

Anti-Black racism in German colonial criminal law

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Abstract: *This chapter examines criminal law in the German colonies between 1884 and 1919 with respect to anti-Black racism. Colonial law is often discussed without a critical examination of historically grown racism. As a result, the role of law in colonialism cannot be fully understood and colonial continuities, including continuities of racism, remain difficult to identify in law. The word ‘racism’ is an umbrella term for many types of racial discrimination. Anti-Black racism denotes the specific kind of racial prejudice directed against Black people and efforts to dehumanise them. Anti-Black racism is little researched, especially in Germany. Literature traces the origins of anti-Black racism back to colonialism.*

Furthermore, there is no doubt that law, and criminal law in particular, was a central aspect of European colonialism in Africa. Both law and racism provided justification for the violent colonisation. However, the dynamics between anti-Black racism and colonial criminal law have yet to be researched. In an interdisciplinary approach, this chapter introduces the term ‘anti-Black racism’ by building on social science

literature. Subsequently, the chapter analyses legal norms of German colonial law with the help of historical and legal literature in search of the influence of anti-Black racism. The chapter aims to fill a gap in the research to date by offering an understanding of the role anti-Black racism played in colonial criminal law, thereby contributing to current discussions on possible colonial continuities in German legal frameworks. The chapter concludes with a proposal for future research on colonial continuities in law in the form of anti-Black racism.

1 Introduction

The legal debate on German colonial law to date often lacks critical perspectives on racism, which have been developed predominantly by Black scholars. Anti-Black racism in particular has not been addressed in detail, although it arose as a result of European colonialism.¹ However, our understanding of colonial law is incomplete if it does not take insights from research on racism into account. This chapter examines anti-Black racism in the criminal law of the German colonies between 1884 and 1919. My intention is not to present anti-Black racism as the sole reason for the development of the colonial legal system, but to make anti-Black racism visible as an important element of that system's development. The chapter, therefore, argues that colonial criminal law reproduced and perpetuated anti-Black racism. An in-depth examination of the Black literature on racism serves as the basis for the investigation. Accordingly, the chapter begins with an introduction to the topic of racism, in general (1) and anti-Black racism, in particular (1.1). Within this framework, the core characteristics of anti-Black racism are identified (1.2) and applied to an analysis of aspects of German colonial criminal law (2). After a brief overview of the colonial legal system, the analysis is aimed at identifying anti-Black racism in the introduction of German colonial law (2.1), the law of sanctions for colonised people (2.2) and the legal dichotomy between racialised people and White people (2.3).

¹ K Oguntoye & M Opitz 'Die Deutschen in den Kolonien' in K Oguntoye, M Opitz & D Schulz (eds) *Farbe bekennen: Afro-deutsche Frauen auf den Spuren ihrer Geschichte* (1991) 29; T Naguib and others 'Anti-Schwarze-Rassismus' (2017) 9f, 26; P Piesche 'Was ist Anti-Blackness?' Heinrich Böll Stiftung (2020), <https://heimatkunde.boell.de/de/2020/06/26/was-ist-anti-Blackness-gedanken-zum-wesen-eines-kollektiven-traumas> (accessed 10 July 2025).

2 Racism

German law contains no legal definition of racism. However, a council of experts convened by the German Federal Government's Commissioner for Anti-Racism recently published a working definition of racism for the German administration. The proposed working definition is based on the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and is intended to provide a precise framework for the implementation of the Convention in Germany and, in particular, to permit an effective treatment of the structural and institutional dimension of racism.² According to the working definition:

Racism is based on a historically evolved division and categorisation of people based on certain external characteristics or on the basis of an actual or supposed culture, ancestry, ethnic or national origin or religion (essentialisation and naturalisation). Certain traits are attributed to these groups (homogenisation) which characterise them and the people assigned to them as superior or inferior (hierarchisation). The groups categorised as inferior are degraded and devalued based on negative stereotypes and prejudices. Assigning people to a certain group leads to a social perception of them as 'belonging' to Germany or 'foreign' or 'not belonging', which in turn leads to exclusionary practices and experiences (dichotomisation).³

This definition is based on the concept of racism as a social construct.⁴ Kelly holds that German society often fails to fully understand the complexity of racism and, hence, ignores the different levels of racism.⁵ According to Kelly, institutional racism, internalised racism, interpersonal racism and everyday racism create and uphold structural racism.⁶ Consequently, racism is more than individual biases or discriminatory interpersonal encounters.⁷ It can be defined as a complex, historically grown structure that affects society as a whole.⁸ As a social structure, racism produces,

2 'Arbeitsdefinition Rassismus des Expert*innenrats Antirassismus' (2025) 5.

3 My translation – MU; Arbeitsdefinition (n 2) 6.

4 B Rommelspacher 'Was ist eigentlich Rassismus?' in C Melter & P Mecheril (eds) *Rassismuskritik: Rassismustheorie und -forschung* (2011) 29.

5 N Kelly *Rassismus: Strukturelle Probleme brauchen strukturelle Lösungen!* (2021) 9f.

6 As above.

7 See also B Rommelspacher 'Was ist eigentlich Rassismus?' in Melter & Mecheril (n 4) 29.

8 As above; C Barışkanmaz *Recht und Rassismus* (2019) 19.

legitimises and perpetuates social hierarchies and, hence, material and symbolic exclusions of constructed groups.⁹

In racism research, racism is often referred to in the plural as racisms, as there are different levels, affected groups, histories and circumstances of racism.¹⁰ With regard to different affected groups, for example, a distinction can be made between anti-Asian racism, anti-Muslim racism,¹¹ Gadjé racism¹² and anti-Black racism.¹³ The present chapter focuses on anti-Black racism.¹⁴

2.1 Anti-Black racism

While the term ‘anti-Black racism’ is regularly used in Anglophone contexts,¹⁵ it has been used in German-speaking research only for a few years.¹⁶ In German legal scholarship, anti-Black racism is hardly

9 S Hall *Rassismus und kulturelle Identität* trans U Mehlem and others (eds) (1994) 130; S Hall ‘Rassismus als ideologischer Diskurs’ trans N Rätzkel in N Rätzkel (ed) *Theorien über Rassismus* (2000) 7ff.; Barışkanmaz (n 8) 19; B Rommelspacher ‘Was ist eigentlich Rassismus?’ in Melter & Mecheril (n 4) 29.

10 Hall (n 9) 130; Kelly (n 5) 10f.

11 Anti-Muslim racism is often called islamophobia but, in the German context, ‘antimuslimisch’ (anti-Muslim) is used to emphasise the fact that it is a kind of discrimination and therefore systematic and structural, and not a pathological condition, as the term ‘phobia’ would suggest. On anti-Muslim racism: I Attia ‘Diskurse des Orientalismus und antimuslimischen Rassismus in Deutschland’ in Melter & Mecheril (n 4) 146ff.; S Arndt *Die 101 wichtigsten Fragen – Rassismus* (2012) 25f.; Barışkanmaz (n 8) 88ff.

12 Gadjé racism refers to racism against Sinti* and Rom*nja. On Gadjé racism: R-L Witt ‘Gadjé-Rassismus’ in O Nobrega, M Quent & J Zipf (eds) *Rassismus. Macht. Vergessen* (2021) 125.

