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Introduction. Colonial Comparisons and Comparative Law

The German colonial empire arose out of a comparison; out of a comparison the end of this colonial empire was justified.

Since the 1840s, "colonial striving" (*koloniale Projektmacherei*) had not subsided in Germany's bourgeois circles. Referring to other European states and their overseas possessions as well as the riches which they derived therefrom, and their growing position of power in the world, was part of the argumentative repertoire of colonial enthusiasts. With the 1871 founding of the nation-state, "colonial abstinence" appeared less and less "coherent", "conceivable or, even, in accordance with reason", since even smaller states like Portugal, Spain or Holland actively pursued colonial politics.[1] Aside from the economic, social-Darwinistic or social-imperial justifications, these (envious) comparisons always played a role whenever it came to promoting or justifying German colonial possessions.[2] The exit point for these comparisons was the "perception … of an own deficit in comparison to nations …, which were estimated to be more successful". "The comparison then led to the attempt to imitate an admired example".[3] Thus the attempt began to create a "German India" in Africa, a "German Hong Kong" in China. Such comparisons expressed the hope for geo-political and colonial parity as a German "world power" which, indeed, had yet to be achieved.

On account of this imitative constellation, the literary scientist Russel A. Berman has described German colonialism as "secondary". Missionary zeal

1 Gründer (2004) 22, 25.

2 See, instead of many: Köpen (1905) 237 et seq.; Friedrichsmeyer/Lennox/Zantop (1998) 8 et seq.

3 Osterhammel (2003) 463 – who has promulgated the rule: "No transfer without prior perception of difference."

did not play the primary role. "Rather, the primary motivation to establish an overseas empire was parity with other colonial powers, specifically the competition but also the imitation of Great Britain. … [T]he German colonial discourse possessed an imitative, epigonic character."[4] Specifically in this German self-reflection, which saw itself as being "forced to take second place", lay the foundation of something like a German colonial "Sonderweg".[5] This path has, to be fair, been discussed in recent years with reference to the application of force in the colonies and potential continuities into the time of National Socialism. Next to many other objections to this "historical-teleology" it has, however, been stated that, in the colonial context, the "European, trans-national dimensions", the "complex entanglements of reciprocal influences, of transfer of ideas and politics between states and their agents" ought to be analysed.[6] The initially described contemporary German comparison with older colonial nations and the orientation toward these suggest this definitively. From these comparisons ensued results which tendentially confirm similarities amongst the colonial powers – from every-day colonial administration through to acts of violence. According to the state of research, "much speaks in favour of the fact that, during time of High Imperialism, the differences amongst the European colonial powers overall took a back seat to their commonalities. The reciprocal attentiveness for the methods of the respectively other colonial powers serves as evidence of this."[7] Insofar as this was concerned, there was progressively less reason to "ignore the colonial knowledge of other states in the legal and administrative areas",[8] given the fact that German "legislation [had] always, to a lesser or greater extent, attempted to learn from historical and foreign experiences".[9]

This article will discuss the German attentiveness to the colonial law of other powers and its role as an exemplar for the German legislature and

4 Berman (2003) 28.
5 Kundrus (2003b) 9.
6 Kundrus (2006) 83 et seq.; cf. Gerwarth / Malinowski (2007).
7 Laak (2004b) 257.
8 Sippel (2001) 354.
9 Dölle (1960) 23. The author refers to the discussions surrounding the General German Commercial Code (*Allgemeines Deutsches Handelsgesetzbuch*), design patent law, the Insolvency Law (*Konkursordnung*), the German Civil Procedure Code (ZPO) and the German Civil Code (BGB).

administration, i.e., colonial comparative law. In this vein, by way of introduction (I.), the context for the transferring, entangling and comparing of laws will be discussed. Subsequently (II.–V.), with reference to four colonial law fields and (VI.) "comparative law" voyages, the German reception of provisions of foreign law but also deviations from these "examples" shall be analysed. Moreover (VII.), the contemporary 'method' of colonial comparative law will be briefly discussed prior to, by way of conclusion, investigating the relationship of comparison and difference in German colonial law.

I. Colonial Law in the Context of Transfer, Entanglement and Legal Comparison

Comparison – not as an historical method (historical comparatism), but rather as the object of historical analysis of law and legal systems[10] – takes the contemporary investigation of "foreign" codifications, norms, institutions and procedures as an occasion to demonstrate the reciprocal (legal) transfer between colonial powers and, finally, their entanglement. Taking as an example German colonial law, we shall historically present and analyse "applied comparative law". The goal of this, i.e. of applied comparative law, is to find the "appropriate solution for this or another specific problem". It is not only relevant in a legal-sociological sense to emphasise that the applied "comparatist is often [under] a compulsion to act: driven by the vital question whether and how, in a particular point, the valid law … should be changed, he must come up with concrete proposals in a limited time-frame".[11] These characteristics of empirical and decision-making structures, the urgency of time and the underlying power relationships are not only to be taken into account vis-à-vis the legislative processes as such. In this context it should be emphasised: "Comparatists [even those in the non-academic field] … are participant observers."[12]

If historians today emphasise the transfers between nations and regions, the task follows herefrom, by way of a critical source analysis, to investigate

10 Cf. Hug (1932); critically on the possibility of a history of comparative law: Frankenberg (1985) 426; Michaels (2002).

11 Zweigert/Kötz (1996) 12.

12 Frankenberg (1985) 441.

those 'craftsmen of transfer' who, in media and institutions, compared, transferred and entangled. In a certain way, the legal comparison analysed in the ministries and colonial offices is a part of the entangled history (*histoire croisée / verflochtene Geschichte*) of, as it may be, Germany and France.[13] Thus, Helmut Coing showed "how modern property law in both countries was created on the basis of a mutual exchange of ideas".[14] A decisive difference was, however, that on account of the object of comparison ("colonial law"), a third category always played a role, namely that of the "colonial other", whose distorted picture as an African "savage" had to be first *comparatively* created within and with the discussed norms[15] and who, nevertheless, acted and reacted independently. At the same time, the transfer analysis cannot be content with confirming "successful" adoptions. It must also take into account resistance and change.[16]

Beginning with the assumption that "the study of colonialism is by nature comparative or cross-national",[17] the necessity of crossing imperial borders in order to achieve a better understanding of colonialism and imperialism has been rightly described as a "commonplace of modern imperial historiography". Whilst important comparative studies exist in the natural sciences and also in reference to the ideologies of (colonial) rule,[18] colonial comparison of laws has hitherto only been given limited academic attention. Indeed, for a long while colonial legal history remained "a relatively untouched field".[19] This may also be on account of the rise of post-colonial and trans-national questions which has caused the framework of the nation-state, with which law is generally connected, to lose its importance for historical analysis. Indeed, this framework remains irreplaceable for legislation and individual legal systems.[20] Nonetheless, even here, influences, processes and discourses can be discovered which reach beyond national borders.

13 Zimmermann et al. (1999); cf. Arndt et al. (2011).
14 Coing (1978) 168.
15 Nuzzo (2011) 211.
16 Haupt/Kocka (2004) 32.
17 Finaldi (2005) 245.
18 Stuchtey (2005) 20 with additional references; cf. Leonhard/von Hirschhausen (2011).
19 MacKenzie (2001).
20 Haupt/Kocka (2004) 35; cf. Sippel (2005).

Whilst the "discipline of history, since historicism … has been largely reserved vis-à-vis comparisons",[21] "legal history has traditionally been closely connected to comparative law".[22] Moreover, in the second half of the nineteenth century, applied "legislative comparative law" was an established procedure (although comparative law, as an academic discipline, had only gradually begun to receive recognition).[23] The history of "comparative law as the basis of legislation"[24] has been addressed repeatedly in an inter-European context and "important early forms of comparative law" exist which go back far further than the 19th century.[25] Among jurists, there developed a recognition that the "experiences of other peoples provide an indispensable reservoir for every true legal reform".[26]

The Rostock public law scholar Friedrich Bernhöft explained the advantages of a "general [i.e., going beyond state borders] methodological instruction of law [*Gesetzeskunde*]": "Regarding that which the legislature should seek out, regardless of which form that for which is striven shall achieve, the extant laws and experiences give reliable reference points for this which have been made with their determinations. One does not need to experiment, since the experiment has already been conducted by others, and its result is available."[27] For the French judge R. de la Grasserie, the "advantage" of comparative law lay "in the completion of all legislation". "All foreign laws can be regarded as a great experimental field. … Each new law is an attempt, limited to a small space, from which other peoples can derive benefit."[28] Further, the French comparatists Raymond Saleilles and Edouard Lambert argued: "Both assigned to comparative law the function of contributing toward the finding of the 'right law'."[29] Legal harmonisation, even in questions of detail – e. g., in colonial law – would here lead to a

21 Haupt/Kocka (1996) 23, who derive this reticence from the necessity of "selection, abstraction and absolution from the context"; in the same vein: Haupt/Kocka (2004) 25.
22 Michaels (2002) 110; cf. Constantinesco (1971) 142: "Vergleichung und Rechtsgeschichte, die häufig miteinander verwechselt werden"; Utermark (2005) 55–118.
23 Zweigert/Kötz (1996) 49–52; Kunze (2004) 19–23; 33–37.
24 Coing (1978) 161; cf. Stolleis (1998); Schwenzer (2008) 71–76.
25 Scherner (1978) 135.
26 Constantinesco (1971) 137.
27 Bernhöft (1895) 8; regarding Bernhöft cf. Zweigert/Kötz (1996) 57.
28 De la Grasserie (1904) 347; cf. Coing (1978) 161; 178.
29 Sandrock (1966) 18.

