

Between legal regimes and legal realities: A critical insight into German colonial criminal law and its practice

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Abstract: *White supremacy and racism were the ideological foundations of colonial rule and, as a result, also of German colonial criminal law. However, German legal academia has so far failed to incorporate the findings of post-colonial legal theories, critical race theory, and critical whiteness studies in its research on German colonial criminal law. This chapter addresses the resulting lacuna by reflecting on the functions of White supremacy and colonial racisms while critically examining German colonial criminal law and its practice. Against this background, this chapter deals with the basic structure of the German colonial criminal legal system before evaluating its*

criminal procedural law, its substantive criminal law, and its law of sanctions. While previous legal historical research has largely adopted a legal positivist approach, this chapter also considers the legal realities of German colonial criminal law by drawing on archival material, including case files from the National Archives of Namibia. One part, therefore, is dedicated to colonial law enforcement practices, with a focus on the infliction of bodily harm and sexualised violence. All in all, the findings of the chapter reveal that German colonial criminal law was not only designed, but also enacted to privilege White colonisers and oppress colonised people.

1 Introduction

On 24 April 1884, the German Chancellor, Otto von Bismarck, announced that 'Lüderitzland' was under the 'protection' of the German Empire, which marked the onset of the German Empire's formal colonial rule. Over the next 35 years, the empire expanded its colonial domination, occupying territories that included present-day Namibia ('German South West Africa'), Tanzania, Rwanda and Burundi ('German East Africa'), Togo, Cameroon ('Kamerun') as well as various islands in the South Pacific and parts of China.¹

As post-colonial legal scholars have pointed out, law played a crucial role in establishing, securing and legitimising the subjugation of colonised peoples.² This was also known at the time, as is illustrated by this quote by a German judge, president of one of the High Regional Courts (Oberlandesgericht) in Germany and member of the Reichstag for the catholic party: 'The blacks must understand that action will be taken against them with the means of the law if the whites intervene against them.'³

1 For an overview of German colonial history, see S Conrad *German colonialism* (2011).

2 K Mehta 'Permanent suspicion' (2025) 137 *Zeitschrift für die gesamte Strafrechtswissenschaft* 744; A Roy 'Postcolonial theory and law' (2008) 29 *Adelaide Law Review* 319, 324, 329.

3 Member of Parliament Peter Spahn (Centre Party) *Verhandlungen des Reichstags – Stenographische Berichte* (Proceedings of the Reichstag – Stenographic Reports), 12th legislative term, 1st session, vol 228, 45th sitting of Parliament, 3 May 1907, 1361D, www.reichstagsprotokolle.de (accessed 18 March 2026) (translation by the author).

Colonial law was intended to help consolidate the German colonisers' claims to rule over the seized territories in relation to other colonial powers and (to be) colonised populations.⁴ Colonial (criminal) law served as a tool of oppression wielded by the German colonial power. Typical justifications for colonialism, such as the so-called 'civilising mission', can be observed not only in debates on colonial legal policy, but also in academic writings and administrative correspondence regarding colonial criminal law.⁵ Colonisers claimed to employ criminal law to merely 'civilise' racialised people, paternalistically positing themselves as benevolent and superior rulers.⁶ With this narrative, colonial powers attempted to morally justify their economically and politically motivated colonisation efforts.⁷ Furthermore, they were able to identify themselves and their own legal systems as modern, cultivated and civilised by distinguishing themselves from colonised people and their legal systems, which were construed as uncultured and backward.⁸ German colonisers leaned on racial ideologies to defend these distinctions and the 'logical' conclusion resulting from these alleged differences: the establishment of a racially segregated colonial legal order that privileged White settlers and discriminated against colonised people.⁹ White supremacy, therefore, was the ideological foundation and at the heart of German colonial rule. Correspondingly, racism in colonial criminal law was not a product of chance, but fulfilled certain functions, as it did elsewhere in the colonial system of rule: the creation of a hierarchised system of order, the legitimisation of the resulting social inequality and the injustices committed, as well as its identity-creating effect for the groups benefiting from it.¹⁰

4 cf Member of Parliament Georg Meyer (NLP) *Verhandlungen des Reichstags – Stenographische Berichte*, 7th legislative term, 2nd session, vol 2, 29th sitting of Parliament, 4 February 1888, 703D.

5 cf on the reception of colonial narratives in colonial law MdM Castro Varela & N Dhawan *Postkoloniale Theorie* (2020) 42ff.

6 cf FJ Sassen *Das Gesetzgebungs – und Verordnungsrecht in den deutschen Kolonien* (1909) 52; E Lütken *Materielles Strafrecht in den Kolonien* (1914) 50.

7 F El-Tayeb *Schwarze Deutsche* (2001) 62. See Petry at 83ff in this volume, on how economic exploitation was enabled through German colonial tax law in German South West Africa.

8 El-Tayeb (n 7) 11ff.

9 cf M Iffert 'Das deutsche Kolonialstrafrecht' (2025) 58 *Kritische Justiz* 173ff.

10 C Barskanmaz *Recht und Rassismus* (2019) 33; El-Tayeb (n 7) 11ff; Iffert (n 9) 173ff; E Kaneza *Rassische Diskriminierung in Deutschland* (2024) 102ff;

Even though the influence of colonial racism and general colonial legitimisation narratives on the construction and application of German colonial criminal law is blatantly obvious, German legal academia has so far neglected to adequately acknowledge the relationship between colonial law and racism.¹¹ Against this backdrop, this chapter will focus on the racist backbone of criminal provisions to illuminate that colonial racism was a central component of colonial (criminal) law. The chapter thereby addresses the research gap in the analyses of German colonial (criminal) law that results from an ongoing ignorance towards the findings of racism research that largely stems from BIPoC scholars.¹² Furthermore, the chapter contributes to closing the research gap regarding the legal realities of German colonial criminal law by not only considering legal texts and legal articles, but also taking into account archival sources that include administrative correspondence and criminal case files.

To this end, the chapter will provide an overview of the criminal law enforced by German colonial authorities across the colonies on the African continent, highlighting the shared characteristics of their colonial criminal justice systems. It will focus on overarching patterns in the basic structure of the colonial justice system, criminal procedures, offences, punishment and prosecution practices, especially regarding assaults and sexualised violence, shedding light on how racism played a significant role in the construction, application and justification of every facet of German colonial criminal law.

2 Basic structure of colonial criminal law: Racial segregation and the influence of White supremacy

During the entirety of formal colonial rule, the colonies were not included in the constitutional list of states defining the state territory of the German Empire.¹³ Politicians and lawyers deduced from this that German law did not apply in the colonies unless it was explicitly

D Liebscher *Rasse im Recht: Recht gegen Rassismus* (2021) 63ff. See also Ugwuoke in this volume at 51ff.

11 Iffert (n 9) 173ff. See also Ugwuoke in this volume at 52.

12 Iffert (n 9) 174. Notable exceptions are the works of Kaneza (n 10) and Liebscher (n 10). See also Ugwuoke in this volume at 51ff.

13 Art 1 of the Constitution of the German Empire, *Reichsgesetzblatt* 1871 (Law Gazette of the Empire), 64ff, https://en.wikisource.org/wiki/Constitution_of_the_German_Empire (accessed 18 March 2026).

decreed.¹⁴ In the so-called Protectorate Act (*Schutzgebietsgesetz*) from 1886,¹⁵ reformed in 1900,¹⁶ the German legislator decided that German criminal law was generally employed, but only for White¹⁷ people.¹⁸ It left the decision on the applicable criminal law for colonised people to the discretion of the German emperor, chancellor and governors in the colonies.¹⁹ With the Protectorate Act, the German colonisers established a racially segregated dual legal order that privileged the White status group, falsely described synonymously as 'white', 'European' or 'non-native',²⁰ and discriminated against the group of colonised people that were interchangeably described with the racist terms²¹ 'coloured' (*Farbige*) or 'natives' (*Eingeborene*).²² The dichotomy that German colonisers tried to establish between these two groups along racial lines was not as clear-cut as they claimed. Instead, their legally constructed

14 F Florack *Die Schutzgebiete, ihre Organisation, Verfassung und Verwaltung* (1905) 17.

15 *Gesetz, betreffend die Rechtsverhältnisse der deutschen Schutzgebiete* (Übersetzung) of 17 April 1886 ('Law concerning the legal relations of the German protectorates'), *Reichsgesetzblatt* 1886, 75ff (abbreviated as Protectorate Act 1886).

16 Protectorate Act (*Schutzgebietsgesetz*) of 10 September 1900, *Reichsgesetzblatt* 1900, 812ff.

17 'White' and 'Black' are capitalised to symbolise that race is a social construct and not a biological reality. 'Black' is a self-designation that stems from resistance and expresses a notion of shared experiences, community, and identity of those affected by anti-Black racism. The capitalisation of 'White' is less common; it is capitalised in this chapter, not to embrace White supremacists, but to make Whiteness visible as a historically and currently relevant racial identity that awards privileged positions in society and profits from being the unnamed and, therefore, invisible standard.

18 Sec 2 Protectorate Act 1886 (n 15) in conjunction with secs 1(2), 4, 21 *Gesetz über die Konsulargerichtsbarkeit* of 10 July 1879 (Act on Consular Jurisdiction), *Reichsgesetzblatt* 1879, 197ff (in short: KGG 1879); sec 3 Protectorate Act 1900 (n 16) in conjunction with sec 19 no 2 *Gesetz über die Konsulargerichtsbarkeit* of 7 April 1900 (Act on Consular Jurisdiction), *Reichsgesetzblatt* 1900, 213ff (in short: KGG 1900). J Gerstmeier *Das Schutzgebietsgesetz* (1910) V.

19 Sec 3 no 1 Protectorate Act 1886 (n 15); sec 4 Protectorate Act 1900 (n 16). Gerstmeier (n 18) V; R Schlottau *Deutsche Kolonialrechtspflege* (2007) 113.

20 Instead of many: Gerstmeier (n 18) 26; Lütken (n 6) 8.

21 A Nduka-Agwu „Farbig“, „Farbige_r“ in A Nduka-Agwu & A Hornscheidt (eds) *Rassismus auf gut Deutsch* (2010) 127ff; N Ofuately-Alazard „Eingeborene_r“ in S Arndt & N Ofuately-Alazard (eds) *Wie Rassismus aus Wörtern spricht* (2011) 683. Instead of using these racist terms, the chapter synonymously utilises the words 'racialised' and 'colonised'. 'Racialised' people are those negatively affected by racism. The term 'colonised people' encompasses all those oppressed by colonialism. It includes persons who were integrated into the colonial regime by the Germans and thus became part of it.

