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Stacey Hynd

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Future Directions in African Crime and Criminal Justice History

Stacey Hynd

“One slaughters a beast and then throws feed to his brother. One does not do that to a human being”¹.

This is what the history of crime and law in Africa should do, and has been striving to do: to analyse what it means to be human, to live a life as part of a given community under often extraordinarily difficult conditions, and to investigate what happens when the social and legal boundaries establishing appropriate membership of that community are violated. Jonny Steinberg’s account of one young Somali’s journey from Mogadishu, through the Somali civil war, to becoming a refugee and trying to establish a new life in post-apartheid South Africa is part of a vibrant new generation of scholarship on crime in Africa, one that explores the lived realities of ordinary Africans and the laws that shape, and often fail to protect, their existence. Steinberg recounts Asad’s struggle to survive and provide for his family as part of a marginalized refugee population in the face of xenophobia, criminal gangs, and the failure of the police to investigate the murder of his uncle, leaving Asad railing against the injustice of a society that sees him potentially facing his uncle’s killers every day in the community and knowing that one day his life too may be ended². This article will briefly sketch the key developments in African criminal and criminal justice history since the 1980s, looking at colonial, postcolonial and contemporary developments, before highlighting productive areas and methods for future research. It should be noted that a lot of the most exciting research is not being done within traditional “criminal history” itself, nor is it even exclusively focused on issues of crime, justice and punishment: more often, these issues are used as a methodological lens by scholars to explore related issues of power, mass violence, injustice, and inequality.

The field of African crime and criminal justice history emerged in the 1980s. Prior to this the field was dominated by colonial ethnographic studies of “customary law”, legal anthropology, and studies by metropolitan-educated African elites³. Revisionist histories from the 1980s onwards however showed that “custom” was

¹ Jonny Steinberg, *A man of good hope: one man’s extraordinary journey from Mogadishu to Cape Town* (2016a, p.230).

² Steinberg (2016a).

³ See Danquah (1928); Rattray (1929); Kenyatta (1938); Gluckman (1955).

often a modern “(re-)invention of tradition”⁴. Instead they highlighted the legal pluralism that shape colonial courts and explored how law served as a cornerstone of colonial rule, establishing – and sometimes restraining – its power, and how Africans exerted agency in negotiating colonial legal arenas⁵. Crime in Africa was first studied as a form of resistance against colonization and the widespread criminalization of native life and labour⁶, but more recently scholars have been analysing criminality as a lens through which to understand tensions within African communities and the socio-cultural changes wrought by colonialism, as in studies of liquor controls and drunkenness⁷, prostitution⁸, madness and criminal insanity⁹, as well as murder¹⁰. The moral panics surrounding ritual murder¹¹ and the criminalization of witchcraft¹² have proven especially illuminating regarding the clashes between colonial and African worldviews, whilst juvenile delinquency has been fruitfully investigated as a marker of late-colonial anxiety and the perceived detrimental impact of capitalism, poverty and urbanization on African societies¹³. Two excellent historiographical reviews on law, crime and punishment in colonial Africa have recently been provided by field-leading scholars Richard Roberts and Richard Waller¹⁴ delineating the development of colonial criminal and legal history. The majority of the literature however focuses British and French colonies, and greater analysis of Belgian, Portuguese and Italian territories, as well as Ottoman influences in North Africa, would deepen our knowledge and enable better comparative analyses. One welcome development has been the recent growth of analyses of Islamic law, although these have often focused on “civil” more than “criminal” offences¹⁵.

In terms of sources, scholars working in African pre-colonial and colonial history can only look on with envy and covetousness at the range and depth of sources available through projects such as the Old Bailey Online and the Digital Panopticon¹⁶. National archives in African countries and former imperial metropolises do hold extensive, if not always detailed, records on colonial law, crime and punishment. For British colonial Africa, for example, colonies produced annual police, prisons, and legal reports, and court records (sometimes including trial transcripts) have often been preserved, whilst administrative officers who sat as judges in District Court sometimes recounted their cases and findings. Colonies also produced annual

⁴ Ranger (1983).