provisional function of legal comparison.[30] "Comparatists have done their work in a variety of spirits, reaching from noble humanism to straightforward instrumentalism."[31]

One of the most politically and academically influential German public law theorists in the second half of the 19th century, Rudolf von Gneist, concerned himself from the start of his legal career with comparative law and did so on an historical basis.[32] Even his famous "English Studies [were undertaken] in the tradition of the Historical School".[33] Finally, following Gneist's analyses of English "self-government" and its progressive development in Prussian self-administrative law (*Selbstverwaltung*), comparative law achieved effective political influence in German constitutional development.[34] It had always been his goal "to derive practical benefits for Prussia and Germany from the English experience".[35] The officials in the ministries of Berlin thought and acted similarly with their "comparative law enquiries".[36] Thus, in 1884, during the reform of capital markets law, they assigned an appendix to their motives which represented "foreign stock market law in its development".[37] Even "overall German criminal law jurisprudence [had been] conquered by the comparative method".[38]

This tradition of comparative law as a natural practice in the ministries of Berlin made it only more likely that existing colonial regimes would be examined when it came to the "fresh" (*am grünen Tisch*)[39] development of a German colonial system. The German administration recognised that foreign colonial legislation could provide significant direction for its own regulatory activity. "Comparatists" – in the case described here – were German colonial bureaucrats, whether it be in the Berlin "headquarters" (Colonial Department of the Foreign Office or, after 1907, the Reich

30 Cf. Michaels (2002) 101; 104; regarding the intention of "universal law", see to begin with Eduard Gans cf. Hug (1932) 1055 et seq.
31 Frankenberg (1985) 426.
32 Gneist (1845).
33 Hahn (1995) 59.
34 Gneist (1863).
35 Hahn (1995) 58.
36 Stolleis (1998) 13.
37 Coing (1978) 174; cf. Stolleis (1992) 437: "Public law is taking its place … in the general expansion of legal-scientific perspectives to include other legal cultures."
38 Cf. Constantinesco (1971) 141.
39 Cf. Pogge von Strandmann (2009).

Colonial Office) or in the African colonies. The objects of their comparison were existing institutions and structures which they considered typical or unusual, but also processes, problematic topics but also practical modes of operation or discourses in light of the *situation coloniale*.

In the following, in light of a series of concrete examples from the everyday administration of German colonial bureaucrats, the "attentiveness to the methods of the respective other colonial powers" will be investigated. The analysis of their legal-comparative mode of operation demonstrates, on the one hand, the diversity of legal topics for which reference was made to foreign examples. On the other hand, in this manner, a legal-argumentative and legally practical entanglement of the colonial empires prior to the First World War emerges. Without the examples and the influence of other colonial states, the German variant would be unthinkable. The German example is also useful because, on account of the late entry into the ranks of the colonial powers, German bureaucrats could assume that virtually all of the "colonial questions" with which they were confronted had already been subject to a legal-technical solution elsewhere which it would be wise to consult. A complete "reinvention" of colonial law was not necessary; even if only in exceptional situations, such as during the German acquisition of the formerly Spanish Caroline and Marianas Islands in 1899, where colonial law regulations were already in force on the ground, whose implementation could be perpetuated, inter alia, by the German administration.[40]

II. The Creation of German Colonial State Law out of Comparative Law?

The discussion surrounding the necessity of "imitating" the successful imperial examples was not purely a propaganda instrument in the hands of colonial agitators. Subsequent to the dismissal of his concerns regarding colonies in 1884 which occurred, inter alia, due to tactical considerations vis-à-vis the election, even Reich Chancellor Otto von Bismarck made it clear that he would orientate himself toward the older colonial powers, but foremost toward Great Britain, in power-political and administrative-technical terms. When the British government caused difficulties in 1884 during the annexation of what later became "German Southwest Africa" (GSWA),

40 Cf. Sack (2001) 326.

the Chancellor accused it of "egoism" and "insulting [German] national feeling". "The 'quod licet Jovi etc. [– non licet bovi]' cannot be applied to Germany." The quote shows that, on the German side, the desire for prestige stood behind the efforts to attain equal rights under international law: in light of the elections, the Reich administration needed to ensure that it did not appear like the "ox" next to the "Jupiter" of London.[41]

Before the Reichstag, then, Bismarck briefly declared that he did not desire formal "colonies" but rather areas which stood under German "protection" (*Schutzgebiete*, protectorates). They ought to be administered "in the style of the English Royal Charters".[42] However, these administrative plans, i.e., of "commercial sovereignty under protection" of the state, soon were revealed to be illusory – as in most of the other European colonies. Privately financed "protection charter" companies were nothing more than "[a] relic from a past [mercantile] age".[43] They were neither willing nor capable of "administering" the areas in Africa or along the Southern Pacific. However, this did not change the fact that, following the late 1880s, the emergent German state colonial administration borrowed from the examples of the older colonial powers. Regarding both the organisation and administration of German possessions from Berlin and the colonial practices on the ground, making comparisons across borders became the rule.

In this way, it happened that comparative law stood at the beginning of German colonial state law (*Kolonialstaatsrecht*). Reich Chancellor Bismarck directed the German representations abroad, even during the Berlin Congo Conference in 1884/5, to report to him regarding the colonial legal systems of their host countries. He wanted to orientate himself regarding their possibilities and problems and, in light of these examples, be able to draft a structure for German colonial law. The British model was of particular interest to him. However, the Reich Chancellor showed his dissatisfaction with the report by Legation Councillor von Frantzius, which was not entirely cohesive, regarding British colonial law. He was unable to enable

41 Bismarck an Münster am 1.6.1884, in: Lepsius / Mendelssohn / Timme (1922), Nr. 743: 61; Canis (2004) 217 et seq.

42 SBRT 5. L.P., 4. Sess., Vol. 2, 42. Session dated 26.6.1884, p. 1062; cf. Schildtknecht (2000) 58–62; Laak (2004b) 106–108; Wagner (2002).

43 Young (1994) 103; cf. Speitkamp (2005) 30–35. 1884/85 German "Protectorates" were "established" in: German East Africa, Cameroon, German South-West Africa, Togo, New Guinea; later included: Samoa and Tsingdao.

him [i.e., Bismarck] to understand the relationship of regulatory and statute law as the prerogative of the Queen or Parliament: "The English system is not clear to me." The explanation: "The English settlers bring their home law with them" was answered by Bismarck with the question, "The whole of English legislation, but the natives? Expulsions? Freedom of movement?" Of particular importance to the Reich Chancellor was the royal prerogative to issue regulations for the British colonies. The assertion that "the legislative right over all colonies [belongs] to the British Parliament" was met with the comment: "That isn't correct."[44]

Even in the following, comparative law opinions were prepared in the Foreign Office and in the Reich Justice Office for the promulgation of the *Schutzgebietsgesetz* (i.e., "Protectorate Law", or SGG). They, however, reduced the complexity of British colonial law to the message that crown colonies were governed via Orders of Council (translated into *Regierungsverordnung*). The SGG, which entered into force in 1886, was orientated toward the imperial system of regulations (*Verordnungen*), which Bismarck preferred, and as such was only distortedly orientated toward the "most chief colonial powers". He, and the Reich administration, chiefly did not want to turn the "Protectorates" into a "parliamentary parade-ground".[45] Thus, pursuant to Sec. 1 SGG, the Kaiser had, on account of his "protective authority [*Schutzgewalt*]", control over the legislature, the executive as well as the judiciary.[46] His privileges were limited pursuant to Sec. 2 SGG in the areas of civil and criminal law and court procedure law, which conformed with the Consular Judiciary Law (*Konsulargerichtsbarkeitsgesetz*) of 1879 and which, in its turn, referred to the relevant Reich laws. Hence, for Europeans in these areas, the laws valid in the Reich were also valid in the Protectorates. In other legal areas, "namely in the field of administration, the Kaiser has unlimited legislative power". In everyday colonial administration, the power

44 Bundesarchiv Berlin BAB R 3001/5273, "AA betr. das staatsrechtliche Verhältnis der Kolonien der hauptsächlichsten Kolonialmächte zum Mutterlande", 23.2.1885 (GLR v. Frantzius – mit Randbemerkungen S.D. des RK v. Bismarck); regarding the (critical) modus operandi of Bismarck cf. Morsey (1957) 277–284.

45 Thus Bismarck's dismissive margin note regarding the 1882 proposal to purchase Formosa for Germany, cited in: Pflanze (1998) 372; Grohmann (2001) 81 et seq.