22 Liebscher (n 10) 165.

racial segregation was volatile, since legal Whiteness and racialisation were not completely consistent with societal Whiteness and racialisation. This discrepancy resulted from the German legislator's decision to define Whiteness predominantly through the possession of a citizenship of a 'state recognised under international law' and racialisation by the lack thereof.²³ In theory, a Black person who had acquired German citizenship through birth to a German parent or naturalisation was legally White. German colonial administrations perceived this as a threat to their colonial rule, which heavily relied on the ideology of White supremacy. They therefore effectively barred Black people from attaining German citizenship by preventing legally recognised marriages between White men and Black women and rejecting citizenship applications of Black subjects.²⁴ Racist arguments were used to justify this practice, such as framing bi- and multiracial children as threats to the colonial system,²⁵ and claiming that racialised people were 'almost entirely still at such a low cultural level that their naturalisation is not feasible'.²⁶

Through this deliberate practice, German identity was construed as being congruent with Whiteness. The claimed equivalence of Whiteness and the citizenship of a 'civilised state' was also applied to nationals of other 'recognised states'. Black citizens of the United States, Brazil, Liberia, Kuba, Argentina and Portugal were systematically withheld their status as legally White²⁷ in the practice of the German colonial criminal justice system: They were judged before courts for colonised people, which imposed penalties such as corporal punishment and chain imprisonment that were considered unlawful for legally White defendants, and passed convictions for crimes that were not punishable under imperial criminal law or colonial decrees for White persons.²⁸

23 For an overview of the different sub-groups of the two status groups, see Schlottau (n 19) 93ff.

24 M Iffert & K Yalçın 'Rassistische Exklusion im Staatsangehörigkeitsrecht' (2024) 57 *Kritische Justiz* 217; F Sillah 'Radikale Solidarität als Widerstand' in Decolonise Berlin & ECCHR (eds) *Dekoloniale Rechtswissenschaft und -praxis* (2024) 74ff.

25 cf Barskanmaz (n 10) 36.

26 E Peters *Der Begriff sowie die staats- und völkerrechtliche Stellung der Eingeborenen in den deutschen Schutzgebieten nach deutschem Kolonialrechte* (1906) 33 (translation by author).

27 cf F Doerr 'Deutsches Kolonialstrafrecht' (1908) 10 *Zeitschrift für Kolonialpolitik, Kolonialrecht und Kolonialwirtschaft* 321ff; R Mallmann *Rechte und Pflichten in den deutschen Schutzgebieten* (1913) 80.

28 Numerous cases from German South West Africa exist: NAN BKE 346 E.59/10; NAN BLU 220 SPS.57; NAN BLU 220 SPS.61; NAN BLU 221 SPS.92; NAN

The legal situation and the legal reality in the German colonies were discrepant since colonial officers, largely unbothered by the administration in the Empire, ensured the adherence of the dichotomous system to the ideals of White supremacy by disregarding contradictory legal rules. In practice, legal Whiteness was defined in accordance with societal Whiteness. While the linkage between citizenship and legal status in the colonies served to reinforce the synonymy of Whiteness and (German) citizenship, the practice on-site ensured that the societal racial segregation was mirrored in the legal system regardless of the legal rules in place.

The ideology of White supremacy also manifested itself in racist hierarchies that affected the status group of colonised people: Racialised people who were not Black were relatively privileged due to their proximity to Whiteness, for instance by being exempt from corporal punishment or certain forms of chain imprisonment.²⁹ The legal situation and its reality, therefore, were more complex than previous contributions to German colonial legal history have suggested.³⁰ Describing the German colonial legal order as simply dichotomous disregards the influences of White supremacy and racialisation on its reality, which was more convoluted than what can be derived from legal texts. Additionally, the lack of distance to the terms employed by German colonisers, which can often be observed in academic contributions on the topic,³¹ perpetuates the colonial notion of stagnant racialised groups that can – as is often

BLU 222 SPS.118; NAN BLU 224 SPS.221; NAN BLU 224 SPS.226; NAN BLU 225 SPS.271; NAN BLU 226 SPS.298; NAN BLU 226 SPS.310; NAN BLU 227 SPS.322; NAN BLU 227 SPS.328; NAN BLU 227 SPS.331; NAN BLU 228 SPS.378; NAN BLU 229 SPS.413; NAN BLU 229 SPS.414; NAN BLU 229 SPS.415; NAN BLU 230 SPS.438–440; NAN BSW 168 16/05; NAN BSW 169 105/06; NAN BSW 169 143/05; NAN BSW 171 34/08; NAN BSW 171 121/08; NAN BSW 174 106/13; NAN BSW 174 24/12. The practice in Togo was equally unlawful: Letter of the Imperial Governor of Togo to the Station Atakpame, dated 9 November 1905, BArch R 150/2036, 108. For an overview of the laws of sanctions, see part 5.

29 See part 5 on colonial punishments below.

30 See, eg, the oversimplified depictions in Schlottau (n 19) 93ff; J Steinkröger *Strafrecht und Strafrechtspflege in den deutschen Kolonien von 1884 bis 1914* (2019) 91ff.

31 See, eg, Schlottau (n 19); Steinkröger (n 30); F Weckner *Strafrecht und Strafrechtspflege für Afrikaner und ihnen gleichgestellte Farbige in Deutsch-Ostafrika* (2010).

implied legitimately – be hierarchised. Notions of White supremacy, therefore, have continuously been reflected in legal academic texts.

The ideology of White supremacy also influenced the decisions on the applicable law: White people were only subjected to German colonial jurisdiction under German criminal laws, while colonial criminal law and jurisdiction were a lot less clear-cut for colonised people. Besides the legal system established by the German administration, some colonised populations, especially in German South West Africa, ensured that their own people remained under their jurisdiction, sometimes even by signing so-called protection treaties.³² Hence, German colonial criminal law gives cause to research the agency of colonised people within the colonial system, since such a perspective highlights the capabilities and resistance of colonised people and dismantles the colonial narrative of them as inferior and mere passive objects of history.³³ However, the use of agency by colonised people when it included anticolonial resistance was often met with a violent response by colonisers. In the case of German South West Africa, the German administration and legal academia declared the protection treaties to be null and void after Germany's genocidal war against the OvaHerero and Nama peoples, thereby expanding its own jurisdiction.³⁴ Compliance with the treaties was always subject to political expediency on the German side.³⁵

Political expediency also motivated German scholars and colonial officers to 'research' customary laws of colonised people.³⁶ Their 'research

32 F Hanschmann 'Die Suspendierung des Konstitutionalismus im Herz der Finsternis' (2012) 45 *Kritische Justiz* 153; O Köbner 'Die Organisation der Rechtspflege in den Kolonien' in Deutscher Kolonialkongress (ed) *Verhandlungen des Deutschen Kolonialkongresses 1902 zu Berlin am 10. und 11. Oktober 1902* (1903) 358ff. On 'protection treaties', see R Tsogang Fossi & G Machona 'Die Kolonisierung „Cameroons“ in Decolonize Berlin & ECCHR (eds) *Dekoloniale Rechtswissenschaft und -praxis* (2024) 170.

33 cf U Schaper 'Deutsche Kolonialgeschichte postkolonial schreiben' (2019) 40-42 *Aus Politik und Zeitgeschichte* 14. On the agency of colonised people within the political and legal system of the German colonies, see, eg, Abotsi and Machona in this volume at 357ff and 191ff.

34 F Doerr 'Deutsche Kolonial-Gerichtsverfassung' (1909) 11 *Zeitschrift für Kolonialpolitik, Kolonialrecht und Kolonialwirtschaft* 175.

35 Hanschmann (n 32) 153; cf A Lampe *Anteil der Eingeborenen an der Verwaltung und Rechtspflege in unseren Kolonien* (1918) 46ff.

36 See M Iffert 'Historische Wahrheit und koloniales Wissen zum „Eingeborenenstrafrecht“' in L von Bogadany, C Resch & J Schumann (eds) *Konflikte um Wahrheit* (2024) 222ff. For the case of Tanzania, see Gabagambi in this volume at 255ff.

interest' in this field stemmed from the fact that they deemed the knowledge of customary laws a vital piece of information in the puzzle of ruling as efficiently as possible.³⁷ Projects that were purportedly directed at 'exploring' customary laws can therefore not be regarded as evidence of colonisers treating colonised people as equals. Customary laws were left in place, not because colonisers accepted them as equal to their own legal regime, but because they did not possess sufficient power for complete domination of the entire territory they claimed.³⁸ The 'research projects', therefore, were a tool for colonisers to gather information on the legal regimes of the peoples they were planning to subjugate further. Still, the vast papers and edited volumes that German scholars produced on the 'laws of the natives' (*Eingeborenenrecht*) cannot be seen as reliable sources of customary laws³⁹ as their knowledge production was highly influenced by colonial motifs.⁴⁰ Colonised people were not only reduced to being mere objects of subjugation, but also of research. The 'research' methods were questionable at best, as they consisted of questionnaires conceptualised in the metropole to be filled out by colonial officers or missionaries, not by colonised people themselves.⁴¹ The questionnaires were composed of over a hundred questions each and were directed at confirming racial biases against colonised peoples and their legal systems, ascribing medievalism and barbarianism to them.⁴² As a consequence, the publications resulting from these questionnaires claimed that brutal punishments, cannibalism, and blood revenge were common practices, thereby reinforcing the view of European legal systems being superior and progressive.⁴³ Instead of reproducing this colonial knowledge and epistemic violence, as many German legal history scholars have done

37 cf Iffert (n 36) 222.

38 cf Hanschmann (n 32) 153.

39 This claim is made by H Sippel 'Der Deutsche Reichstag und das „Eingeborenenrecht“' (1995) 61 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 735.

40 R Habermas 'Die deutschen Großforschungsprojekte zum „Eingeborenenrecht“ um 1900 und ihre Folgen' (2012) 129 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Germanistische Abteilung)* 182; Iffert (n 36) 225ff.

41 Iffert (n 36) 216.

42 Habermas (n 40) 170ff; Iffert (n 36) 220ff; U Schaper *Koloniale Verhandlungen* (2012) 239.

43 Habermas (n 40) 170ff; Iffert (n 36) 220ff.

in the past,⁴⁴ this chapter will focus on the law enacted by German colonisers, starting with criminal procedural law.

3 Criminal procedural law

The racial segregation of the colonial legal system affected the criminal procedural law. To illustrate the severe differentiations between White and racialised defendants, criminal proceedings against the former will be outlined before moving on to proceedings against the latter.

