Oil Dependence and Access to Environmental Justice in Nigeria: The Case of Oil Pollution

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Abstract

For the past sixty years, Nigeria has failed to control oil-related pollution. Chronic oil spills and devastation of fragile ecosystems have forced inhabitants to live in a toxic environment, fuelling grievances and conflict.

This dissertation studies the effectiveness of Nigeria's legal system to provide access to environmental justice (A2EJ) for victims of oil pollution in the Niger Delta. The thesis shows that despite Nigeria's extended period of democratic rule, A2EJ remains constrained by historical factors, such as economic motivations of past regimes when developing legislation and governance practices. A2EJ also remains constrained by modern political and economic factors, such as the negative impact of the scale of the oil sector on governance institutions, both in effectively carrying out regulatory remits and in making impartial decisions in the courts. Some positive developments in A2EJ are identified in Nigerian oil pollution-related jurisprudence, but these are overshadowed by procedural and jurisdictional constraints facing the majority of potential and actual litigants, as evidenced in case law and in survey findings.

This research contributes to the A2EJ literature by developing a theoretical framework for assessing A2EJ in resource-dependent contexts. Using a socio-legal methodology, the case study applies new data to the interrogation of A2EJ in Nigeria's oil sector. In order to study legal gateways to environmental justice, this research focuses on, first, the *status quo* of oil sector governance in practice, second, the legislative and regulatory framework underpinning it, and finally, domestic and transnational litigation involving pollution disputes between oil companies and communities. The dissertation draws on three original datasets collected during fieldwork in Nigeria in 2014: the results of a survey of twenty-seven Nigerian legal practitioners, a case law dataset of forty-seven oil company-community disputes over oil pollution, and twenty-one key informant interviews.

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Abbreviations

A2EJ – Access to Environmental Justice
A2J – Access to Justice
AGRA – Associated Gas Re-injection Act
CLPR – Civil Litigation Research Project
DPR – Department of Petroleum Resources
ECOWAS – Economic Community of West African States
EIA – Environmental impact assessment
ETJ – Extra-territorial jurisdiction
ETL – Extra-territorial litigation
FHC – State High Court
FREP – Fundamental Rights (Enforcement Procedures) Rules 2009
JIT – Joint Investigation Team
JIV – Joint Investigation Visit
MEND – Movement for the Emancipation of the Niger Delta
MOSOP – Movement of the Survival of the Ogoni People
MPR – Ministry of Petroleum Resources
NDDC – Niger Delta Development Commission
NESREA – National Environmental Standards and Regulation Enforcement Agency
NNPC – Nigerian National Petroleum Company
NOSDRA – National Oil Spill Detection and Response Agency
ONWA – Oil in Navigable Waters Act
OPA – Oil Pipelines Act
PIEL – Public Interest Environmental Litigation
SHC – State High Court
SPDC – Shell Petroleum Development Company
UNECE - United Nations Economic Commission for Europe

1 Introduction

Hear the call of the ravaged land,
The raucous cry of famished earth
The dull dirge of poisoned air
The piteous wail of sludged streams
Hear, oh, hear!
Stunted crops fast decay
Fishes dies and float away
Butterflies lose wing and fall
Nature succumbs to th'ecological war

"The Call," Ken Saro Wiwa[1]

1.1 Introduction

The objective of this dissertation is to assess the effectiveness of legal gateways to environmental justice for victims of oil pollution. To do this, I take as my focus the West African country of Nigeria, which is well-known for its significant economic dependence on oil revenues and the highly localised negative effects of the oil sector's activities in the Niger Delta. The research detailed here builds on the tradition of the SOAS Access to Environmental Justice (SOAS/A2EJ) project, and makes a new contribution to this tradition by focusing on a case study from Sub-Saharan Africa (only one out of eleven case studies in the Harding collection studies an African country).[2] Unlike the studies that comprise the SOAS/A2EJ project, this case study moves away from urban areas and into the rivers and creeks of an oil-rich region that has long served as an engine for Nigeria's economic growth.

[1] This poem was written by environmental activist and founder of the Movement for the Survival of the Ogoni People (MOSOP) Ken Saro Wiwa. He wrote the poem in prison before his execution. See: Ken Saro-Wiwa. *Silence Would Be Treason: Last Writings of Ken Saro-Wiwa*, ed. Ide Corley, Helen Fallon, and Laurence Cox (Dakar Senegal, Nairobi: Conseil pour le Developpement de la Recherche Economique et Sociale en Afrique, 2013).
[2] Andrew Harding, ed. *Access to Environmental Justice: A Comparative Study (*Boston: BRILL, 2014).

This research employs a socio-legal methodology that interrogates four different aspects of legal gateways to environmental justice in Nigeria's oil sector: (i) oil sector governance in practice, (ii) the underlying legislative and regulatory framework for the oil sector governance regime, (iii) case law of pollution disputes between oil companies and communities, and (iv) the experience of litigation in seeking redress for environmental harms. The methods used include key informant interviews, a survey, and a systematic case law dataset, all of which provide new data points for analysis.

In this Introduction, I outline the aims and parameters of this research while providing context and justification for the study itself. I conclude by providing a detailed map of the structure and contents of the remainder of the dissertation.

1.2 Aims of the Research

This research project has three aims in studying access to environmental justice (A2EJ) in Nigeria's oil sector.

The first of these aims is to frame the A2EJ landscape in Nigeria within the incentive structure of the Rentier State.[3] I do this in order to contribute to the A2EJ literature by positing how a specific set of social, political and economic conditions characteristic of the Rentier State can affect access to environmental justice in specific ways.[4] This is a key objective of my research because this refines and improves upon the way in which A2EJ research is undertaken in resource dependent contexts. While Socio-Legal Studies encourages a multi-disciplinary

[3] In short, a Rentier State is a State that relies on revenue earned from "foreign individuals, concerns or governments." See Hossein Mahdavy, "The Pattern and Problems of Economic Development in Rentier States: The Case of Iran," in *Studies in the Economic History of the Middle East*, ed. M.A. Cook. 428-467 (New York: Oxford University Press, 1970), 428. More on Rentier States in Chapter 2, Section 2.3.

[4] Harding's *Access to Environmental Justice: A Comparative Study* recognises the importance of politics in A2EJ, but does not engage with other literatures to explore these dynamics, discussed further in Chapter 2.

approach, there has not yet been a study that has explicitly applied a Rentier State framework to A2EJ. My study contributes, then, to the filling of this lacuna.

The second aim of this research is to build on analysis conducted during military rule in Nigeria as a means of understanding how and if the Rentier State is evolving its stance toward A2EJ in the oil sector, and, if so, under which conditions. The George Frynas study, discussed in greater detail in Chapter 2, analysed oil sector legal and regulatory frameworks as well as oil pollution litigation in Nigeria, but his analysis ended before Nigeria entered is longest-ever period of democratic rule in 1999.[5] No research has since carried out a line of inquiry that employs similar research methods as Frynas' study used.[6] This has left a gap in the rigorous study of A2EJ in Nigeria's oil sector since 1999, which my project seeks to engage and fill.

My final research objective concerns my use of qualitative and quantitative evidence within a clear theoretical framework. More specifically, I aim to mobilise a range of data collection techniques in order to make an original contribution to the study of A2EJ in Nigeria's oil sector. The focus on methodology in Chapter 3, in particular, aims to develop a framework that can be used for future studies on environmental justice in Nigeria and elsewhere.

1.3 Boundaries of the Work

The study is ambitious in that it covers multiple areas of law and governance, both on paper and in practice. For the purposes of the study, a set number of parameters were considered.

[5] It is important to note that while Frynas also identifies the Rentier State framework as relevant to the Nigerian context and highlights some similar dimensions of A2EJ for analysis, his overall approach to the study does not acknowledge or reference the relevant access to justice literature, as will be discussed in Chapter 2.
[6] Discussed in Chapter 2.

Firstly, the study focuses specifically on legal gateways to environmental justice in the oil sector in Nigeria, rather than all possible avenues for access to justice and types of natural resources. The choice of oil as differentiated from other types of resources comes from its unique properties and implications for governance, which I discuss further in Chapter 2. As has been done elsewhere,[7] this research uses the terms "access to environmental justice" and "legal gateways to environmental justice" interchangeably.[8] I did this to limit the research scope, while remaining aware that A2EJ can take non-legal forms, such as community mobilisation and other forms of activism.[9]

Secondly, while the study uses the relevant political economy and political science literature as a framing device for understanding how a Rentier State behaves, this research project remains a socio-legal study. This means that the degree to which political economy research methodologies and analytical tools are employed is selective. As a first, original, step in applying Rentier State principles to a socio-legal analysis of A2EJ, I employed basic quantitative research methods in this theory-building study.

Thirdly, the research focuses on the period from 1999-2015. The year 1999 marked the transition from military rule to democracy in Nigeria, and the enactment of the 1999 Constitution, which is still in force today. The end boundary of the study is 2015, which marks the cut off for case law and legislation included in this analysis. As significant parts of this thesis address the evolution of legislation and

[7] Such as Andrew Harding, ed., "Access to Environmental Justice: Some Introductory Perspectives," in *Access to Environmental Justice: A Comparative Study* (Boston: Brill, 2014), 1-20.
[8] See Chapter 2, section 2.2 on A2EJ, which discusses definitions, and M.J. Cha and Martin Lau, "Introduction to Environmental Justice in the Rural and Natural Resource Context in South Asia" in *Environmental Justice and Rural Communities: Studies from India and Nepal*, eds. Patricia Moore and Firuza Pastakia. p. ix-xii. (Bangkok, Thailand and Bland, Switzerland: IUCN, 2007), https://portals.iucn.org/library/sites/library/files/documents/2007-030.pdf, p.ix.
[9] See M.J. Cha, "Environmental Justice in Rural South Asia: Applying Lessons Learned from the United States in Fighting for Indigenous Communities' Rights and Access to Common Resources," *Georgetown International Environmental Law Review* 19, no. 2 (2007): 206-207.

litigation practice over regime types, a historical approach is taken where appropriate. While I draw upon historical accounts to inform my understanding, these accounts are not meant to be comprehensive. Specific developments that have taken place since 2015 are, however, incorporated where appropriate and feasible.

While these are the overarching boundaries of the study, specific limitations of the methodology and the methods chosen will be discussed in Chapter 3.

1.4 Research Context

Now is a particularly important time to study the state of legal gateways to environmental justice in Nigeria's oil sector. International oil prices have been depressed since August 2014 and tension in the Niger Delta is rising again.[10] With less money in government coffers, the Federal Government will have to address frustration in the oil producing region more substantively than simply compensating restless groups, as has been done in the past.[11]

According to journalist Sebastian Junger, who has come face-to-face with Niger Delta militants, instability in the Niger Delta is not only a threat to Nigeria's

[10] "Trouble Brewing in Nigeria Swamps Threatens Economy," *ENCA,* 6 August 2017, https://www.enca.com/africa/trouble-brewing-in-nigeria-swamps-threatens-economy (accessed August 1, 2017); "Central Bank of Nigeria: Crude Oil Price," https://www.cbn.gov.ng/rates/crudeoil.asp?year=2016 (accessed August 14, 2017); Akin Oyedele, "Crude Oil Crashes below $40 per Barrel," *Business Insider*, August 21, 2015, http://www.businessinsider.com/crude-oil-prices-august-21-2015-8 (accessed August 14, 2017).
[11] "Nigeria: Frustration Grows in Niger Delta," *Stratfor*, August 1, 2017, https://worldview.stratfor.com/article/nigeria-frustration-grows-niger-delta (accessed September 10, 2017); Omololu Ogunmade, "Nigeria: Pandef, Osinbajo Meet On Niger Delta," *This Day (Lagos)*, August 4, 2017. http://allafrica.com/stories/201708040060.html (accessed August 10, 2017); "Niger Delta Amnesty Program," *Office of the Special Advisor to the President of Niger Delta* http://www.osapnd.gov.ng/index/ndap (accessed September 10, 2017); Cheta Nwanze, "Niger Delta Amnesty Programme as a Slippery Slope," *Stratfor,* July 3, 2017, https://worldview.stratfor.com/article/niger-delta-amnesty-programme-slippery-slope (accessed September 10, 2017).

young democracy. Instability in Nigeria could also destabilise global energy supplies, making countries such as the United States particularly vulnerable.[12]

Viewed in this way, understanding the ability of legal gateways to deliver substantive relief to Niger Delta residents has significant implications as much for Nigeria as it does globally.