46 Section 1 SGG: "Protective authority in the German Protectorates is exercised by the Kaiser in the name of the Reich." "Die Schutzgewalt in den deutschen Schutzgebieten übt der Kaiser im Namen des Reiches aus."

to issue regulations (*Verordnungen*) pursuant to Sec. 3 SGG, which also encompassed "regulating the legal relationships of the natives", became decisive.[47] This was expanded in revisions (1888; 1900) in such a manner that the Reich Chancellor and the governors received regulatory power which they, in turn, could delegate.[48]

With the characterisation of a "dictatorship of the Kaiser"[49] in the colonies, this state law construct has not been adequately analysed in historical terms. Not the monarch but, rather, the bureaucrat was the all-determining figure of colonial rule. Even Hannah Arendt, in connection with "Race and Bureaucracy", determined that in the imperialist age, the "systematic oppression via regulations, which we call bureaucracy" had become the characteristic attribute of colonial rule. In the colonies, she saw the administration as standing in place of a government, of "regulations standing in place of the law". As an example, Arendt named the "régime des décrets" which had been introduced in Algeria by the French and which was analogous to "the same 'government by reports' which had originally defined British rule in India".[50] But she could have just as aptly referred to the German "pyramid of delegated regulatory power"[51] from the Kaiser to the colonial district officer. Bismarck's orientation toward the British model of colonial rule of rule by regulation (as it had been presented to him) contributed to the bureaucratic regulatory pyramid becoming the defining characteristic of German colonial state law. As with its counterparts, the German colonial state remained "a government of administrative decrees by the governor, his council and his apparatus". A separation of the executive and legislative as well as an independent judiciary were, "de facto", not present.[52]

47 Meyer (1891) 503.

48 Regulation of the Reich Chancellor dated 25.12. 1900; for all Protectorates 27.9.1903 – Right of delegation in § 6. The "Instruktion für die Bezirkshauptleute [in DSWA]" dated 1.5.1900 in: Leutwein (1907) 553–557.

49 Sippel (2001): 355 et seq.; cf. Münstermann (1911).

50 Arendt (1958) 285.

51 Hausen (1970) 24.

52 Osterhammel (2003) 64; cf. Speitkamp (2005) 42.

III. The "Competency Law for all Protectorates"

In the "General Act of the Berlin Conference" (1885) the Signatory Powers recognised, in Sec. 35 "the obligation to insure the establishment of authority in the regions occupied by them". They ought to be capable of "protect[ing] existing rights". The legal and factual gestalt of the "authority" remained at the disposal of the colonial powers.[53] In everyday German administration, the absence of separation of powers in the SGG and the generally phrased colonial regulatory competency caused the creation of numerous ambiguities which led to "disputes". The governor of Samoa, Wilhelm Solf, discussed a "condition of insecurity in distinguishing competencies". He considered this to be "unsustainable in the long term" and suggested, in 1906, "to pass a law in which the competency of the Kaiser, the Reich Chancellor, the Colonial Office, the Governor and his subordinate administrative organs is determined once and for all".[54] In the following year he continued to urge such a legal regulation of the "rights and obligations" of the various colonial instances, whereby he included in this the "legislative entities".[55]

However, the Colonial State Secretaries Bernhard Dernburg and Friedrich von Lindequist did not address the matter. The officials and Reich administration [i.e., those responsible for introducing such legislation] were intimidated by the complexity of a legal regulation. It was not until 1912 that the Reichstag placed the topic on its agenda by way of a resolution.[56] This was triggered by complaints about the costs of colonial administration and the high number of bureaucrats in the colonies. With respect to an overview of the laws regarding competency, the parliamentarians hoped to achieve a simplification of the administration and an increase in the degree of reliance on colonial self-government which, in the end, would lead to a reduction in costs. They knew well that by passing a law, the co-determination right of Parliament in colonial matters would be extended beyond budgetary authority, and so a majority petitioned the Reich Chancellor to

53 General-Akte der Berliner Konferenz, 26.2.1885 (RGBl. 1885, Nr. 23: 215–246): Article 35: "l'existence d'une autorité suffisante pour faire respecter les droits acquis".

54 BAB R 1001/5595, p. 3, "Kompetenzgesetz für die Schutzgebiete", Vermerk Solf, 22.2.1906.

55 BAB R 1001/5595, p. 6, Solf to AA, KA, 21.5.1907 "gesetzgebende Körperschaften".

56 Application by Gothein and Gen., 23. Session of the Commission for the Reich, 25.4.1912.

prepare "a general competency law for all Protectorates under consideration of the individuality of the specific areas".[57]

The officials in the Reich Colonial Office who were subsequently entrusted with the matter were not persuaded of the necessity of a "uniform competency law". The director of Department A2 thought it would be "not appropriate". He drew attention to the fact that the "English and French … addressed these questions also colony-by-colony, not uniformly". Department A3 was concerned about the fundamental structure of the Bismarckian colonial constitution. Indeed, a uniform law would imply that its "changes would require the consent of the Reichstag". Such a situation could "in no case" be suffered to occur. Department A1 also held there to be "no occasion to surrender the principle of the Kaiser's protective authority [*Schutzgewalt*]". Rather than a general colonial competency law, it was suggested that the governments be mandated with the collection of all organisational and competency regulations in their respective colonies.

Wilhelm Solf, who had been elevated to Colonial State Secretary in December 1911, declared his consent with this proposal at the beginning of 1913. He was open about the fact that he, as well, desired to "weaken the impact of this resolution". His goal was not an expansion of the rights of the Reichstag at the expense of the Kaiser's right to issue regulations, but rather a "compilation of the administrative proceeding and a description of the competencies of the various instances". Solf, always ready to "learn from the British coloniser, to view him as the older and more experienced one",[58] therefore provided his officials with a copy of the "Regulations of Her Majesty's Colonial Service" (1911) as an "example" (*Vorbild*). With 403 paragraphs and roughly 100 pages, the "Regulations" provided a summary of the competency regulations for the British Empire. "Something like this ought to be created for the Protectorates."[59] It served colonial comparative law that British colonial law, similarly to its European Continental counterparts, was increasingly being codified. This simplified reception by German officials. Indeed, even prior to the Paris Comparative Law Congress of 1900,

57 BAB R 1001/5595, p. 12, Vermerk zum Antrag der Budgetkommission, RT-Drucksache Nr. 385, 3.9.1912.

58 Vietsch (1961) 103 et seq.; 127: Solf considered "Germany as the junior partner of England … and [determined] the German role in the world in this manner."

59 BAB R 1001/5595, pp. 44–48, Vermerke KompetenzG, Ref. A1, A2, A3, A6, A10, StS Solf, 28.1.1913.

"the premise [was acknowledged] that only that which is comparable – i.e., similar – is possible to compare". Hence, the limitation expressed in academia, namely that comparisons were limited to "statute law and, by and large, the legal systems of the European Continent",[60] did not apply to colonial law.

In a long decree which summarised the discussion, the six German governors were tasked in August 1913 by the Reich Colonial Office to present a table of the competency regulations in their colonies within a year's timeframe. With the explanation that the "English colonial administration" had created "an exemplar", Solf also sent them copies of the 'Regulations'. These offered a "true template and summary of administrative procedures … Something similar ought to be appropriate for the German Protectorates". Thus, it was the wish of the Secretary of State that "every Protectorate should receive its own constitution [*Verfassung*]", which would not be understood in the spirit of "German law", but rather of the "English constitution. (That is, roughly, a general administrative regulation.)" The Reich Colonial Office rejected using the Prussian Competency Law (*Zuständigkeitsgesetz*) of 1883 as a "template" or to go down the "path of imperial legislation" with a colonial "Competency Law". It was intended not to limit the Kaiser's power of regulation; furthermore also the "easy ability to adjust [the administration of the Protectorates] ought to remain intact".[61] The governors in Dar-es-Salaam (German East Africa) and Buea (Cameroon) declared in May and July 1914 that it would not be possible for their bureaucrats, on account of time constraints, to prepare the table. Shortly thereafter, the matter "resolved" itself due to the outbreak of the First World War.[62]

60 Zweigert/Kötz (1996) 58; similarly: Schwenzer (2008) 75.

61 BAB R 1001/5595, pp. 133–46, RKA to Gouv Daressalam, Windhuk, Buea, Lomé, Rabaul, Apia, 30.8.1913.

62 BAB R 1001/5595, p. 162, Gouv Daressalam to RKA, 17.5.14; p. 165 Gouv Buea to RKA, 7.7.14; Memorandum RKA, 11.8.14.

IV. Colonial "Native Status" in a Comparative Law Perspective

The fact of the many commonalities in the organisational structures of the colonial states has been explained, variously, as the result of similar policies: "everywhere the organization and reorganization of the colonial state was a response to a central and overriding dilemma: the native question".[63] However else the various colonial systems answered this "native question", the definition of those it concerned remained fundamental, i.e., who would be considered "a native"? The colonial goal was definitiveness. This appeared necessary in order to create a binary code of "savage vs. civilised", without which colonial discourse and colonial law could not exist. However, this question was easier to answer theoretically than practically. It was based on a negation: the "native" was "savage" because he was not "civilised". "Such an utterly antithetical being could not be brought within the replete realm of civilization … the savage, in short, was denied a participative legal personality."[64] A legal definition of this "savage" was missing in German law for a good reason.[65] There existed German citizenship,[66] but it was not the intention of the ministerial officers to create the "legal term of being a Protectorate citizen".[67] With the declaration that "natives" (in contrast to a German Reich citizen) "belonged to the coloured races inhabiting the German Protectorates, including mixed individuals", legal definitiveness was avoided. Skin colour was just as little a compulsive indicator as the fact of having been born in a colony. This is shown by reference to Afro-Americans or "Goanese and Parsi" as well as "non-Mohammedan Syrians" in German East Africa who, qua governmental regulation, were not qualified as "natives".[68]

The status of given individuals could be disputed either because a European-African marriage had issued a child or because an African woman had married a European man. The political intent in the German colonies, post 1900, was aimed increasingly at considering "mixed marriages" and "mixed offspring" to be "undesired" and to stop, if not criminalise, sexual

63 Mamdani (1996) 16; cf. Bernhöft (1897).
64 Cf. Fitzpatrick (2001) 20.
65 BAB R 1001/5580, p. 3, Notiz betr. Fall Baumann, StS Solf, Meyer-Gerhard, 21.4.1913.
66 Gosewinkel(2004); Gosewinkel (2001).
67 BAB R 1001/5578, p. 21, AA, Notiz zu Bl. 18, RMA an AA, 17.12.1901.
68 BAB R 1001/5583, p. 48, RKA to AA, 15.7.1913.

contact between settlers and African women. In 1905, in German Southwest Africa, the prohibition of so called "mixed marriages" was issued.[69] The debate over this was part of an internationally recognisable tendency to more stringently separate the colonial rulers from the colonised, and this was to be legally reinforced.[70] Thus, it should be emphasised that "the regulations [in German Southwest Africa] regarding racial segregation were orientated toward the patterns tested in colonial practice in Algeria, Rhodesia and the South African provinces of Natal and Transvaal".[71] Increasingly, due to the discriminatory "Native Law" which, starting in 1907, instituted obligations to work and carry a passport, it became – in German Southwest Africa as well – desirable for the affected children and wives to attain a European citizenship and thus be considered "white".