3.1 Criminal proceedings against White people

The criminal procedure law was the part of colonial criminal law for White people that deviated the most from the legal situation in Germany.⁴⁵ However, a fair trial was still guaranteed by several safeguards. The German colonisers established District and High Courts (*Bezirksgerichte* and *Obergerichte*) that were competent for criminal proceedings against White defendants.⁴⁶

These proceedings were led by a judge; for serious crimes, up to four White laymen had to be present as associate judges in hearings as well.⁴⁷ High Courts were also established in almost every colony, which ruled on complaints and appeals as a collegiate court.⁴⁸ The judges were not necessarily lawyers, as colonial civil servants could also fulfill this role; however, usually, persons with the ‘quality of a judge’, meaning appropriate legal education and training, were installed as judges.⁴⁹ Their judicial independence was guaranteed by law in 1910.⁵⁰ The judges were also responsible for conducting preliminary investigations, which is why the role of the public prosecutor was diminished compared to imperial criminal procedure law.⁵¹ However, prosecutors were at least present during hearings, where they could file applications; they also had

44 See Iffert (n 36) 227ff.

45 cf Doerr (n 34) 161; Schlottau (n 19) 172.

46 For an overview, see Schlottau (n 19) 190ff.

47 F Doerr *Deutsches Kolonialstrafprozessrecht* (1913) 13ff. On the deviating regulation of criminal jurisdiction in Kiautschou: Schlottau (n 19) 197ff.

48 Schlottau (n 19) 165ff.

49 Doerr (n 34) 164 (translation by author); Schlottau (n 19) 172ff.

50 Secs 48(1), 49 *Kolonialbeamtengesetz* (Colonial Civil Servants Act) of 8 June 1910, *Reichsgesetzblatt* 1910, 881ff; Doerr (n 34) 164; Schlottau (n 19) 172ff.

51 Doerr (n 47) 15ff; Schlottau (n 19) 162ff, 180ff.

the right to appeal.⁵² These deviations from imperial criminal procedure law were installed in the German colonies due to the lack of personnel in the administration.⁵³ Nevertheless, discussions on how to improve proceedings against White defendants were omnipresent in legal academia and policy throughout the formal colonial rule.⁵⁴

Otherwise, colonial criminal proceedings were equivalent to those in Germany: The proceedings were governed by the principle of mandatory prosecution and defendants had the right to a lawyer.⁵⁵ Technically, trials were open to the public;⁵⁶ however, the court hearings were conducted in German and only the testimonies of witnesses who did not speak German were translated.⁵⁷ This practice excluded colonised people who had little to no knowledge of the German language from following the proceedings against White defendants. In effect, this meant that the court proceedings, at least regarding their content, were usually only accessible to the White German-speaking population. The Whiteness of the audience mirrored the Whiteness of the parties to the proceedings: Due to discriminatory legal rules and practices, only White men were selected as judges, associate judges, defenders, and public prosecutors.⁵⁸ Racialised people, therefore, were limited to the roles of witnesses, victims, and sometimes translators as far as proceedings against White defendants were concerned. This was a deliberate decision that aligned with the ideology of White supremacy; A racialised judge presiding over a White defendant would have conflicted with the colonisers' claim that posited White people as the 'ruling race'. The ideology of White supremacy also influenced the assessment of witness statements. While White witnesses and defendants were generally deemed believable when the courts dealt with crimes against racialised victims, the courts devalued the testimony

52 This was the legal situation as of 1898: *Kaiserliche Verordnung* (Imperial Decree) of 13 December 1897, *Reichsgesetzblatt* 1898, 1; sec 5(1) *Kaiserliche Verordnung* (Imperial Decree) of 9 November 1900, *Reichsgesetzblatt* 1900, 1005ff; Schlottau (n 19) 180ff.

53 Köbner (n 32) 334; F Seelbach *Grundzüge der Rechtspflege in den Deutschen Kolonien* (1904) 77.

54 C Essner 'Der Kampf um das Kolonialgericht' (1992) 5 *Historische Mitteilungen* 78ff. For an overview: Schlottau (n 19) 156ff, 167ff, 183ff.

55 F Doerr 'Die Geltung der Reichs-Strafprozeßordnung in den deutschen Schutzgebieten' (1912) 14 *Zeitschrift für Kolonialpolitik, Kolonialrecht und Kolonialwirtschaft* 16ff, 21; Doerr (n 47) 81ff; Schlottau (n 19) 236.

56 Schlottau (n 19) 236.

57 Doerr (n 47) 84.

58 cf Schlottau (n 19) 177.

of colonised witnesses and victims: They exploited racist narratives such as Black people being forgetful, easily influenced and prone to lying, to argue why the testimonies of racialised witnesses and victims were innately less credible.⁵⁹ This strategy of colonial courts privileged White defendants accused of harming racialised victims which, in turn, were regularly prevented from obtaining any form of justice for the wrongs White people had committed.⁶⁰

3.2 Criminal proceedings against colonised people

The ideology of White supremacy also heavily influenced the design of criminal proceedings against racialised defendants, who were not guaranteed the same rights as White suspects. For instance, cases against colonised people were not dealt with by actual courts, but by so-called district offices (*Bezirksämter*, *Distriktsämter*) or stations (*Stationen*) which were part of the administrative branch of the colonial government or the military.⁶¹ The civil servants who acted as judges had no legal training and were not granted judicial independence.⁶² Yet, they were responsible for the entire proceeding, from preliminary investigations to the delivery of the judgment to the execution of sentences.⁶³ The participation of a public prosecutor was not provided and not deemed necessary.⁶⁴ The powerful position of the civil servants was also increased by the fact that the initiation of criminal proceedings was at their discretion.⁶⁵ This was to ensure that they did not jeopardise the colonial rule by initiating proceedings in an unstable political environment.⁶⁶

Usually, the civil servant ruled on his own. Occasionally, two 'esteemed' colonised people were involved as associate judges who, differently from their White counterparts, were not granted voting

59 P Bauer 'Die Strafrechtspflege über die Eingeborenen der deutschen Schutzgebiete' (1905) 19 *Archiv des öffentlichen Rechts* 45; H Karlowa *Die Strafgerichtsbarkeit über die Eingeborenen in den deutschen Kolonien* (1911) 27, 76.

60 cf G Walz *Die Entwicklung der Strafrechtspflege in Kamerun unter deutscher Herrschaft 1884-1914* (1981) 293ff; Schaper (n 42) 220.

61 cf Steinkröger (n 30) 145, 153ff.

62 H Brinkmann *Strafrecht und Strafverfahren für die Eingeborenen der deutschen Schutzgebiete* (1904) 47; Schlottau (n 19) 140ff, 199ff.

63 cf Karlowa (n 59) 80.

64 Karlowa (n 59) 66.

65 Brinkmann (n 62) 53ff.

66 Karlowa (n 59) 71.

rights.⁶⁷ German colonisers attempted to hereby enhance the reputation of the colonial criminal justice system⁶⁸ without giving colonised people any tangible influence on the outcome of the proceedings. Otherwise, the racialised associate judges could have outvoted the White civil servant, which would have stood in conflict with their usurped role as White ruler.

The position of colonised people judged by said civil servant was further weakened by withholding an effective right to an attorney from colonised defendants.⁶⁹ The latter also did not have the right to appeal; the requirement that the governor had to confirm serious sentences before their execution was not an adequate replacement to safeguard against miscarriages of 'justice'.⁷⁰ This confirmation requirement was even abandoned in certain cases of 'emergencies', allowing civil servants to immediately execute colonised people.⁷¹

Instead of criticising the design of the criminal proceedings and suggesting improvements as they did for the procedural law for White defendants, German legal academics did not take offence at the lack of a fair trial for the racialised suspects. Instead, it was declared that criminal proceedings against colonised people should be 'as simple, clear and short as possible'.⁷² Racist tropes were used to justify this stance,⁷³ namely, that colonised people were less intelligent and forgetful and that the alleged 'educational purpose of punishment' could only be achieved if the proceedings were concluded quickly.⁷⁴ Racist stereotypes can also be found in the discourse on substantive colonial criminal law.

67 Sec 13 *Verfügung des Reichskanzlers wegen Ausübung der Strafgerichtsbarkeit und der Disziplinargewalt gegenüber den Eingeborenen in den deutschen Schutzgebieten von Ostafrika, Kamerun und Togo* ('Decree of the Reich Chancellor on the exercise of criminal jurisdiction and disciplinary authority over the natives in the German protectorates of East Africa, Cameroon, and Togo') of 22 April 1896 in Zimmermann (ed) *Die deutsche Kolonial-Gesetzgebung* vol 2 (1898) 215ff (abbreviation of the collection of laws in the following footnotes: DKolGG); Lampe (n 35) 46ff.

68 Karlowa (n 59) 59, 73ff.

69 Brinkmann (n 62) 57.

70 Secs 10ff *Decree of the Reich Chancellor on the exercise of criminal jurisdiction and disciplinary authority over the natives in the German protectorates of East Africa, Cameroon, and Togo* of 22 April 1896 (n 67); Schlottau (n 19) 326ff.

71 See more on this provision and its practice in part 5.2.

72 H Wick *Die Farbigenrechtspflege in den deutschen Schutzgebieten* (1914) 101.

73 Schaper (n 42) 167.

74 Wick (n 72) 101.

4 Substantive colonial criminal law

4.1 Substantive criminal law for White persons

As in the German Empire, the principle of legality and most criminal offences in the Imperial Criminal Code applied to White persons in the German colonies. Some gaps that resulted from the incomplete transfer of the entire German criminal law to the colonies for White people were addressed by issuing several colonial regulations.⁷⁵ These pertained to petty crimes such as poaching,⁷⁶ and were limited regarding the types of permissible sanctions and maximum sentences.⁷⁷

4.2 Substantive criminal law for colonised persons

For colonised people, however, the colonisers rarely issued regulations that contained substantive provisions.⁷⁸ Due to the decisions of the German legislator as well as the Emperor not to declare the Imperial Criminal Code (*Reichsstrafgesetzbuch*) applicable to colonised people, colonial officials were not bound by its provisions when judging cases against colonised defendants.⁷⁹ As a result, the principle of legality contained in the Imperial Criminal Code⁸⁰ was not guaranteed in relation to the colonised accused.⁸¹ Thus, the substantive provisions of the Imperial Criminal Code were degraded to being mere reference points that could be ignored when political expediency demanded it.⁸² This endowed colonial officers with the power to try racialised children below the age of criminal responsibility (12 years)⁸³ or convict colonised defendants for acts that were not punishable under imperial criminal law.⁸⁴ Legal academics supported this design of the criminal justice system, justifying the arbitrary use of criminal law in the colonies:

75 Iffert (n 9) 180ff.

76 E Lüders *Das Jagdrecht der deutschen Schutzgebiete* (1913) 57ff; Schlottau (n 19) 240ff.

77 Sec 6 no 1 Protectorate Act 1900 (n 16).

78 Iffert (n 9) 181.

79 As above.

80 Sec 2(1) Imperial Criminal Code of 1871, *Reichsgesetzblatt* 1871, 127ff.

81 Iffert (n 9) 181.

82 cf Karlowa (n 59) 21.