13 Kelly (n 5) 10f.; W Hund *Rassismus und Antirassismus* (2018) 69.

14 It should be noted that it is not the aim to create a hierarchy between different kinds of discrimination or kinds of racism but to work out the particularities of anti-Black racism. Furthermore, the idea of a hierarchy between different kinds of discrimination contradicts the concept of intersectionality. This concept was coined by Crenshaw and emphasises the fact that each person has a distinct and complex identity and therefore experiences discrimination in different ways. Recommended reading: K Crenshaw ‘Demarginalising the intersection of race and sex’ (1989) *University of Chicago Legal Forum* 139.

15 But still often overlooked.

16 On anti-Black-racism in Germany instead of many: Oguntoye and others (n 1); F El-Tayeb *Schwarze Deutsche: Der Diskurs um „Rasse“ und nationale Identität 1890-1933* (2001); N Kelly *Afrokultur: ‘der raum zwischen gestern und morgen’* (2016); M Eggers and others *Mythen Masken und Subjekte: Kritische Weißseinsforschung in Deutschland* (2017).

discussed.¹⁷ A more comprehensive introduction to the topic is therefore required.

Briefly, anti-Black racism, also known as anti-Blackness, denotes racism against Black people.¹⁸ More precisely, anti-Black racism is a term that serves to identify the specific racist practices directed against Black people that may be blurred by more general terms such as ‘racism’.¹⁹ Anti-Black racism is defined as ‘the beliefs, attitudes, actions, practices, and behaviours of individuals and institutions that devalue, minimize, and marginalise the full participation of Black people ... It is the systematic denial of Black humanity and dignity.’²⁰

The term ‘Black’ is a political term that not only refers to biological characteristics such as skin colour.²¹ In fact, the term denotes a socio-political position within a society of white dominance.²² Accordingly, the word ‘Black’ is capitalised here, not to essentialise the designation, but to emphasise the ‘level of meaning of the Black resistance potential that has been inscribed in this category by Black people and People of Colour’.²³ The term ‘*white*’, on the other hand, is written in lower case italics to draw attention to its constructional character and to indicate the difference to the historical and political meaning of the term ‘Black’.²⁴ Kaneza uses the term ‘Black people’ as a synonym for ‘people of African descent’, a population group that is racially marked and racialised.

17 Recommended reading: E Kaneza *Rassische Diskriminierung in Deutschland: Verwirklichung eines positiven Rechts für die Gleichberechtigung von Schwarzen Menschen* (2024).

18 Kelly (n 5) 10; Arndt (n 11) 22f.; The term ‘Kolonialrassismus’ (colonial racism) is also frequently used as a synonym for anti-Black racism.

19 K Ross ‘Call it what it is: Anti-Blackness’ *New York Times* 4 June 2020, www.nytimes.com/2020/06/04/opinion/george-floyd-anti-Blackness.html (accessed 30 July 2025).

20 J Comrie and others ‘Anti-Blackness/colorism’ in Boston University Centre for Antiracist Research (ed) *Moving toward antibigotry: Collected essays from the Centre for Antiracist Research’s Antibigotry Convening* (2022) 74.

21 However, anti-Black racism is closely related to the discrimination types colourism, texturism and featurism because they prioritise proximity to whiteness.

22 N Sow ‘Schwarz’ in S Arndt & N Ofoatey-Alazard (eds) *Wie Rassismus aus Wörtern spricht: (K)Erben des Kolonialismus im Wissensarchiv deutsche Sprache: ein kritisches Nachschlagewerk* (2019) 608.

23 M Eggers and others ‘Konzeptionelle Überlegungen’ in Eggers and others (n 16) 13.

24 As above.

The decisive factor is the collective experience of racial discrimination directed against people who are read and perceived as African.²⁵

In order to be understood accurately, racism must be analysed in its specific historical context.²⁶ A knowledge of European colonialism is therefore necessary to recognise and understand anti-Black racism, as this form of racism originates in the enslavement and exploitation of the African continent and its inhabitants.²⁷ The *Maafa*²⁸ and its effects are often underestimated and downplayed by referring to the pre-existing worldwide practice of enslavement, of prisoners of war, for example. However, the *Maafa* is distinguished by an unprecedented 'numerical, ideological, specifically anti-Black dimension and brutality'.²⁹ In order to legitimise this brutal colonisation and ongoing systematic exploitation of the colonised peoples and their resources, Europeans, including scientists, declared Black people to be inferior.³⁰

After legal and philosophical concepts of social order had replaced the divine order of the Middle Ages, a pseudo-scientific culturalist and biologicistic justification of social relations followed in the nineteenth century.³¹ The first racial categorisation emerged in the seventeenth century.³² In 1684, the French physician François Bernier distinguished

25 Kaneza (n 17) 56f.

26 Hall (n 9) 128ff.

27 K Oguntoye & M Opitz 'Die Deutschen in den Kolonien' in Oguntoye and others (n 1) 29; P Piesche 'Was ist Anti-Blackness?' Heinrich Böll Stiftung (n 1); Naguib and others (n 1) 9f, 26.

28 The centuries-long trans-Atlantic enslavement and murder of millions of Africans is called *Maafa*. *Maafa* is the Kiswahili word for 'great disaster', 'catastrophe' or 'great tragedy'. On the *Maafa*: N Ofuately-Alazard 'Maafa' in Arndt & Ofuately-Alazard (n 22) 594.

29 A Hankings-Evans 'Imperiale Vorherrschaft in der völkerrechtlichen Entstehungsgeschichte' Decolonize Berlin e.V. & ECCHR (eds) *Dekoloniale Rechtswissenschaft und -praxis* (2024) 248; '[T]hree factors made the transatlantic slave trade unique: its duration – almost four centuries, the racial identity of its victims – Black African men, women and children, and its intellectual legitimization – the cultural denigration of Africa and of Blacks, in short, the construction of the ideology of anti-Black racism, and its legal organization embodied in the "Codes Noirs", the Black Codes.' (Doudou Diène, UNESCO) as cited in N Ofuately-Alazard 'Die europäische Versklavung afrikanischer Menschen' in Arndt & Ofuately-Alazard (n 22) 103.

30 Hankings-Evans 'Imperiale Vorherrschaft in der völkerrechtlichen Entstehungsgeschichte' in Decolonize Berlin e.V. & ECCHR (n 29) 246.

31 U Lembke '„Wir sind Deutsche, wir sind Weiße und wollen Weiße bleiben“' in P Dann, J von Bernstorff & I Feichtner (eds) *(Post)Koloniale Rechtswissenschaft* (2022) 232.