In addition, colonial bureaucrats were faced with the "difficulty" that for certain couples, "barriers" were crossed relating not only to skin color but also to citizenships. The rules of private international law were, in practice, not always unambiguous. Thus, the bureaucrats in German Southwest Africa repeatedly had to deal with the question as to whether legitimate children of Prussian or Saxon citizens whose mothers had issued from marriages with British citizens with so-called "bastard-women" could attain German citizenship via patrilineal descent. This was even of importance for the British administration. From Cape Town, it observed closely the legal development in the neighbouring German colony. Several hundred British citizens had settled there. They had, mostly coming from the Cape Colony, settled there even prior to the German occupation of Nama and Hereroland. When the Territorial Council (*Landesrat*), the organ of self-government of German Southwest Africa,[72] in 1912 passed a resolution requesting that the governor officially recognise the "mixed marriages" concluded up until 1905 – under the proviso that the married couple would, in the estimation of the responsible district deputy, "present white mannerisms"[73] in raising children and in their "moral" habits – the British government intervened.

69 Cf. Hartmann (2004); Hartmann (2007).

70 Cf. Gosewinkel (2004) 244 et seq.; Kundrus (2003c) 220; regarding the Italian case: Nuzzo (2011) 217, "to discourage the interracial union".

71 Sippel (2001) 354.

72 On the translation of German colonial terminology see Ridley (1996) xv.

73 Kundrus (2003c) 276.

It considered it "desirable that no British subject who had the status of a white man when the Protectorate was taken over by the German Government should be reduced to the status of a native". The same ought to also apply to his legitimate children, over whose legal status no German district deputy ought to decide. In the British Empire, debates had begun at the time in relation to "imperial citizenship",[74] and questions regarding status, "race" and belonging to the Empire were not going to be made more difficult by conflict with German laws. The Reich Colonial Office in Berlin had to concede that, pursuant to British marriage law, "mixed marriage" was permissible and thus "would lead to acquisition of British citizenship for natives [and their children]". Given this ancestry, the "status rights of a white" would, "also now continue to be recognised" for a Briton.[75]

From this, it followed for German bureaucrats that "foreign citizens [here the British woman Agnes Bowe] … [are] not natives in the sense of the Protectorate Law [SGG], even when they are coloured". By way of marriage with a German, these individuals could acquire Reich citizenship.[76] In other cases, the admission of the binding legality of a marriage trumped the political intention to prevent "mixed race individuals" (*Mischlinge*) with German citizenship. Secretary of State Solf, who in 1912 opened the so-called "mixed marriage" debate in the Reichstag by referring to the "ill effects of mixed marriages" in nations which "have conducted colonial politics longer than us" and warned the Parliamentarians regarding "woolly-haired grandchildren",[77] conducted his administrative practices less ideologically than his statements would lead one to expect.[78] In 1913, he declared as valid the marriage of Prussian citizen Friedrich W. Krabbenhöft, concluded 1881 in Keetmanshoop, with the British woman Lucie Forbes. The "condition that Mrs. Krabbenhöft is descended on her mother's side from bastards of the Cape Colony" was "of no influence on the validity of the marriage" and "the transfer of citizenship to his wife and his children". In this estimation, Solf was followed by the Reich Justice Office and the legal

74 Cf. Gorman (2006) 8 et seq.; 50 et seq.
75 BAB R 1001/5585, p. 4, RKA to Gouverneur Windhuk; p. 3, RKA an AA, 11.12.1912.
76 BAB R 1001/5585, p. 6, RKA to Gouverneur Windhuk, 5.7.13 (Marriage of Farmer Schubert with Agnes Bowe).
77 Stenographische Berichte des Reichstag, 53. Sitzg., 13. L.P, 2. Mai 1912: 1648 (C).
78 Cf. Gosewinkel (2004) 247.

department of the Foreign Office.[79] In the case of Mrs. Windelberg, a similar decision was made; she had married a German pursuant to English law in 1907 in Rietfontein, British Betchuanaland. Even here it was irrelevant that Mrs. Windelberg "has the appearance of a mulatto [*Mischlingin*]". She and her children had, pursuant to Sec. 5 of the Citizenship Law of 1870, acquired the husband's or, as it may be, father's citizenship at marriage or birth.[80]

In this discourse, "'being white' was separated from the white body by jurists by way of the introduction of a supplementary category of citizenship".[81] Aside from the legal supplementary category, the cultural component of "being white" also applied. In this sense, questions regarding conduct of life were relevant, as well as capabilities and knowledge. Thus, the decision of the Windhoek Superior Court to declare itself as not competent regarding the criminal procedure against the examined engineer (*Diplom-Ingenieur*) Baumann, on account of his "possessing a mixture of coloured blood", and to transfer him to the native jurisdiction was regarded by Solf as "very dubious". Although he considered the courts – in the absence of a legal definition – as being competent to determine "who is a native", they nevertheless ought to do this "with reference to language usage".[82] This, however, the Superior Court obviously had not done. It would not have occurred to anybody in German Southwest Africa to describe Baumann, who had studied in Germany and served there in the military, as a "native" on account of one of his four great grandmothers.

With this investigation of specific cases, which also referenced cultural "attributes" of the individual, the German colonial administration did not – as it knew – stand alone. Imperial discourses were defined by "the common conflation of 'race' and 'culture'".[83] For example, the bureaucrats in the Reich Colonial Office had at their disposal a circular of the Governor General of Madagascar in which he clarified the treatment of the legal status of "enfants métis" of European fathers on the island. In this matter, children

79 BAB R 1001/5583, p. 65, RKA to AA, 18.7.13; p. 67, RJA an RKA, 7.8.1913; p. 68, AA an RKA, 20.8.1913.

80 BAB R 1001/5578, Bl. 32, RKA to Gouv Windhuk; Bl. 33, RKA to Strafanstalt Lüneburg, 17.5.1913; cf. Braun (1912).

81 Kundrus (2003c) 276; ibid: 273 on the case of Willy Krabenhöf, son of Friedrich Wilhelm and Lucie.

82 BAB R 1001/5580, p. 3, Notiz betr. Fall Baumann, StS Solf, Meyer-Gerhard, 21.4.1913.

83 Gorman (2006) 9.

were at stake who had been recognised by their fathers and entered into the birth registry, which was a possibility that, as of 1905, no longer existed in German Southwest Africa. The question as to whether the parents were married appeared to play no role. The Governor General expressly did not wish to touch upon the question regarding the legal clarification of French citizenship, which belonged to the courts. His concern was the factual, administrative assessment of these children, whom he wished to be viewed "comme Français qui, vivant avec leur père Français sous son toit ou se comportant comme Français dans les actes ordinaires de la vie sociale". "Native law" should not be applied to them, as would have otherwise been the case upon completion of the sixteenth year of life (tax obligations and work duty [*prestation*]). He encouraged all administrators to apply all regulations benevolently in favour of these "young people".[84]

By way of direct comparison of the French and German regulations it is apparent that French bureaucrats, in contrast to their German colleagues, did not need the "supplemental construct" of citizenship. It was sufficient to be descended from a European father and to live in a European manner in order to ensure the administrative acceptance of "not quite white" Frenchmen. Legal arguments were largely absent in the Madagascan directive. Instead, "benevolence" was the measure of an investigation of the child's lifestyle. German bureaucrats, on the other hand, made it clear that "native law" would only then not be applied in the event that the legal conditions for this were satisfied. "Benevolence" was as little desired as a cultural 'progression' from "native" to coloured citizen. One is justified in interpreting the squiggly line at the margin of this French passage in the German file as an indication of critical surprise. Furthermore, the introduction of a fourth colonial inhabitant category, next to German citizens, foreigners and "natives", namely of "the assimiliated", was – as legalised in Portuguese and Italian colonies[85] – not foreseen. Colonial citizenship law was assigned such relevance that Berlin bureaucrats, in the fullness of time, considered it to be part of their basic ministerial toolkit. Substantive changes by other powers in this field of law were regularly reported to the other Reich offices.[86]

84 BAB R 1001/5578, p. 34, Abschrift: La Quinzaine Coloniale, 25.4.1913: 287 ("Le statut légal des enfants métis reconnus").