83 Sec 55 Imperial Criminal Code 1871 (n 80).

84 Iffert (n 9) 181; Walz (n 60) 104ff.

‘[The introduction of the principle of legality] would considerably reduce the creative power of jurisprudence, which is particularly desirable in this area for the further development of the law.’⁸⁵

Colonial officials used their ‘creative power’ by inventing new criminal offences on the spot, such as ‘drifting around at night’ or the ‘malicious abandonment of one’s husband’.⁸⁶ Furthermore, officials across all colonies on the African continent punished racialised witnesses and even defendants for supposedly lying in court.⁸⁷ The Imperial Criminal Code only included such a provision for witnesses who lied under oath;⁸⁸ the colonial justice system closed this self-made impunity gap that resulted from withholding oaths from racialised witnesses by punishing them for alleged lies. Colonised people were hereby barred from the advantages of oaths – the supposedly increased credibility of statements made under such – while still being criminalised for lying before the court.

Occasionally, the colonial administrations issued regulations that contained substantive provisions. For instance, in the last year of the genocidal German war against the OvaHerero and Nama peoples, the governor of German South West Africa enacted a regulation that obligated almost all colonised people to possess and always carry with them a ‘*Passmarke*’ (a piece of metal including name and a number).⁸⁹ Colonised people were also prohibited from leaving their district without a passport (*Reisepass*) issued by the German colonial authorities,⁹⁰ hereby severely inhibiting the freedom of movement of colonised people. White persons were permitted to demand the presentation of the *Passmarke* or passport and temporarily detain colonised persons who did not own

85 Wick (n 72) 68 (translation by author).

86 Iffert (n 9) 181 (translation by author).

87 M Heger ‘Koloniales Strafrecht’ in P Dann, I Feichtner & J von Bernstorff (eds) (*Post*) *Koloniale Rechtswissenschaft* (2022) 182; Schlottau (n 19) 253; Weckner (n 31) 202.

88 Sec 153 Imperial Criminal Code 1871 (n 80).

89 Secs 1, 2, 10 *Verordnung des Gouverneurs von Deutsch-Südwestafrika, betreffend die Paßpflicht der Eingeborenen* (‘Regulation issued by the Governor of German South West Africa concerning the passport requirement for natives’) of 18 August 1907, DKolGG vol 11 (1907) 347ff. Similar provisions had already been enforced in several districts at the beginning of the war: J Zimmerer *German rule, African subjects* (2022) 91.

90 Secs 3, 5 *Verordnung des Gouverneurs von Deutsch-Südwestafrika, betreffend die Paßpflicht der Eingeborenen* (‘Regulation issued by the Governor of German South West Africa concerning the passport requirement for natives’) of 18 August 1907 (n 89).

one,⁹¹ thereby acting as *de facto* auxiliary police to ensure the functioning of the surveillance system.⁹² Colonised persons who did not bow to this oppressive regime faced punishments according to the 'regulations in place for the punishment of natives',⁹³ which left it up to the colonial officer to decide on the sanction he saw fit to impose.

Another example of the way in which colonial administrations interfered with the way of life of colonised people was the criminalisation of acts such as 'witchcraft', 'blood feud', certain 'fetish'-related practices, and 'poison ordeals' in Togo.⁹⁴ With this regulation, the German administration ascribed medievalism and barbarism to colonised communities while simultaneously attempting to suppress practices they were unable or unwilling to comprehend.

One criminal offence that German colonisers introduced across all colonies on the African continent was the so-called disciplinary punishment (*Disziplinarstrafe*), which served their economic interests and enforced racist hierarchies in the 'working' context. For the 'continued breach of duty, indolence, rebelliousness, leaving the workplace without justification and other serious breaches of the employment relationship', colonised people could be subjected to corporal punishment or chain imprisonment for up to 14 days.⁹⁵ The complaint of the 'employer' was usually sufficient grounds for the colonial officer to administer

91 Sec 16(1) Regulation issued by the Governor of German South West Africa concerning the passport requirement for natives of 18 August 1907 (n 90).

92 cf Zimmerer (n 89) 32, 98.

93 Secs 16(2), 17 *Verordnung des Gouverneurs von Deutsch-Südwestafrika, betreffend die Paßpflicht der Eingeborenen* ('Regulation issued by the Governor of German South West Africa concerning the passport requirement for natives') of 18 August 1907 (n 89) (translation by author).

94 No 3, 4, 5, 9 *Runderlaß des Gouverneurs von Togo, betreffend die Bestrafung von Straftaten der Eingeborenen* ('Circular letter from the Governor of Togo, concerning the punishment of crimes committed by natives') of 11 February 1907, DKolGG vol 11 (1907) 93ff.

95 Sec 17 *Verfügung des Reichskanzlers wegen Ausübung der Strafgerichtsbarkeit und der Disziplinargewalt gegenüber den Eingeborenen in den deutschen Schutzgebieten von Ostafrika, Kamerun und Togo* ('Decree of the Reich Chancellor on the exercise of criminal jurisdiction and disciplinary authority over the natives in the German protectorates of East Africa, Cameroon, and Togo') of 22 April 1896 (n 67); *Änderung der Verordnung, betreffend die Strafgerichtsbarkeit der Eingeborenen in Südwestafrika* ('Amendment to the regulation concerning the criminal jurisdiction of the natives in South West Africa') of 8 November 1896, DKolGG vol 2 (1898) 294ff (translation by author).

punishments under these broad terms.⁹⁶ The provision was described as 'abnormal' for German law, as it criminalised breaches of civil contracts, which was considered impermissible in German criminal law at the time.⁹⁷ German colonisers and legal academics employed anti-Black stereotypes to legitimise the deviation from their own standards: They portrayed Black people as lazy and lacking in work ethic, therefore needing to be 'educated' by White colonisers through the use of force.⁹⁸ Such racist tropes were used to justify the design of the law of sanctions as well.

5 Colonial punishments

5.1 Law of sanctions for White persons

For White persons, almost the same sanction law applied as in the Empire: The permissible sanctions consisted of the death penalty, fines and four different types of imprisonment.⁹⁹ Only the most severe form of imprisonment (called *Zuchthaus*) was always accompanied by hard compulsory labour.¹⁰⁰ The criminal code determined the permissible sanctions for each criminal offence and the maximum punishment, thereby guaranteeing the predictability of the sentencing decision. Only minor adjustments of the legal rules were made, such as expanding the permissible types of execution: While death row inmates in Germany were only to be executed by decapitation,¹⁰¹ hanging and death by firing squad were added as execution methods in the colonies.¹⁰² The relevance of this adaptation was negligible, as only two White men were sentenced to death and executed during the entirety of formal German colonial rule on the African continent:¹⁰³ Fidel Anton Falk and Bruno Max Sommer

96 Exemplary: Proceeding against *Hendrik Gido*, NAN BKE 342 E.27/07; proceeding against *Susanna*, NAN BKE 343 E.42/07. Steinkröger (n 30) 162; Walz (n 60) 223; Weckner (n 31) 230.

97 Karlowa (n 59) 27; Lütken (n 6) 57.

98 Bauer (n 59) 57; Karlowa (n 59) 27; Lütken (n 6) 57ff.

99 Iffert (n 9) 183.

100 Sec 15 Imperial Criminal Code 1871 (n 80).

101 Sec 13 Imperial Criminal Code 1871 (n 80).

102 Sec 9(1) *Kaiserliche Verordnung* ('Imperial Decree') of 9 November 1900 (n 52).

103 In addition, three Chinese men were sentenced to death and executed in Samoa in 1913 (Judgment of the District Court of Apia against *Chan Hing*, *Ah Kau* and *Ai Tsai Lin* on 5 July 1913, BArch R 1001/4960, 4ff and letter of the District Office Apia to the Governor of Samoa concerning the carried-out executions, dated 30

were convicted of, among others, murdering a White police sergeant in German South West Africa, condemned to death for this crime¹⁰⁴ (not, however, for the murder of a Black boy, a Black woman and the rape and murder of a Black girl)¹⁰⁵ and hanged in 1912.¹⁰⁶ Two main factors can be determined for the reason as to why White people were almost never sentenced to death: First, in times of peace and for the civilian population, the German criminal law of the time limited the death penalty to only four crimes, which included murder and high treason.¹⁰⁷ Second, the colonial judges used their power to convict White defendants guilty of killing Black people of manslaughter (instead of murder) or to acquit them entirely.¹⁰⁸ Therefore, in practice, murder sentences were reserved for deadly male White-on-White crime.¹⁰⁹

The colonial justice system and government also regularly took the interests of White convicts to heart by allowing those that had been sentenced to *Zuchthaus* to serve their punishment in Prussia, thereby safeguarding their health.¹¹⁰ For those convicts that remained in the colonies, the German administration ensured that they were segregated from racialised inmates;¹¹¹ the general racial segregation of German colonial societies, therefore, extended to everyday prison life as well.

November 1913, BArch R 1004-F/AGCA 6051/0398, 53). This proceeding took place after Chinese citizens had been declared legally White in questions of colonial jurisdiction in 1912 (sec 1 *Verordnung des Gouverneurs von Samoa, betreffend die rechtliche Gleichstellung der Chinesen mit den Nichteingeborenen* ('Decree of the Governor of Samoa concerning the legal equality of Chinese with non-natives') of 6 January 1912), *Deutsches Kolonialblatt* 1912, 246.

104 Judgment of the District Court of Windhoek against *Fidel Anton Falk* and *Bruno Max Sommer* on 27 July 1912, NAN GWI 731 K.10/12 vol 3, 451ff.

105 See the case file NAN GWI 731 K.22/12.

106 Report on the execution carried out on 12 December 1912, NAN GWI 731 K.10/12 vol 3, 491.

107 See Brinkmann (n 62) 27.

108 T Leutwein *Elf Jahre Gouverneur in Deutsch-Südwestafrika* (1906) 431. See also the case against Elisabeth Ohlsen who was acquitted of the charge of inflicting bodily harm resulting in the death of a Black man: NAN GWI 728 3K.9/11.

109 The only other case in which a White man was convicted and sentenced to death was the case against Clemento Marusic for the murder of a White merchant (Judgment of the District Court of Swakopmund on 3 December 1910, NAN GSW 412 D78/10, 50ff). The conviction was overturned by the High Court of Windhoek which deemed Marusic mentally incompetent and therefore acquitted him (Judgment of the High Court of Windhoek on 13 March 1912, NAN geschütztes Leerzeichen zwischen GSW und 412 D78/10, 198ff).