32 El-Tayeb (n 16) 11.

racial groups based on geography, skin colour and physical forms.³³ The Swedish naturalist Carl von Linné went still further and added intellectual and cultural value judgments to the putative four different races: 'Europaeus albescens, Americanus rubescens, Asiaticus fuscus, Africanus niger'.³⁴ According to Von Linné, the *white Europaeus* would be guided by law, while the choleric red *Americanus* would be guided by customs, the money-loving yellow *Asiaticus* by opinions, and the malicious and lazy Black *Africanus* by arbitrariness.³⁵ He thus placed the *white race* at the top and the *Black race* at the bottom of his racial hierarchy. In the German-speaking context, racial constructions were taught, among others, by philosophers who are still revered today.³⁶ For instance, Immanuel Kant explained in his 1775 lecture 'Of the different races of human beings' that *white* people and Black people are different races: 'In this way, [N-word] and *whites*, while not different kinds of human beings [*Arten von Menschen*] (since they belong presumably to one phylum [*Stamm*]).'³⁷ Kant also wrote in *Physical geography* (1802): 'Humanity has its highest degree of perfection in the *white* race. The yellow Indians have less talent. The [N-word] are much lower, and lowest of all is part of the American races.'³⁸

In these contexts, '*white*' not only described a light skin colour, but was also a synonym for the ability to be civilised.³⁹ Racial classifications, thus, were always based on the linking of assumptions about culture

33 P Boule 'François Bernier and the origins of the modern concept of race' in S Peabody & T Stovall (eds) *The colour of liberty: Histories of race in France* (2003) 13f.

34 C Linné *Systema naturae sive regna systematice proposita per classes, ordines, genera et species* (1735) as cited in O Brunner, W Conze & R Koselleck (eds) *Geschichtliche Grundbegriffe: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland* (1972) 145.

35 K Palm 'Der „Rasse“-Begriff in der Biologie nach 1945' in F Maetzky (ed) *Gemachte Differenz: Kontinuitäten biologischer „Rasse“-Konzepte* (2009) 241f.; Brunner and others (n 34) 145.

36 T Plümecke *Rasse in der Ära der Genetik: Die Ordnung des Menschen in den Lebenswissenschaften* (2015) 73; Kelly (n 5) 19f.

37 I Kant 'Of the different races of human beings' in R Loudon & G Zöller (eds) *Anthropology, history and education* (2007) 85; on the use of the N-word: G Kilomba *Plantation memories: Episodes of everyday racism* (2019) 100ff.

38 I Kant 'Physical geography' trans O Reinhardt in E Watkins (ed) *Natural science* (2012) 576.

39 M Popal 'Zivilisiert und wild' in Arndt & Ofuatey-Alazard (n 22) 678; D Liebscher 'Zwischen rassistischer Rechtsspaltung und Antidiskriminierungskategorie' in Dann, Bernstorff & Feichtner (n 31) 12.

with the idea of a hierarchy of different racial groups.⁴⁰ In these racial hierarchies, whiteness and Blackness usually occupy the opposite poles.⁴¹ Thus white society requires the existence of Black people, portrayed as others, in order to construct and define its whiteness.⁴² Kilomba, building on Fanon, states:

[I]n the white conceptual world, the Black subject is identified as the 'bad' object, embodying those aspects that white society has repressed and made taboo, that is, aggression and sexuality. We therefore come to coincide with the threatening, the dangerous, the violent, the thrilling, the exciting and also the dirty, but desirable, allowing whiteness to look at itself as morally ideal, decent, civili[s]ed and majestically generous, in complete control, and free of the anxiety its historicity causes ... That is, Blackness serves as the primary form of otherness by which whiteness is constructed.⁴³

Ross adds that, for people who have been racialised as white, the denial of humanity of Black people 'reinforces their whiteness, their humanness, their power, and their privilege'.⁴⁴ Anti-Black racism is thus revealed to be a theoretical framework in which Black people are not recognised as human in societies of white dominance.⁴⁵

2.2 Core characteristics of anti-Black racism

Building on two studies, a Swiss study about anti-Black racism and law from 2017⁴⁶ and the Afrozensus, the first broad survey of the German Black community from 2022,⁴⁷ we can now identify the core characteristics of anti-Black racism.

It must be emphasised that these characteristics of anti-Black racism do not denote or correspond to characteristics of Black people but derive from the projections created to enforce and justify white supremacy and racist and capitalist oppression.⁴⁸ Furthermore, it must be stated that

40 D Liebscher 'Zwischen rassistischer Rechtsspaltung und Antidiskriminierungs kategorie' in Dann and others (n 31) 12.

41 El-Tayeb (n 16) 11f, 37.

42 K Ross 'Call it what it is: Anti-Blackness' *New York Times* (n 19); M Aikins and others 'Afrozensus 2020' (2021) 41; Arndt (n 11) 22.

43 Kilomba (n 37) 17.

44 K Ross 'Call it what it is: Anti-Blackness' *New York Times* (n 19).

45 As above.

46 Naguib and others (n 1).

47 Aikins and others (n 42).

48 Kilomba (n 37) 17; Aikins and others (n 42) 41.

analogues of some of these characteristics can also be found in other forms of racism. However, the specific forms of the characteristics of anti-Black racism are based on the specific historical context of anti-Black racism as described above.

2.2.1 *Dehumanisation and racial hierarchy*

Anti-Black racism involves a series of sometimes contradictory or overlapping archetypes of Black people, and the central quality of these archetypes is always the dehumanisation of Black people.⁴⁹ This dehumanisation of Blackness derives from the trans-Atlantic enslavement. According to Piesche, the extent and severity of the exploitation made it necessary for the enslavers not to regard their victims as human beings.⁵⁰ Thus, the purpose of racial categorisation was to legitimise the aspirations of the European countries to achieve economic growth and political power.⁵¹ This dehumanisation of Black people is also reflected in the fact that the European countries suppressed, enslaved and murdered the populations of their colonies while their philosophers of the Enlightenment theorised on universal human rights.⁵² Examples of the effects of the dehumanisation of Black people are the practice of comparing Black people to animals⁵³ and the denial of basic human characteristics such as the will to freedom or the perception of pain.⁵⁴

As we have seen, the historic racial hierarchy that constructs white people as the highest form of human being and Black people as not real human beings⁵⁵ locates Black and white people as polar opposites. Between these two poles, non-Black racialised people are arranged in varying proximity to whiteness. How exactly this hierarchisation takes place depends on the context. The racial hierarchy is, among other things,

49 P Piesche 'Was ist Anti-Blackness?' Heinrich Böll Stiftung (n 1); Naguib and others (n 1) 27ff.

50 Piesche (n 49); see also B Rommelspacher 'Was ist eigentlich Rassismus?' in Melter & Mecheril (n 4) 25; R Schütte & W-M Nosakhare 'Ehre, wem Ehre gebührt' in Decolonize Berlin e.V. & ECCHR (n 29) 40.

