

Africa's lawyers:
*between imperial legacies
and transformations in
global capitalism*

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Brown bag seminar

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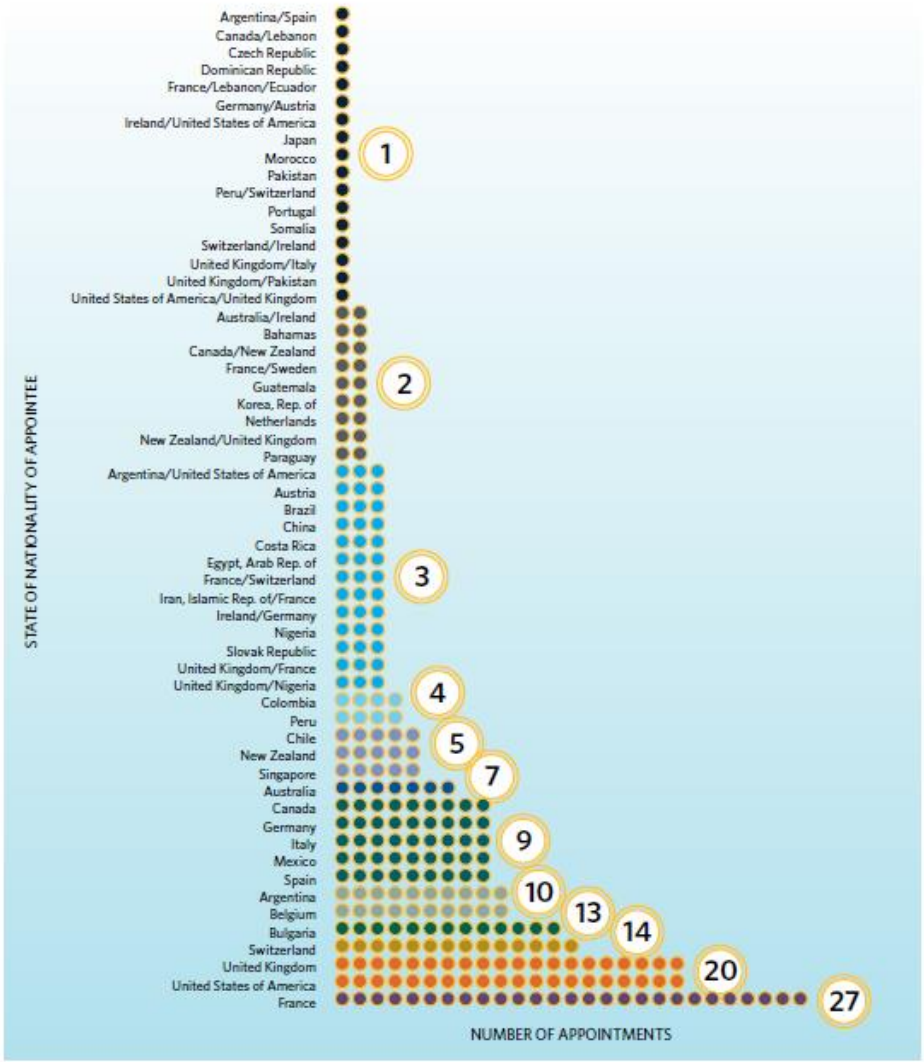
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The (policy) pull to look at African lawyers (1)

- “Boom” of arbitration cases involving African states: 11 of the 56 new ICSID arbitration cases registered in 2018 were brought against African states (19.6 per cent of claims registered that year).
 - Approximately half of these cases relate to oil, gas or mining projects
 - Issue of the “stability” of contracts; expansion of “risks” faced by multinationals (arbitration but also social responsibility and transnational litigation)
 - “Backlash” against investment arbitration across Africa: South Africa (South Africa’s Protection of Investment Act 2015: mediation or recourse to local courts), Namibia (2016 Namibia Investment Protection Act: mediation or recourse to local courts unless explicitly stipulated in contracts), Ivory Coast (2018 Investment code: mediation or OHADA)

One major point of contention: lack of representativeness of African interests in ISDS. (Out of the 11 ICSID registered cases involving African states in 2011, no African law firm acting as counsel)

STATE OF NATIONALITY OF ARBITRATORS, CONCILIATORS AND AD HOC COMMITTEE MEMBERS APPOINTED IN FY2018 IN CASES REGISTERED UNDER THE ICSID CONVENTION AND ADDITIONAL FACILITY RULES



Source: ICSID's 2018 annual report, p. 33

The (policy) pull to look at African lawyers (2)

- Professional and institutional responses:
 - Institutional innovations towards an “Africanization” of arbitration (OHADA; PCA; African Commission of the ICC in Paris; AfCFTA; PAIC)
 - Legal education pull (associations dedicated to arbitration in Africa, such as AfricArb, I-ARB and African Arbitration Association)
 - Massive expansion of the corporate hemisphere across Africa, especially South Africa (e.g. ENSAfrica)
 - Levelling the playing field? (CONNEX; African Legal Support Facility)

The (scholarly) problem with Africa's lawyers (1): The pendulum of ideological projections



Africa rising, Africa failing

Law *for/versus* politics

- **Judicialization of “mega-politics” worldwide and across Africa** (Hirschl 2008) - matters of outright and utmost political significance that often define and divide whole polities
- **“Criminalization of politics”** (“lawfare”) (Comaroff and Comaroff 2006): fetishism of the law at the intersection of outsourced and outlaw economies
- **“Institutions matter”** (World Bank 1998): ebb and flow of development policies (judicial institutions as the cause or solution to under-development)
- **State capture** “*Je préfère que la richesse du continent revienne à un Noir corrompu plutôt qu’à un Blanc néocolonialiste.*” (“I would rather the wealth of the continent was captured by a corrupted African rather than a White neo-colonialist”, Sindika Dokolo, husband of Isabel Dos Santos, interviewed by *Le Monde* in 2017)