110 J Gerstmeyer 'Gefängniswesen' in H Schnee (ed) *Deutsches Kolonial-Lexikon* (1920) 682; cf Steinkröger (n 30) 135 fn 882.

111 Gerstmeyer (n 109) 682.

5.2 Law of sanctions for colonised people

For colonised people, only catalogues of permissible sanctions, often without specifying corresponding punishable acts, were codified.¹¹² For cases beyond the requirement of the governor's approval,¹¹³ the colonial official presiding over the case was solely in charge of deciding which sanction to impose for which act and to what extent.¹¹⁴ Just like the substantive parts of criminal provisions, the types of penalties and their range determined in the provisions of the imperial criminal law were degraded to being a mere guiding principle that could be ignored due to political expediency.¹¹⁵ Furthermore, the permissible sanctions differed significantly from those applicable to White convicts, rendering any reliance on the Imperial Criminal Code as a reference point effectively moot. The German colonisers reintroduced penalties that had been abolished in the Empire with the introduction of the Imperial Criminal Code in the nineteenth century, such as chain imprisonment and corporal punishment, and relied heavily on these brutal forms of sanctions in practice.¹¹⁶ This, of course, stood in stark contrast to the self-proclaimed progressiveness and modernity of colonisers who attributed medievalism and barbarism to colonised peoples. The colonial law of sanctions is just one example of the contradictory nature of colonial legitimisation narratives. To justify their violence under the guise of criminal law, German colonisers applied several strategies, including the use of racist stereotypes. The law of sanctions was also organised according to racist hierarchies, reserving the most severe forms of punishment for Black persons.¹¹⁷

112 For colonies on the African continent: sec 2 *Verfügung des Reichskanzlers wegen Ausübung der Strafgerichtsbarkeit und der Disziplinalgewalt gegenüber den Eingeborenen in den deutschen Schutzgebieten von Ostafrika, Kamerun und Togo* ('Decree of the Reich Chancellor on the exercise of criminal jurisdiction and disciplinary authority over the natives in the German protectorates of East Africa, Cameroon, and Togo') of 22 April 1896 (n 67).

113 See above in part 3.2.

114 Iffert (n 9) 183.

115 cf the letter of the Governor of German South West Africa to the District Office Lüderitzbucht, dated 19 April 1913, NAN ZBU 691 FV.c.2 vol 5, 113.

116 See below in part 6.1.

117 The penalties imposed on Black people were altogether more severe than those imposed on 'Arab' or 'Indian' people in the same colony or the criminal sanctions used in Kiautschou, German New Guinea or Samoa: Iffert (n 9) 183.

In contrast to the law of sanctions for White people, only two forms of imprisonment were introduced and applied against racialised persons: imprisonment and chain imprisonment, which both included hard compulsory labour.¹¹⁸ Imprisonment without forced labour was claimed to be an unviable option against colonised people on the African continent.¹¹⁹ The fact that the colonial state as well as White companies profited from forced labour was obscured with the racist arguments that were brought forward: German colonisers described racialised people as lazy and without the need for personal freedom; without compulsory labour, they argued, prisoners would enjoy the mere deprivation of liberty due to the provided food and shelter.¹²⁰ Only forced labour, therefore, would constitute an actual penalty and simultaneously educate racialised people on a 'proper' (meaning White) work ethic.¹²¹ To further aggravate the hardships of imprisonment with hard and forced labour, the German colonisers reactivated a sanction abolished in the Empire: chain imprisonment. Inaccurately treated as the equivalent to the *Zuchthaus* penalty for White convicts,¹²² racialised people who were sentenced to chain imprisonment had to perform forced labour while being shackled together with neck or leg irons and chains that were kept in place at all times, usually even at night in the cells.¹²³ In addition to the racist justifications colonisers brought forward for the necessity of

118 For colonies on the African continent: sec 2 *Verfügung des Reichskanzlers wegen Ausübung der Strafgerichtsbarkeit und der Disziplinargewalt gegenüber den Eingeborenen in den deutschen Schutzgebieten von Ostafrika, Kamerun und Togo* ('Decree of the Reich Chancellor on the exercise of criminal jurisdiction and disciplinary authority over the natives in the German protectorates of East Africa, Cameroon, and Togo') of 22 April 1896 (n 67). For an overview, see Schlottau (n 19) 271ff.

119 Instead of many; FO Karstedt *Beiträge zur Praxis der Eingeborenenrechtsprechung in Deutsch-Ostafrika* (1912) 59ff.

120 As above.

121 See only Karlowa (n 59) 33.

122 See only Brinkmann (n 62) 31.

123 Instead of many: *Dienstanweisung des Gouverneurs von Togo, betreffend die Ausübung der Strafgerichtsbarkeit und der Disziplinargewalt gegenüber den Eingeborenen gemäß der Verfügung des Reichskanzlers vom 22. April 1896* ('Official directive from the Governor of Togo concerning the administration of criminal justice and disciplinary authority over the natives in accordance with the decree of the Imperial Chancellor of 22 April 1896') of 10 January 1906, DKolGG vol 10 (1907) 10.

forced labour, they claimed that only chain imprisonment would ensure the sufficiently degrading nature of this punishment.¹²⁴

The conditions of detention in the prisons for colonised people were so poor that few inmates survived five years of chain imprisonment.¹²⁵ The governor of German East Africa, therefore, decreed that one year of chain imprisonment was to be regarded as equivalent to a five times longer imprisonment in the Empire, while five years of chain imprisonment were to be considered the equivalent of a life sentence.¹²⁶ Chain imprisonment was only employed in the colonies on the African continent and in this form only against Black persons. 'Indian' and 'Arab' defendants were mostly exempted from this brutal form of imprisonment, which was justified with colonial racist hierarchies.¹²⁷ If they were sentenced to chain imprisonment, they were shackled individually; it was explicitly forbidden to shackle them to Black inmates – a regulation that also reinforced racial segregation within the colonised population.¹²⁸ The law of sanctions, therefore, serves as an example for racist hierarchies within colonised communities, which awarded relative privilege to People of Colour based on their proximity to Whiteness.

The same pattern existed regarding corporal punishment, which was introduced as a criminal sanction against Black male persons in German colonies on the African continent.¹²⁹ Just like chain imprisonment, corporal punishment had previously been abolished as a criminal sanction

124 Transcript of the judgment signed by Dr Rudolf Asmis in the criminal case against 27 members of the Akwa community in Togo for defamation on 26 October 1906, appendix to the report of the deputy director of the Colonial Department dated 13 April 1907, *Verhandlungen des Reichstags – Stenographische Berichte*, 12th Legislative Term, 1st Session, vol 241, Document No 323, 1868.

125 *Auszug aus dem Runderlaß des Gouverneurs von Deutsch-Ostafrika* ('Excerpt from the circular of the Governor of German East Africa') of 9 November 1906, DKolGG vol 10 (1907) 340ff.

126 *Auszug aus dem Runderlaß des Gouverneurs von Deutsch-Ostafrika* ('Excerpt from the circular of the Governor of German East Africa') of 9 November 1906 (n 124).

127 Brinkmann (n 62) 31; Karstedt (n 119) 59.

128 *Auszug aus dem Runderlass des Gouverneurs von Deutsch-Ostafrika, betreffend die Vollstreckung der Kettenhaft an Indern* ('Excerpt from the circular issued by the Governor of German East Africa concerning the enforcement of chain detention on Indians') of 10 February 1904, DKolGG vol 8 (1905) 42; Karstedt (n 119) 59.

129 Secs 6ff *Verfügung des Reichskanzlers wegen Ausübung der Strafgerichtsbarkeit und der Disziplinargewalt gegenüber den Eingeborenen in den deutschen Schutzgebieten von Ostafrika, Kamerun und Togo* ('Decree of the Reich Chancellor on the exercise of criminal jurisdiction and disciplinary authority over the natives in the German protectorates of East Africa, Cameroon, and Togo') of 22 April 1896 (n 67). While this sanction was also introduced in Kiautschou, no statistical evidence

in the empire.¹³⁰ German colonisers, therefore, spent considerable time and energy attempting to justify the major role corporal punishment played in the colonial criminal justice system against Black men and boys.¹³¹ They falsely¹³² claimed that corporal punishment corresponded to the legal views of colonised populations and, therefore, was indispensable for the maintenance of colonial rule,¹³³ thereby once again accusing colonised people of medievalism and portraying themselves as benevolent rulers that respected the convictions of those they subjugated. Instead, corporal punishment solely served the interests of German colonisers: The punishment could be carried out easily in public spaces, which enabled colonisers to demonstrate their power in a deterrent and cost-efficient way.¹³⁴ Unlike prison sentences, the convicted Black man or boy was also (supposedly) immediately available to continue his (forced) labour for White colonisers after the execution of the sentence, which enabled the continuous exploitation of colonised people for profit making.¹³⁵ To obscure the self-serving nature of corporal punishment, colonisers also employed anti-Black stereotypes, such as the alleged lower sensitivity to pain of Black persons¹³⁶ or that their minds were equal to those of children against whom beatings by parents and teachers was still widely accepted at the time.¹³⁷ Colonisers thereby legitimised this brutal type of sanction by once again self-portraying themselves as benevolent educators of people that, according to racist theories, were their subordinates.

Even sanctions that existed in the German Empire and (technically) applied to White colonisers were brutalised against racialised persons. The death penalty, which played almost no role in the criminal justice system for White defendants, was almost entirely rid of its safeguards

on the imposition of this form of criminal punishment in Kiautschou exists: cf Schlottau (n 19) 305ff; 422. On Cameroon: Schaper (n 42) 171ff.

130 Schlottau (n 19) 289ff.

131 cf Schaper (n 42) 172.

132 Walz (n 60) 187ff.

133 Doerr (n 27) 331; Hermann 'Die Prügelstrafe nach deutschem Kolonialrecht' (1908) 10 *Zeitschrift für Kolonialpolitik, Kolonialrecht und Kolonialwirtschaft* 78; O Köbner 'Kolonialstrafrecht' (1904) 11 *Mitteilungen der Internationalen Kriminalistischen Vereinigung* 574; Wick (n 72) 58.

134 Wick (n 72) 58; Schaper (n 42) 169ff; Schlottau (n 19) 92.

135 Wick (n 72) 58; Schaper (n 42) 169ff; Schlottau (n 19) 92.

136 Instead of many: B von Zastrow 'Südwestafrika' in E Schultz-Ewerth & L Adam (eds) *Das Eingeborenenrecht* vol 2 (1930) 267.