51 Naguib and others (n 1) 32.

52 B Rommelspacher 'Was ist eigentlich Rassismus?' in Melter & Mecheril (n 4) 25.

53 Naguib and others (n 1) 27f; Kilomba (n 37) 43.

54 Aikins and others (n 42) 42.

55 Plümecke (n 36) 69; on racial hierarchies: I Wilkerson *Caste: The origins of our discontents* (2020) 29; R Hall 'The colonial origins of colorism' in R Hall (ed) *Interdisciplinary perspectives on colorism* (2022) 17.

a result of the 'divide and rule' strategy adopted towards the colonised peoples,⁵⁶ and is linked to colourism, texturism and featurism. These forms of discrimination are closely related to racism but also operate within racialised groups that are constructed as homogeneous.⁵⁷

2.2.2 *Homogenisation and Othering*

An important mechanism of racism, one that is called the core idea of colonialism⁵⁸ and the first characteristic of racism,⁵⁹ is Othering. The concept of Othering originated in the context of post-colonial theory.⁶⁰ Othering is the process of designating some as 'the Other' in order to validate one's own constructed normality.⁶¹ 'The others' are categorised as not belonging and deviating and are devalued in order to create or reinforce power imbalances. In order to devalue individuals as 'the others', it is necessary to *homogenise*, that is, to combine people into uniform groups and reduce them to certain characteristics and properties.⁶² During colonialism, African identity was constructed as one-dimensional and flawed.⁶³ African people were reduced to a homogeneous, uncivilised and uncultured group. In this way, African societies were robbed of their diversity and subjectivity.⁶⁴ Anti-Black racism is thus based on the portrayal of Black people as homogeneous, and on a contrasting imagined standard of white humanity.⁶⁵ Hence, Black bodies supposedly deviate from the norm and are depicted as out of place and unattractive. Skin, body structures, facial shapes and hair textures that deviate from the white European ideal are thus degraded.⁶⁶

56 Plümecke (n 36) 69; on the 'divide and rule' strategy: R Morrock 'Heritage of strife' (1973) 37 *Science & Society* 129ff; Hall (n 55) 19ff.

57 Comrie and others (n 20) 74.

58 'Mit kolonialen Grüßen...' (2013) 14.

59 Kilomba (n 37) 40.

60 I Siouti and others 'Methodologischer Eurozentrismus und das Konzept des Othering' in I Siouti and others (eds) *Othering in der postmigrantischen Gesellschaft: Herausforderungen und Konsequenzen für die Forschungspraxis* (2022) 7ff.

61 E Said 'Orientalism' (1977) 31 *The Georgia Review* 162ff.

62 n 58, 16ff.

63 El-Tayeb (n 16) 37; N Ofuatey-Alazard 'Die europäische Versklavung afrikanischer Menschen' in Arndt & Ofuatey-Alazard (n 22) 107.

64 A Hankings-Evans 'Imperiale Vorherrschaft in der völkerrechtlichen Entstehungsgeschichte' in *Decolonize Berlin* e.V. & ECCHR (n 29) 246.

65 Aikins and others (n 42) 41f.

66 As above.

Moreover, the alleged Black attributes, cultures and behavioural patterns are *essentialised*, that is, they are thought to be inscribed in Black people through their blood.⁶⁷ Everything a Black person does becomes linked to their supposed group nature and is reduced to it. This essentialisation restages and confirms the homogenising dehumanisation and de-individualisation.⁶⁸ Like dehumanisation, homogenisation and Othering were also necessary for the violent colonisation as a means to justify the inhumane power relationship between the colonisers and the colonised peoples.⁶⁹

2.2.3 *Primitivisation and infantilisation*

Black cultures are degraded and labelled as inferior. African cultural expression especially is equated with primitiveness and/or primordiality.⁷⁰ One implication of this supposition is the idea that Black people reflect an 'earlier' stage of development that has already been surpassed by white people.⁷¹ Another is the notion of Black people as dirty, irrational, lazy and utterly uncivilised.⁷² This primitivisation is accompanied by an infantilisation of Black people, who are depicted as dependent on 'the master'.⁷³ This infantilisation is evident, for example, in the German philosopher Hegel describing the African continent as a 'Kinderland' (country of children), a land without history and closed in on itself.⁷⁴ The depiction of Black people and the African continent as having no history is a result of the fact that history was written from the perspective of European colonisation, which relegated knowledge of African societies to the background at best.⁷⁵ In the Eurocentric version of history, Black people appear 'not as subjects of their history, but as objects of conquest'.⁷⁶ In addition, because the white European definition

67 Aikins and others (n 42) 42.

68 As above.

69 Schütte & Nosakhare (n 50) 40.

70 Aikins and others (n 42) 42; Naguib and others (n 1) 14.

71 El-Tayeb (n 16) 15; Kilomba (n 37) 43.

72 Naguib and others (n 1) 30; Kaneza (n 17) 102; Kilomba (n 37) 43.

73 Kilomba (n 37) 43.

74 G Hegel *Vorlesungen über die Philosophie der Geschichte* (2021) 49.

75 G Krüger 'Das goldene Zeitalter der Viehzüchter' in J Zimmerer & J Zeller (eds) *Völkermord in Deutsch-Südwestafrika: Der Kolonialkrieg (1904–1908) in Namibia und seine Folgen* (2016) 13f.

76 As above.

of knowledge is largely limited to written documents, the absence of such writings is misinterpreted as the absence of history in general.⁷⁷ Iffert notes that there is an asymmetry in the data available⁷⁸ on German colonial criminal law because, although white Germans studied ‘natives law’ (*Eingeborenenrecht*), there are no written records on the subject by the colonised people.⁷⁹

The term *Eingeborene*, like the English ‘natives’, literally denotes people who originate in the colonised country. However, the German term has a distinct racist connotation which distinguishes it from the English translation.⁸⁰ In the following, the German term *Eingeborene* is used to make this distinction apparent in referring to the legal concept at that time. Otherwise, I refer to colonised people or specifically to Black people.

2.2.4 *Physicality, exoticisation⁸¹ and sexualisation*

Finally, anti-Black racism is characterised by the reduction of Black people to their bodies. As Kilomba notes, aggression and sexuality are traits that the white society has repressed and projected onto Black people as the Other.⁸² Black bodies are therefore portrayed as stronger than average, dangerous and violent.⁸³ Furthermore, Black bodies are constructed as exotic and available, attributes that often go hand in hand with extreme sexualisation.⁸⁴ Another physical aspect of the Otherness attributed to Black people concerns the perception of pain. First, Black bodies are purported to be more robust and pain resistant and, second,

⁷⁷ As above.

⁷⁸ See also U Schaper ‘Deutsche Kolonialgeschichte postkolonial schreiben’ (2019) 69 *Aus Politik und Zeitgeschichte* 15.

⁷⁹ M Iffert ‘Historische Wahrheit und koloniales Wissen zum „Eingeborenenstrafrecht“’ in L von Bogdandy, C Resch & J Schumann (eds) *Konflikte um Wahrheit* (2024) 226.

⁸⁰ N Ofuatey-Alazard ‘Eingeborene_r’ in Arndt & Ofuatey-Alazard (n 22) 683.

⁸¹ The practice of portraying or regarding someone or something as exotic. See also Arndt (n 11) 22.

⁸² Kilomba (n 37) 17.

⁸³ As above; B Rommelspacher ‘Was ist eigentlich Rassismus?’ in Melter & Mecheril (n 4) 26f; Arndt (n 11) 22f.

⁸⁴ Kilomba (n 37) 43; Aikins and others (n 42) 41; Arndt (n 11) 22. The manifestation of anti-Black racism in the form of the exoticisation and sexualisation of Black bodies will not be further elaborated on here, as they are not as significant for the following as the other core characteristics. They have been briefly listed to portray a more complete image of anti-Black racism.