Shell-BP discovered oil in Nigeria in commercial quantities in 1956 in Bayelsa State in the Niger Delta.[13] At that time, Nigeria was a British colony of around 41 million people.[14] The country's main exports were agricultural products, such as palm oil and groundnuts.[15] Today, Nigeria is home to a population of almost 190 million people, has the largest economy in Africa, and is one of the largest producers of oil in the world.[16] The Niger Delta, Nigeria's oil producing region, is home to more than 30 million people, approximately 2 million more people than the entire population of neighbouring Ghana.[17]

[12] Nigeria is the fifth largest supplier of oil to the United States. See Stephanie Hanson "MEND: The Niger Delta's Umbrella Militant Group," *Council on Foreign Relations*, March 21, 2007, https://www.cfr.org/backgrounder/mend-niger-deltas-umbrella-militant-group (accessed August 10, 2017) and Sebastian Junger, "Blood Oil," *Vanity Fair,* January 31, 2015, https://www.vanityfair.com/news/2007/02/junger200702 (accessed August 15, 2017).
[13] George Frynas, *Oil in Nigeria: Conflict and Litigation Between Oil Companies and Village Communities* (Münster: LIT Verlag Münster, 2000), 9.
[14] "UN data: Total population, both sexes combined (thousands)," *United Nations*, 2017, http://data.un.org/Data.aspx?q=nigeria&d=PopDiv&f=variableID%3A12%3BcrID%3A566 (accessed August 15, 2017).
[15] Adam Robert Green, "Agriculture Is the Future of Nigeria," *Forbes*, August 8, 2013, https://www.forbes.com/sites/skollworldforum/2013/08/08/agriculture-is-the-future-of-nigeria/ (accessed September 10, 2017).
[16] "Population, total," *World Bank*, http://data.worldbank.org/indicator/SP.POP.TOTL?locations=NG&page=2 (accessed August 15, 2017) and "Country Comparison: Crude Oil-Production," *Central Intelligence Agency* https://www.cia.gov/library/publications/the-world-factbook/rankorder/2241rank.html (accessed August 15, 2017).
[17] Alexander Sewell, "About the Niger Delta," *Stakeholder Democracy Network*, http://www.stakeholderdemocracy.org/about-the-niger-delta/ (accessed August 7, 2017) and "Population, total."

In 2015, Nigeria was producing 2.3 million barrels of oil per day[18] and a majority of the Federal Government's revenue was coming from the oil sector.[19] In spite of these developments, the country has struggled to translate almost sixty years of oil production into positive human development outcomes.[20] Nigeria suffers from some of the worst income inequality in the world, with more than 60% of the population living under the poverty line.[21] An Oxfam report characterised this inequality by noting that "The combined wealth of Nigeria's five richest men - $29.9 billion - could end extreme poverty at a national level."[22] Moreover, according to a UNDP Human Development Report, the Niger Delta has been getting poorer and this is a problem that cannot simply be solved by closing the income gap. A majority of residents in the Niger Delta live in communities of less than 1,000 people, making it particularly challenging to deliver services and develop the infrastructure needed for development.[23]

Beyond the region's declining development, oil production has put the Niger Delta's fragile ecosystem, which includes one of the largest mangrove forests in the

[18] "Nigeria Crude Oil Production by Year (Thousand Barrels per Day)," *Mundi Index*, https://www.indexmundi.com/energy/?country=ng&product=oil&graph=production (accessed September 10, 2017), and "Nigeria - International - Analysis - U.S," *Energy Information Administration,* https://www.eia.gov/beta/international/analysis.cfm?iso=NGA (accessed August 15, 2017).

[19] Seventy percent of government revenue and almost all of the country's foreign exchange earnings come from oil exports. See "World Economic Outlook: Subdued Demand: Symptoms and Remedies," *the International Monetary Fund*, Washington, October, http://www.imf.org/external/pubs/ft/weo/2016/02/ (accessed September 10, 2017) and "Nigeria Executive Summary." *Export.gov* https://www.export.gov/apex/article2?id=Nigeria-Executive-Summary (accessed August 8, 2017).

[20] "Nigeria," *OPEC*, http://www.opec.org/opec_web/en/about_us/167.htm (accessed August 15, 2017).

[21] "National Human Development Report, 2015 - Human Security and Human Development in Nigeria," http://www.ng.undp.org/content/nigeria/en/home/library/poverty/national-human-development-report-2016.html (accessed September 10, 2017).

[22] "Nigeria: extreme inequality in numbers," *Oxfam*, https://www.oxfam.org/en/even-it-nigeria/nigeria-extreme-inequality-numbers (accessed August 15, 2017).

[23] For an in-depth assessment of the complexity of Human Development in the Niger Delta see, "Niger Delta Human Development Report," *Abuja: UNDP* 2006, http://hdr.undp.org/sites/default/files/nigeria_hdr_report.pdf (accessed August 10, 2017).

world, at risk.[24] This is causing alarm for those who live in the Niger Delta, who struggle to access potable drinking water and uncontaminated fish stocks due to the effects that the oil sector has had on the environment. One NGO found that "60 percent [of Niger Delta inhabitants] depend directly on the services provided by the environment – such as fish and clean drinking water– for their well-being."[25] A UNDP report states that a majority of Niger Delta residents are drinking water from unsafe sources, "including rivers, lakes or ponds, unprotected wells and boreholes."[26]

An extensive fourteen-month study of Ogoniland conducted by UNEP found, for example, that residents of Ogoni, an area of the Niger Delta home to more than 800,000 people and a historic battleground in the fight for environmental justice, are exposed to oil in the air they breathe, the water they drink, and the soil and dust that touches their skin.[27] In one instance, UNEP found that "community members at Nisisioken Ogale are drinking water from wells that is contaminated with benzene, a known carcinogen, at levels over 900 times above the World Health Organization (WHO) guideline."[28] As I will show in Chapter 6, the damage that oil spills cause to farmland, drinking water, and fish stocks have been the subject of legal battles between oil companies and communities for decades.

The severe environmental harm caused by oil spills and gas flaring is also a rising concern for the international climate change community.[29] Because mangroves are highly efficient carbon sinks, damage to the Niger Delta's mangroves not only

[24] "Environmental Assessment of Ogoniland Report," *UNEP*. http://web.unep.org/disastersandconflicts/where-we-work/nigeria/what-we-do/environmental-assessment-ogoniland-report (accessed August 9, 2017).
[25] "Conserving wetlands in Nigeria's Niger River Delta," *Wetlands International* https://www.wetlands.org/casestudy/conserving-and-restoring-wetlands-in-nigerias-niger-river-delta/ (accessed August 15, 2017).
[26] "Niger Delta Human Development Report," *UNDP*, 2006.
[27] "Environmental Assessment of Ogoniland Report," *UNEP,* 10.
[28] "Environmental Assessment of Ogoniland Report," *UNEP,* 11.
[29] "Conserving wetlands in Nigeria's Niger River Delta," *Wetlands International* and Mark Spalding et al., "Science: Mangrove Forests as Incredible Carbon Stores," *Cool Green Science*, May 24, 2017, https://blog.nature.org/science/2013/10/11/new-science-mangrove-forests-carbon-store-map/ (accessed August 15, 2017).

negatively impacts fish stocks, which use mangroves as breeding grounds, but also thwarts efforts to combat climate change.[30]

The practice of flaring gas, discussed in Chapter 5 and in Appendix I, makes the air difficult to breathe and creates severe sound pollution and acid rain, while also acting as a major contributor to greenhouse gas emissions. While gas flaring has been on the decline in Nigeria, the country remains the seventh largest gas flarer in the world.[31] It is estimated that Nigeria's flaring activities contribute more than 16 million tonnes of CO2 emissions per year.[32]

Governance has also been a persistent challenge for Nigeria, and this has significant implications for managing the oil sector. Transparency International ranks Nigeria 136 out of 176 countries in its Corruption Perceptions Index.[33] While oil is not the only source of corruption in Nigeria, oil-related scandals are common and often uncover the misappropriation of funds at a grand scale. For example, before being removed from his position, the former Governor of the Central Bank of Nigeria identified USD 20 billion in Nigerian National Petroleum Company (NNPC) oil revenue that should have been remitted to the federation account but never arrived.[34]

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[30] James Hutchison et al., "Predicting Global Patterns in Mangrove Forest Biomass," *Conservation Letters*, September 20, 2013, http://onlinelibrary.wiley.com/doi/10.1111/conl.12060/full (accessed August 15, 2017); Spalding et al, "Mangrove Forests are Incredible Carbon Stores" and "Environmental Assessment of Ogoniland Report," *UNEP*.

[31] "Nigeria's Flaring Reduction Target: 2020," *World Bank*, http://www.worldbank.org/en/news/feature/2017/03/10/nigerias-flaring-reduction-target-2020 (accessed August 15, 2017).

[32] "Nigerian Gas Flare Tracker," 2017.

[33] "Nigeria," *Transparency International*. https://www.transparency.org/country/NGA (accessed August 15, 2017).

[34] See "Nigeria Central Bank Head Lamido Sanusi Ousted," *BBC News*, February 20, 2014, sec. Africa. http://www.bbc.com/news/world-africa-26270561 (accessed September 10, 2017); Tim Cocks and Joe Brock, "Special Report: Anatomy of Nigeria's $20 Billion 'Leak,'" *Reuters*, February 6, 2015, https://www.reuters.com/article/us-nigeria-election-banker-specialreport-idUSKBN0LA0X820150206 (accessed September 10, 2017); PricewaterhouseCoopers, "Impact of Corruption on Nigeria's Economy," *PwC Nigeria*, https://www.pwc.com/ng/en/publications/impact-of-corruption-on-nigerias-economy.html (accessed September 10, 2017). See also the Ibori case, where the former Governor of oil-rich Delta State was convicted of conspiracy to defraud and money launder about 50 million GBP. Conor Gaffey "Could a Nigerian Ex-Governor Convicted of

In another, relatively recent case, an oil scandal highlighted how deeply entrenched illicit behaviour has become in the highest levels of government and in international oil companies. In this case, Royal Dutch Shell Petroleum (the parent company of the Nigerian subsidiary SPDC) and ENI (the Italian oil major) were implicated in the payment of more than USD 1 billion to a Nigerian oil company, Malabu, to acquire a lucrative oil bloc. Documents and recordings make it irrefutable that the international oil companies were aware that Malabu was owned by then-Oil Minister, Dan Etete.[35] In addition to this, a recent investigation showed that the Nigerian Attorney General at the time, along with a previous Attorney General, were transferred millions of dollars in connection with the Malabu transaction.[36] While governance and A2EJ challenges amount to more than simply corruption, it is important to recognise that such regular and systematic corrupt practices in the sector can have a negative effect on public trust in the government's ability to execute its responsibilities.[37]

The combination of poor governance, severely damaged environment and limited financial benefit to residents of the region where oil is extracted, has created a dangerous situation, in which conflict has bred.[38] Some of this has taken non-

Corruption Manage to Get into Office Again?" *Newsweek*, February 1, 2017. http://www.newsweek.com/james-ibori-nigerian-politics-corruption-551213 (accessed September 10, 2017).

[35] Robbie Gramer, "Leaked Records Show Shell's Complicity in Massive Oil Corruption Scandal," *Foreign Policy*, April 11, 2017, http://foreignpolicy.com/2017/04/11/emails-show-shells-complicity-in-biggest-oil-corruption-scandal-in-history-nigeria-resource-curse-etete-eni/ (accessed August 15, 2017).

[36] Gramer, "Leaked Records Show Shell's Complicity."

[37] Søren Serritzlew, Kim Mannemar Sønderskov and Gert Tinggaard Svendsen, "Do Corruption and Social Trust Affect Economic Growth? *A Review, Journal of Comparative Policy Analysis: Research and Practice* 16, no. 2 (2014) 121-139; 134-135.