85 Nuzzo (2011) 213 et seq.

86 BAB R 1001/5578, p. 28, Deutsche Botschaft Paris an AA, 3.6.1912, "z.K. RAI, RJA, RKA".

The ideological justifications of all these categorisations of "native status" were a result of imperialism, which is to be characterised as a Pan-European ideology.[87] Ideologically, as well, the "differences of the European colonial powers as a whole were subordinate to their commonalities".[88] In this way, adherents of the German Conservative Party were inspired by British arguments. In this sense, not only methods of rule, colonial structures and regulations but also "English anthropological theories of evolution" were read and adapted by German colonial bureaucrats. The arguments regarding the legitimisation of colonial rule were, therefore, similar: "many statements of German colonial jurists and officers of the colonial forces expressed views similar to the English idea of the rule of the more educated and civilized elements within a society".[89] As in Great Britain, but perhaps to an even greater extent, after 1900, a legitimisation of colonial rule on the basis of racial arguments gained traction. It justified power over Africans not by reference to certain capabilities and aristocratic hierarchies, but because of belonging to a specific "race".[90]

V. Comparative Law due to Political Pressure The Reform of German "Native Criminal Law" 1895/96

The criminal jurisdiction over Africans was one of the central elements of colonial rule. The guiding legitimising idea of bringing order to chaos was persuasive to contemporaries especially because – ostensibly in the context of this civilising mission – reference was primarily made to the law. Nevertheless, the practical execution of this 'law' frequently showed the less civilised side of colonial rule: "[I]t was law which combined exuberant violence with contained order."[91] Since the start of colonial administration, colonial criminal law was, therefore, disputed; in Germany, it soon became an emotionally charged topic.

87 Walkenhorst (2007) 318 et seq.; 332.
88 Laak (2004b) 257.
89 Friedeburg (2001) 380; 386.
90 Friedeburg (2001) 396: "But it must be remembered [that] the term 'race' remained, both in England and Germany, very often tied to assumptions about education, social class and civilization that must not be mistaken for a biologically-minded racism."
91 Fitzpatrick (2001) 20.

Pursuant to the "Protectorate Agreements" between the German Reich and the individual "tribes" and, as it may be, their "chiefs" (as in the source language), conflicts between Africans were to be regulated according to their traditional law. In this capacity, the German colonial state acted similarly to its European counterparts,[92] knowing well that "the treaty can still be disregarded when some higher imperative of civilization supervenes".[93] If a European were involved, the disputed question would either be settled exclusively by a Reich court or by drafting African rapporteurs. For criminal matters pertaining to Africans, the district deputy was responsible as "native judge". The grounds for punishment were derived from a – not further explicated – mixture of analogous application of the Reich Penal Code and the customary law considered applicable in the respective region. The German colonial criminal law for Africans was characterised in practice by its lack of uniformity, even by its arbitrariness. Despotism and brutality were the consequences.[94]

Colonial Director Paul Kayser, in 1895, was compelled to introduce reforms when a series of brutal beatings became known in Germany. The media and the Reichstag then began discussing the lack of rights of Africans. These beatings had been glorified as "court proceedings" although they had ended in death and had been committed by colonial bureaucrats, namely Wehlan and Leist in Cameroon and Carl Peters in German East Africa. Kayser requested the Colonial Council (*Kolonialrat*), a panel of experts of the Colonial Department (Foreign Office), to discuss the question as to whether a general reform of colonial criminal law and court procedure law would be recommended for the "natives". He also requested a position paper from the governors/territorial commanders in the Protectorates. In this process, it became apparent that – in the absence of other rules – they had borrowed directly from the criminal law of a British colony. In Togo, floggings were issued and executed "pursuant to Secs. 78, 82, 172 through 174, 178 of the [1892] Criminal Code Ordinance valid in the neighboring Gold Coast colony". The territorial commander (*Landeshauptmann*) appeared content with this. In the event of German criminal regulations in his protectorate, he suggested that the provisions of the ordinance regarding floggings be added

92 Nuzzo (2011) 214.
93 Fitzpatrick (2001) 21.
94 Cf. Schaper (2007); Feijó (2012).

directly to the text. A partial translation into German was already available.[95] The votes in favour of "abolishing floggings" in the colonies were in the minority. For this as well, the examples of other states were taken into account. The Colonial Council came to the conclusion that "it is not necessary as yet to uniformly regulate the details of the material [of "native criminal law"] in all the Protectorates".[96]

There was no earnest attempt to create binding and precise norms. It was convenient in this sense that no adequate expertise existed in the colonies in order to prepare existing law pursuant to German standards for a codification process.[97] The "men on the ground" were to be given, if anything, legal guidelines which would comfort critics in Germany. 'Africa' was envisioned as an area in a permanent state of emergency. On account of this "civilisational" difference, it appeared difficult to imagine that legal protections against the colonial administration would be comparable to those in the home country.[98]

In the course of the hectic political debate, the reference to "older" colonial powers was designed to comfort and provide clarification. The Colonial Department urged a survey of the German representations in Paris, London and The Hague at their respective governments. However, it became apparent that the "problems of comparative law … [lie] in the access to information regarding foreign legal systems".[99] Indeed, this survey only brought about partial clarity vis-à-vis the foreign "native criminal laws". Unclear competencies and nebulous formulations characterised these colonial laws, as well.

Ambassador Count Münster had, meanwhile, conversationally discovered in Paris that "special regulations regarding criminal procedures against natives have not been issued". It is, however, a principle that "world-views of the races and tribes are, insofar as possible, to be taken into consideration. Floggings are to be avoided as much as possible". Later, Münster summarised French Foreign Minister Berthelot to the effect that "the criminal law

95 BAB R 1001/5561, p. 11, Kolonialrath, IV. Sitzungsperiode 1895/96: 5 (appendix 7).

96 BAB R 1001/5561, p. 22, Kolonialrath, IV. Sitzungsperiode 1895/96: 2 et seq., Protokoll, 11.6.1895.

97 Cf. Knoll (2001).

98 Cf. Nuzzo: (2011) 209 et seq.; Schaper (2012) 128–143.

99 Michaels (2002) 114; regarding the (cognitive) challenges of comparative law cf. Frankenberg (1985) 413 et seq.

applicable in the home country is effective in all colonies". Pursuant to the review of the decrees sent alongside, the officials at the Colonial Department did not accept this verdict "to the full extent". They pointed at individual regulations pursuant to which the "criminal acts committed by natives are to be judged according to a modified criminal code". In fact, the "supplementary material" that the embassy acquired thereupon foresaw a significant enhancement of criminal penalties for Asians in "Cochinchine".[100]

The envoy in The Hague reported that a particular criminal law "only exists for natives in the Dutch East Indies", whereas in Surinam and Curação the same law applies to all. Floggings did not exist "anywhere", however the death penalty, "compulsory work in chains" and without chains, gaol and fines did. A new version of criminal law for the Dutch Indies was being prepared. Ambassador Count Hatzfeld received from British Foreign Minister Salisbury a memorandum prepared in the Colonial Office regarding the criminal law of the "natives" in the British colonies as well as a copy of the "Natal Native Code".[101] The Colonial Office held the view that, in general, "in the British Colonies natives and Europeans are subject to the same laws and are amenable to the same courts" for such crimes as are universally recognised as "mala in se". However, the "chiefs" in certain South African colonies continued, as before, to exercise limited criminal law authority. Modes of conduct such as polygamy, which were based in tradition, were not punished. However, in accordance to the local situation, "police matters" contained certain provisions specifically for "natives", e. g., passport laws, and upon violations "some slight penalty would be inflicted". Her Majesty's Government emphasised that it did "not view [the] creation [of distinct offences] with favour when proposed by their local [colonial] Officers". As a punishment for disobedience toward the directions of the governor, in Natal, the confiscation of cattle had proved itself useful.[102] With respect to this format of informational dissemination, which ought to have served "comparative law", the difficulty of procuring useful statements from the interviewees was apparent. Unencumbered by any diplomatic restraint,

100 BAB R 1001/5561, p. 19, Botschafter Münster, Paris to AA, 22.10.1895; p. 25 et seq., 6.1.96; p. 63 et seq. AA to Botschafter Münster, Paris, 17.4.96; p. 98 et seq., Botschafter Münster, Paris to AA, 22.4.96 (Décrète 28.2.87).