⁵ Chanock (1985); Moore (1986); Mann and Roberts (1991); Merry (1991); Mamdani (1996); Benton (2002); Roberts (2005).

⁶ Rotberg (1971); Crummey (1986); Anderson (1993, 2018).

⁷ Akyeampong (1996); Willis (2005).

⁸ White (1992).

⁹ Vaughan (1983); McCulloch (1995).

¹⁰ Bernault (2006).

¹¹ Murray and Sanders (2006); Pratten (2007).

¹² Gray (2001); Luongo (2011).

¹³ Campbell (2002); Fouchard (2010); George (2014).

¹⁴ Roberts (2013); Waller, 2014).

¹⁵ Jeppie *et al.* (2010).

¹⁶ See <https://www.oldbaileyonline.org/> and <https://www.digitalpanopticon.org/>.

“Blue Books” which collated government statistics and reports. Postcolonial holdings however tend to be much patchier, with post-independence governments failing to appropriately archive their departmental records, and many collections lack necessary cataloguing and preservation, particularly in district archives. There is however a wider range of materials available for the study of African crime and criminal justice than is often realised, and much of it remains – if not pristine – then at least untouched by historians’ hands and ripe for analysis. Witness testimonies and confessions from murder trial case files have provided fascinating insights into the socio-economic tensions which strained African families and communities¹⁷. Colonial statistics offer under-explored possibilities for comparative, quantitative research. Regional district archives and missionary records in particular offer profitable avenues for exploring local histories of crime and customary law, as do private papers of legal officials, whilst vernacular print cultures, proverbs and oral traditions can offer useful insights into local understandings of social transgression and its sanctioning.

Over the past few years there has been a particular growth in studies of colonial punishment and state violence in Africa. Colonial states introduced metropolitan criminal justice systems into Africa that clashed with local restorative notions of punishment and often legitimized penal sanctions that were no longer acceptable in metropolitan Europe itself, such as flogging and public execution. Colonial penal systems in Africa quickly became characterized by a focus on didactic deterrence and a maintenance of law and order¹⁸, whilst policing was far more by coercion than consent¹⁹. Scholars have highlighted how, despite colonial rhetoric of penal reform and modernization, violence remained central to colonial penalty, with continued use of the death penalty²⁰ and corporal punishment²¹. Prisons differed from the Western penitentiary model in their conscious strategy to constrain bodies rather than discipline minds²². Further research however is required on non-custodial forms of punishment, such as fines and compensation, the exiling of political opponents, and the use of collective punishments in the face of anti-colonial unrest and rebellion. Looking towards imperial records, in Britain the recently declassified Hanslope “migrated archive”²³ offers a treasure trove of information on the late colonial state’s attempts to retain control over its increasingly recalcitrant subjects. These records have already helped rewrite the history of state violence during states of emergency, particularly during the Mau Mau rebellion in Kenya, demonstrating the full extent of the atrocities and violence committed by British forces and their African allies during military campaigns, forced villagization and detention camps²⁴. The migrated archive however also contains detailed records on late colonial policing and state surveillance, including Special Branch records on alleged political subversion, sedition, and communist interference, which are yet to be fully explored. French

¹⁷ Hynd (2012).

¹⁸ Killingray (1986).

¹⁹ See Thomas (2012).

²⁰ Hynd (2008).

²¹ Pierce (2001).

²² Bernault (1999, 2007); Branch (2005); Hynd (2015a).

²³ Anderson (2017).

²⁴ See Anderson (2012a, 2012b); Bennett (2012).

colonial violence is also coming under renewed historical scrutiny, with recent analyses of the Algerian war of independence highlighting the abuse and torture of prisoners and detainees²⁵, and the extreme violence of colonial policing and para-military techniques²⁶. Incidentally, it would be beneficial for studies of late colonial violence (both judicial and extra-judicial) to move beyond a focus on Mau Mau and Algeria, and to develop our understandings of other, more under-researched, decolonization struggles and associated rights-abuses, such as in those in Malawi²⁷ and Cameroon.