137 Iffert (n 9) 184; cf Heger (n 87) 166. See also Ugwuoke in this volume at 70.

against colonised accused. First, German colonisers significantly expanded the crimes for which they sentenced racialised persons to death, either through explicit decrees or practice.¹³⁸ For instance, in German South West Africa, Black people were sentenced to death and executed for raiding cattle, even though no provisions explicitly imposed the death penalty for this offence.¹³⁹ Anti-colonial resistance fighters were also regularly executed,¹⁴⁰ which was partially based on colonial regulations.¹⁴¹ Colonised defendants were not given the right to appeal; instead, death sentences only had to be approved by the governor, who decided based on the report of the responsible officer.¹⁴² As a result, the colonial justice system rendered colonised convicts without legal protection. Even the requirement of the governor's approval could be circumvented in a 'state of war', 'cases of riots', during 'attacks' or 'other emergencies', which granted civil servants the authority to immediately execute colonised people they had just sentenced to death as they saw fit.¹⁴³ The source material on these abbreviated proceedings is sparse, but it can be stated with certainty that colonial officers made use of

138 Brinkmann (n 62) 27ff; Wick (n 72) 54.

139 Just one example: Confirmation of the death sentence delivered by the District Office Rehoboth against *Geiweb, Taraob und Nubib*, dated 8 March 1912, for *bandenmäßig begangenen Viehdiebstahl* ('gang-related cattle theft') and report on the carried-out execution on 12 March 1912, NAN ZBU 688 FV.b.2, 11, 13.

140 See, eg, the execution of six Black people on 2 March 1906, for 'treason resp. sedition through hostilities against the white population of the protectorate and insubordination against the German authorities' (translation of author), letter of the Gouverneur of German South West Africa to the *Reichskolonialamt* in Berlin, dated 27 May 1907, NAN ZBU 687 FV.a.2, 46. For the case of *Rudolf Duala Manga Bell* in Cameroon, see Machona in this collection at 191ff. The German authorities also issued an arrest warrant against *Samuel Maharero*, among others, for the alleged incitement to murder and assault, on 24 January 1905: NAN BWI 53 E.4.d.20.

141 See sec 3 no 4 *Dienstvorschrift des Gouverneurs von Kamerun, betreffend die Ausübung der Strafgerichtsbarkeit gegenüber den Eingeborenen* ('Administrative order of the Governor of Cameroon concerning the exercise of criminal jurisdiction over the natives') of May 1902, DKolGG vol 6 (1903) 467ff.

142 Sec 11 *Verfügung des Reichskanzlers wegen Ausübung der Strafgerichtsbarkeit und der Disziplinargewalt gegenüber den Eingeborenen in den deutschen Schutzgebieten von Ostafrika, Kamerun und Togo* ('Decree of the Reich Chancellor on the exercise of criminal jurisdiction and disciplinary authority over the natives in the German protectorates of East Africa, Cameroon, and Togo') of 22 April 1896 (n 67).

143 Sec 15ff *Verfügung des Reichskanzlers wegen Ausübung der Strafgerichtsbarkeit und der Disziplinargewalt gegenüber den Eingeborenen in den deutschen Schutzgebieten von Ostafrika, Kamerun und Togo* ('Decree of the Reich Chancellor on the exercise of criminal jurisdiction and disciplinary authority over the natives in the German protectorates of East Africa, Cameroon, and Togo') of 22 April 1896 (n 67).

this provision in German South West Africa, German East Africa and Cameroon.¹⁴⁴ Historical sources also reveal that officials who abused this violent provision with already minimal prerequisites did not have to fear prosecution, since governors regularly excused their behaviour.¹⁴⁵ In total, German officials executed at least 1 300 colonised people in the colonies on the African continent, although the actual number is likely to be much higher.¹⁴⁶ This form of deadly violence against colonised people, which was sanctioned by criminal law, significantly exceeded the execution of death penalties in Germany during the same time frame, in absolute as well as relative numbers.¹⁴⁷ Not only the practice of the death penalty, but also the extension of its applicability in substantive colonial criminal law deserves scrutiny through the lens of critical legal theories. One provision from Cameroon serves as an epitome of the intersections of race, gender and sexuality in colonial regulations. In 1902, the governor of Cameroon allowed facultative death sentences for cases in which a Black man was convicted of sexually assaulting a White woman or child.¹⁴⁸

The introduction of this provision was based on a recommendation of the German Colonial Council (*Kolonialrat*),¹⁴⁹ which served in an

144 German South West Africa: Sentencing of 21 persons to death for *Aufbruch* (rioting) by the District Office Keetmanshoop in 1898/1899, NAN ZBU 701 F.V.k.19 vol 1, 48. German East Africa: Weckner (n 31) 178. Cameroon: Sentencing of three Black men to death for *Entlaufen* (running away) by one White officer named Sandrock and two White associate judges on 20 June 1903, BArch R 1001/5086, 85ff.

145 See, eg, *Runderlaß des Gouverneurs, betreffend Verhängung der Todesstrafe gegen Eingeborene* ('Circular from the Governor concerning the imposition of the death penalty on natives') of 27 June 1904, in Ruppel (ed) *Die Landesgesetzgebung für das Schutzgebiet Kamerun* (1912) 831ff. See also the acquittal of a German officer named Sandrock for the unlawful execution of three Black men: BArch R 1001/5086, 85ff and 104ff.

146 The statistics do not include, eg, the years of the German war against the OvaHerero and Nama peoples, nor the death sentences carried out by court martial: Schlottau (n 19) 279, 424, 430 and Steinkröger (n 30) 181ff.

147 Schlottau (n 19) 281.

148 Sec 3 no 3 *Dienstvorschrift des Gouverneurs von Kamerun, betreffend die Ausübung der Strafgerichtsbarkeit gegenüber den Eingeborenen* ('Administrative order of the Governor of Cameroon concerning the exercise of criminal jurisdiction over the natives') of May 1902 (n 140).

149 Art 11 of the Colonial Council's decision, Appendix 3 to the Protocol of the 22nd meeting on 2 December 1897, IV. Session period 1895/1898, BArch R 1001/6971, 219.

advisory role to the German government.¹⁵⁰ During its session where it discussed recommendations for criminal provisions in the colonies, the legitimacy of sentencing Black men to death for sexually assaulting White women and children was defended: It was claimed that 'the recognition of the unconditional superiority of the Whites' rendered such a provision indispensable.¹⁵¹ This narrative was also transferred into legal academic texts, where this expansion of the death penalty was said to be 'fully justified' since 'the utmost contempt for the ruling race manifested in the commission of this offence'.¹⁵² These reasonings can only be understood if one considers how the ideology of White supremacy was also built on racialised and gendered stereotypes of sexuality. In the colonial context, White women were supposed to be demure housewives to White men and secure the continuity of White superiority in the colonies by procreating with White men.¹⁵³ Their bodies were nothing less than symbols of 'White racial purity'; concerning their sexuality, they were deemed representatives of a 'White sexual honour'.¹⁵⁴ In the patriarchal German society, their sexual nature was construed as passive, undemanding, and targeted towards the satisfaction of the male sex drive.¹⁵⁵ Sexual intercourse, in this vein, was considered an act of submission towards men. In contrast, Black men were portrayed as hypersexual and especially interested in sexual relations with White women to the point that they would resort to rape.¹⁵⁶ The sexuality of Black men was thereby construed as nothing less than a danger to the ideal of White femininity and White supremacy as a whole, since the act of submission of a White woman towards a Black man was irreconcilable with the notion of White superiority.¹⁵⁷ This 'black peril' narrative was a strategy also used by other colonial powers and in the United States of America to subjugate Black

150 On the *Kolonialrat*, see H Pogge von Strandmann 'Der Kolonialrat' in U van der Heyden & J Zeller *Kolonialmetropole Berlin* (2002) 32ff; G Westphal *Der Kolonialrat 1890-1907* (1965).

151 Protocol of the 22nd meeting on 2 December 1897, IV. Session period 1895/1898, BAArch R 1001/6971, 214 (translation by author).

152 Karlowa (n 59) 31 (translation by author).

153 El-Tayeb (n 7) 151; R Habermas *Skandal in Togo* (2016) 63; DJ Walther 'Racialising sex' (2008) 17 *Journal of the History of Sexuality* 18.

154 Habermas (n 152) 63; B Kundrus *Moderne Imperialisten* (2003) 223; M Mamozai *Schwarze Frau, weiße Herrin* (1989) 154ff.

155 El-Tayeb (n 7) 151.

156 El-Tayeb (n 7) 155; Habermas (n 152) 64ff.

157 cf El-Tayeb (n 7) 148ff; Kundrus (n 153) 223.

men.¹⁵⁸ The protection of women for their own sake, therefore, was not a motivating factor for colonial legal policies: After all, White men were rarely prosecuted for sexualised violence they committed against White women or Women of Colour, as will be demonstrated shortly.¹⁵⁹ The claim to save White women from the alleged dangers posed by Black men, therefore, was only a welcome pretext to justify White violence and the suppression of colonised people.

6 Colonial law enforcement practices

The violent nature of colonial criminal law against colonised people is also revealed when examining the practice of colonial law enforcement.

6.1 General patterns

Colonised people were punished much more severely than White people for the same crimes.¹⁶⁰ In cases of homicide committed against White persons in German South West Africa, colonised people were regularly convicted of murder, sentenced to death and executed.¹⁶¹ In contrast, White people were only sentenced to prison terms ranging from a few months to three years for killing colonised people.¹⁶² Besides the extensive use of the death penalty against racialised people, German officials also relied heavily on corporal punishment and imprisonment that included forced labour, while White convicts were commonly sentenced to fines.¹⁶³ The judges used options provided by the criminal law of the Empire to achieve such lenient penalties for White defendants that were accused of harming colonised people, for example, by granting them mitigating circumstances. This allowed judges to avoid the minimum penalties usually determined for crimes such as inflicting dangerous, grave or deadly bodily harm (*gefährliche* or *schwere Körperverletzung* resp *Körperverletzung mit Todesfolge*) or rape, sexual assaults and/or sexual abuse of children.

158 El-Tayeb (n 7) 154; Habermas (n 152) 65.

159 See part 6.3.

160 T Kopp *Nichtdeutsche Angeklagte im deutschen Strafverfahren* (1997); Schlottau (n 19) 332.

161 Leutwein (n 107) 431; Schlottau (n 19) 332.

162 Leutwein (n 107) 431.

163 cf Schlottau (n 19) 442ff.