101 BAB R 1001/5561, p. 21, Gesandtschaft Den Haag to AA, 29.10.1895.

102 BAB R 1001/5561, p. 35 et seq., Grf. Hatzfeld to AA, 7.1.1896; p. 38, Memorandum Colonial Office, 4.1.1896.

however, the Attorney General of Natal summarised the criminal laws of his colony more than ten years later before the Assembly in the following manner: "We have a law for the Kaffir in this colony, and the law is to flog him and to flog him severely." As in the German colonies, the settlers massively resisted any efforts by the colonial administration to restrict or even eliminate corporal punishment.[103]

This lack of ability on the part of the government to execute its will could not, however, be admitted by any colonial administration. At the start of 1896, while the German Colonial Department was occupied with investigating the uninformative documents regarding foreign colonial criminal law, the outrage regarding excesses of colonial violence in the German colonies grew ever more heated. The Prussian Ministry of Justice declared that it could not push for prosecution against Peters, Leist and Wehlan since the sections of the Reich Criminal Code, which punished using extortion to procure testimony, could not find application due to lack of a legal provision of "court proceedings for natives". Faced with the urgency of the matter Colonial Director Kayser admitted to the territorial commanders in Togo and Cameroon that he could not anticipate the timing of a regulation on "native criminal law". However, the application of corporal punishment "in accordance with discretion" must, he said, stop. Until further notice, all he could do was request them to do everything "for the sake of protecting the natives" in order to avoid additional "unpleasant occurrences".[104]

In February 1896, finally, the Kaiser authorised the Reich Chancellor by way of a regulation "to regulate the court procedure regarding the natives of the African Protectorates", which was done two days afterwards via an executive order. In this, the Chancellor prohibited "all measures other than those set forth in the German procedural codes" designed to extract confessions.[105] Two weeks later August Bebel gave his famous speech before the Reichstag, which caused considerable commotion, regarding the brutal rule of Peters in German East Africa. This had given rise to the nickname "Lynching Peters" (*Hänge-Peters*) for the once-celebrated "colonial pioneer".[106] Once again, Colonial Director Kayser was put under

103 Zit. in: Peté/Devenish (2005) 4.
104 BAB R 1001/5561, p. 42 et seq., KolA to Dr. Seitz (Kamerun); Köhler (Togo), 15.1.1896.
105 BAB R 1001/5561, p. 52, VO v. 25.2.1896; RKVerf v. 27.2.1896.
106 Cf. Perras (2004) 227; Baer/Schröter (2001) 90.

immense pressure which did not relent until after his resignation six months later.[107]

On 22 April, 1896, the promised Reich Chancellor executive order regarding the "Exercise of Criminal Jurisdiction and Disciplinary Authority vis-à-vis the Natives". Its goal was to bindingly set forth responsibilities and forms of punishments. Similarly to the list of the German consul in the Hague regarding the permissible punishments, § 2 provided a table which, however, included floggings. Furthermore, fines, gaol, compulsive labour and the death penalty could be imposed. Partially, passages were copied verbatim from the above-named translation of the Criminal Code Ordinance of the Gold Coast (1892) for the purpose of executing floggings. Thus, women were exempted (§ 4) and youths not yet 16 years old could only be subject (§ 5) to "lashes" ("whipping" rather than "flogging").[108] Hence it is said that "it was characteristic for German colonial rule that flogging was made into a science. In instructions, not only was the procedure for executing criminal punishments set forth in minute detail, but also the type and size of the punishment instruments".[109] It must, however, not be overlooked that this executive order as well only apparently set forth precise norms. Vital formulations were kept vague and invited pseudo-legalised violence. The question of the law materially applicable to Africans under German rule remained insufficiently answered. In this way, Africans were – upon application by their employers – to be punished "on account of continued violation of their obligations and sluggishness, on account of stubbornness … as well as other significant violations of the service or employment relationship for disciplinary purposes with corporal punishment and … with chain-ganging (*Kettenhaft*) for no longer than 14 days". What, however, was "sluggishness"? What was punishment "for disciplinary purposes"? Who made these decisions? Generally, the station representative, often a non-commissioned officer of the small military outpost would, as the *Tägliche Rundschau* remarked with great concern.[110]

A related, but as yet unanswered question involves colonial jurisprudence and its relationship to comparative law. For German legal practice, it has

107 Kayser an Eulenburg, 4.9.1896, in: Eulenburg, 1983 III, Nr. 1263, S. 1737 f.; Laak (2005) 73.

108 BAB R 1001/5561, p. 59, RKVerf v. 22.4.1896, for East-Africa, Cameroon and Togo.

109 Sippel (2001) 365.

110 BAB R 1001/5561, p. 110, Tägliche Rundschau, 5.5.1896.

been largely determined that one "[must] seek out examples in which the judges, for their decisions, make reference to foreign law in the one or the other sense".[111] Also, comparative law considerations of German colonial courts are, as yet, to be investigated. Not only the use of foreign jurisprudence to support the viewpoint in one's own verdict was at stake. Often, the courts in Buea, Windhoek or Dar-es-Salaam were responsible for judging fact patterns connected to international law and were obliged to deal with conflict of laws.

VI. 'Comparative Law' Journeys of German Colonial Bureaucrats

The orientation of German colonial bureaucrats toward the norms of older colonial powers has already been discussed with reference to a few examples which may serve as a basis for extrapolation: thus, bureaucrats in Windhoek, when drafting executive orders and regulations for German Southwest Africa, routinely drew inspiration from rules in neighbouring Cape Colony. In this case, they directly appealed to the German consul-general or the Capetown authorities.[112] Even peculiarities of tax law or the definition of "spiritual drinks" was not resolved without a glance over the Oranje River.[113] The German settlers, as well, frequently emphasised "parallels in other settler colonies" as a means of justification. Thus, "legal provisions made in South Africa, Algeria, the southern and northern states of the United States, Australia and even the Austro-Hungarian controlled Balkans influenced the regulations in Southwest Africa".[114]

Moreover, the comparison was not limited to the issuance of regulations. For an investigation of the "education of colonial officials", author M. Beneke drew upon a wide collection of materials regarding the relevant educational institutions in England, France and Holland.[115] Furthermore, the

111 Dölle (1960) 33 et seq. for French references made by the Reichsgericht in matters of estate law (RGZ 51, 166).

112 National Archives of Namibia NAN GLU 313, Gen F III, Vol. 1, Bl. 120, Gouverneur Windhoek to Bezirksgericht Lüderitzbucht, 2.2.08.

113 Cf. NAN ZBU 1657, S II g 4, p. 111, Consul General of Cape Town to Governor Windhoek, 2.3.08; p. 119 et seq., *Transvaal Government Gazette*.

114 Bley (1968) 313; regarding the adoption of Nigerian "recipes" for Cameroon, see Wirz (1972) 189.

115 Beneke (1894).

orientation was not one that remained limited to texts. Rather, personal exchanges with colonial bureaucrats of other colonial powers were conducted. Thus, Legate Jacobs of the Reich Colonial Office travelled to London and Paris in order to acquire "new knowledge of colonial legal and administrative systems for implementation in our own overseas territories".[116] Direct observation on the ground was also sought out.

The journeys of Colonial Secretary Bernhard Dernburg in Africa provide ample witness of this. Following his visit to German East Africa in 1907, later, in May 1908, he went back to London with his friend Walther Rathenau where he, inter alia, met with former Colonial State Secretary Winston Churchill prior to setting out for Cape Town, Durban, Johannesburg and Bulawayo before he made his way to German Southwest Africa. His companion, Oskar Bongard, a journalist and former colonial bureaucrat, justified their route thus: "Since we have similar conditions in German Southwest Africa, it would be foolishness to not make use of the experiences of the Boers and English. Down there, at that very place, one can see what must be done by us but also, almost as frequently, the way it ought not to be done." Thus, millions in "tuition" (*Lehrgeld*) could be saved.[117]

Settlement Commissioner Paul Rohrbach expressed similar views vis-à-vis Dernburg's predecessor Oskar Stübel as he spoke about "an already planned" journey through South Africa. Indeed, "without their experience, as I recognise repeatedly, a truly secure and – even temporarily – conclusive verdict regarding our settlement matters in Southwest Africa would not be possible".[118] That, in this context, not just settlement but also rulership techniques vis-à-vis Africans were involved appeared to be self-explanatory. As late 1909, the anthropologist Thilenius wrote about the "substantially more advanced" British and French colonies: their experiences were "to be usefully applied to the future development of the German [colonies]".[119] Accordingly, Oskar Bongard suggested – after his trip with Dernberg – the

116 Sippel (2001) 354.

117 Bongard (1909) 4; although he warned against – in relation to the question of communal self-administration – an "eager aping of British-South African organisation which contradicts our national lifestyle" (121); on the journey cf. Schölzel (2006) 76–118: Lindner (2011) 137–150.

118 SächsHStA 12829, Nachlass Stübel Nr. 10, p. 31, Rohrbach an Stübel, 6.2.05.

119 BAB R 3001/5255, Hamburgisches Kolonialinstitut. Bericht über das erste Studienjahr WS 1908/09; SS 1909, Hamburg 1909, p. 18.

application of the British rulership technique of "indirect rule", as used in Rhodesia, to German areas as well.[120]

These journeys were not exceptional. Even lower ranked colonial officers were dispatched on comparative law journeys. From Togo, district officer Rudolf Asmis visited "Nigeria, the Gold Coast and French West Africa in order to find out how, over there, certain administrative and legal questions were handled".[121] Asmis, at the same time, contributed to comparative law and ethnological research regarding African laws. Thus, starting in 1911, he published his investigations in the *Zeitschrift für vergleichende Rechtswissenschaft* (Journal for Comparative Law) regarding the "Tribal Laws of the District Atakpame".[122] The Deputy Governor of German Southwest Africa, Oskar Hintrager, drove to the South African Union and Australia in 1914, on official business, in order to investigate the settlement situation under similar natural-environmental conditions.[123] In 1912, in the registry of the Reich Colonial Office for "Legal Matters", a file was created for the "Issuance of Funding for the Study of Foreign Colonial and Legal Relationships". However, up until the outbreak of the First World War, only the research trips of two theology professors, Mirbt (Göttingen) and Schmidlin (Münster) to the German colonies and to South Africa were partially financed.[124]