Black people's disclosure of pain is mistrusted because they are alleged to exaggerate.⁸⁵

3 German colonial law

When the social construction of 'human races' was declared to be an analytical concept and a biological fact, it also became a basis of theoretical discussions in law.⁸⁶ This part examines sources from German colonial criminal law in regard to the core characteristics of anti-Black racism described above.

From the very beginning of European colonialism, which began in the fifteenth century, the Germans were involved, even before German colonial rule was established.⁸⁷ The Berlin West Africa Conference of 1884-1885 marked the climax of the colonisation of the African continent, and at its end the German Empire was also able to consider itself a colonial power.⁸⁸ The German colonial Empire formally lasted from 1884 to 1919 and encompassed several Pacific islands, Kiautschou in present-day China and various territories on the African continent, making it at times the fourth largest colonial empire in the world by area.⁸⁹ To define the legal situation of the colonies, the Reich legislature enacted the Protectorate Act (*Schutzgebietsgesetz*) in 1886.⁹⁰ This Act conferred the sovereign power (*Schutzgewalt*) in the German colonies to the Emperor. The Protectorate Act referred to the Consular Jurisdiction Act (*Konsulargerichtsbarkeitsgesetz*),⁹¹ which made large parts of the criminal

85 Aikins and others (n 42) 42; Naguib and others (n 1) 80.

86 With further references: A Hankings-Evans 'Imperiale Vorherrschaft in der völkerrechtlichen Entstehungsgeschichte' in Decolonize Berlin e.V. & ECCHR (n 29) 249.

87 El-Tayeb (n 16) 60; J Zimmerer 'Geschichte des europäischen und deutschen Kolonialismus' (2012) 62 *Aus Politik und Zeitgeschichte* 13; S Conrad *Deutsche Kolonialgeschichte* (2023) 17f.

88 Kaneza (n 17) 117f; with further references: A Hankings-Evans 'Imperiale Vorherrschaft in der völkerrechtlichen Entstehungsgeschichte' in Decolonize Berlin e.V. & ECCHR (n 29) 244; Schaper (n 78) 11.

89 Conrad (n 87) 28ff.

90 Protectorate Act 1886 (Gesetz, betreffend die Rechtsverhältnisse der deutschen Schutzgebiete v. 17.4.1886), reformed in 1900: Protectorate Act 1900 (Bekanntmachung wegen Redaktion des Schutzgebietsgesetzes v. 10.9.1900); in detail on German colonial criminal law Merle Iffert in this book.

91 Gesetz über die Konsulargerichtsbarkeit v. 10.7.1879 (KGG 1879), reformed in 1900: Gesetz über die Konsulargerichtsbarkeit v. 7.4.1900 (KGG 1900).

law of the Reich applicable to white people in the colonies.⁹² In regard to colonised people, the Protectorate Act permitted a special criminal law to be enacted.⁹³ Shortly afterwards, the Decree of the Imperial Chancellor in Respect of the Jurisdiction over Natives in the German protectorates in East-Africa, Cameroon and Togo (*Verfügung des Reichskanzlers wegen Ausübung der Strafgerichtsbarkeit und der Disziplinargewalt gegenüber den Eingeborenen in den deutschen Schutzgebieten von Ostafrika, Kamerun und Togo*) was issued.⁹⁴ This special criminal law did not comply with the guarantees of the Criminal Law of the Empire (*Reichsstrafrecht*) and Criminal Procedure Law of the Empire (*Reichsstrafprozessrecht*) at the time.⁹⁵ Criminal law for the colonised peoples was regulated by numerous ordinances and administrative regulations issued in particular by the Emperor, the Imperial Chancellor and governors.⁹⁶ The Protectorate Act thus established a dual legal system in the colonies, which was maintained until the end of formal colonial rule.⁹⁷

3.1 The enactment of colonial law and the establishment of a dual legal system as racist practices

The mere fact that the German Empire felt entitled to pass laws that were to apply to the colonised territories is evidence that they did not recognise the colonised people as cultured and self-governing human beings. From the perspective of German legal scholars, the political structures in the colonies had no attributes of statehood,⁹⁸ which is why the Empire claimed sovereignty over these territories.⁹⁹ In reality,

92 Protectorate Act 1900 sec 3 and KGG 1900 sec 19.

93 Protectorate Act 1900 secs 3 & 4.

94 'Verfügung des Reichskanzlers wegen Ausübung der Strafgerichtsbarkeit und der Disziplinargewalt gegenüber den Eingeborenen in den deutschen Schutzgebieten von Ostafrika, Kamerun und Togo vom 22.4.1896' in A Zimmermann (ed) *Die deutsche Kolonial-Gesetzgebung* (1898) 215ff.

95 M Iffert 'Historische Wahrheit und koloniales Wissen zum „Eingeborenens-trafrecht“' in Bogdandy, Resch & Schumann (n 79) 211.

96 As above.

97 U Schaper *Koloniale Verhandlungen: Gerichtsbarkeit, Verwaltung und Herrschaft in Kamerun 1884-1916* (2012) 45; M Iffert 'Das deutsche Kolonialstrafrecht' (2025) 58 *Kritische Justiz* 175.

98 A Gutmann & F Hanschmann 'Staatsorganisationsrecht: deutsche Kolonialgebiete im Verfassungsrecht des Deutschen Reiches' in Dann, Bernstorff & Feichtner (n 31) 49; Conrad (n 87) 39ff.

99 A Gutmann & F Hanschmann 'Staatsorganisationsrecht: deutsche Kolonialgebiete im Verfassungsrecht des Deutschen Reiches' in Dann, Bernstorff & Feichtner (n 31) 49.

pre-colonial power structures on the African continent were diverse.¹⁰⁰ Conrad notes that the mistaken conclusion is being drawn even today that, because the European concept of statehood could not be applied to African societies, there was no statehood whatsoever on the African continent before the arrival of colonialism.¹⁰¹

In article 6 of the General Act of the Berlin Conference on West Africa, the European colonial powers established that

[a]ll the powers exercising sovereign rights or influence in the aforesaid territories bind themselves to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being ... bringing home to the natives the blessings of civilisation.¹⁰²

By describing themselves and their own legal systems as civilised and constructing the colonised as morally inferior, the colonisers wanted to distinguish themselves from the colonised people and their legal systems.¹⁰³ In accordance with the cited Act, the Imperial Court argued that the German protectorates (*Schutzgebiete*)¹⁰⁴ were not subject to any state authority other than that of the German Empire.¹⁰⁵ In doing so, the court ignored pre-colonial legal and governance structures. It thus added one more to the many narratives that falsely portray the African continent as a region without a history – a trope that aligns with the degradation, primitivisation and infantilisation of Black people and African cultures described in the definitions of anti-Black racism.