There is still a need for broader contextual studies of penalty rather than just punishment, and for research that illuminates the relationship between different forms of judicial and extra-judicial violence in colonies²⁸: between capital punishment and punitive expeditions against rebellious tribes; between flogging in prisons and on plantations; and between prison labour, forced labour, “unfree” labour and slavery more broadly²⁹. As the 2016 “Crime and Punishment in Africa” conference at the University of Florida noted, there is a need for studies that “move beyond lists of crimes and their punishments to look at what takes place in prisons in both colonial and postcolonial Africa, and examines the conduct of warders and prisoners alike”³⁰. Jocelyn Alexander’s exemplary research on the history of political imprisonment in Zimbabwe draws on oral history, archives and political memoirs to demonstrate how detention camps could serve as spaces of practical and imaginative exercises in self-government and state-making, rather than just being spaces of repression³¹. The role of African professionals in colonial and postcolonial criminal justice systems is certainly deserving of greater investigation. Historians have begun to interrogate the experiences of African interpreters, clerks, judges and lawyers³² to explore the power and tactical agency they exerted within colonial court structures. Katherine Bruce-Lockhart’s doctoral research on the Ugandan prison service is an excellent example of the value of this professional focus. Based in part on extensive interviews with former prison officers it highlights how prison staff constructed a distinct professional ethos that helped to advocate for penal modernization in the colonial era and to avoid prisons becoming sites of torture and extreme violence under Idi Amin’s authoritarian regime³³. Oral history, with its potential for recovering/uncovering African voices that are otherwise absent in the archive, is certainly one research methodology that should be more fully utilised in researching law and crime in the continent for the colonial and independence era.

One area where there has been a striking growth in research since the late 1990s has been on gendered experiences of crime and criminal justice. Early studies explored both the restrictions and possibilities for agency afforded to African women

²⁵ Branche (2001, 2014).

²⁶ Thomas (2011); Evans (2012); Klose (2012).

²⁷ McCracken (2011).

²⁸ See Alexander and Kynoch (2011).

²⁹ Hynd (2015b).

³⁰ See Leedy and White (forthcoming).

³¹ Alexander (2011).

³² Lawrance *et al.* (2006); Ibhawoh (2013); Karekwaivanane (2016).

³³ Bruce-Lockhart (forthcoming).

within colonial legal systems³⁴. Inspired by the cultural turn and feminist histories, scholars subsequently explored women's experiences of colonial exploitation and empowerment. Hodgson and McCurdy's edited volume on "wicked women" in particular has inspired a subsequent generation of scholars to use histories of crime and deviance to explore shifting notions of gender³⁵. Colonial attempts to manage or control female sexual activity have dominated much of the literature, which has focused on marriage disputes and adultery³⁶, prostitution³⁷, illicit sex³⁸, coercive marriage³⁹ and rape⁴⁰. Others have focused on linkages between new forms of masculinity and criminal cultures⁴¹, or on female violent crime⁴². A burgeoning literature has also been generated in recent years on African homosexualities, tracing the criminalization of homosexual practices and the crimes committed against Africa's LGBTQ+ communities, partly in response to recent attacks on LGBTQ+ persons and their human rights by both religious and political bodies⁴³.

Other productive avenues for future research include a focus on the social meaning of crimes rather than just their punishment. There has been a shift in recent historiography away from the strictly empirical, administrative perspectives of colonial history towards a more socio-cultural perspective on law and criminality. Recent studies have productively focused on the quotidian realities and everyday experiences of law, crime and social (dis)order in Africa, giving greater space to personal narratives. This has been driven in part by the growth of African Studies as a discipline, and by a shift in methodology towards increasingly inter-disciplinary analyses of law, crime and punishment. Inter-disciplinary conferences have provided constructive venues in recent years for the discussion of issues of both historical and contemporary concern, such as domestic violence⁴⁴, forced marriage⁴⁵ and law and social order⁴⁶. The input of anthropologists and historical anthropology has greatly enhanced our knowledge of local African understandings of what constitutes a "crime" and suitable punishment, and how these often clash with global, Westernised peno-legal practice. In his recent, post-humously published, study of Nigerian organised crime, Stephen Ellis highlights the affective and metaphysical dimensions of criminality, and how understanding the spirit world and its impact on an individual's prosperity is a prerequisite for studying crime in that country⁴⁷.