[38] While Northern Nigeria is also struggling with conflict, particularly with Boko Haram, here I focus on the Niger Delta conflict, as it is immediately relevant to the area of study. There are some linkages to the Northern conflict and this research, however, including suggestions that there is a relationship between oil exploitation in the Niger Delta and the rise of Boko Haram. See Nafeez Ahmed, "Behind the Rise of Boko Haram - Ecological Disaster, Oil Crisis, Spy Games." *The Guardian*, May 9, 2014, http://www.theguardian.com/environment/earth-insight/2014/may/09/behind-rise-nigeria-boko-haram-climate-disaster-peak-oil-depletion (accessed September 10, 2017). There is also oil exploration taking place in Northern Nigeria. See Agence France-Presse, "Boko Haram Attack on Nigeria Oil Team 'Killed More than 50,'" *The*

violent forms, such as the Movement for the Survival of the Ogoni People (MOSOP), which was founded in 1990 and which gained international attention after nine of its leaders, including Ken Saro Wiwa, were hanged by the military government for a crime they did not commit.[39] Other more recent forms of resistance by young and disenfranchised residents of the Niger Delta have taken the form of organised, violent attacks in order to advocate for more control over the region's oil reserves. The Movement for the Emancipation of the Niger Delta (MEND) has been one of the major militant groups since its emergence in 2006.[40] They have claimed responsibility for kidnappings, pipeline attacks, and are known to engage in oil bunkering (the practice of stealing oil from pipelines to sell on the black market).[41] Their arms are perceived to be more sophisticated than that of the Nigerian military combating them. MEND's actions have been so disruptive that oil production was cut by a third for a period.[42]

This is the context within which this dissertation is situated. While the Nigerian government has amassed a great deal of wealth from the oil sector, residents of the Niger Delta have grown poorer. Both the homes and livelihoods of residents have been negatively affected by oil exploitation, and policies to address their concerns have been inadequate.[43] Within this sits a legal system comprised of a range of tools that could in theory prevent pollution, promote regional development, and provide redress to those who have experienced negative impacts of oil sector activities in Nigeria.

Telegraph, July 28, 2017. http://www.telegraph.co.uk/news/2017/07/28/boko-haram-attack-nigeria-oil-team-killed-50/ (accessed September 10, 2017).

[39] Movement for the Survival of the Ogoni People, http://www.mosop.org.ng/ (accessed September 10, 2017); and Karen McGregor, "Ogoni Nine hanged as indifferent West failed to respond," *The Independent*, September 18, 2000, http://www.independent.co.uk/news/world/africa/ogoni-nine-hanged-as-indifferent-west-failed-to-respond-699325.html (accessed September 10, 2017).

[40] Stephanie Hanson, "MEND: The Niger Delta's Umbrella Militant Group," *Council on Foreign Relations*, March 21, 2007, https://www.cfr.org/backgrounder/mend-niger-deltas-umbrella-militant-group (accessed August 10, 2017).

[41] For a more detailed description of MEND and militant activity in the Niger Delta, see Hanson, "MEND: The Niger Delta's Umbrella Militant Group."

[42] Hanson, "MEND: The Niger Delta's Umbrella Militant Group" and Junger, "Blood Oil."

[43] See Chapter 5 on the Niger Delta Development Commission.

1.5 Thesis Roadmap

This dissertation is broken up into 8 chapters. Chapter 2 develops a theoretical framework for the research by reviewing three bodies of literature: the A2EJ literature, the Rentier State literature, and the Nigeria-specific research on environmental legal challenges in the oil sector. Chapter 3 introduces the methodology for the research and discusses the experience of my fieldwork, in addition to data collection methods for interviews, a survey, and a case law dataset. This Chapter acts as an anchor for the empirical Chapters, in particular Chapters 5, 6, and 7, where I draw heavily upon original data.

Chapter 4 analyses Nigeria's oil sector governance framework. It builds upon the theoretical scaffolding developed in Chapter 2 by interrogating governance arrangements in the sector, as they have an impact on A2EJ. In particular, Chapter 4 compares institutional governance design with that of Norway, a country that discovered oil around the same time as Nigeria. It then interrogates the financial imbalance between actors involved in sector governance, before analysing the impact of the "Joint Investigation Visit" - a mechanism for determining the cause of oil spills in Nigeria.

Chapter 5 investigates the underpinnings of the governance regime discussed in Chapter 4 by interrogating the legal and regulatory framework for the oil sector, insofar as it addresses A2EJ. The Chapter does so by reviewing key legislation relevant to this research, from colonial era legislation that is still in force today to the promulgation of the 1999 Constitution and the new legislation that came thereafter.

Chapter 6 moves away from legislation and regulation to litigation, and focuses on a systematically collected body of case law that covers environmental disputes between oil companies and communities living in the Niger Delta. By undertaking

an analysis of oil pollution litigation, the Chapter discusses the viability of public interest environmental litigation in the Nigerian context, as well as extra-territorial litigation abroad.

Chapter 7 puts the case law into further context by using the findings of a repeated survey I administered to 27 Nigerian lawyers. The purpose of this Chapter is to understand not just the judgements of the courts, but the experience of litigation as an integral dimension of the legitimacy of the courts as a legal gateway to environmental justice.

Chapter 8 brings these strands together to reinforce the overarching argument of the dissertation: that the specific context of oil dependence in Nigeria distorts legal gateways to environmental justice in the country's oil sector. After discussing these findings, this final Chapter briefly considers the practical implications of the project and further areas of research that build on the work in this thesis.

2 Literature Review

2.1 Introduction

The study of law's ability to provide mechanisms for protection and redress in a particular context requires more than just a thorough reading of legislation, or a review of a sample of case law. Rather it necessitates deep consideration of the political and economic context within which those laws and courts exist. The theoretical tools for undertaking such study in a complex jurisdiction like Nigeria have, however, been lacking. This is not because Nigeria is too complex a context to study, rather it is because the literatures required to develop a theoretical basis for investigation have not historically borrowed concepts from one another.

In particular, there are three complementary literatures that would benefit from each other's respective strengths in the study of Nigeria's oil sector and the legal system's ability to provide justice to those vulnerable to oil pollution. This Chapter will provide the theoretical framework for this dissertation by identifying gaps in these literatures and threading them together. This means synthesising the literature on A2EJ, the Rentier State, and Nigerian oil and environmental law.

Providing this framing is fundamental to achieving the first objective of this research project: "to frame the A2EJ landscape in Nigeria within the incentive structure of the Rentier State."[44] This particular theoretical scaffolding achieves more than simply identifying a research gap for this thesis to fill; it also provides a future framework for academics and policymakers to consider A2EJ in the Nigerian context more accurately and holistically, leading to research and policy outcomes that can come closer to addressing the root causes of A2EJ's challenges in the Nigerian context.

[44] See Chapter 1.

The following sections will discuss these bodies of literature in more detail. I will begin with a review of the A2EJ literature, from its origin in the United States to a more globalised conceptualisation of A2EJ in different contexts. Afterward, I will provide an overview of the Rentier State literature, highlighting particular socio-economic conditions within which A2EJ might exist. The final section will cover the Nigeria-specific literature. In particular, this final section will discuss the key shortcomings of legal research available on Nigeria's oil and gas sector. This will lay the foundation for my research contribution to the field.

2.2 Access to Environmental Justice (A2EJ)

We live in an increasingly complex and interlinked world. Each day, individuals, communities, and governments make decisions determining how we consume the earth's finite natural resources. These decisions can affect us directly, but quite often have the most direct negative effects on those living far from where consumption happens. This is the challenge of providing access to environmental justice in the 21st century.[45] These concerns are significantly more acute in the Global South, where some populations disproportionately shoulder the bulk of the environmental burden for those that have the means (geographic or financial) to protect themselves from environmental harms.[46]

Definitions of A2EJ are varied. It is both an evolving organic movement led by civil society actors and an academic subject of inquiry. This sub-field within the broader access to justice literature is concerned with procedural mechanisms for environmental justice insofar as these are able to deliver substantive justice.[47] According to Cha, "[t]he environmental justice movement is distinctive because it

[45] More on this in David Schlosberg, "Theorising Environmental Justice: The Expanding Sphere of a Discourse." *Environmental Politics* 22, no. 1 (2013): 37–55.
[46] J.M. Cha, *Increasing Access to Environmental Justice: A Resource Book for Advocacy and Legal Literacy in South Asia* (Kathmandu, Nepal: International Centre for Integrated Mountain Development, 2007). Available at: http://lib.icimod.org/record/22025/files/attachment_135.pdf (April 16, 2013).
[47] Andrew Harding, "Access to Environmental Justice: Some Introductory Perspectives" in *Access to Environmental Justice: A Comparative Study* (Boston: BRILL, 2014), 4.

looks at cases of environmental harm, not just as a purely environmental concern, but also as a civil rights or human rights issue. The idea of environmental justice recognises the fact that clean air and water and non-toxic living conditions are basic civil rights, not just environmental concerns".[48] These features make A2EJ, and the study of it, distinctive from the more traditional environmental movement, which historically has been primarily concerned with ecological preservation and conservation.[49]

A2EJ is premised upon the fact that environmental harms are a threat to people and communities, and as such, individuals may require legal mechanisms to prevent or rectify these harms.[50] This research is then appropriately situated within the wider A2EJ literature, as it is a study that acknowledges from the outset that oil sector activity in the Niger Delta poses environmental threats to communities that may be both prevented and redressed through government action. The degree to which access to these legal protections and remedies is possible is my subject of inquiry.

2.2.1 A2EJ Beginnings, The United States

In the United States, concern for the environment was initially spurred on by a host of environmentalists who were primarily invested in conserving and protecting nature in its most pristine form.[51] This movement was largely led by white, upper- and middle-class Americans.[52] This changed in the 1980's, with the ushering in of a "multiracial environmental justice movement," which included members of marginalised communities of colour that were being negatively

[48] Cha, *Increasing Access*, 5.
[49] Ibid.
[50] Mijin Cha and Martin Lau, "Introduction to Environmental Justice in the Rural and Natural Resource Context in South Asia." In *Environmental Justice and Rural Communities: Studies from India and Nepal,* edited by Patricia Moore and Firuza Pastakia. IUCN, 2007. https://portals.iucn.org/library/sites/library/files/documents/2007-030.pdf, ix-xii, ix.
[51] M.J. Cha, "Environmental Justice in Rural South Asia: Applying Lessons Learned from the United States in Fight for Indigenous Communities' Rights and Access to Common Resources." *Georgetown International Environmental Law Review* 19 no. 2(2007): 185-207, 189.
[52] Ibid.

affected by economic development decisions, specifically by urban pollution.[53] The movement focused on urban communities bearing the brunt of environmental harms in the form of waste disposal and industry-related pollution. This served as a turning point, forcing United States policymakers to recognise that environmental degradation and harm was more than simply an issue for the environment itself; it was also an issue for the communities inhabiting those environments.[54]

According to Kameri-Mbote and Cullet, the very crux of the environmental justice movement in the United States was, for much of its history, related to race. These academics found that the United States' experience with Environmental Justice was preoccupied with "the distribution of environmental benefits and burdens across society along the lines of race or colour."[55] However, from the mid-nineties this sentiment has changed, both as reflected in new literature on Access to Environmental Justice, and in the movement itself. Walker notes that by 2009, the concept of A2EJ in the United States proved to be elastic, incorporating broader notions of identity politics beyond race in the decades following the civil rights era.[56]

Legal remedies were a tool used early in the United States movement for A2EJ, particularly when race discrimination was central to the movement.[57] This

[53] See Robert D Bullard, "Race and Environmental Justice in the United States*." Yale Journal of International Law* 18 (1993): 319-334, and Benjamin Chavis Jr., *Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites* (The University of Michigan: Public Data Access, 1987).
http://d3n8a8pro7vhmx.cloudfront.net/unitedchurchofchrist/legacy_url/13567/toxwrace87.pdf?1418439935 (accessed 29 June 2017).
[54] For an overview of the evolution of the A2EJ movement in the United States, see M.J. Cha, "Environmental Justice in Rural South Asia."
[55] Patricia Kameri-Mbote and Philippe Cullet, *Environmental Justice and Sustainable Development: Integrating Local Communities in Environmental Management* (Geneva: International Environmental Law Research Centre, 1996): 1.
http://www.ielrc.org/content/w9601.pdf (29 June 2017).
[56] Gordon Walker, "Beyond Distribution and Proximity: Exploring the Multiple Spatialities of Environmental Justice." *Antipode* 41, no. 4 (2009): 614–636.
[57] Luke Cole, "Environmental Justice Litigation: Another Stone in David's Sling." *Fordham Urban Law Journal* 21, no.3 (1993): 523-544.