Another such trope is the assumption that the colonised Black people needed to be civilised,¹⁰⁶ reflected in the report of the Imperial district

100 Conrad (n 87) 39ff.

101 As above.

102 General Act of the Berlin Conference on West Africa, 26 February 1885.

103 Iffert (n 97) 174f.

104 The original term *Schutzgebiete* can be translated as ‘protectorates’. However, the word was invented in order to avoid calling the colonies *Protektorate*, a previously existing legal term that can also be translated as ‘protectorates’. *Protektorate* would have implied legal obligations which the German Empire did not intend to fulfil with regard to the colonies. See A Gutmann & F Hanschmann ‘Staatsorganisationsrecht: deutsche Kolonialgebiete im Verfassungsrecht des Deutschen Reiches’ in Dann, Bernstorff & Feichtner (n 31) 49f.

105 RGStE 44, 403, 404; M Breitbach and others (eds) *Versammlungsrecht des Bundes und der Länder: Völker- und Europarecht, GG, VersammlG, StGB, Landesrecht, Geschichte* (2020) Rn. 148.

106 M Iffert ‘Historische Wahrheit und koloniales Wissen zum „Eingeborenenstrafrecht“’ in Bogdandy, Resch & Schumann (n 79) 208f.; Breitbach and others (n 105) Rn. 147; eg P Bauer ‘Die Strafrechtspflege über

judge in Duala to the German foreign office, which stated that Black people had to be educated to obey commandments and prohibitions and thus learn to respect others' personalities and property.¹⁰⁷ Lothar von Trotha, the German general responsible for the genocide of the Ovaherero and Nama,¹⁰⁸ described the colonisers' attitude towards the colonised in a similar way:

The decisive factor in the treatment of natives is that they must not be placed on the same level as whites and must be regarded as an immature member of human society. This results in a kind of patriarchal relationship and the white man's duty to educate the morally weaker native.¹⁰⁹

Trotha's statement indicates the great importance of the narrative of the civilising mission, which can be described as the ideological core of the colonial project.¹¹⁰ Iffert, summing up the function of that ideology, says that in order to justify their actual goal – the violent economic exploitation of the colonised people – the colonisers presented themselves as benevolent civilisers who merely wanted to educate colonised people to work.¹¹¹ In other words, the anti-Black racist narrative of the civilising mission was used to morally justify Germany's economically and politically motivated colonial aspirations,¹¹² and furthermore served to consolidate the Germans' claims to power over the colonies.¹¹³

die Eingeborenen der deutschen Schutzgebiete' (1905) 19 *Archiv des öffentlichen Rechts* 35.

107 Bauer (n 106) 35.

108 Conrad (n 87) 51ff.

109 My translation – MU. Original: 'Für die Behandlung der Eingeborenen ist maßgebend, dass er nicht auf die gleiche Stufe mit dem Weißen gestellt werden darf und als ein noch nicht mündiges Glied der menschlichen Gesellschaft betrachtet werden muss. Es ergibt sich hieraus eine Art patriarchalischen Verhältnisses und die Pflicht des Weißen, den moralisch schwächeren Eingeborenen zu erziehen.' 'Praktische Erfahrungen aus Deutsch-Südwestafrika' in HSTA Stuttgart, M660/083, Pkt 21 (1904) 25 as cited in S Kuß *Deutsches Militär auf kolonialen Kriegsschauplätzen: Eskalation von Gewalt zu Beginn des 20. Jahrhunderts* (2010) 214f; similar: Bauer (n 106) 36.

110 Conrad (n 87) 69; Schaper (n 78) 13.

111 Iffert (n 97) 174f; similar: A Eckert 'Rechtfertigung und Legitimation von Kolonialismus' (2012) 62 *Aus Politik und Zeitgeschichte* 17ff.

112 El-Tayeb (n 16) 62.

113 A Dietrich & J Strohschein 'Kolonialismus' in Arndt & Ofuately-Alazard (n 22) 117.

The 'overall hostile attitude of the colonisers toward the colonised'¹¹⁴ had a substantial impact on German colonial law. This is also reflected in Gerstmeyer's comments in the German Colonial Lexicon, a sort of commentary on colonial legal regulations, under 'natives laws' (*Eingeborenenrecht*): He writes that 'in view of their low cultural status, the native population in the protectorates is generally not yet ready to be placed on an equal legal footing with Europeans'.¹¹⁵

The dual legal system based on a racial dichotomy is thus a concrete example of the racist practice of Othering. There were two status groups that differed by racial ascriptions.¹¹⁶ The privileged status group included citizens of the German Empire or other 'members of civilised nations' [*Angehörige zivilisierter Nationen*], and was described as 'white', 'European' or 'non-natives' [*nicht-Eingeborene*].¹¹⁷ In addition, there were a few selected population groups whom the Emperor or the governors placed on an equal level with the white population by decree.¹¹⁸ The other status group was described as 'natives' (*Eingeborene*). Their legal status was 'contradictory and fragile'¹¹⁹ and the laws to which they were subject differed fundamentally from the legal system applicable in the territory of the Reich.¹²⁰ According to Protectorate Act (1900) section 4, the 'natives' are subject only to the jurisdiction regulated in Protectorate Act (1900) sections 2 and 3, which made large parts of the criminal law of the Empire applicable to the white people in the colonies, to the extent

114 N Oermann 'The law and the colonial state' in G Eley & J Retallack (eds) *Wilhelminism and its legacies: German modernities, imperialism, and the meanings of reform, 1890-1930* (2003) 175.

115 My translation – MU. Original: 'die eingeborene Bevölkerung in den Schutzgebieten in Anbetracht ihres geringen Kulturzustandes im Allgemeinen noch nicht reif ist, rechtlich mit den Europäern auf eine Stufe gestellt zu werden.' J Gerstmeyer 'Eingeborenenrecht' in H Schnee (ed) *Deutsches Koloniallexikon* (1920) 507 ff.

116 Schaper (n 97) 69; D Liebscher *Rasse im Recht – Recht gegen Rassismus: Genealogie einer ambivalenten rechtlichen Kategorie* (2021) 161ff.

117 Iffert (n 97) 175f.

118 D Liebscher *Rasse im Recht – Recht gegen Rassismus: Genealogie einer ambivalenten rechtlichen Kategorie* (2021) 167.

119 Schaper (n 97) 69ff; U Lembke 'Wir sind Deutsche, wir sind Weiße und wollen Weiße bleiben' in Dann, Bernstorff & Feichtner (n 31) 233; Liebscher (n 118) 165.

120 D Liebscher 'Zwischen rassistischer Rechtsspaltung und Antidiskriminierungskategorie' in Dann, Bernstorff & Feichtner (n 31) 15.

determined by Imperial Decree. However, the Emperor never issued any such decree.¹²¹

German colonial law had no legal definition of the term ‘natives’ (*Eingeborene*).¹²² As late as 1913, the High Court in Windhoek, the last court of appeal in colonial law issues in German South West Africa (now Namibia), stated that the term *Eingeborene* ‘has not yet been defined anywhere.’¹²³ It was therefore largely left to the colonial administrations to determine, arbitrarily as the case might be, who belonged to the group of ‘natives’ and who did not.¹²⁴ The High Court in Windhoek went on to define the term as ‘all blood members of the primitive and half-civilis[s]ed peoples settled in the colony and their descendants’,¹²⁵ a definition that linked ‘racial-biological categorisations with ideas of civilisation (culture) and uncivilisation (nature or half-culture).’¹²⁶ Gerstmeyer’s commentary on the Protectorate Act (*Schutzgebietsgesetz*) stated that ‘natives’ (*Eingeborene*) were ‘members of the coloured tribes native to the protectorate.’¹²⁷ The ‘members of foreign coloured tribes’¹²⁸ were considered equal to ‘natives’ under section 2 of the Imperial Ordinance

121 Iffert (n 97) 177.

122 N Oermann ‘The law and the colonial state’ in Eley & Retallack (n 114) 178; J Zollmann ‘German colonial law and comparative law, 1884-1919’ in T Duve (ed) *Entanglements in legal history: Conceptual approaches* (2014) 266; Liebscher (n 118) 162.