³⁴ Hay and Wright (1982).

³⁵ Hodgson and McCurdy (2001).

³⁶ Shadle (2006); Burrill (2015).

³⁷ White (1992).

³⁸ Aderinto (2015).

³⁹ Bunting *et al.* (2016).

⁴⁰ Thornberry (2016).

⁴¹ Glazer (2000).

⁴² Zimudzi (2004).

⁴³ Epprecht (2013).

⁴⁴ Roberts *et al.* (2010).

⁴⁵ Bunting *et al.* (2016).

⁴⁶ Karekwaivanane and Cooper-Knock (2016).

⁴⁷ Ellis (2016).

The literature on ideas of crime and criminality in South Africa is particularly rich⁴⁸. Contemporary studies of African criminality have increasingly been informed by socio-legal perspectives and by the development of African criminology as a field of inquiry. Studies of policing in particular have benefited from this approach, with growing investigation of the relationship between formal and informal institutions of policing⁴⁹, of community policing and vigilantism⁵⁰, and of police violence⁵¹. Olly Owen's excellent ethnographic research on the Nigerian police highlights how the violence, corruption and negligence that typifies interactions with the police may be less signs of officer's power than of their own attempts to cope with their lack of power within the hierarchical and paramilitarized police infrastructure⁵², and has recently been influencing police training reform in Nigeria.

Perhaps the most exciting spaces for future research however lie in relationships between states, societies and crime the postcolonial and contemporary eras. The 1970-80s – often referred to as the “decades of the dictators” – were in many parts of Africa years of economic downturn and state collapse, the rise of authoritarianism and the abjection of Western-style “modernity”. As a result, they were also a time of burgeoning criminality and a breakdown in any semblance of a “rule of law”. Conflict, reduced budgets and a lack of political will has meant that state archives have in many cases either seen significant tranches of their holdings destroyed, poorly preserved, or simply never deposited by the relevant government departments⁵³. The political transition to majority rule with the end of apartheid in South Africa was infamously accompanied by the destruction of incriminating government documents⁵⁴. However, private archives and family papers, university research deposits law societies, and newspapers all contain valuable information on patterns of crime, whilst district archives can retain surprising amounts of holdings from state surveillance reports on actions classified as “political crimes” and opposition to the state. From an international perspective, local and international NGO reports from groups such as Amnesty International, Human Rights Watch and various UN bodies, provide detailed evidence on patterns of crime judicial and extra-judicial punishments across Africa. Recent research on Uganda in particular has highlighted the possibilities posed by such materials. Alicia Decker's compelling account of women's experiences during Idi Amin's reign in Uganda in the 1970s draws on archival and oral histories to demonstrate the how women socially navigated the violence and criminality of Amin's regime, and how they sought to locate the family members who had been detained or “disappeared” by the state, without getting arrested themselves⁵⁵.

There is a pressing need for more research on postcolonial punishment, both judicial, and extra-judicial. Postcolonial states have often been characterized by the capricious application of the rule of the law, shown in many countries by the use

⁴⁸ See e.g. Kynoch (2013), Gillespie (2014).

⁴⁹ Cooper-Knock (2016).

⁵⁰ Smith (2015).

⁵¹ Steinberg (2014).

⁵² Owen (2016).

⁵³ Ellis (2002).

⁵⁴ Harris (2000).