One of these comparative trips has, incidentally, made its way into world literature. In 1909, Councillor to the Reich Colonial Office Robert Heindl had been sent on a journey during which he was supposed to gain an understanding of the penal colonies in the Pacific. Their existence had excited the imaginations of certain "criminal law reformers" in Germany. Heindl's journey, regarding which he published a comprehensive report in 1914,[125] was discussed in the media such that, in Prague, it even came to Franz Kafka's attention. It is likely that the journey provided the historic background for the story, "In the Penal Colony", which takes place in French New Caledonia.[126] Kafka described "the Penal Colony" as a dystopia of a

120 Bongard (1909) 52 et seq.; 127.
121 Sippel (2001) 354.
122 Asmis (1911); cf. Knoll (2001) 253 et seq.: Schaper (2012) 236–245; 251.
123 Hintrager (1955).
124 BAB R 1001/5592 (files regarding the issuance of funds for the study of foreign colonial and legal relationships), p. 2, Übersicht Studienreisen.
125 Heindl (1914); cf. Kundrus (2003c) 104–108.
126 Müller-Seidel (1986).

morally debased special zone. However, the story (completed October 1914) is not as surreal as it has, since then, appeared to numerous interpreters.[127] The factual report about a visitor to a penal colony who is supposed to evaluate its legal system contains much that would appear well known to an historian of colonial criminal law. Kafka shows thus that the procedural and moral deformations of the colonial system of justice were also familiar to contemporary critics. In the case of Kafka, everything is orientated toward a machine which cuts the penalty out of the criminal's very body. The claim to discovery of the truth through due process is juxtaposed with a radical reversal of the 'course of law'. One case is "as easy as the next". "Guilt is always beyond a doubt", states the officer who grants himself both legislative and judicial powers. A court procedure appears superfluous. The criminal is never informed of the verdict, which is issued without a hearing. The colonial officer is not only everything, he also can do everything – like the former commandant in the "Penal Colony": "soldier, judge, constructor, chemist, architect". For him, a generally valid law ("Guilt is always beyond a doubt"), a generally valid verdict (the death penalty) and a generally valid execution apparatus are all that is required. The de-individualised case law of the penal colony is complete – and it is absurd.[128] However, the hyperbole should not obscure the fact that the selection of the topic, as well as its presentation, represented Kafka connecting with the contemporary discourse which also contained voices critical of colonialism.[129]

VII. Regarding the 'Method' of Colonial Comparative Law

Civil law professor Ernst Zittelmann considered comparative law advantageous also because it "evoked criticism [*kritikerweckend*]". By comparison, paths leading toward other solutions were analysed, it caused "doubts …

127 Cf. Kurt Tucholsksky in der Weltbühne (1920) regarding 'In der Strafkolonie': "You need not ask what the point of it is. It has no point. Perhaps the book does not even belong in this time, and it certainly does not move us forward. It has no problems and knows no doubts or questions. It is completely innocuous. Innocuous like Kleist." Cited in: Wagenbach (2002) 135.

128 Kafka (1994); cf. regarding the background of court metaphors: Grözinger (1994).

129 Cf. Albert/Disselnkötter (2002); regarding colonial criticism: Stuchtey (2010); Schwarz (1999).

regarding whether the current solutions in one's own law were the best ones possible".[130]

The connection between comparison and criticism formed, in Germany, as previously described, the basis for colonial-agitation efforts starting in the middle of the 19th century. On the one hand, there were the powerful seafaring nations; on the other hand, there was Germany, excluded from global commerce and prevented from extending its power. However, going forward into the course of the thirty year "real history" of German colonialism, comparative criticism was levelled against German activities in the colonies again and again. This went so far that the Reich Colonial Office itself began making comparisons in order to underscore its own (relative) success. In February 1913, the State Secretary issued a memorandum regarding the "Colonial Administration of the European States", the goal of which was to show that the assertion that the administration of the German colonies was too large and expensive was "groundless" – in the words of the *Norddeutsche Allgemeine Zeitung*, a semi-official mouthpiece.[131]

However, in what manner did this comparison occur? Costs, personnel and numbers on the one hand, colonial competencies and jurisdictions on the other hand – which were a field more difficult to measure and compare. Since the second half of the 19th century, comparative law had grown "almost instantaneously in importance". It was the "developmental idea of Hegel" which provided the philosophic foundation "on which basis comparative law was introduced into the science of jurisprudence".[132] An historian of comparative law is, therefore, well served by remembering that the manner in which foreign law is perceived, i.e., the manner in which comparative law was conducted by colonial bureaucrats, was always (pre-) formed by certain basic assumptions, not the least of which was a developmental hierarchy into which the nations were categorised. In addition to this, subjective prejudices, perspectives, ideals, backgrounds in domestic law and the local political situation had to be taken into account.[133]

130 Zittelmann (1900); cf. Zweigert/Kötz (1996) 57 et seq.

131 BAB R 3001/5273, excerpt, NAZ #36, 12.2.14 "haltlos" [SBRT, Anl. XIII/1, Vol. 303, Denkschrift Nr. 1356 32/14, dated 9.2.1914].

132 Sandrock (1966) 12; cf. Hug (1932) 1055; Dölle (1960) 19 et seq.; Stolleis (1998) 15 et seq.; 22.

133 Regarding the necessity of the self-reflectivity of comparative law, cf. Frankenberg (1985) 443.

The "selection of a solution represents a legal-political decision which can be justified by legal comparison". Thus, the methodical "question which and how many foreign legal systems ought to be drawn upon for comparison" was formulated in accordance with which foreign "regulations one believed would promote the legislative effort".[134] Although the criteria pursuant to which the objects of comparison were selected or, as it may be, the question as to which embassies and legations were to be asked for information was not made explicit, the comparative legal view of German officials was nonetheless primarily directed 'upwards', i.e., toward those to whom 'competency' was ascribed in solving colonial problems at least as well or better than oneself. Since "only legal systems … on the same developmental level were considered to be directly comparable",[135] in internal German discussions, arguments referencing Great Britain and France played the larger role. The regulations in the Netherlands and Spain were only occasionally consulted. Italy appears in the files of the Reich Colonial Office chiefly in the role of asking questions. The German Reich in part considered itself the successor of the Portuguese colonial empire,[136] which served as a negative foil. In this mode of reading, the Portuguese *imperio* was not considered to be of equal stature. It was thought of as persisting at a lower developmental level and, insofar as this, appeared irrelevant for purposes of a comparison.

No academic 'methods' supported these classifying efforts to create normatively-based hierarchies. Indeed, rather, the methods were based on the aims pursued.[137] These were derived, first, from the desired goal to do as well as the 'large', the 'old' colonial powers in legal-political terms and, second, from the argument (which was useful for domestic politics) to authority based on reference to these successful role models. The limits of comparability were, in this context, not well considered. They, however, were obvious in the selective presentation of desired objects of comparison, which encouraged the selection of a specific variant; take, for example, the case of Bismarck, who in 1885 assumed that the regulatory provisions of the SGG were equivalent to British regulatory law for the colonies. Questions

134 Sandrock (1966) 28 et seq.
135 Michaels (2002) 101.
136 Cf. Tschapek (2000); Friedrichsmeyer/Lennox/Zantop (1998) 15.
137 Dölle (1960) 22 with additional references; cf. Richers (2007) 511; Frankenberg (1985) 413 "The ultimate aims of comparative law – to reform and improve the laws, to further justice and to better the lot of humankind"; Stone (1951) 326.

regarding the reasons why a provision in a draft was based on foreign legal material, or not, or what – in comparison to other, foreign law solutions to a (legal) problem – was desirable about this were rarely discussed. Most saliently, the question was posed regarding the transferability of solutions found elsewhere – in their context – to a German fact pattern. Even the translatability of the legal terms did not always appear to be unambiguously possible, which meant that confusion could ensue. Thus, when State Secretary Solf demanded "a constitution" for every "Protectorate", it was to be understood – as described above – in the "spirit" of the "English constitution" (i.e. as a general set of administrative rules).[138]

Difficulties with colonially intended legislative comparison, which for practitioners did not pertain chiefly to methodical questions but rather to the acquisition of information, were not limited to the German administration. That other colonial powers were interested in the German colonies and their laws has already previously been suggested.[139] In France and Great Britain in particular, comparative law enjoyed a long tradition. It was "practically" orientated, which included (commercial) law in the colonies.[140] The French Ministry of Justice, for example, had established in 1875 a *Comité de législation étrangère*.[141] Nevertheless, it was not always recognisable from where the bureaucrats derived their knowledge of foreign norms. However, the above-discussed "reciprocal attentiveness regarding the methods of the respectively other colonial powers"[142] went so far that the ministries of various states requested information from each other about the legal situation in their respective colonies. Thus, as German bureaucrats requested information from their colleagues in London or Madrid regarding the "state law relationships of natives in the [British or Spanish] colonies to the mother country",[143] so too did the Italian Colonial Ministry request the regulations

138 BAB R 1001/5595, p. 133–146, RKA an Gouv Daressalam, Windhuk, Buea, Lomé, Rabaul, Apia, 30.8.13.

139 Cf. Laak (2004) 132: "The Germans were especially proud of the 'scientific' approach to their colonial methods, which were now applied across a broad front, and that this was recognised by colonial competitors prior to 1914."

