajectories. This part seeks to analyse some learnings that emerge from the comparative study.

First, the influence of German colonial rule on contemporary normative frameworks through direct lines of continuity surrounding same-sex sexual practices in Namibia and Tanzania is both complex and difficult to trace. Unlike British colonial rule, which left behind enduring institutionalised and codified legal systems, especially the well-documented penal codes criminalising same-sex sexual practices, German colonial rule appears to have left behind a more limited and less enduring (legal) impact. It seems obvious to attribute this to the relatively short duration of German colonial rule and the fact that it was not the last colonial administration before independence. Further, the absence of extensive German colonial legal documentation today should not be misinterpreted as evidence that institutional structures, such as those of the British Empire, were not introduced by the German colonial administration. Rather, it reflects the reality that much of this documentation was either destroyed or never systematically archived. Nevertheless, as already outlined above, it would be inaccurate to conclude that German colonialism had no enduring effect merely due to the scarcity of formal legal evidence. In fact, the German colonial imposition of rigid heteronormative structures and binary gender norms, which ultimately served as a tool to exercise power, contributed to shaping social perceptions of sexuality and gender in ways that continue to resonate today, to the detriment of LGBTIQ+ individuals. With a focus on gender, the ECCHR argues that

gendered forms of control played a relevant role in establishing and maintaining the German colonial rule. The long-term effects of this conduct can be linked to several aspects of the current debates regarding reparations for the German

colonial crimes, the topic of rehabilitation, but also the right to truth, the right to know as well as guarantees of non-recurrence.¹¹¹

Thus, in essence, these legacies might not be directly visible and are difficult to trace, as they are embedded within cultural norms rather than in legal texts, yet they are so obvious.

Second, Namibia and Tanzania are illustrative cases of how colonial legacies interact with post-colonial trajectories. Despite the two countries' divergent legal and societal developments in the post-independence period, both continue to struggle with the colonial inheritance that shaped their approaches to gender and sexuality. These struggles reflect broader continental dynamics in which post-colonial societies seek to resist, reinterpret or reformulate inherited norms and legal structures tending to forget what was their own and what was imposed.¹¹² While the visible traces of German legal influence may be limited, its socio-cultural impact, particularly in terms of the moral codes and social hierarchies introduced under colonial rule, remains embedded in societal attitudes. The effort to disentangle contemporary legal and normative systems from these colonial impositions, therefore, is not only a legal task but also a deeply social and political one. This realisation is particularly evident in South Africa, which is the textbook example for the discrepancy between law as lived and that in the books. Despite having some of the most protective laws in the world concerning sexual orientation and gender identity, South Africa continues to face significant societal challenges, such as hate crimes, discrimination and marginalisation.¹¹³ As such, the study of German colonial influence must go beyond formal legal analysis to include the cultural and ideological legacies that continue to shape how sexuality and gender are understood and governed today.

Finally, I argue that the German colonial legal histories of today's Namibia and Tanzania serve not only as reflections of internal realities,

111 European Centre for Constitutional and Human Rights (n 31).

112 See in a different vein, CT McNamara 'Silent, spoken, written, and enforced: The role of law in the construction of the post-colonial queerphobic state' (2018) 51 *Cornell International Law Journal* 523-531.

113 P de Vos 'The limit(s) of the law: Human rights and the emancipation of sexual minorities on the African continent in contested intimacies: Sexuality, gender, and the law' in D Higginbotham & V Collis-Buthelezi (eds) *Contested intimacies: Sexuality, gender, and the law in Africa* (2015) 1-16.

especially the historical review of Germany's colonial past, but also contribute to the interpretation and understanding of broader global discourses. This argument draws on two historical specificities of German (colonial) rule, which inform my reflections on current global debates concerning law, sexuality and human rights. The argumentation is embedded in and emerges from the concept of the human as an intractable problem that argues for the existence of an ideal: 'the European heterosexual man emerges as the model of the universal human' which shapes legal, political and societal constructions until today.¹¹⁴ Debele and I argue that

humanness is teleological, and those relegated to the zone of non-being are doomed to aspire towards it. Even though we find race taking centre stage as a determinant parameter for this model, the intersection of race with gender and sexuality is indispensable to the process of designating a legible humanity.¹¹⁵