⁵⁵ Decker (2014).

of widespread detention and imprisonment as punishments in and of themselves. Political detainees have written powerfully about their experiences⁵⁶ and now scholarly investigation of political detention and imprisonment is effectively highlighting the extent of abuses committed and resistance offered⁵⁷. Further study of imprisonment as a whole is required however, as is study of both corporal and capital punishment⁵⁸ and other forms of violence against citizens by state officials or proxies. Has there been a “carceral archipelago”⁵⁹ in Africa, beyond perhaps the example of apartheid South Africa? Theoretically speaking, there is further debate to be had on to what extent Eurocentric notions of punishment offered by scholars like Foucault and Garland apply in an African context⁶⁰. In terms of criminal justice, the accountability borne respectively by the legacies of colonialism and postcolonial politics requires greater elucidation in relation to the abrogation of the rule of law in some states. Do states require full control of their courts and judges to routinely imprison their enemies? What can investigating rates of acquittal, appeal and suspended sentences tell scholars about the nature of justice and punishment in Africa?

Focusing on the contemporary era, there are perhaps two key pathways for research on crime and law: firstly in relation to the impact of conflict, and secondly to the impact of democratization and economic liberalization, the parallel processes which have shaped the African continent since the 1990s. The relationship between war and crime offers many productive avenues of investigation for understanding the development of criminal cultures and networks in many regions, particularly in today’s globalized world. War creates conditions for new forms of crime as people seek to survive, or even thrive, in dangerous conditions. Samuel Daly’s innovative doctoral research on the legal system in Biafra during the Nigerian civil war 1967–70 accesses previously ignored documentation from the short-lived secessionist Biafran government to compellingly highlight the strategies of “survival by deception” that ordinary Biafrans embarked upon to secure their and their families’ access to resources and protection⁶¹, but also shows how these strategies provided templates for the criminal cultures which have plagued Nigeria in recent years. In the post-Cold War era, scholars have noted the linkages between so-called “new wars”, which swept countries like Sierra Leone and Liberia, and global or regional criminal activities⁶². Whilst it is historically disputable whether there is anything “new” about these linkages, the theory of “resource curses” and “greed” driving conflict, with the criminal extraction and sale of highly lootable resources like coltan and “blood diamonds” fuelling extremely violent and protracted conflicts, has proven highly influential⁶³. The links between criminal enterprises – including armed robbery, drug smuggling, and arms trading – and terrorist organizations like Boko Haram and AQIM in West Africa and Al-Shabaab in Somalia also require greater scholarly investigation.

⁵⁶ See First (1965); Soyinka (1972); Mapanje (2011).

⁵⁷ See Alexander (2011).

⁵⁸ Karimunda (2014).

⁵⁹ Foucault (1975).

⁶⁰ Steinberg (2016b).

⁶¹ Daly (2017).

⁶² Kaldor (1999).

⁶³ See Collier and Hoeffler (2002).

Recent developments in international law have driven new research into war crimes and crimes against humanity, particularly in relation to sex- and gender-based violence, with major ongoing research focusing on the practice of forced marriage and sexual slavery in African conflicts⁶⁴, and the impact of conflict-related violence on peace-time domestic and sexual violence⁶⁵. Scholars are also beginning to unpack the relationship between transitional justice, human rights and criminal justice in post-conflict spaces, highlighting how social accountability, trust in the rule of law and access to tangible justice – or at a least belief in the possibility of that justice – can be crucial components in peace-building processes⁶⁶. They have also highlighted how African “traditional justice”, such as *gacaca* courts in Rwanda, can contribute to transitional justice⁶⁷. Others have highlighted the contentious place which Africa and ideas of Africa occupy in international criminal and humanitarian law, particularly following the International Criminal Court’s unifocal targeting of African offenders⁶⁸. Such discussions of rights and justice however raise the question of exactly what is meant by those terms among by African populations. The concept of “justice” itself has been a largely neglected topic and requires further study⁶⁹.