123 My translation – MU. Original: ‘bisher nirgendwo festgelegt ist’; Obergericht Windhuk, Urteil vom 12.3.1913, zitiert nach H Sippel ‘Rechtspolitische Ansätze zur Vermeidung einer Mischlingsbevölkerung in Deutsch-Südwestafrika’ in F Becker (ed) *Rassenmischehen – Mischlinge – Rassentrennung: Zur Politik der Rasse im deutschen Kolonialreich* (2004) 149; in more detail Liebscher (n 118) 161ff.

124 U Lembke ‘Wir sind Deutsche, wir sind Weiße und wollen Weiße bleiben’ in Dann, Bernstorff & Feichtner (n 31) 261; D Liebscher ‘Zwischen rassistischer Rechtsspaltung und Antidiskriminierungskategorie’ in Dann, Bernstorff & Feichtner (n 31) 16.

125 My translation – MU. Original: ‘sämtliche Blutsangehörige der in der Kolonie sesshaften Natur- und Halbkulturvölker und ihre Deszendenz’; Obergericht Windhuk, Urteil vom 12.3.1913, zitiert nach H Sippel ‘Rechtspolitische Ansätze zur Vermeidung einer Mischlingsbevölkerung in Deutsch-Südwestafrika’ in Becker (n 123) 149.

126 Liebscher (n 118) 162.

127 My translation – MU. Original: ‘Angehörige der im Schutzgebiet heimischen farbigen Stämme’; J Gerstmeyer ‘Eingeborenenrecht’ in Schnee (n 115) 25; on the racist meaning of the term ‘farbig’: N Sow ‘Farbig/e’ in Arndt & Ofuately-Alazard (n 22) 684.

128 My translation – MU. Original: ‘Angehörige fremder farbiger Stämme’. J Gerstmeyer *Das Schutzgebietsgesetz: Das Schutzgebietsgesetz nebst der Verordnung betr. die Rechtsverhältnisse in den Schutzgebieten und dem Gesetz*

on the Legal Relationships in the German Protectorates (*Kaiserliche Verordnung vom 09.11.1900*), except where the governor might make an exception with the approval of the Imperial Chancellor. 'Japanese [were] not considered as members of coloured tribes' because their nation of origin was itself a major colonial power in the Pacific region.¹²⁹ The racist classifications were therefore based not only on phenotypical characteristics, but also on the categorisation as a 'civilised' or 'uncivilised' nation in the context of global power structures.¹³⁰ The status as 'natives' in the 'protectorates' (*Schutzgebiete*) meant that the colonised were subjects, but not citizens, of the German Empire.¹³¹ Insofar as it served the interests of the Empire, imperial laws could be applied to them, but the colonised people were not considered legal subjects and did not acquire any political or social rights.¹³² This legal distinction between the two groups codified the racist and constructed otherness of the colonised. That is, the colonial society was legally racially segregated. Without this binary distinction of the *savage* 'natives' and the *civilised* 'citizens of the empire', colonial discourse, colonial law and colonial rule could not have existed.¹³³ Colonial law was thus an instrument used by Germans to serve German colonial interests, not African interests.¹³⁴

3.2 Law of sanctions under section 2 of the Imperial Chancellor's Decree of 22 April 1896

One reason why legal racial segregation was so important to the German colonisers was the great difference between the criminal laws applicable to each group. In practice, German colonial criminal law for the colonised population was characterised by its inconsistency.¹³⁵

über die Konsulargerichtsbarkeit in Anwendung auf die Schutzgebiete sowie den Ausführungsbestimmungen und ergänzenden Vorschriften (1910) 25.

129 Liebscher (n 118) 165.

130 D Liebscher 'Zwischen rassistischer Rechtsspaltung und Antidiskriminierungskategorie' in Dann, Bernstorff & Feichtner (n 31) 19; Conrad (n 87) 66ff.

131 U Lembke '„Wir sind Deutsche, wir sind Weiße und wollen Weiße bleiben“' in Dann, Bernstorff & Feichtner (n 31) 255.

132 As above.

133 J Zollmann 'German colonial law and comparative law, 1884-1919' in Duve (n 122) 266.

134 N Oermann 'The law and the colonial state' in Eley & Retallack (n 114) 181.

135 Zollmann (n 133) 272.

The punishments permitted were laid down in the Imperial Chancellor's Decree of 22 April 1896, but the order does not state to which offences they apply. It was hence mostly up to colonial officials to determine punishments.¹³⁶

According to section 2 of the Decree, the permitted penalties were corporal punishment, including beating and flogging; fines; imprisonment with hard labour; chained imprisonment; and death. Corporal punishment was the most frequently imposed punishment alongside chained imprisonment, because it could be implemented quickly, cheaply and with a public effect.¹³⁷ Besides, the people punished in this way were supposed to be absent from their labour duties for the shortest amount of time possible.¹³⁸ This was imperative because the colonial economy was based on the forced labour of the colonised people.¹³⁹ As an example of how laws were bent to protect the interests of the settlers, the historian Oermann describes a case in which a German employer's request stated that the 'strict application of the code of law by means of imprisonment would destroy the Africans' economic value to their employer.'¹⁴⁰

The Imperial German Criminal Code at this time excluded corporal punishment.¹⁴¹ This is because corporal punishment was usually intended to have an educational effect on the delinquent and, therefore, was not applicable to adults under the absolute justification of punishment that prevailed at the time.¹⁴² In contrast, private corporal punishment was still permitted as a means of education when used by teachers on their students, for example.¹⁴³ The fact that this form of punishment was applied to adult colonised people therefore indicates the infantilisation of these people.¹⁴⁴ This is also reflected in the statement of Paul Bauer,

136 As above; Iffert (n 97) 183.

137 Schaper (n 97) 171ff; Iffert (n 97) 184.

138 Schaper (n 97) 169f; N Oermann 'The law and the colonial state' in Eley & Retallack (n 114) 173f.

139 As above.

140 Oermann (n 138) 175.

141 Zollmann (n 133) 272; M Heger 'Koloniales Strafrecht' in Dann, Bernstorff & Feichtner (n 31) 166.

142 M Heger 'Koloniales Strafrecht' in Dann, Bernstorff & Feichtner (n 31) 166.

143 As above.

144 With more references: Schaper (n 97) 173ff.

a German jurist, that ‘the natives are children – they must be educated through prohibitions and punishments.’¹⁴⁵