The (scholarly) problem with Africa's lawyers (2): (Trans)national governance

- **Upstream:** prominence of contracts in transnational governance:
 - Power relations as a blind-spot in global value chains (Cutler and Dietz 2018)
 - Murkiness of divides between public sphere and private interests (France and Vauchez 2017)
 - Fragility of social contract undergirding extraction (violence; legal contests; but also climate emergency)
- **Downstream:**
 - ISDS legitimacy (1): *Who* arbitrates?
 - ISDS legitimacy (2): *What* law? (legal islands and vernacularity)

The problem with Africa's lawyers (3): knowledge gaps and *imperial entanglements*

Sociology of law / sociology of legal professions in the orbit of the US hegemon:

- “Profession is a world of ordinary language which has been smuggled into scientific language; but it is above all a social construction, the product of an entire labor of construction of a group and of a representation of this group which has crept surreptitiously into the science of the social world” (Bourdieu and Wacquant 1992: 212)

***Chiaroscuro* of knowledge on law and legal institutions; very little knowledge on African lawyers**

- “Imperial entanglements” (Steinmetz 2012): scholarly representations as part of, and shaped by, the colonial enterprise. Little *aggiornamento* of legal scholarship.
- Policy pulls and their contradictions: courts as both the *problem* of and the *solution* to under-development
- Missionaries of the rule of law or mercenaries of neocolonial interests?
- Gentlemen politicians of law or corporate warriors?

The example of the PCA List of arbitrators: Abubakar Malami, “gentleman politician of law” as politician and former Min of Justice versus Adebayo Adenipekun, San, business lawyer and part of legal team of Goodluck Jonathan



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EMBRACE A NEW DAWN

Know how, know who, offshore and connected

- Pascal Agboyibor, Togolese, one of the top 3 business lawyers (and only Sub-Saharan African) in Francophone Africa in the past 4 years
- “Shadow power broker” of transactions between states and foreign corporations in the African continent
- Royal family, law as a “family business”, economy of contracts and portfolio of African contacts...

From legal professions to *lawyers' double games in the transformation of state power*

- Hobbes' *Leviathan* (the monarch as the head of the state's corporate body) and the King's two bodies (Kantorowicz 1957): lawyers at the service of power holders – and thus playing a central role of legitimation of state power – but also needing to distance themselves from politics, as a condition to protect the autonomy of the law, and with it their professional practices
- **Lawyers and the Empire:** kingpins yet “fighting brigade of the people” (Oguamanam and Pue 2016)
- **Double-games (Dezalay & Garth 2002) linked to transformations of the field of state power**



- **Legal elites and hierarchy in legal professions (extraversion, family, social and economic capital, political proximity):**
 - an *entry-point* to trace globalization patterns across the African continent;
 - an *entry-point* to trace the authority over time of international dispute settlement mechanisms
- More nuanced (though not less bleak) explanation of Africa's unequal and uneven relationship with the global economy as one shaped by the path of imperial legacies and successive interconnected waves of globalization.

What for?

ISDS upstream: the “Africa Bar” in Paris and contract negotiation (1)

‘It’s a Whites’ business’ (Economist, Fair Links)

‘I am a White African’ (Mr Africa at Herbert Smith Freehills)

‘The Good, the Bad and the Ugly’ (Economist, Fair Links)

‘As a lawyer, you need to stand straight and always return to the law’ (*Être droit dans ses bottes et toujours retourner au droit*) (Mr Africa at Herbert Smith Freehills)

‘My specialty now is crisis management...We can’t anymore confine risk to arbitration’ (Mr Africa at Herbert Smith Freehills)



The Africa Bar in Paris: *offshore* yet connected

- External shocks: the policy pull towards transparency, but a three-legged tango dance (the pull of IFIs)
- Interconnectedness between imperial legacies, Big Bang and the *aggiornamento* of the “Republic of Lawyers”
- Symbolic displacement towards the “Wall Street law firm” model but centrality of charisma (white, French, males)

Extraction and the gate-keeping analogy: *an entry point to trace continental patterns*

- “The gatekeeper state like the colonial state is strong at the nodal point where local society meets external economy, dependent on manipulating revenues and patronage deriving from that point, including foreign aid and commercial deals” (Cooper, 2014)
- Imperial legacies over the structure, over time, of extractive economies and ongoing transformations in global capitalism (financialization; GVCs): **extraversion and identity rents combined with vernacular constitutionalism** (murky world of outsourcing and scaffolding of hyper-legality and lawlessness)
- Back to Agboyibor and the “Africa” bar in Paris: the weight of imperial legacies **or virtue capitalism with an imperial twist**



Conclusion: A research agenda that zooms *in* and *out*



- **Reversing the lens: rather than looking at responses to the ongoing backlash against ISDS, let's look at the nodes of contact between Africa and ISDS**
- **Empires in world history** (Burbank and Cooper 2010): more typical form of polity in world history
- **Field of power in Empires:** need to take into account geographic scale (octopus-like); and Empires as more than giant states and more than forerunners of modern states: “(m)odern colonial empires were asymmetrically structured assemblages of states and other geopolitical formations” (Steinmetz 2014: 9)
- To understand law(yers)’ relationship with power in post-colonial realm: need to connect changes in former *métropoles* and former colonies with new poles of global power (US, China) and transformations in the global economy (financialization; globalization)