involved using environmental legislation to block discriminatory developments or practices by finding fault with procedures, rather than the substance of the activity in question. This litigation approach was then followed by a new tactic – using civil rights statutes to argue that environmental harms were a form of racial discrimination.[58] While civil rights suits enjoyed some early successes, a changing legal landscape toward a more restrictive interpretation of statutes meant that environmental justice advocates in the United States were forced to find alternative mechanisms for justice. Members of the A2EJ movement have recently begun to either focus on utilising other legal mechanisms, like substantive environmental legal instruments, or on mobilising political movements.[59]

The A2EJ movement is rooted in the tensions between race, power and equity in environmental decision-making. While first developed in the United States, this research on A2EJ in Nigeria contributes to the further generalisability of these tensions in an interconnected world. Racial inequality in environmental governance takes on a transnational dimension when considering the ways in which primarily European and American companies work, if not collaborate, with Nigeria's governing elite to exploit natural resources of one region of the country to the detriment of the poor who live there.[60] The racial dimension becomes clear when environmental practices by major oil companies are probed: best practice for oil operations in Nigeria are not the same as quality or standard of best practice for oil operations in the United States, for example.[61] Over time, this inequity has

[58] Cole, "Environmental Justice Litigation", 530.
[59] Cha, *Increasing Access*, 193. Cha's research found that for communities living far from formal legal institutions, like courts, law was not the best mechanism for environmental justice. She found that community action and mobilisation were often more effective tools for drawing attention and demanding action for environmental injustice.
[60] However, it is worth noting that the states of the Niger Delta region are comparatively wealthier than states in the impoverished north of Nigeria. This means that while the struggle to secure a safe environment puts residents of the Niger Delta in a marginalised position, it does not mean that they are the *most* disenfranchised in the Nigerian context. See: Nigeria Data Portal "Nigeria Poverty and Unemployment Maps" Nigeria.OpenDataForAfrica.Org, http://nigeria.opendataforafrica.org/ysydsef/nigeria-unemploymnet-and-poverty-maps (accessed August 08 2018).
[61] Olubayo Oluduro and Olubisi Friday Oluduro, "Oil Exploitation and Compliance with International Environmental Standards: The Case of Double Standards in the Niger Delta of Nigeria," *Journal of Law, Policy and Globalization* 37 (2015): 67-82.

led to conflict in the Niger Delta where companies have used state sanctioned violence against residents of the Niger Delta and residents of the region have perpetrated violence on the oil companies in protest of their practices in the region.[62]

2.2.2 The Globalisation of A2EJ

While the US movement has focused strongly on the plight of urban populations, there is a body of global literature on A2EJ that has developed to suit different contexts, from urban centres to rural communities.[63] Walker argues that there has been horizontal and vertical diffusion of the concept – horizontal referring to A2EJ as applied to new jurisdictions with different demands, and vertical referring to A2EJ as it incorporates transboundary environmental issues, like climate change, which are global challenges and affect some communities disproportionately across the world.[64]

The remainder of this section will focus on the horizontal diffusion of the concept, briefly reviewing the SOAS/A2EJ project from the nineties and the published research that followed in 2014.[65] The primary purpose of this review is to highlight that while much progress has been made to contextualise A2EJ and apply it to different jurisdictions and circumstances, there still remains a gap in thinking about natural resource extraction in its socio-political context, a challenge that

[62] While ethnic conflict, communities fighting each other based on their ethnic identity, is not a prevalent narrative in the oil pollution/A2EJ struggle in Nigeria today, Ako notes that even within their own country, Niger Delta communities are often comprised of ethnic minorities,. This was a concern raised before independence by the Ijaws of the Niger Delta who were concerned about marginalisation in an independent Nigeria; a prescient concern. Rhuks T Ako, "Nigeria's Land Use Act: An Anti-Thesis to Environmental Justice," *Journal of African Law* 53, no. 2 (2009), 300.

[63] See Walker, "Beyond Distribution and Proximity."

[64] Walker specifically explores South Africa and the UK's adoption of the A2EJ concept in Gordon Walker, "Globalizing Environmental Justice: The Geography and Politics of Frame Contextualization and Evolution," *Global Social Policy* 9, no. 3 (2009): 355-382. See also JoAnn Carmin and Julian Agyeman, eds., *Environmental Inequalities Beyond Borders: Local Perspectives on Global Injustices* (Cambridge: MIT Press, 2011). This is an edited volume entirely focused on the globalisation of environmental justice.

[65] The focus on the Global South is meant to restrict the scope of the review, while also focusing on a body of literature where my own research on Nigeria is situated.

does not fit neatly into discussions about A2EJ for rural populations nor for urban populations.

2.1.1.1 The SOAS/A2EJ Project

The SOAS/A2EJ project was inspired by Garth and Cappelletti's Florence project on access to justice.[66] SOAS/A2EJ researchers focused specifically on access to environmental justice in urban settings in the Global South. The project did this in a series of studies that investigated the particular mechanisms and obstacles that influenced access to environmental justice in some of Asia and one of Africa's most environmentally fraught cities.

The importance of being able to seek equitable and timely legal remedy for injustices in a politicised world was of significance to the SOAS/A2EJ project. Their case studies were primarily cities in which residents faced forcible removal from their homes, or the deleterious effects of water and air pollution from industrialisation. In many ways, the cities covered in Malaysia, Pakistan, India, Ghana, Indonesia, Nepal, China, and Thailand encountered similar challenges to those faced by communities in the United States' inner cities: marginalisation that results in forced migration or living in environmentally hazardous conditions.[67]

An edited volume was published in 2014, born out of the SOAS/A2EJ research endeavour. The findings across countries confirmed that "legal gateways to environmental justice are largely ineffective"[68]. The comparative research found

[66] See Harding, *Access to Environmental Justice,* ix. The Florence Project was a comparative research project that took place over four years in the 1970s by Cappelletti and Garth. It is credited with putting forth the tenets of access to justice literature. These features will be familiar to any student of access to justice: that justice is harder for some to attain than others, and that accessing justice (particularly legal mechanisms) requires institutions that can provide equitable access and treatment, so that outcomes are "individually and socially just." See also Bryant Garth and Mauro Cappelletti, "Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective," *Articles by Maurer Faculty* 1142 (1978): 180 – 292. http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=2140&context=facpub (accessed April 2, 2013).
[67] Harding, *Access to Environmental Justice.*
[68] Ibid.,7.

that despite differing contexts, legal remedies in the respective countries shared some similarities both in advantages (the ability to receive a binding decision and the ability to use legal proceedings as a basis for public information campaigns) and in disadvantages – that is,

> a general lack of case law (even in the common law jurisdictions); lack of standing; delay; prohibitive cost (or risk thereof) due to a lack of legal aid and the hazards of litigation; a concentration, in the reported cases, on procedure rather than substance; legal doctrinal limitations, such those relating to evidence and causation; and judicial caution or lack of real independence when faced with litigation against public bodies.[69]

The groundwork set by the SOAS/A2EJ project has created space for this research in two ways. Firstly, the unique body of literature provides an opportunity for my research to contribute a study from Sub-Saharan Africa to a growing body of evidence on A2EJ in the Global South. While the Harding collection is not an exhaustive publication in terms of A2EJ research, it does represent a significant contribution to the field. However, there is only one study of A2EJ in Africa in the collection.[70] Secondly, the SOAS/A2EJ project highlights "the connections between the legal gateways and the general political and economic environment; the degree of democracy and judicial independence; and also the openness and resourcing of administrative bodies."[71] This provides an opportunity for this research to explore the complex variables that affect A2EJ in the Nigerian context, from resourcing of regulators to the influence of broader politics on policymaking. Particularly, SOAS/A2EJ's recurrent theme of "politics" provides an entry-point into a more focused examination of how political and economic factors influence A2EJ.

2.1.1.2 The Political Economy of A2EJ

[69] Ibid., 8.
[70] James S. Read "Access to Environmental Justice in Ghana (Accra)," in *Access to Environmental Justice,* Andrew Harding, ed., 21-58.
[71] Harding, *Access to Environmental Justice*, 10.

The A2EJ literature has grown in complexity over time, but has not explicitly embraced relevant theoretical frameworks from political economy and political science, which would enhance the richness of the work undertaken. While this may be a choice, it is, in fact, a missed opportunity. Political science and political economy literature have much to offer a researcher concerned with government decision-making and behaviour. Political economy in particular, refers to the way in which economic incentives can affect political decision-making, and vice versa.[72] As discussed above, the A2EJ literature is concerned with the procedural mechanisms for environmental justice and the degree to which these mechanisms are able to deliver substantive equity. Taken together, then, the political economy of access to environmental justice is the study of the ways in which political and economic incentives can enable or constrain a government's ability to develop and use procedural mechanisms for substantive environmental justice outcomes.[73]

To some extent, access to justice (A2J) research in the political economy tradition is as old as the study of A2J itself. The Florence Project founders Cappelletti and Garth acknowledge that a perfect black letter process for accessing justice means little in the absence of "political and social reform."[74] These researchers identify a flawed assumption by their "access" colleagues "that the legislative creation of a right implies a societal commitment to its full enforcement," instead emphasising that the "political reality is much more complicated".[75]

[72] In the introduction to Laffont's work, he chronicles the evolution in thinking around political economy, particularly incentives of government. See Jean-Jacques Laffont, "Introduction", *Incentives and Political Economy* (New York: Oxford University Press, 2001), 1-5.

[73] Laffont argues that regulation must be "delegated to politicians, thereby creating an incentive problem when politicians' motivations are to stay in power by pleasing to a certain degree a majority of voters rather than to maximize social welfare." In the case of Nigeria, a majority of voters have an incentive for government to continue to extracting oil at any environmental cost, because the long term negative effects of pollution in the oil producing regions are only felt by a relatively small proportion of the overall population, whereas a majority of the population benefit from sector revenues in the form of government services. See Laffront, *Incentives and Political Economy*, 174.

[74] Garth and Capelletti, "Access to Justice", 289.

[75] Mauro Cappelletti and Bryant Garth. "Foreward: Access to Justice as a Focus of Research." (1981). Windsor Yearbook of Access to Justice 1 (1981): ix-xxvi, xvi.

The SOAS/A2EJ study also comes close to discussing the political economy of A2EJ, but does not incorporate political economy theories in its work, missing an opportunity to further develop hypotheses as to the reasons for certain A2EJ mechanisms being more effective than others in a given context.[76] In particular, Perry-Kessaris' research on A2EJ in Bangalore identifies that a tension exists between the economic interests of the state and its obligation to deliver environmental justice.[77]

Cha finds in her study of Bangladesh's Chittagong Hill Tract community (CHT) that the lack of power of the CHT community vis-à-vis the government's economic incentives to exploit their environment for financial gain was central to the struggle for A2EJ. In this, Cha eludes to an important characteristic of natural resources and the fight for A2EJ. She writes that natural resource challenges "make environmental justice struggles even more difficult."[78] In the case of the CHT, this was due to the countervailing interests of indigenous populations who use the land and its resources to maintain their way of life, while newcomers to the area saw the resources as an economic opportunity to be exploited.[79]

Perry-Kessaris' case study on the city of Bangalore asks "To what extent can, did, and do Bangaloreans use legal gateways to slow down or reverse the decline – to redress the balance between economy and environment?"[80] She found their ability to do so was limited in part by the tension between the state's obligation to deliver justice and the state's economic policy that promoted rapid development in

[76] To account for these barriers, Harding asserts that "environmental justice is a good which can only be achieved by a massive feat of political will". "Political will" remains unexplored in Harding's work. This is an opportunity for this research to add further complexity to the study of A2EJ by exploring the political drivers in a given context. See Andrew Harding, ed. *Access to Environmental Justice: A Comparative Study.* (Boston: BRILL, 2014).
[77] While the research acknowledges political and power dynamics that challenge the principles of A2EJ, it does so without the vocabulary of well-established research in the political science and political economy research.
[78] M.J. Cha, *Environmental Justice in Rural South Asia.*
[79] Ibid, 193.
[80] Amanda Perry-Kessaris, "Chapter 3: Access to Environmental Justice in India's Garden City (Bangalore)," in *Access to Environmental Justice: A Comparative Study,* edited by Andrew Harding, 59-87. (Boston: BRILL, 2014), 86.