Turning to peace-time developments in law and crime, there is an academic consensus that there has been a “criminalization of the state” across many parts of Africa since the independence-era, which has been deepened by the spread of neo-liberal economic regimes and democratization⁷⁰. John and Jean Comaroff posit that rising criminality in the postcolony is part of a dialectic of law and dis/order, framed by deregulation and new modes of mediating human transactions: criminal violence here does not so much repudiate the rule of law or the licit operation of the market, as appropriate it⁷¹. With contemporary global interest in the rise of kleptocratic politics, there is a need for more, and better, historicization of this erosion of the line between the political and the criminal across Africa. Ellis and Pierce have effectively shown how this can be undertaken⁷², with their historical and anthropological analyses of corruption in Nigeria, but future research should also focus on related issues of fraud, bribery and economic crimes, youth militias and election violence, highlighting the crimes committed by Africa’s “Big Men” as well as ordinary citizens. More broadly, the inter-disciplinary 2016 Carter conference on crime and punishment in Africa at the University of Florida raised three important avenues for future research. Firstly, it called for greater analysis of the transnational dimensions of crime, suggesting scholars look at crimes such as poaching and smuggling⁷³ that involve trade across borders and are illegal in different, transnational domains. Further analysis is also

⁶⁴ Bunting (2012).

⁶⁵ Medie (2013); Porter (2016).

⁶⁶ See Allen and MacDonald (2015).

⁶⁷ Clark (2010).

⁶⁸ Clarke (2009); Allen (2013).

⁶⁹ Johnson and Karekwaivanane (forthcoming).

⁷⁰ Bayart *et al.* (1999).

⁷¹ Comaroff and Comaroff (2006).

⁷² Ellis (2016); Pierce (2016).

⁷³ Scheele (2012).

required on the development of transnational and global dimensions of African crime, particularly in relation to the international drugs trade⁷⁴ and modern forms of slavery and human trafficking⁷⁵, but also criminal practices that take advantage of globalized networks of communication and information like the infamous Nigerian “419 scam” emails. Secondly, it noted that historians should investigate the processes by which customary practices, such as subsistence hunting, same-sex relations, or the use of natural stimulants like khat, become criminalized in a modern state. This also highlights the issue of “quasi-legality” and the shifting definitions and boundaries of crime in law and social practice. Thirdly, the question was raised as to how to study actions that are criminal according to both domestic and international laws but which routinely go unpunished, such as pogroms in Rwanda or farm invasions in Zimbabwe. This reflects John and Jean Comaroff’s highlighting of the need to study the “zones of ambiguity between the presence and absence of law” that have emerged in the postcolony⁷⁶. Another area of pressing future research would be the threats posed to the environment and sustainable development across the continent by criminal and illicit activities.

Overall, perhaps the most productive shift in terms of the development of African literature however would be a move away from seeing Africa as a “dark continent” or an exceptional space and towards the greater integration of Africa and Africanist scholars into broader global histories of crime and criminal justice. Africa is increasingly being read into histories colonial penalty and the “coercive networks of empire”⁷⁷, as recent studies of murder trials⁷⁸, deviance⁷⁹ and convict labour⁸⁰ show, whilst Clare Anderson’s “Carceral Archipelago” project fruitfully includes Africa in its analysis of the relationships and circulations between convict transportation, penal colonies, labour migration, and carceral spaces more broadly⁸¹. In future, it would be welcome to move beyond thinking of Africa as a space of the criminal “Other” or of penal primitivism, and to explore the differences and similarities which mark its treatments of crime and justice from those in Europe and elsewhere. The integration of Africa into the field of criminal history more broadly would be of benefit to both Africanists and criminal historians.

Stacey Hynd
Senior Lecturer in History
University of Exeter (UK)
s.hynd@exeter.ac.uk

⁷⁴ See Carrier and Klantschnig (2012).

⁷⁵ Quirk (2011); Lawrance and Roberts (2012).

⁷⁶ Comaroff and Comaroff (2006).

⁷⁷ Sherman (2009).

⁷⁸ Wiener (2007).

⁷⁹ Jackson and Manktelow (2015).

⁸⁰ de Vito and Lichtenstein (2015).

⁸¹ <http://www2.le.ac.uk/departments/history/research/grants/CArchipelago>.

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