6.2 Inflicting bodily harm, or: the ‘mistreatment of natives’

Assaults by White colonisers against racialised people they ‘employed’ were usually condoned by the German colonial administration: This ‘paternal right of chastisement’ (*väterliches Züchtigungsrecht*) supplemented the above-mentioned ‘disciplinary punishment’ enacted by colonial officials and enabled White colonisers to – allegedly only ‘moderately’ – assault racialised people for ‘insolence’, ‘disobedience’, and so forth.¹⁶⁴ In practice, colonisers regularly used whips, causing severe injuries or even the death of those they had maltreated.¹⁶⁵ Even in these cases, the White perpetrators were rarely prosecuted; if they were indicted, they could still rely on the colonial justice system to secure them acquittals or incredibly lenient sentences.¹⁶⁶ The courts achieved the latter by denying that the use of a whip constituted an assault committed by the use of a dangerous object,¹⁶⁷ or granting White offenders mitigating circumstances by blaming the assaulted racialised victim for the violence of the White perpetrator and thereby justifying said violence.¹⁶⁸ These strategies allowed the courts to sentence White offenders to measly fines or short prison sentences that underscored those imposed in the substantive provisions. One case that garnered significant attention at the time and in (legal) historical research is the prosecution of Ludwig Cramer, who assaulted seven Black women and one Black man so severely that three of the women died, two suffered a miscarriage, and three of the victims sustained serious injuries.¹⁶⁹ In the appeal proceedings, the High Court of Windhoek (*Obergericht Windhuk*) considerably lowered the sentence imposed by the District Court of Windhoek by granting Cramer mitigating circumstances in seven of the eight cases.¹⁷⁰ Among

164 cf Schlottau (n 19) 268ff; M Schröder *Prügelstrafe und Züchtigungsrecht in den deutschen Schutzgebieten Schwarzafrikas* (1997) 101ff.

165 Schröder (n 163) 103ff.

166 cf Walz (n 60) 232.

167 See, eg, the judgment of the District Court of Keetmanshoop against Eduard Mostert on 27 June 1904, NAN GKE 268 D.45/03, 17ff; cf sec 223a Imperial Criminal Code of 1876, *Reichsgesetzblatt* 1876, 39ff.

168 See the judgment of the District Court of Windhoek against Harry Venter on 6 November 1908, NAN GWI 623 3D.217/08, 16.

169 Judgment of the High Court of Windhoek against Ludwig Cramer on 4 April 1913, NAN GWI 653 3D.56/12 vol 2, 162ff. See M Mamozai ‘Der Fall Cramer’ in H Melber (ed) *Namibia* (1981) 33ff; Schröder (n 163) 109ff.

170 Judgment of the High Court of Windhoek against Ludwig Cramer on 4 April 1913, NAN GWI 653 3D.56/12 vol 2, 193ff.

others, it considered that Cramer's social standing would suffer from a prison sentence, which is why it only sentenced him to four months' imprisonment and a fine of 2 700 Mark.¹⁷¹ The judgment of the High Court was not only outrageous because it significantly downplayed the violence and injustice Cramer had committed, but also because it did not consider that by inserting his finger into the vulva and/or vagina of one of the pregnant Black women named Konturu, Cramer had likely also perpetrated sexual assault.¹⁷² This wilful ignorance of the Court towards sexualised violence committed by White men was not the exception, but the rule.

6.3 Sexualised violence

As part of my thesis project, which is closely related to this chapter,¹⁷³ I evaluated 144 case files concerning sexualised violence, mostly from German South West Africa, to examine the influence of misogynistic, racist and anti-queer sentiments on the outcome of these proceedings; these findings will form the basis for this brief part.¹⁷⁴ From these cases, it can be deduced that White men – usually with a certain degree of systematicity – targeted Black women, men and children. While White men also victimised White women, men and children, the way the courts handled these cases barely deviated from the practice in Germany, which was equally influenced by misogynistic and anti-queer stereotypes. The (attempted) rapes of White women only led to convictions and harsh punishments if the victim matched the patriarchal image of a 'perfect rape victim': a demure 'virgin' or wife without extramarital affairs who defended herself against the assault with all her physical strength.¹⁷⁵ As far as same-sex conduct between White men was concerned, colonial courts criminalised consensual as well as non-consensual acts under the

171 Judgment of the High Court of Windhoek against Ludwig Cramer on 4 April 1913, NAN GWI 653 3D.56/12 vol 2, 162, 198.

172 Judgment of the High Court of Windhoek against Ludwig Cramer on 4 April 1913, NAN GWI 653 3D.56/12 vol 2, 184ff.

173 In my PhD project (*Kritische Kolonialstrafrechtsgeschichte*), I analyse the German colonial criminal law, its practice and the involvement of legal academia from the perspective of critical legal theories (critical race theory, critical whiteness studies, postcolonial legal theory, feminist legal theory).

174 Only a very limited amount of exemplary case files will be cited in the following.

175 See the only case in which the accused was convicted of the (attempted) rape of a White woman: NAN GSW 402 D.106/08.

infamous section 175 of the Imperial Criminal Code.¹⁷⁶ The question of consent did not influence sentencing decisions,¹⁷⁷ since the purpose of the provision was not to protect the sexual autonomy of men, but rather to uphold anti-queer 'moral standards' in society.¹⁷⁸ As far as the sexual abuse of White children was concerned, the courts imposed harsher penalties when White boys or young White girls were victimised.¹⁷⁹ In all cases that concerned White male sexualised violence against White victims, the colonial situation was rarely mentioned as a factor that influenced sentencing decisions.¹⁸⁰ Just like in the Empire, misogynistic and anti-queer sentiments regularly had a determining impact on the outcome of the proceedings.

Proceedings led against White men for sexual crimes committed against Black, Indigenous, and People of Colour, however, were additionally impacted by colonial racism, severely impeding racialised victims from obtaining justice. Rape committed by White men against Black women and teenage girls rarely led to a conviction, and even then, the sentences were as lenient as possible, as the courts deemed the substance abuse of the offenders and their alleged 'strong sex drive' mitigating circumstances.¹⁸¹ The colonial courts also used racist

176 For literature (by non-legal scholars) on same-sex conduct and its criminalisation in German colonies, see HI Schmidt 'Colonial intimacy' (2008) 17 *Journal of the History of Sexuality* 25ff; 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) 149ff; Walther (n 152); DJ Walther 'Sex, race and empire' (2010) 33 *German Studies Review* 45ff.

177 See, eg, the judgment of the District Court of Swakopmund against Friedrich Benthien and Franz Breznik on 13 November 1909, NAN GSW 407 D.100/09, 13ff, where both defendants were only sentenced to two days' imprisonment for the anal rape of another man.

178 cf only Norddeutscher Bund *Motive zu dem Entwurfe eines Strafgesetzbuches für den Norddeutschen Bund* (1869) 150ff.

179 Judgment of the District Court of Swakopmund against Anton Frank on 9 May 1905, NAN GSW 369 D.96/05, 30ff, confirmed by the High Court of Windhoek on 17 July 1905, NAN GSW 369 D.96/05, 92ff; judgment of the District Court of Windhoek against Dimitris Sametes on 27 November 1908, NAN GWI 725 3K.21/08, 19ff.

180 One exception in a proceeding regarding sec 175 of the Imperial Criminal Code is the judgment of the District Court of Keetmanshoop against Otto Walser on 16 January 1912, NAN GKE 309 D.10/12, 52ff. Furthermore, the colonial context played a role in cases against Boers or involving crimes against Boer girls; see, eg, the judgment of the District Court of Windhoek against Wilhelm Vogelbruck on 22 March 1912, NAN GWI 729 K.2/12, 36ff.

181 See the judgment of the District Court of Keetmanshoop against Gustav Voigt on 2 March 1912, NAN GKE 311 D.35/12, 24ff; judgment of the District Court of

and misogynistic stereotypes about the sexuality of Black women to achieve impunity for White perpetrators, especially by assuming that Black women were generally sex workers and, therefore, in no need of protection against rape.¹⁸²

Lenient sentences were also handed down to White perpetrators who had sexually assaulted or raped (several) Black men and male teenagers.¹⁸³ However, the fact that the conviction rate in these cases was significantly higher than in cases involving the rape of Black women and teenage girls cannot be attributed to the courts' desire to punish the at times systematic sexual violence committed against Black men and male teenagers. Instead, the courts sanctioned White perpetrators for endangering the image of colonial masculinity – the superior White heterosexual male – and thereby jeopardising White supremacy, the ideological foundation of colonial rule, as a whole.¹⁸⁴

Proceedings against White men who had committed sexual abuse of Black girls were characterised by the adultification of the latter, with courts accepting the perpetrators' claims that they believed the girls to be at least 14 years old, thereby denying that a case of child sexual abuse had occurred.¹⁸⁵ If the courts convicted the White perpetrators, the sentences were once again as lenient as possible, since the judges granted the defendants mitigating circumstances and/or only found the

Windhoek against Karl Schneider on 31 January 1913, NAN GWI 731 K.21/12, 44ff.

182 cf the judgment of the District Court of Keetmanshoop against Gustav Voigt on 2 March 1912, NAN GKE 311 D.35/12, 24ff (acquitted on several counts of sexual assault).

183 See, eg, the three cases against Victor van Alten: NAN GWI 578 D.2/04; NAN GWI 579 D.13/05; NAN GWI 587 D.6/06 vol 1; judgment of the District Court of Windhoek against Walter Sobtzik on 16 May 1913, NAN GWI 732 K.5/13, 78ff; judgment of the District Court of Windhoek against Maximilian von Rudno-Rudzinski on 8 May 1914, NAN GWI 733 3K.7/14, 26ff.

184 cf the judgment of the District Court of Swakopmund against Freiherr Friedrich von Fürstenberg on 3 July 1901, NAN GSW 346 C.41/01, 68ff; judgment of the District Court of Windhoek against Walter Sobtzik on 16 May 1913, NAN GWI 732 K.5/13, 78ff; judgment of the District Court of Windhoek against Maximilian von Rudno-Rudzinski on 8 May 1914, NAN GWI 733 3K.7/14, 26ff.