140 Cf. Hug (1932) 1060–1066; 1069; Burge (1837/38).

141 Cf. Constantinesco (1971) 134.

142 Laak (2004) 257.

143 BAB R 1001/5578, p. 8, FO to AA, 8.12.1900, p. 12, Ministerio de Estado to Radowitz, 21.3.1901.

in use in the German colonies from the Foreign Office pursuant to which the "natives" in the Protectorates could attain the status of a German citizen. The question was answered with reference to the SGG in its 1900 version.[144] The Italians, who had in particular adapted French colonial law,[145] in 1913 requested information again from the Germans regarding the legal status of "foreign natives" or "native states (in particular Mohammedans)" in the Protectorates.[146] The generosity and thoroughness with which the request was answered appears remarkable. It required three drafts before it could be answered. The questions asked were too basic in order to be given simple answers which, at the same time, would not reveal any of the deficient elements of German colonial law.[147]

However, it was indeed not merely the smaller colonial power who asked the larger "catch-up" colonial nation regarding explanations of their colonial regulations. The efforts of Colonial Secretary Solf, an anglophile, led to a "trans-national respect for German colonial methods", as apparent from an exchange of letters between Solf and Frederick Lugard, the Governor General of Nigeria. "Growing recognition of German colonial achievements" among British commentators has been observed by researchers recently.[148] For example, a British reception of German hunting law in Africa can be discerned.[149]

Conclusion: Comparison and Difference in German Colonial Law

In light of the contemporarily emphasised comparability of European colonial systems, German bitterness regarding the Versailles Treaty was especially great in light of the fact that the "renunciation [*Verzicht*]" of colonies (Art. 119) was based on comparison: Germany was supposedly incapable of colonising. It had, it was alleged, oppressed the population.[150]

144 BAB R 1001/5578, p. 27, Note Verbale, Chargé d'affaires d'Italie an AA, 12.7.1912; cf. Gosewinkel (2004) 252 et seq.
145 Nuzzo (2011) 214.
146 BAB R 1001/5583, p. 37, Italienische Botschaft Berlin an Auswärtiges Amt, 7.3.1913.
147 BAB R 1001/5583, p. 38–56, Entwürfe: RKA an AA, 18.6.; 15.7.1913.
148 Vietsch (1961) 133: cf. Lindner (2011) 32–42; 65–84 (84) "wachsende Anerkennung".
149 "[The British] drew heavily on German examples [of colonial game legislation] derived from Africa." MacKenzie (2001); cf. Hinz (2001) 342.
150 Cf. Antonelli (1921) 59; 73; Schnee 1924.

The violence in German Southwest Africa was specifically documented in 1918 in the British "Blue Book". In this, regulations and decrees of the governor were replicated which were to prove the brutality of German colonial law. In its answer, the "White Book", "actually an anti-Blue Book", the German government in 1919 did not attempt a refutation but rather compared British and German practices against "rebels" and "bandits" and argued "that the British committed the same kind of atrocities" in India and other colonies.[151] Does this comparison of "colonial performance" contain the core of something "special" in German colonialism which historians have investigated now for decades?[152] The "Blue Book" had, at least, unmistakably produced the connection between law and violence in colonialism. That this was a peculiar (and violent) law was a part of the British argument that the German representatives at Versailles attempted to relativise.

Without a doubt, aside from the above-described transfers and entanglements, peculiarities of German colonial law did exist. But it has been – rightly – emphasised that differing "institutions" can arise "from a joint discussion".[153] The differences are to be found less in colonial criminal law and its mode of operation than in other legal sectors. An early commentator on colonial law expressed the presumption that, on account of the German colonial acquisitions being rather recent, "German colonial law would need to assume a very different character [from that of other colonial states] and retain this in light of, if nothing else, the great difference in the times".[154] Among these differences belonged, e. g., the "unique relationship of the subjection of colonial vis-à-vis consular law …, which is not to be found in any legal system of another colonial power".[155] Also, the legal and administrative order in the colonies established on the basis of colonial state law did not occur in accordance with "a prepared plan" which foresaw, e. g., the copying of a British template colony. In the search for role models, frequently the "Prussian model [or that of another German state] was

151 Silvester / Gewald 2003; Reichskolonialamt (1919); Hillebrecht (2007) 73–95 (92).

152 "It is difficult to decide where – given the development that SWA has taken – the typical stops and the peculiar begins." Bley (1968) 312; see also: Berman (1999); Kundrus (2011); Steinmetz (2005).

153 Coing (1978) 178.

154 Fleischmann (1891) 171.

155 Köbner (1904) 1088; cf. Sack (2001) 48 f.

adopted".[156] In this, the German colonial administration was no different from that of the other powers, whose "administrative order … was, primarily, determined by the system [which was] valid in the respective 'home country'".[157]

Without accounting for the "common roots or interactions of various kinds which … influenced the respective legal system",[158] the differences between individual colonial powers have been described again and again. Not only contemporaries but also historians have compared German colonialism in a global context, often with the goal of differentiating it. Hence it was emphasised that the efforts to catch up with others were responsible for German colonialism "having, to a greater extent, in comparison with the established colonial powers, elements of 'improvisation' and 'last-minute panic' which, in colonial practice, had overtones of arrogance and affected 'perfectionism'".[159] The 'improvisation' became noticeable in that German administration was made more difficult because it "had, in comparison to other colonial empires, surprisingly limited personnel and equipment assets".[160] If "historical comparisons" of this kind were considered a "possibility for reviewing" German colonial history,[161] then this is indeed accurate. However, from this emerges the challenge to avoid essentialising various "teleologies of rule" as well as schematic narratives[162] without concluding herefrom that comparisons emerge from an apologetic intention or, on the other hand, lead to tautologies which state that different things are 'different' and same things are 'same'.[163]

If one summarises, at this point, the comparisons, transfers, mutual influences, reciprocal effects, alternating or asymmetrical perceptions and power constellations, one comes, in fact, to a global or, at least European, "entangled history" of (German) colonial law.[164] Based on the source

156 Speitkamp (2005) 45.
157 Sippel (2001) 355.
158 Sippel (2001) 351.
159 Gründer (2004) 26 referring to Bade.
160 Sippel (2001) 357.
161 Berman (2003) 24.
162 Cf., e. g., Young (1994) 99 et seq., who is able to characterise the colonial rulership structures of the British, French, Belgians and Italians with, respectively, one or two sentences.
163 Michaels (2002) 108.
164 Cf. Conrad / Randeria (2002).

analysis presented here, it is shown that one cannot argue for significantly differing national colonial legal systems. The institutionalised principles, as well as the basic normative assumptions, were based on the overall European colonial discourse. Common to all European colonial laws was also their legitimising character. In light of the violence and de facto legal vacuum on the part of the colonised, this often crossed into the realm of apologetics when it was desired that the actions of the colonial administrations be given the appearance of legal conformity. It also helped that colonial law was based on a closed world-view consisting of "civilization and chaos" – "insulated, complete and universal".[165]

In spite of the incompleteness and methodological deficiencies of colonial comparative law, these comparative discourses extended from anchoring the colonies in public law to criminal law and beyond, even into the distant realms of individual factual problems such as alcohol licenses. Its perspective across national borders and beyond had become self-evident. Specificity, and/or difference did not appear to be desirable attributes in the overall European colonial (legal) discourse. This would have contradicted the basic assumptions of comparative law: one wanted to benefit from others' experiences and make reference to the "common 'storehouse of solutions'".[166] In light of the "structural and ideological commonalities … as well as the orientation to colonial patterns of foreign colonial powers", it is said to be impossible to speak of a "characteristic German colonial and administrative system".[167] For German colonial law, the same principle applies as it does to German law on the whole: "It is difficult to say what part of it is German."[168]

165 Fitzpatrick (2001) 22.

166 Thus the explanation at the Paris Congress on Comparative Law 1900, zit. in: Zweigert / Kötz (1996) 58.

167 Sippel 2001: 354 et seq.; 368 with additional references.

168 Grossfeld (1996) 2. "German law owes a large debt to foreign influences; they explain the wealth of our legal culture as a mixture of Germanic, Roman, northern Italian, French, Dutch, English and American impulses. Our law developed from 'borrowing'. It is difficult to say what about it is German." The history of reception and transfer of European laws in Africa is not concluded with the end of colonialism. Even the post-colonial states exist with a significant colonial inheritance in their codifications, cf. Joireman (2001). Moreover, there was the undeniable tendency to continue the reception of European law by way of comparison for one's own purposes, cf. Grote (2001) 19 et seq. with additional references; Sack (2001) 332.

This shows that whosoever wishes to overcome essentialising national and state categories and to place trans-national, multi-polar, global influences and situations into the centre of his research will not be able to avoid analysing concrete examples of such processes in light of the sources. The question regarding (imperial) entanglement in legal history directs the focus by necessity to colonial instruments of rule and their application. It shows, moreover, that even concepts such as "transfer", "legal transplant", "hybridisation" or "legal pluralism" must be linked backwards to the political decisions that form the basis for those manifestations which are supposed to describe these terms. The methodical concepts of comparison and of *histoire croisée* are equally necessary for this purpose.[169] In fact, the history of German colonial law shows, e. g., how contemporary comparison became a medium for entangling and, moreover, how a *histoire comparée* can contribute to the illustration of various modes of global entanglement, dependency and transfers. How, then, did British, French, Italian, Portuguese and other colonial bureaucrats compare their empires with the other colonial powers? How did they transfer what and why? A comparative colonial history of global-historical scope must still be written.

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