Bangalore, often to the detriment of its residents. Perry-Kessaris, along with Randeria, begin to build the case for what will be central to this dissertation: the claim that states are not passive entities that have forgotten, or were too weak to provide A2EJ, but are instead incentivised to ensure that the opposite takes place. As Randeria argues:

> The state is not merely a victim of the neo-liberal economic globalization, since it remains an active agent in transposing it nationally and locally… We are faced not by weak, or weakening, states but by cunning states, which capitalize on their perceived weakness in order to render themselves unaccountable both to their citizens and to international institutions.[81]

The underlying theme of this dissertation is the relationship between access to justice and the state's constraints in providing justice due to its economic dependence on oil and, as a result, its relationship with the private sector. The natural starting point for such research is joining A2EJ developments with those in the political economy canon. As discussed in the below section on the "petro-state," there is a unique set of A2EJ challenges for major resource exporters as a distinct subset of countries in the Global South.

2.2.3 A2EJ Summary

The A2EJ literature has moved the discussion about environmental degradation from an isolated issue of ecosystems to one that is intimately linked to the well-being of the humans who inhabit those environments. This shift first began in the United States and then globalised, finding a nuanced voice in different contexts, from the urban environments in major cities in Asia and Sub-Saharan Africa struggling with toxic waste and industrial pollution to the particular challenges of the rural context.

In the course of this evolution, studies on A2EJ have increasingly noted that political incentives can supersede developments in progressive law-making and

[81] Randeria cited in Amanda Perry-Kessaris, *Global Business, Local Law: The Indian Legal System as a Communal Resource in Foreign Investment Relations* (London: Ashgate, 2008), 87.

litigation for determining outcomes for those seeking environmental justice. This growing acknowledgement has both called into question the utility of the law as a mechanism for environmental justice and highlighted the need for more explicit links in A2EJ research to relevant discussion in the political economy literature.

Now is the right time to bridge this gap, particularly in the context of A2EJ in countries where governments are dependent on revenues coming from oil production. Schlosberg finds that the field has come a long way in recognising "the plurality of environmental (in)justice experiences" and expanding the topical space of the EJ frame.[82] This project capitalises on the opportunity to fill this research lacuna. The following section on the "petro-state" introduces a particular strand of this political economy research, which focuses on the effect of the political economy of an oil dependent country on A2EJ.

2.3 The Rentier State

Why do some countries rich in natural resources fail to make use of those resources for the greater developmental good of their populations? Political scientists and economists have asked this question in one form of another since the eighties.[83] Scholars have proposed a range of theories. Some suggest that resource dependence harms a country's macro-economy with a large inflow of foreign exchange that makes a country's other exports less competitive globally.[84] Others have suggested that resource dependence leads to militancy and conflict in resource-rich regions, which stokes instability in a country more broadly.[85] I find

[82] For a more in-depth review of the Environmental Justice movement and the academic work surrounding it see Schlosberg, "Theorising environmental justice."
[83] Jeffrey Sachs and Andrew Warner, "Natural Resource Abundance and Economic Growth," *NBER Working Paper Series*, Working Paper 5398 (1995), http://www.nber.org/papers/w5398.pdf (accessed 30 June 2017).
[84] This is called Dutch Disease. For a definition of Dutch Disease, see "Definition of Dutch disease" ft.com/Lexicon http://lexicon.ft.com/Term?term=dutch-disease (accessed August 11, 2017).
[85] Researchers have also employed a range of sophisticated econometric quantitative analyses to test these theories. For a comprehensive review of the resource curse literature, see Michael Ross, "The Paradoxical Wealth of Nations," in *The Oil Curse*: *How Petroleum Wealth Shapes the Development of Nations* (Princeton: Princeton University Press, 2012).

one body of this "resource curse" literature on "Rentier States" and "petro-states" to be most compelling as it focuses specifically on the way in which dependence on oil can affect the behaviour of state institutions.

The purpose of this section is to consider Rentier State Theory as a framing for A2EJ analysis in Nigeria. First, the section will explain what is meant by "rent" and "Rentier State Theory". Then, it will focus on the particular dynamics of oil dependence that may affect A2EJ.

2.3.1 "Rent"

"Rent" is here defined as revenue earned from a good that grossly surpasses the cost of production. To provide an everyday example: we may pay "rent" to occupy a flat that we do not own for an extended period of time. If we suppose our landlord inherited the flat and pays only a small amount for upkeep, then the "rent" collected by the landlord has much higher value than the amount of labour required by him to maintain the property. In the realm of natural resources, political scientists and economists use the term rent to describe the money made by governments that have similarly inherited ownership of a country's subsoil assets and reap great financial rewards from selling the right to exploit those assets at almost no labour cost to government.

Rent on its own is not necessarily a bad thing. It can cause problems, however, if the entity collecting rent is not a person, but a government that is dependent upon rent to fill state coffers. These problems are particularly pronounced when rent is one of the main sources of income for the state, particularly if only a few are employed by the sector. What I have just described is what Beblawi and Luciani identify as the conditions under which a state is a "Rentier State".[86]

[86] Hazem Beblawi and Luciani Giacomo, eds. *The Rentier State* (New York, NY: University of California Press, 1987).

2.3.2 The Special Features of Petroleum Rent

Ross argues that petroleum in particular has special qualities that make rent generated unique and a possible challenge for governance.[87] Ross proposes "scale, source, stability and secrecy" as features of oil rent that are challenging for sector governance, particularly in a time when many major producers have nationalised oil companies. To begin with, Ross suggests that the sheer scale of oil revenues can have perverse effects on governance, like increasing the size of the government apparatus, or stoking unrest among citizens who expect to see more material benefit from oil production.

Ross argues that the source of the oil revenue, from rents that require little labour or domestic inputs, means that governments can easily be disconnected from citizen accountability; the challenge is thus maintaining the social contract relationship between government and citizenry without taxation.[88] Without taxes, governments have less accountability to citizens, who in turn expect fewer government-provided services. Ross identifies the secrecy of sector activities (attributed to the opaque actions of national oil companies largely operating with impunity) as an impediment to accountability and prudent financial management.[89] Finally, Ross suggests resource rents are unique because of their lack of stability – serious fluctuations in the oil price and pressure to spend in the near term makes it difficult for governments to financially plan for price shocks.[90]

Karl argues that the "source" dimension of Ross' argument, particularly how oil revenue diminishes an accountability mechanism between government and tax-paying citizens, is what makes a resource rich country behave like a "petro state".[91] In such a case, it is not that the government acts with impunity and without an

[87] Ross, "The Paradoxical Wealth of Nations", 5.
[88] Ibid.
[89] Ibid.,6
[90] Ibid.
[91] Terry Lynn Karl, "Ensuring Fairness: The Case for a Transparent Fiscal Social Contract," in *Escaping the Resource Curse*, eds., Macartan Humphreys, Jeffrey D. Sachs and Joseph Stiglitz (New York: Columbia University Press, 2007), 262.

accountability mechanism, rather it is no longer the citizens for whom the state needs to perform. Thus, the national oil company and the private sector hold the accountability relationships, as they are the primary revenue providers. This creates a vicious cycle, potentially causing the state to shirk other responsibilities, making decisions based primarily on securing further rents, and therefore perpetuates a political cycle that focuses on securing access to these excess funds.[92]

The "petro-state" framing provides a fusion of the political, the economic, and the psycho-social. As such, it provides a useful platform from which to understand how such a government might manipulate its own institutions beyond, or shy of, their prescribed duty. Karl attributes some of this institutional manipulation to governments' need to centralise power, decision-making, and revenue management in order to engage with commercial partners.[93] However, what begins as necessity for sector development can morph into dependence. These required preconditions for large scale development leave behind "a legacy of overly-centralized political power, strong networks of complicity between public and private sector actors, highly uneven mineral-based development subsidized by oil rents and the replacement of domestic tax revenues and other sources of earned income by petrodollars".[94] As Karl argues, "In effect, this alters the frameworks for decision-making in a manner that further encourages and reinforces these initial patterns, producing a vicious cycle of negative development outcomes."[95] This phenomenon is useful for considering the Nigerian context where historical patterns of dependence may be causing continued perverse decision-making,

[92] Matthew Gray, "A Theory of Late Rentierism" in the Arab States of the Gulf," *Occasional Paper* no. 7 (Centre for International and Regional Studies Georgetown University, School of Foreign Service in Qatar, 2011), 1.
[93] Terry Lynn Karl, "The Perils of the Petro-State: Reflections on the Paradox of Plenty," *Journal of International Affairs* 53, no. 1 (1999): 31-48; 34.
[94] Ibid.
[95] Karl rejects the common notion that perverse outcomes from oil exploitation are due to lacking capacity of the state, rather he asserts that it is precisely because of the political urgency of short-term planning that state leaders shirk the formulation of long term development trajectories. See Karl, "Ensuring Fairness," 262; Nazeem Barma, Kai Kaiser, Tuan Minh Le, and Lorena Viñuela, *Rents to Riches?: The Political Economy of Natural Resource-Led Development* (Washington: World Bank Group, 2011), 100. This is similar to the "cunning state" concept discussed by Randeria. See Randeria, "Glocalization of Law", 305–328.

despite a democratic governance regime and shared understanding that development challenges persist due to oil dependence.

2.4 Nigerian Law and Oil Literature

There is a rich tradition of studying the Nigerian oil and gas sector.[96] A majority of the literature between the 1960s and 1990s focused on the technical and economic aspects of the industry and its effect on the broader Nigerian economy.[97] Toward the end of this period, political analyses emerged that questioned how oil and politics in the post-colonial federal state interacted; interrogation of the legal and regulatory framework became a subset of these questions.[98] George Frynas' study, in particular, has proven to be a defining work for the Nigeria literature on disputes between oil companies and communities. The first part of this section focuses on Frynas' work and discusses its shortcomings. The subsequent section then explores research produced after Frynas' study. The section concludes by identifying a gap in the Nigerian environmental law literature that this thesis will fill.

2.4.1 The Frynas Study

In March 1998, Frynas administered a survey to Nigerian legal practitioners about the oil industry and the relationship between oil companies and communities affected by the petroleum sector. The survey was one component of the doctoral research Frynas was conducting at the time, which would go on to be published in 2002 as a book entitled *Oil in Nigeria: Conflict and Litigation Between Oil Companies and Village Communities.*[99] This work has informed my approach to this dissertation, both in building on Frynas' research's strengths and addressing its shortcomings.[100] This section will outline the key features of his work and then

[96] Frynas provides a detailed account of the oil and gas sector literature from the late 1960s to the late 1990s in Frynas, *Oil in Nigeria*, 3.
[97] Frynas, *Oil in Nigeria,* 3-6.
[98] Ibid., 3.
[99] Ibid., 100-148.
[100] The research was undertaken at the beginning of Frynas' career as an academic concerned with business studies, particularly corporate social responsibility, international business, and

highlight its limitations, which this research will address almost two decades since the publication of Frynas' book.

Frynas' research identified a gap in the literature on the role of the legal system as an intermediary between oil interests and community interests. The author had three aims with his research agenda:[101] 1. To study litigation between multi-national corporations and communities in oil producing areas in order to better understand the nature of conflict in the Niger Delta, 2. To give "a detailed analysis of the nature of legal disputes between oil companies and village communities in Nigeria, given the dynamic processes of legal change in a developing society," and 3. To "make a contribution to the research and the debate on the role of multinational companies in developing countries and on the day-to-day operations of African legal systems."

In order to achieve these objectives, Frynas analysed 68 court cases involving disputes between communities and oil companies, in addition to analysing the results of a survey of more than 150 Nigerian lawyers.[102] He undertakes these empirical exercises and provides a historical analysis (pre-colonial, colonial and post-colonial) of the Nigerian legal system, including oil law and environmental law, while drawing attention to the role of customary law in some oil-related cases (e.g. in delineating ownership of land), as well as the court system more broadly).[103]

strategic management. At time of writing, Frynas was a Professor of Corporate Social Responsibility at Middlesex University. See "Professor George Frynas" http://www.mdx.ac.uk/about-us/our-people/staff-directory/profile/frynas-george (accessed July 26, 2017).