185 See, eg, the judgment of the District Court of Windhoek against Karl Kropp and Benedikt Hummel on 2 July 1909, NAN GWI 725 3K.3/09, 21; judgment of the District Court of Windhoek against Adolf Helm on 13 May 1913, NAN GWI 731 3K.1/13, 21; judgment of the District Court of Windhoek against Walter Sobtzik on 16 May 1913, NAN GWI 732 K.5/13, 78ff.

defendant guilty of child sexual abuse and not rape.¹⁸⁶ In one case, the court defended the imposition of the absolute minimum sentence – six months' imprisonment (*Gefängnis*) – by claiming the 'virginity' of the 12-year-old Black girl 'clearly had not been intact' before she had been raped.¹⁸⁷ Black girls were hereby adultified, subjected to misogynoir,¹⁸⁸ and left unprotected by colonial courts. Even the harshest sentence regarding the abuse of Black girls – four years of *Zuchthaus* – against the colonial police officer Odenwald was extremely lenient, considering that his rape had caused the death of the Black girl he had assaulted.¹⁸⁹ With a strict application of the law, Odenwald should have received a minimum sentence of ten years of *Zuchthaus*.¹⁹⁰ The sentence handed out against Odenwald was not even the longest one regarding the sexual abuse of girls, as one White perpetrator was sentenced to five years of *Zuchthaus* for the sexual abuse of one of the two young White girls he had assaulted.¹⁹¹ Judging from the sentencing decisions, the sexual abuse of Black boys was also considered a lesser offence compared to the sexual abuse of White boys: The sentences were more lenient due to the assumption of extenuating circumstances, but still harsher than for sexual crimes committed against Black girls.¹⁹²

186 See, eg, the judgment of the District Court of Swakopmund against Heinrich Eisel on 2 February 1906, NAN GSW 377 D.21/06, 14ff; judgment of the District Court of Swakopmund against Emil Berglof on 21 August 1906, NAN GSW 382 D.115/06, 34ff; judgment of the District Court of Omaruru against Günther Fischer on 4 May 1909, NAN GOM 138 K.1/09, 36ff.

187 Judgment of the District Court of Swakopmund against Emil Berglof on 21 August 1906, NAN GSW 382 D.115/06, 34ff (translation by author).

188 The term was coined by the Black feminist author Moya Bailey and refers to the intersections of anti-Black racism and misogyny that affect Black women; see M Bailey *Misogynoir transformed* (2021) 1.

189 The court denied the causal link between the rape and the death, even though it was deemed 'highly likely' in the autopsy report that Odenwald's crime was responsible for the death of the severely ill 11-year-old victim: NAN GKE 312 D.55/12, 10ff and 87ff.

190 Sec 178(1) Imperial Criminal Code 1871 (n 80).

191 Judgment of the District Court of Swakopmund against Anton Frank on 9 May 1905, NAN GSW 369 D.96/05, 30ff, confirmed by the High Court of Windhoek on 17 July 1905, NAN GSW 369 D.96/05, 92ff.

192 See, eg, the judgment of the District Court of Swakopmund against Ernst Klucke on 18 June 1901, NAN GSW 346 C.37/01; judgment of the District Court of Keetmanshoop against Carl Richter on 25 February 1903, NAN GKE 267 D.8/02, 45, confirmed by the judgment of the High Court of Windhoek on 7 July 1903, NAN GKE 267 D.8/02, 70ff; judgment of the District Court of Windhoek against Salomon Suskin on 2 April 1908, NAN GWI 723 K.5/08, 41ff; judgment

Not only was the outcome of proceedings against White perpetrators obviously prejudiced by the race of the defendant and the victim, but the same pattern can be observed when examining cases against Black men, teenagers and even boys. Unlike White men, Black men, teenagers and boys were regularly convicted for rape and sexual assault of Black women and girls, with sentences being relatively lenient.¹⁹³ The judges used these cases to establish the authority of the colonial criminal justice system, while simultaneously and erroneously externalising patriarchal views on sexuality to colonised communities.¹⁹⁴

German colonisers also imposed their own views on sexuality and gender roles: At least one case from German South West Africa can be reconstructed in which three Black men were punished under section 175 of the Imperial Criminal Code for (most likely) consensual sex.¹⁹⁵ One of the men convicted received a sentence of five months' imprisonment with hard labour and 40 lashes which, in comparison, was much harsher than those imposed against White men who had sexually assaulted numerous Black men and boys.¹⁹⁶ The same pattern can be observed when analysing cases against Black male teenagers and boys for the alleged sexual abuse of White girls. With the sole argument that a harsh punishment was necessary 'in the interest of the white race' for

of the District Court of Windhoek against Andrea Fontane on 18 March 1908, NAN GWI 723 K.4/08, 30ff.

193 See, eg, the judgment of the District Office Windhoek against Jan on 19 July 1909, NAN BWI 61/E.4.d.40 (unnumbered); judgment of the District Office Gobabis against Hudaweib on 21 February 1913, NAN ZBU 699 FV.k.9, 16; judgment of the District Office Keetmanshoop against David Nanny on 12 June 1913, NAN BKE 351 E.40/13, 13ff; judgment of the District Office Rehoboth against Habib-Kind on 21 January 1914, NAN ZBU 699 FV.k.11, 134ff. Exceptions are the cases against Hans Kanigunda (NAN BWI 59 E.4.d.36, 3ff) and the case against Maschina-Hamuel & Others (NAN BSW 174/183-185/10).

194 See, eg, the judgment of the District Office Gobabis against Hudaweib on 21 February 1913, NAN ZBU 699 FV.k.9, 16; judgment of the District Office Swakopmund against Maschina-Hamuel & Others on 25 October 1913, NAN BSW 174/183-185/10, 10ff.

195 Judgment of the District Office Swakopmund against Jonas, Opapa, and Hainas on 8 April 1908, NAN ZBU 704 FV.k.19 vol 7, 252.

196 See, eg, the three cases against Victor van Alten: NAN GWI 578 D.2/04; NAN GWI 579 D.13/05; NAN GWI 587 D.6/06 vol 1; judgment of the District Court of Windhoek against Walter Sobtzik on 16 May 1913, NAN GWI 732 K.5/13, 78ff; judgment of the District Court of Windhoek against Maximilian von Rudno-Rudzinski on 8 May 1914, NAN GWI 733 3K.7/14, 26ff.

such cases,¹⁹⁷ Black teenagers were sentenced to severe sentences such as five years of chain imprisonment and 50 lashes¹⁹⁸ or ten years of chain imprisonment and deportation to Cameroon;¹⁹⁹ at least one of them did not survive the sentence.²⁰⁰ In the latter case, the 16-year-old defendant named Friedrich²⁰¹ had been sentenced to death for the alleged rape of a four-year-old White girl, after the governor had referred the case back to the district office in Omaruru.²⁰² Discontent with the first judgment that had 'only' sentenced Friedrich to eight years of chain imprisonment and 50 lashes,²⁰³ the governor influenced the District Office to alter the sentence: in its first judgment, he claimed, the District Office had failed to consider the 'danger which can arise from overly lenient punishment, resulting in insufficient containment of the natives' desire for white women.'²⁰⁴ The district office in Omaruru gave way to the 'black peril' narrative promoted by the governor, claiming that the death penalty was necessary 'to protect the authority of the white race'.²⁰⁵ The only reason Friedrich was not executed is because the Deputy Governor of German South West Africa commuted the sentence to ten years of chain imprisonment and deportation due to Friedrich's juvenile age;²⁰⁶ besides this decision, his age was never considered a mitigating factor or ground for exemption from punishment.

197 See, eg, the judgment of the District Office Swakopmund against Jakob on 1 September 1908, NAN BLU 223 SPS.182, 22ff (translation by author).

198 Judgment of the District Office Swakopmund against Jakob on 1 September 1908, NAN BLU 223 SPS.182, 22ff.

199 Decree of Deputy Governor of German South West Africa, Oskar Hintrager, of 15 June 1912, NAN BOM 31 C.8.b. vol 5 (unnumbered).

200 File note from 7 or 8 November 1910, NAN BLU 223 SPS.182 (unnumbered).

201 German colonisers gave colonised people they had 'hired' German first names instead of using their real names; some also referred to colonised people in an especially degrading manner by using terms for objects, in particular food and drinks. See also N Oermann 'The law and the colonial state' in G Eley & J Retallack (eds) *Wilhelminism and its legacies* (2003) 175.

202 Judgment of the District Office Omaruru against Friedrich on 4 May 1912, NAN BOM 31/C.8.b vol 5, 22ff. The case file also contains a rare picture of the defendant.

203 Judgment of the District Office Omaruru against Friedrich on 23 January 1912, NAN BOM 31/C.8.b vol 5, 5ff.

204 Letter of the Governor of German South West Africa, Theodor Seitz, to the District Office Omaruru, dated 12 February 1912, NAN BOM 31/C.8.b vol 5, 8ff (translation by author).

205 Judgment of the District Office Omaruru against Friedrich on 4 May 1912, NAN BOM 31/C.8.b vol 5, 22ff.

206 Decree of Deputy Governor of German South West Africa, Oskar Hintrager, of 15 June 1912, NAN BOM 31 C.8.b. vol 5 (unnumbered).

Not only Black teenagers, but also at least two Black boys as young as eight and ten years old were convicted of sexually assaulting a White girl,²⁰⁷ with one of them being sentenced to two years' imprisonment with hard labour and 40 rod strokes, even though as a Liberian he was legally White.²⁰⁸ The colonial justice system, therefore, did not only adultify Black girls, but also Black boys below the age of criminal responsibility and Black teenagers who were treated like adults, stripping them of their – only theoretically – legally recognised innocence, childhood and youth.

Overall, the criminal prosecution and punishment practice confirms that criminal law was used as a tool of oppression that protected the interests of the colonial administration and White settlers, with the colonial courts revealing their sympathy for White violence and their contempt for racialised victims as well as defendants.

7 Summary and outlook

German colonial criminal law was a substantial method with which colonisers tried to establish and safeguard their rule over colonised peoples. As such a building block, colonial criminal law was also devised in accordance with colonial racism and the ideology of White supremacy, affecting its basic structure, criminal proceedings, substantive law, the law of sanctions, and its practice. While criminal law for White people largely corresponded to imperial criminal law, a discriminatory legal regime was created against colonised people. The colonial criminal justice system was, by design, made to protect the interests of the colonial state as well as those of White colonisers. This heavily influenced the outcome of proceedings, in which judges revealed a complete disregard for the harms White people caused to racialised persons. The decisive role colonial racism played in the formation and application of colonial (criminal) law must be considered when coming to terms with Germany's colonial past; as such, colonial legal regimes as well as colonial legal realities require more attention in legal historical research. However, this

207 Judgment of the District Office Lüderitzbucht against Pilo on 20 November 1907, NAN BLU 222 SPS.112, 7; judgment of the District Office against Moritz on 14 January 1910, NAN BSW 173 15/10 (unnumbered).

208 Judgment of the District Office Lüderitzbucht against Pilo on 20 November 1907, NAN BLU 222 SPS.112, 7.

remains just one of the puzzle pieces of dealing with colonial injustices, their continuing effects, and challenges in addressing them as well as for identifying legal continuities in former colonies and colonial powers – a discussion reflected in several chapters in this long overdue edited volume.

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