I argue that both specificities of German (colonial) rule can be traced back to this concept of the human, and that they illustrate the ongoing structural challenges surrounding SOGIESC rights on a global scale, challenges that have been and are ultimately rooted in the dynamics of power instead of morality. Paragraph 175 of the German Criminal Code targeted same-sex sexual practices between men only, thereby centring men as subjects of regulation and viewing male sexuality as a larger (or the only) threat, likely due to dominant notions about men's societal roles and capacities. In contrast, same-sex sexual practices of women (partly also those of colonised men) were considered invisible and assumed to be governed implicitly by the regulation of white male sexuality. This reflects and reinforces a gendered and hierarchical conception of who *counts* as a legal subject in the context of power and one that in the end traces back to the figure of the European heterosexual man as the normative standard. The dual legal system implemented in the German colonies introduced a fundamental and 'particularly strict'¹¹⁶ distinction between European inhabitants of the protectorates (White people) and the colonised population (Black people). This racialised legal structure equally reinforced the idea that full legal personhood was reserved for

114 Zundel & Debele (n 6) 5.

115 As above.

116 Severin (n 88) 153.

those who fit the colonial ideal of the human. The ECCHR though in different wording argues in the same vein:

For the German colonial administration, the establishment and maintenance of binary genders as well as the control of sexual relationships were a topic of major importance. This, at first view surprising, insight was explained with the importance attributed to the alleged cultural superiority of the colonists in the context of the coloni[s]ing mission, which was used to justify political claims to power. This superiority could only be maintained and reaffirmed in a context of segregation along raciali[s]ed and gendered lines, which was an openly declared goal of the colonial administration (*Dissimiliationsprinzip*/principle of dissimilation).¹¹⁷

These two specificities reveal deeper and globally embedded structures and lead to the realisation that as long as there is no distancing from this idealised model of the human in law and society, countries such as Tanzania and Namibia will continue to face structural challenges in disentangling their legal and societal frameworks from colonial legacies. More broadly, this also explains why the rights of LGBTIQ+ persons are fragile and remain globally contested, with their recognition varying across changing conditions of temporality and locationality. Especially in a time of crisis, whether economic, political or environmental, there tends to be a reactionary return to the idealised notion of the human. This turn regularly manifests in intensified hostility toward those who fall outside this construct. This pattern can currently be observed in very different places around the world.

In essence, even in the absence of direct legal linkages between the German colonial legal systems and those of present-day Namibia and Tanzania, colonial legacies continue to influence different areas of life today, especially societal norms. Moreover, this analysis allows to make broader observations concerning law, sexuality and human rights.

8 Conclusion

Coming to an end, I acknowledge that I entered this research with different expectations regarding the outcomes. I had anticipated finding direct traces of German colonial laws in today's legal frameworks. In retrospect, this expectation was likely too ambitious, maybe even naive.

117 European Centre for Constitutional and Human Rights (n 31).

However, rather than revealing straightforward legal continuities, the research raised broader questions about how influence can be traced and how responsibility should be approached. In this regard, the research has neither been without results, nor has it been useless. On the contrary, it has revealed how colonial legacies continue to shape post-colonial trajectories in Tanzania and Namibia, particularly by influencing societal norms and moral perceptions. It also demonstrates that German (colonial) law incorporated the notion of the European heterosexual man as the model of the universal human, an ideal that continues to influence Namibia, Tanzania and societies around the world today.

There are many directions in which this research could and should be continued. My analysis leaves open the question of why, despite persistent hostility towards LGBTIQ+ communities in both Tanzania and Namibia, it is only Namibia's judiciary and, partly, its legislature, that have demonstrated commitment to upholding constitutional and international human rights standards. Further, it would be valuable to look at the role of German churches and missionaries to further trace how colonial moral frameworks still influence legal and social attitudes in Tanzania and Namibia today. Another interesting direction would be to examine the influence of German terminologies and translations related to SOGIESC issues, and how they may have contributed to shaping certain understandings of sex and gender. All of this remains to be done in future research. This chapter remains a first step: a comparative exploration of whether and how German colonial administration has influenced today's legal and societal structures around SOGIESC rights in Tanzania and Namibia, and what broader insights can be drawn from this inquiry.

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