[101] Frynas, *Oil in Nigeria,* 2.

[102] Frynas uses the case law to track changing attitudes toward compensation and the amount that should be dispensed. He also assesses the degrees to which different tort and defence tactics are successful for litigants.

[103] Frynas, *Oil in Nigeria,* 100-148 and 182-224. Frynas also conducted interviews, but does not discuss this as a methodological feature of his work, nor does he explain how he chose his interview subjects or how he conducted those interviews.

His analysis finds that up until the dawn of the Obasanjo administration, there was empirical evidence to support the notion that Nigeria favours the oil industry in its policymaking. More specifically, he finds:

1. Plaintiffs face significant barriers in accessing courts,
2. Legal practitioners tend to regard courts as biased in favour of oil companies,
3. And there is bias present in Nigeria's statute law in favour of oil companies.[104]

In **Irou v. Shell BP**[105], one of the most overt cases of the judiciary choosing economic priorities over the health and safety of communities, Frynas finds that, "the judge refused to grant an injunction in favour of the plaintiff whose land, fish pond, and creek had been polluted by the activities of the defendant because in his opinion, nothing should be done to disturb the operation of trade (i.e. mineral oil), which is the main source of Nigeria's revenue".[106]

Frynas' work is significant for this research for three reasons: 1. the frame of analysis takes place just before a major regime change in Nigeria – the dawn of the Fourth Republic –and thus provides an account of military-era aspects of the legal system, as it relates oil pollution redress, 2. it is a unique example of rigorous research methodologies being applied to the question of company-community relations in dealing with oil spill disputes, with a present, but lesser emphasis on the role of the Nigerian state in that process, and 3. the data collected and analysed by Frynas provides the opportunity for historical study of A2EJ in Nigeria's oil sector.

2.4.1.1 Shortcomings of the Frynas study

While not in the same academic field, Frynas collected the kind of data and asked similar questions to those concerned with A2EJ research. His work sets a high

[104] Frynas, *Oil in Nigeria*, 224.
[105] Ibid. 189; **Irou v. Shell BP** (Unreported) Suit W/89/71, Warri HC.
[106] Ibid.,189.

standard for research into the interaction between oil companies and communities when dealing with oil pollution in Nigeria. He proves that it is possible to apply rigorous methodologies to challenging and complex questions and provides an important and comprehensive baseline of case law, historical analysis, and survey work from which this research and other projects have benefitted immensely.

However, there are limitations to Frynas' work for the study of A2EJ. This section will highlight the conceptual gaps in Frynas' research, particularly with regards to its paucity of theoretical framing. The methodological shortcomings of his work will be more thoroughly discussed in Chapter 3.

Frynas demonstrates a strong command of the Nigeria-specific literature in the area of oil pollution regulation and litigation, but fails to demonstrate a broader command of theoretical work related to socio-legal studies and A2EJ; both are concepts that he draws upon superficially. In particular, he makes cursory mention of his research being *socio-legal,* but then does not elaborate further or reference any literature in that field. This implies that he is using this term divorced from the literature that has so shaped it.[107] Further, despite an extensive discussion on access to courts, Frynas does not address the issue of access to justice, nor the A2EJ literature that was already developed when he was working on this topic. Doing so would have improved his ability to contextualise survey findings.[108] The implication of omitting these rich bodies of literature lies mainly in the limited ability of the research to contribute to the development of theory in the future.[109] Increased awareness and use of these theoretical frameworks would have also provided a stronger basis for explaining the findings of his quantitative studies.

[107] Roger Cotterrell defines the term "socio-legal" in Roger Cotterrell, "Why must legal ideas be interpreted sociologically?" *Journal of Law and Society*, 25 no. 2 (1998):171-192.
[108] Frynas, *Oil in Nigeria,* 100-107.
[109] Some of this literature existed at the time of Frynas' research, but other projects were being developed in tandem, and so it is possible that he was not privy to relevant work.

In addition to the limited and superficial use of available theoretical frameworks, Frynas frames his research as studying the conflict between oil companies and communities.[110] This emphasis on companies and communities implicitly focuses on a dyadic relationship between the two.[111] In reality this relationship is more usefully portrayed as triadic, as the state should be included in these interactions as a distinct player with agency. Frynas discusses the state and its potential bias in favour of oil company preferences, but he does not engage with the fact that the state can act as an equal agent with an agenda in disputes that may arise in future.[112]

The limitations of Frynas' research are rectified in this dissertation, which focuses not on oil company behaviour, but on state conduct in the context of oil sector development. This is an important but subtle distinction that enables me to consider the way the state operates, moving my study away for corporate behaviour to instead investigate the ways in which the state might struggle to create an enabling environment for A2EJ. The importance of understanding state behaviour is more obvious in A2EJ literature where there is a keen interest in reform and channels available for disenfranchised groups to seek redress for environmental harm.

One clear illustration of Frynas' limited portrayal of state agency is his discussion of joint venture agreements and the impact they have on state conduct.[113] While he does recognise the state's significant commercial stake in the industry through joint venture arrangements, he does not hold the state responsible for the negative impact on communities that oil operations can cause.[114] Frynas' argument is that

[110] This focus on conflict was likely informed by the current events unfolding during Frynas' period of analysis, particularly the MOSOP struggle for recognition in the Niger Delta and the execution of environmental activist Ken Saro Wiwa. See Frynas, *Oil in Nigeria,* 1.
[111] Ibid., 3.
[112] It is understandable that Frynas would try to isolate this relationship given his interest in Corporate Social Responsibility, however, this oversimplification does not serve the purpose of understanding the dynamics and incentives of actors involved in oil pollution disputes.
[113] Frynas, *Oil in Nigeria*, 57.
[114] Frynas, *Oil in Nigeria*, 8.

if the foreign company is the operator of an oil exploration or production project, they will be the ones named in a court case, and so become the focus of inquiry.[115] He also suggests that regulation has failed to affect the oil sector due to the intertwined regulatory roles that the Nigerian National Petroleum Company (NNPC) and the Department of Petroleum Resources (DPR) have played historically.[116]

While both his statements regarding regulation and joint ventures are not wrong per se, they are incomplete and depict the state as reactionary and weak. As a means of addressing this, I draw on the A2EJ literature to make the claim that the Nigerian state must be understood as an actor that makes choices based on its own agenda.[117] I illustrate this specifically through interviews and survey findings where respondents provide evidence of a state that makes sub-optimal choices for citizens in favour of continued revenue-capture.[118]

While simplifying the role of the state in one respect, Frynas does seek to highlight the complexity of the state apparatus elsewhere in his study, particularly in his critique of work by Omoweh. Frynas suggests that Omoweh's research has been compromised by his own Marxist perspective of the relationship between colonialism and economic underdevelopment in the Niger Delta region, which positions oil companies as immediately at fault before presenting any supporting evidence.[119] As a way of responding, Frynas suggests that different parts of the state apparatus, like the judiciary, have their own internal dynamics that can

[115] Chapter 4 will discuss in further detail why the State's commercial participation in the sector is an important contributor to poor governance.
[116] Ibid., 29.
[117] This is in line with the work of Randeria, which investigates what she terms "a cunning state". See "Glocalization of Law", 306. See also Karl's "Perils of the Petro-State," in which he identifies a "Petro-State" – a state that is not weak, but rather empowered to make self-interested choices in policy and law.
[118] My argument thus follows Karl's research into petro-state behaviour in "Perils of the Petro-State."
[119] Frynas, *Oil in Nigeria*, 5.

prevail.[120] The assertion made by Frynas is not incorrect in that different parts of the state apparatus do indeed have their own internal dynamics.

However, Frynas does not discuss the relative power of those institutions; while the judiciary may have its own dynamics, it does not operate autonomously from the rest of government, which Frynas' own work later shows. This assertion by Frynas that heterogeneity of institutions within the state apparatus is significant enough to have a substantive effect on the institution's overall performance reflects a departure from Rentier State literature. While the judiciary may have its own dynamics, it is still situated within an incentive structure built around oil dependence.

This dissertation builds on Frynas' work to ensure sufficient continuity for historical study, but it also improves upon his research, particularly as it relates to the theoretical underpinnings of his study. My project seeks to reframe Frynas' inquiry in order to focus on state agency, oil dependence and the effects on A2EJ in the Nigerian context.

2.4.1.2 Developments Since Frynas' Research

It has been 17 years since the publishing of Frynas' analysis, and much has changed in Nigeria, in the environmental justice movement and in global oil markets during this period. His work covers a period dominated by military rule in Nigeria, with only the beginnings of democracy emerging in the final stage of his work. Since the late 1990's and early 2000's, Nigeria has established an environmental policy and a constitution that affords rights to citizens, and has had peaceful democratic elections and transitions of power.[121] Since that time, the increased volatility of global oil prices has threatened the stability of economies like Nigeria's, which is dependent on oil revenue.

[120] Ibid.
[121] See Chapter 5 for more on legislative developments since democracy in 1999.

During Frynas' period of research, a global movement was gaining momentum for more democratic and inclusive environmental decision-making and governance standards. This first started with the Rio Declaration, particularly Principle 10, which outlined that states should have clear mechanisms for public participation in environmental decision-making and the provision of access to environmental information. [122] Nigeria is a signatory to this non-binding declaration.

However, it was not until just after Frynas' period of analysis, that the first agreement was signed that would codify these commitments in law. The United Nations Economic Commission for Europe's (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, more commonly known as the Aarhus Convention, came into force in Europe with 47 signatories across Europe in 2001. The Aarhus Convention confers a series of environmental rights onto citizens that signatory states have been responsible for codifying in domestic law.

While the Convention only binds countries in the European Union and UNECE member states, it has had a far reaching impact on international norms and standards for public participation in environmental decision-making, including influencing some actors outside of signatory countries.[123] For example, Etemire highlights that the Aarhus Convention has been persuasive in jurisprudence in non-signatory states such as Mauritius and Brazil. He notes that while not legally enforceable in Nigeria, Nigerian activists have used expectations and obligations under the Aarhus convention as a framework for campaigning.[124]

[122] United Nations Rio Declaration on Environment and Development (13 June 1992), 31 I.L.M. 874 (1992).
[123] Uzuazo Etemire, *Law and Practice on Public Participation in Environmental Matters: The Nigerian Example in Transnational Comparative Perspective* (Oxon: Routledge, 2016).
[124] Ibid. While there is no clear link made between the relatively recent Freedom of Information Act 2011 in Nigeria and the Aarhus Convention, Etemire argues that, despite substantial flaws, access to environmental information provisions are on the path to being more expected in the Nigerian context, which may have a knock-on effect for those in the Niger Delta exercising their rights.