However, the frequent use of corporal punishment was sometimes controversial. The German Colonial Office in Berlin and the officials in the colonies differed on this issue.¹⁴⁶ From Governor Leutwein’s perspective, the officials in Berlin simply had not understood the situation in the colonies: ‘Africans, he believed, could not be disciplined with jail sentences or only a few strokes of the lash.’¹⁴⁷ To prove his standpoint, Governor Leutwein asked members of the Rhenish Missionary Society (RMS) whether they regarded corporal punishment of the colonised people as a necessary instrument to ensure order in the colonies. As he expected, the majority replied that they considered corporal punishment to be a valuable tool.¹⁴⁸

In order to justify the use of corporal punishment in colonial criminal law, the officials in the colonies referred to anti-Black racist stereotypes,¹⁴⁹ such as the beliefs that the colonised had a lower perception of pain¹⁵⁰ and that they had a low mental and moral level,¹⁵¹ and to the erroneous claim that corporal punishment was in keeping with the legal views of the colonised population.¹⁵² The racist strategy of primitivisation becomes apparent here once again. Franz Oskar Karstedt, a German colonial official and ministerial officer, went even further and claimed in his book on the practice of *Eingeborenenrechtsprechung* (court decisions on charges against ‘natives’) that corporal punishment was ‘the only punishment that has a truly salutary influence on the [n-word]’.¹⁵³

145 My translation – MU. Original: ‘Die Eingeborenen sind Kinder – sie müssen erzogen werden durch Verbote und Strafen.’ Bauer (n 106) 35.

146 Oermann (n 138) 173f.

147 As above.

148 As above.

149 Schaper (n 97) 167, 171f; Iffert (n 97) 184.

150 Schaper (n 97) 172.

151 Reichskolonialamt (ed) *Die Behandlung der einheimischen Bevölkerung in den kolonialen Besitzungen Deutschlands und Englands: Eine Erwiderung auf das englische Blaubuch vom August 1918: Report on the natives of South-West-Africa and their treatment by Germany/ Reichskolonialamt* (1919) 68; Schaper (n 97) 172.

152 Schaper (n 97) 172; Iffert (n 97) 184; M Heger ‘Koloniales Strafrecht’ in Dann, Bernstorff & Feichtner (n 31) 167.

153 My translation – MU. Original: ‘die einzige Strafe ... die auf den [N-Wort], einen wirklich heilsamen Einfluss hat’: F Karstedt *Beiträge zur Praxis der Eingeborenenrechtsprechung in Deutsch-Ostafrika* (1912) 62.

Karstedt also held that all those who had argued against corporal punishment in Africa in theoretical discussions, based on the dogma that everyone who looks like a human being is equal, were wrong.¹⁵⁴ Karstedt thus expresses his opinion that, while Black people may look human-like, they are not human.

Similar arguments can be found in the attempts to justify chained imprisonment. In this form of punishment, which was also very frequently imposed, prisoners were shackled together with neck or leg irons and chains during forced labour and while in prison.¹⁵⁵ Chained imprisonment was only used on the African continent and in this form only applied to Black people.¹⁵⁶ To justify chained imprisonment, it was claimed that, in view of the alleged laziness of Black people, only the compulsion to work would constitute an actual punishment for them.¹⁵⁷ As it was argued that Black people did not have a need for freedom, they would even enjoy the deprivation of freedom for the benefit of the food and 'lodging' they were given.¹⁵⁸ In both forms of punishment, Black people were thus primitivised and their basic human characteristics were denied.

3.3 The racial hierarchy in German colonial criminal law

The treatment of the Asian and African colonies clearly followed a racial hierarchy, and the oppression of Black people was presented by scientists as a natural necessity.¹⁵⁹ Accordingly, German colonial law of sanctions for colonised peoples was also structured by a racial hierarchy. This is apparent in the fact that some of the sanctions applied in non-African colonies were less severe than those used on the African continent. Furthermore, even within the colonies on the African continent, Black people were punished more severely than other racialised people.¹⁶⁰ Corporal punishment, for example, was excluded as a sanction against

154 Karstedt (n 153) 63.

155 Iffert (n 97) 183.

156 Karstedt (n 153) 59f.

157 As above.

158 As above; Iffert (n 97) 183f; with more references: Schaper (n 97) 177f.

159 El-Tayeb (n 16) 62f.

160 Iffert (n 97) 183.

Arabs and Indians.¹⁶¹ In the case of chained imprisonment, the punishment of being chained to other prisoners was exclusively applied to Black people. Non-Black people were to be locked up individually.¹⁶²

The classification of 'Indians' above Black people in the racial hierarchy is made clear by the comparison of the two groups in a statement by the German Imperial Colonial Office. In order to defend itself against the British accusation that it colonised people too brutally, the Imperial Colonial Office stated that the British carried out the same punishments even 'against cultural people such as the Indians', not 'barbaric *native* tribes' (*barbarische Eingeborenenstämme*).¹⁶³ Here, the 'Indians' are racially constructed as a homogeneous group alongside the 'natives', but they are at least ascribed a culture, while the 'natives' are first referred to by the racist term '*Eingeborene*' and then further degraded as different and inferior by the terms '*barbarisch*' and '*Stämme*'.¹⁶⁴ In the statement, the Imperial Colonial Office also attests to the British that the 'colour bar' system in India is a product of British colonial rule and that even the more distinguished and educated Indians are 'treated socially as if they were [n-word]'.¹⁶⁵ The Imperial Colonial Office implies here that Black people are treated the worst, and that 'Indians' do not deserve to be so treated. It is important to point out that the different colonial powers were not concerned in their mutual accusations with drawing attention to racist practices, but rather with justifying their own brutal and inhumane actions by claiming that the other colonial powers were even more brutal.

4 Conclusion

This analysis demonstrates that anti-Black racism can be found in colonial criminal law in various manifestations and, therefore, was an important factor in German colonial practice. The infantilisation and primitivisation of Black people is evident in the very establishment of

161 The penalties permitted in sec 2 of the Imperial Decree 1896 were restricted under the terms of sec 3.

162 Karstedt (n 153) 59.

163 Reichskolonialamt (n 151) 26.

164 On the racist connotations of the terms '*Eingeborene*' and '*Stamm*': N Ofuatey-Alazard '*Eingeborene_r*' in Arndt & Ofuatey-Alazard (n 22) 683; S Arndt '*Stamm*' in Arndt & Ofuatey-Alazard (n 22) 668ff.

165 Reichskolonialamt (n 151) 160.

colonial law and was used to justify colonisation through the narrative of the civilising mission. The establishment of the racially segregated dual legal system can be linked to the construction of Black people as a homogeneous group which was supposed to embody Otherness and the opposite of *whiteness*. Along with Othering and homogenisation came the dehumanisation of Black people, which is fundamental to anti-Black racism. The extent of the punishments applicable to Black people was a particular manifestation of this dehumanisation. By denying their basic human characteristics, Black people were subjected to particularly harsh punishments that were applied, in the context of the racial hierarchy, only to Black people. Future research could build on these findings and investigate which colonial continuities exist in the (German) legal system. Furthermore, the framework of the core characteristics of anti-Black racism can be used to analyse various domains of both colonial law and contemporary law.

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