In addition to the Aarhus Convention, the Climate Justice movement and discourse has risen in prominence since the time of Frynas' research. Climate Justice is concerned with the material, negative, impact of climate change on marginalised and disadvantaged communities who are not responsible for creating the conditions for climate change, yet disproportionately suffer its consequences.[125] The Climate Justice movement has been present in both national and international arena, urging governments, communities and citizens to work toward accountability mechanisms for addressing climate change in an equitable way.[126]

In this context, Nigeria is an interesting case. It is both a contributor to climate change through detrimental practices such as gas flaring and oil production more broadly, but its citizens also disproportionately suffer from wealthier countries' consumption of oil. Sea level rise in the Niger Delta and severe droughts in northern Nigeria are products of climate change that negatively affect the poor, while energy consumption in Nigeria remains low.[127]

The main global forum where these discussions are taking place is under the United Nations Framework Convention on Climate Change, first during the Kyoto Protocol discussions in the 1990s and more recently during the negotiations of the Paris Agreement in 2015.[128] The Paris Agreement has been a global rallying cry

[125] Jethro Pettit. "Climate Justice: A New Social Movement for Atmospheric Rights." IDS Bulletin, 35: 102-106, https://opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/8533/IDSB_35_3_10.1111-j.1759-5436.2004.tb00142.x.pdf?sequence=1 (accessed July 9, 2018), and Paul Chatterton, Featherstone, David and Routledge, Paul. "Articulating Climate Justice in Copenhagen: Antagonism, the Commons, and Solidarity." *Antipode*, 45 (2013): 602-620.
[126] Jethro Pettit. "Climate Justice: A New Social Movement for Atmospheric Rights."
[127] Peter Akpodiogagaa and Ovuyovwiroye Odjugo "General Overview of Climate Change Impacts in Nigeria," *Journal of Human Ecology*, 29:1 (2010): 47-55.
[128] The Kyoto Protocol, signed in 1997 and entered into force in 2005 "is an international agreement linked to the United Nations Framework Convention on Climate Change, which commits its Parties by setting internationally binding emission reduction targets." The Paris Agreement builds on the Kyoto Protocol by bringing developing countries into the discussion more prominently, "for the first time brings all nations into a common cause to undertake ambitious efforts to combat climate change and adapt to its effects, with enhanced support to

for nations' collective responsibility to curb climate change and has received a high degree of visibility in the international cooperation agenda. Nigeria currently has committed under the Paris Agreement to curb polluting activities, such as ending gas flaring, achieving 13 GW of off grid solar capability, and improving energy efficiency by 30 percent by 2030.[129] These measures and others included in Nigeria's Paris Agreement commitments are meant to take place between 2015 and 2030 and highlight how, despite being a poor country in terms of human development indicators, the country is expected to reduce emissions. This added dimension to the global environmental debate, and Nigeria's engagement in that discussion, may have an impact on the country's future response to areas of environmental concern, though early indications for swift action as a result of these commitments have not been limited.[130]

Changes to the context, global movements and developments in research methodologies have not, however, been fully reflected in recent related academic literature.[131] In the wake of Frynas' research, there has been a growing body of academic inquiry into Nigeria as a case study on environmental law in the context of oil sector activity. Unfortunately, this research corpus does not significantly

assist developing countries to do so. As such, it charts a new course in the global climate effort." See: United Nations Climate Change, "KP Introduction," UNFCCC.int. https://unfccc.int/process/the-kyoto-protocol (accessed 08 August 2018). and United Nations Climate Change "The Paris Agreement," UNFCCC.int, https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement (accessed August 08 2018).

[129] "Nigeria's Intended Nationally Determined Contribution." Report. Federal Ministry of Environment, Federal Government of Nigeria. October 27, 2015. http://www4.unfccc.int/ndcregistry/PublishedDocuments/Nigeria First/Executive Summary_Nigerian INDC_271115.pdf (Accessed July 09, 2018).

[130] While material developments to date have been limited, the government of Nigeria did establish a Department of Climate Change in 2011 in order to ensure its compliance with the UNFCCC. Upgrading the previously named 'Special Climate Change Unit' to a full department may be an indication that this topic holds increasing political importance. See the Department's website at: http://climatechange.gov.ng/about-us/department-of-climate-change/.

[131] Omeje's work relies heavily on Frynas' research to consolidate the theory that Nigeria's designation as a Rentier State has meant that the government has manipulated legal frameworks in line with its own economic incentives. His study does not employ any original data to further make this case, nor does it propose a link to the existing research on A2EJ, still presenting a gap to be filled by this research. See Kenneth Omeje, "The Rentier State: Oil-related Legislation and Conflict in the Niger Delta, Nigeria," *Conflict, Security & Development* 6 no. 2 (2006): 211-230.

advance our knowledge of A2EJ in the Nigerian oil sector. There has not yet been research relating to oil pollution redress in the Nigerian context as thorough in its approach as Frynas' work, nor has there been research that convincingly exhibits a command of the related theoretical literature.[132] While there have been studies conducted on the legal frameworks for environmental justice and protection since Frynas' research, few have collected new data or employed rigorous investigative methodologies to advance the current view on A2EJ in Nigeria.[133] Instead, there has been one approach to research, which lays out the existing laws and conducts a doctrinal critique, rarely yielding new findings or perspectives.[134]

This dissertation does not intend to disprove the broad consensus of this body of literature; indeed the findings in this study broadly support the consensus that

[132] This assertion is made after using multiple systematic database searches. Specifically, I used Boolean searches in Google Scholar and HeinOnline to assess search returns for: Nigeria AND oil AND law and assessed the 200 most relevant search returns from each. In order to ensure that this was not a search anomaly, I then I also followed the citation listings for Frynas' key works to see what has since followed his research.

[133] For example, Stephenson and Schweitzer apply a theoretical model to the challenges of accessing environmental justice in the Delta, but do not develop any analytical framework for fully appreciating the political economic complexity of the context, suggesting the government might somehow "develop and sustain the political wherewithal to establish different rules." See Max Stephenson Jr. and Lisa A. Schweitzer, "Learning from the Quest for Environmental Justice in the Niger River Delta," in *Environmental Inequalities Beyond Borders: Local Perspectives on Global Injustices*, eds., JoAnn Carmin and Julian Agyeman (Cambridge MIT Press, 2011), 45-66.

[134] The lack of original data, theoretical framing, or clear methodology may be due to the fact that many of these journal articles and research briefs focus on providing prescriptive measures for improving Nigeria's governance regime, rather than focusing on rigorous methodologies. For example, see: Hekeem Ijaiya and O.T. Joseph, "Rethinking Environmental Law Enforcement in Nigeria," *Beijing Law Review* 5, no. 4 (2014): 306-321; Chilenye Nwapi, "A Legislative Proposal for Public Participation in Oil and Gas Decision-Making in Nigeria", *Journal of African Law* 54, no. 2 (2010): 184-211; Nelson E Ojukwu-Ogba, "Legislating Development in Nigeria's Oil-Producing Region: The N.D.D.C. Act Seven Years on", *African Journal of International and Comparative Law* 17, no. 1 (2011): 136-149; Gozie Ogbodo, "Environmental Protection in Nigeria: Two Decades after the Koko Incident", *Annual Survey of International & Comparative Law* 15, no. 1 (2009): 1-18; Eghosa Osa Ekhator, "Public Regulation of the Oil and Gas Industry in Nigeria: An Evaluation," *Survey of International & Comparative Law* 21, no.1 (2016): 43-91; Allan Ingelson and Chilenye Nwapi, "Environmental Impact Assessment Process for Oil, Gas and Mining Projects in Nigeria: A Critical Analysis", *Law, Environment and Development Journal* 10, no. 1 (2014): 1-22; Evaristus Oshionebo, "Transnational Corporations, Civil Society Organisations and Social Accountability in Nigeria's Oil and Gas Industry*," African Journal of International and Comparative Law* 15, no. 1 (2007): 107-129; Olubayo Oluduro, "Environmental Rights: A Case Study of the 1999 Constitution of the Federal Republic of Nigeria", *Malawi Law Journal* 4, no. 2 (2010): 255 – 27; Adebola Ogunba, "An Appraisal of the Evolution of Environmental Legislation in Nigeria, *Vermont Law Review* 40 (2016): 673-694.

domestic approaches to environmental governance in the oil and gas sector in Nigeria are inadequate for providing access to justice. The research does, however, identify an opportunity for a unique contribution to the field by providing a sound theoretical framework and nuance and granularity to the debate since the Fourth Republic through employing a range of research methods and original data collection.

2.5 Conclusion

This Chapter examined the three key bodies of literature related to this research, namely the evolution of the A2EJ literature, the Rentier State literature, and the Nigerian environmental and oil law literature, with a particular focus on Frynas' research. Through this review, I have established that my research project will provide a contribution to knowledge production within the A2EJ literature and the Nigerian environmental law literature.

The A2EJ and Rentier State research, viewed together, pave a way forward for a specific kind of political economy of access to environmental justice. This research provides a strong theoretical basis for study of the ways in which political and economic incentives can enable or constrain a government's ability to develop and use procedural mechanisms for substantive environmental justice outcomes. According to Cotterell, there is precedent for taking such an approach. He argues that "a sociological perspective is thus not exclusive of or separate from the perspectives offered by [other disciplines, such as economics]".[135] This research will build on the developments made by A2EJ scholars, such as Perry-Kessaris, Bedner, and Harding, who have identified politics and economic development as constraints to A2EJ, and employ a theoretical framework which explicitly incorporates political economy theory into research design.

[135] Cotterrell states that "it is now evident that legal ideas can be understood as the outcome of historical, cultural, political or professional conditions which sociological studies are able to describe and explain." See "Why must legal ideas be interpreted sociologically?," 173; 185.

This Chapter has also shown that Frynas' research has been formative for this thesis, but argues that his study is not without its shortcomings. My study builds on Frynas' research by collecting similar data points in order to draw some conclusions about change over time. The dissertation also builds on Frynas' work theoretically, but provides a more concrete framework for research on disputes that take place between companies and communities in the context of state dependence on oil revenue. This is a significant contribution that enables this research to move from purely an empirical exercise to a holistic academic project that can inform future studies on access to environmental justice in the context of a dominant oil sector.

The remaining chapters of this dissertation will expand upon, and further develop, these points. Chapter 3 on methods will address the critique that research on A2EJ in Nigeria has lacked a methodological framework and original data collection since Frynas' work. Chapter 4, on oil sector governance, particularly the section on "Joint Investigation Visits," will further explore the Rentier State and its effect on A2EJ. Chapters 5, 6, and 7 will use the "political economy of A2EJ" framing to investigate the development of legislation, case law on oil spill disputes, and litigation practice respectively.

3 Research Methodology

3.1 Introduction

The previous Chapter reviewed the bodies of literature that inform the theoretical framework for this study. I showed that building a socio-legal theoretical framework by joining research from the fields of political economy and A2EJ provides a valuable foundation for this dissertation's focus on the effect of oil dependence on A2EJ in Nigeria's oil sector. I also indicated that while this project builds on the important work of George Frynas, it also addresses shortcomings in his theoretical framework. Finally, I made the claim that my research makes a novel contribution to the literature by identifying a gap in contemporary empirical research on A2EJ in Nigeria's oil sector.

This Chapter takes the theoretical framing provided by Chapter 2 and develops a plan for its mobilisation using empirics – that is to say, this project's methodology. The methodology for this dissertation is socio-legal in nature. It employs a case study and uses a mixed methods approach to data collection and analysis. This means that my research focuses on legal institutions' treatment of pollution in the oil and gas sector in Nigeria by collecting a range of data in order to understand how different factors influence A2EJ for those affected by oil industry pollution. This range of data includes talking to practitioners at the front lines of oil pollution law-making and litigation in key informant interviews, collecting views from a wider group of lawyers through a survey, and collating and analysing case law that captures litigation dynamics among adjudicators, companies and communities in oil pollution disputes.[136]

[136] A note on referencing throughout this thesis: The Law Pavilion electronic law reports are used for a majority of case law citations. As a result, page or paragraph numbers are not available. For the citation of legislation, I have accessed legislation through the International Centre for Nigerian Law's compilation of the laws of the Federation of Nigeria. See "Laws of the Federation of Nigeria," http://nigeria-law.org/Legislation/LFN/LFNMainPage.htm (accessed September 1, 2017). Some Nigerian government institutions refer to the ICNL website for a comprehensive collection of legislation, and so to the best of my knowledge, legislation presented in this thesis is up to date. Interviews that I conducted are cited throughout this text anonymously using their interview code and date of interview. Survey respondents are referred to by the timecode from

Section 3.2 will discuss my choice of case study as socio-legal method. Section 3.3 will reflect on the experience and value of doing fieldwork in Nigeria. Section 3.4 will focus on the types of data collected – survey responses, interviews, and case law – and the approach taken in my analysis of that data. In the data section, I will outline how Frynas' methodological approach informed this research, particularly my use of a repeated survey. This discussion of the methodology is crucial as a means of providing context to my findings and their limitations. The presentation of the methodology is also important in order to address one of the gaps in the literature to date, identified in Chapter 2: namely, that fact that there is a lack of clear methodological approach or rigour to research concerning A2EJ in Nigeria's oil sector.

3.2 Case Study As Method

My chosen methodology provides a unique opportunity to explore a specific set of economic, political, and social variables that have a bearing on access to environmental justice in Nigeria. This section discusses the choice for the case study methodological approach.[137] First, I will map out the methodological options that were taken into consideration for this research. The remainder of the section will then focus on the selected methodology.

3.2.1 Weighing Up Methodological Approaches

When initially considering how to approach my research question and broader research objectives, I surveyed a range of methodological approaches.[138] Given a trend in legal research to employ quantitative studies, I first considered whether

their survey submission, a unique and anonymous identifier. Finally, this thesis uses the Chicago style for citation, which means at first reference, a citation will cite full details of a source. At second citation, it will provide an abbreviated citation, which can otherwise be cross-checked with the bibliography.

[137] The case study as method is explored in Pamela Baxter and Susan Jack, "Qualitative Case Study Methodology: Study Design and Implementation for Novice Researchers," *The Qualitative Report 13,* no. 4 (2008): 544-559.

[138] Many of these methodologies are explored in Wing Hong Chui and Mike McConville, eds., *Research Methods for Law* (Edinburgh: Edinburgh University Press, 2007)

such an approach might be applicable to my research question.[139] A quantitative approach could have involved a cross-country study using an index of variables, for example, which might proxy "gateways to environmental justice," and which could then be set against a country's dependence on natural resource revenues in a regression.[140] Doing so, however, would only capture a moment in time at best. At worst, the variables comprising the index would fail to capture the phenomena in question, meaning that results would not accurately reflect the context. Another option was to focus only on Nigeria, and do a quantitative analysis of the quantum of compensation awarded to victims of oil pollution.[141] Such an approach would allow for historical study over time, but such a study would only investigate one very specific dimension of A2EJ in the context of the oil sector, and would not take into account the many other ways in which A2EJ might be achieved or denied. For these reasons, I deemed the quantitative approach to be inappropriate.[142]

I also considered a traditional approach commonly taken in legal research; a doctrinal methodology.[143] Historically, this has been the preferred method of scholars working on legal issues relating to oil pollution and oil sector governance more broadly in Nigeria.[144] This type of research tends to be compelling to some researchers because it can be conducted from anywhere. Desk-based research also does not necessarily require access to influential actors. At the same time, it provides an indisputable account of an event that has been written down.

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[139] For a discussion of trends in quantitative legal scholarship, see Wing Hong Chui, "Quantitative Legal Research," in *Research Methods for Law,* eds., Wing Hing Chui and Mike McConville (Edinburgh: Edinburgh University Press, 2007).

[140] For example, Brunnschweiler and Bulte test a common hypothesis about the relationship between war and natural resource dependence by running three different regressions on a dataset. See Christa N. Brunnschweiler and Erwin H. Bulte, "Natural resources and violent conflict: resource abundance, dependence, and the onset of civil wars," *Oxford Economic Papers* 61, no. 4 (2009): 651 – 674.

[141] This was one approach used by Frynas. See Frynas, *Oil in Nigeria*, 182.

[142] Ruling out purely quantitative methodology was also supported by Frynas' own research, which used quantitative methods alongside other data collection techniques.

[143] For more on the doctrinal method, and indeed how it can be considered an empirical method in and of itself if reframed, see Ian Dobinson and Francis Johns, "Qualitative Legal Research," in *Research Methods for Law,* eds., Wing Hong Chui and Mike McConville (Edinburgh: Edinburgh University Press, 2007).

[144] See Chapter 2.

Referring to doctrinal analysis, Posner writes that "'[t]his branch of legal scholarship is largely autonomous; that is, its practitioners do not have to know any other field of learning in order to contribute to it."[145]Cotterrell, one of the founders of modern socio-legal studies, argues that this autonomy is an inherently limiting approach to understanding how law is influenced by the world in which it lives and vice versa.[146] In light of this, Cotterrell suggests that "[a] sociological perspective on legal ideas is necessary to recognise and analyse the intellectual and moral power of law in this respect. To interpret legal ideas without recognising, through sociological insight, this dimension of them would be to understand them inadequately."[147] It is precisely for this reason that I concluded that doctrinal analysis alone would be insufficient for this research.

3.2.2 Case study: The Preferred Choice

Case study as method has, rather unfairly, faced critique for its perceived shortcomings in scientific rigour.[148] However, using a case study as the central focal point of research is an important tool for exploring complex phenomena, and can lead to new areas of research in its own right, as well as corroborating or challenging pre-existing hypotheses formed by other researchers[149] One possible criticism of case study research is that it may not have external validity, meaning that conclusions drawn from the research cannot be applied elsewhere. In response to this, I argue that gaining a deeper understanding of a phenomenon, as it occurs in a specific context, is important and valuable in its own right and can act as a contribution toward the refining and development of theory.[150] This is particularly

[145] Richard A. Posner, "The Present Situation in Legal Scholarship," *Yale Law Journal* 1113, no. 90 (1980): 1113-113; 1114.
[146] Cotterrell, "Why Must Legal Ideas Be Interpreted Sociologically?," *182.*
[147] Ibid.
[148] Specifically, its limited scope and hence difficulty for making generalisations and its perceived bias toward telling the researcher what they already believe to be true. See Flyvberg for more on these critiques and a thorough defence of the case study as method. Bent Flyvbjerg, "Five Misunderstandings About Case-Study Research," *Qualitative Inquiry* 12, no. 2 (2006): 219-245.
[149] Ibid.
[150] The same could also be said of heavily quantitative, but popular, social science methods, such as randomised control trials.

significant for my research, as it takes as its "case" the context of Nigeria, a country of almost 190 million people.

By using case study as method – including the use of a survey and key informant interviews – my study takes an empirical approach to a theoretical question.[151] Doing so allows me to answer socio-legal questions that are practical (how does the Nigerian federal, democratic government use and shape the legal system with respect to the oil sector) as well as critical (does the Rentier State obfuscate access to justice by perpetuating its own interests above that of its citizenry?).

Baxter and Jack note that it is not an exception, but rather quite common for case studies to employ a range of data sources, including quantitative survey data, to triangulate understandings from any one source, and to gain a more comprehensive grasp of complex phenomena.[152] In the case study approach, analysis of these various sources is holistic. In this sense, my project follows the approach of these researchers, who argue that "each data source is one piece of the "puzzle," with each piece contributing to the researcher's understanding of the whole phenomenon."[153]

Frynas' research expanded the parameters of what was possible for my research to achieve. While not asking the exact same research questions, Frynas' use of a survey allows for this research to take a historical approach to interrogating the change in A2EJ over time in Nigeria. This has enabled me to build on his work, rather than focus on an isolated moment in history.[154] There are some drawbacks to using a survey designed by someone else for a different purpose, but Friedman notes that having the opportunity to have baseline data from "which to measure

[151] Baxter and Jack argue that "[r]igorous qualitative case studies afford researchers opportunities to explore or describe a phenomenon in context using a variety of data sources". See Baxter and Jack, "Qualitative Case Study Methodology," 544-559.
[152] Baxter and Jack, "Qualitative Case Study Methodology," 544-559.
[153] Ibid, 554.
[154] Lawrence M. Friedman, "Opening the Time Capsule: A Progress Report on Studies of Courts over Time," *Law & Society Review* 24, no. 2 (1990): 229-240; 229.

and monitor what is happening in our own turbulent times" outweighs the deficiencies that such studies might have.[155]

3.3 The Fieldwork Experience

The use of fieldwork as part of the methodology was both necessary and informative. Undertaking fieldwork allowed me to access documents, like case law and certain regulations, which would not have been possible to retrieve remotely. Fieldwork also provided an opportunity for me to immerse myself in the wider context of the research, an occasion that would have not been paralleled by only reading the Nigeria literature.[156] For example, simply visiting the office of the national oil company and then the next day visiting the oil spills regulator allowed me to observe the sheer scale and centrality of the Nigerian National Petroleum Company (NNPC) complex in contrast to the relative obscurity and disrepair of the small National Oil Spill Detection and Response Agency (NOSDRA) offices.[157] The resulting data collected added an additional level of scrutiny often absent in other studies on the topic, which primarily rely on doctrinal analysis.[158]

The main period of fieldwork took place over 9 weeks in July, August, and September of 2014 in Abuja.[159] The following section will cover some of the key features of my fieldwork.

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[155] Friedman, "Opening the Time Capsule," 240.

[156] SOAS/A2EJ scholars such as Lau, Cha, and Perry-Kessaris conducted fieldwork without undertaking participant-observation. Further, McConville highlights the value of fieldwork in Mike McConville, "Development of Empirical Techniques and Theory," in *Research Methods for Law,* eds., Wing Hing Chui and Mike McConville (Edinburgh: Edinburgh University Press, 2007).

[157] Gupta and Ferguson argue that "[f]ieldwork's stress on taken-for-granted social routines, informal knowledge, and embodied practices can yield understanding that cannot be obtained either through standardised social science research methods (e.g. surveys) or through decontextualised reading of cultural products (e.g. text-based criticism)." Quoted in Regina Sheyvens and Donovan Storey, eds., "Introduction," *Development Fieldwork: A Practical Guide* (London: SAGE Publications, 2003). See also Dan Brockington and Sian Sullivan, "Chapter 4: Qualitative Research," *Development Fieldwork: A Practical Guide* (London: SAGE Publications, 2003).

[158] For more on the choice to employ an empirical methodology and the importance of detailing that methodology honestly and openly, see McConville "Development of Empirical Techniques."

[159] This period was also supplemented by other visits over the course of four years. While these other visits were primarily work related, rather than research related, they provided additional time to build networks and meet informally with practitioners working in the sector.

3.3.1 Choice of City

I selected Abuja as my site of study for both research and logistical reasons. The city is both the seat of the Federal Government and an environment stable enough to allow for independent research conducted by a foreign woman. Abuja is the Federal Capital of Nigeria and is home to the Supreme Court, the seat of the Executive, the headquarters for most regulatory bodies, and the seat of the National Assembly – the country's legislature. It is a place where politics is the main business in town, and where key decisions about governance, including oil and gas sector governance, are made.[160]

Other possible cities to base my fieldwork would have been Port Harcourt, the capital of Rivers State and a hub for environmental litigation relating to oil spills; or Lagos, the commercial centre of Nigeria, which also serves as the country's centre for arbitration and is home to the country's major law firms. Frynas' fieldwork focused on the Niger Delta itself and Lagos.[161] While Port Harcourt is a central site for oil pollution litigation, and much closer to the physical location of where oil spills and other forms of oil-related environmental degradation take place, basing the research there may have introduced a state-centric bias, given that the focus of my research is primarily the Federal Government's behaviour. Another complication was that I would have faced limited mobility in Port Harcourt, due to security concerns. Lagos would have been a useful place to be based had my research focused primarily on private sector actors, but the city is less convincing as a hub for research concerned with the Federal Government and the "Rentier State", and thus not entirely suited to my purposes.[162]

[160] The National Assembly, the legislative branch of government, is based in Abuja, as is the Presidency. Abuja is also the headquarters of the Nigerian National Petroleum Company and NOSDRA.
[161] Frynas, *Oil in Nigeria*, 103.
[162] For a history of Abuja as Nigeria's capital, see Jonathan Moore "The Political History of Nigeria's New Capital" *The Journal of Modern African Studies*, Vol. 22, No. 1 Cambridge University Press (Mar., 1984), pp. 167-175.

As outlined above, basing the fieldwork in Abuja had considerable advantages, but it also introduced its own biases. The main bias was that since the research was primarily conducted in Abuja, I was not receiving a first-hand account of challenges for redress from victims of oil pollution. Rather, I was receiving mediated accounts through legal counsel. In order to address this possible bias, I referred to studies, particularly the UNEP Ogoniland report, which explored the negative effects of oil pollution on oil communities through first-hand accounts of victims.[163] I also mitigated this bias by conducting phone and in-person interviews with people who live and work in affected areas in order to gain their insights in the absence of visiting myself.

3.3.2 Sites of Inquiry

Within Abuja, I spent time in the office of an oil sector governance reform programme funded by an international donor organisation as well as a commercial law firm that works in the oil and gas sector. These spaces provided an opportunity to ground both myself and my research, particularly in the early days of fieldwork when the research landscape was still coming into focus.[164] I decided upon these sites due to the ease of access that was provided to me by gatekeepers from both institutions, as well as their relevance to the work; both institutions offered substantive, relevant data points for my research.[165] Below, I describe these sites of inquiry and how they contributed to this research study.

[163] See "Environmental Assessment of Ogoniland," *Nairobi: United Nations Environment Programme*, 2011. http://postconflict.unep.ch/publications/OEA/05_ch05_UNEP_OEA.pdf (accessed August 1, 2017).
[164] Taylor, Bogdan, and DeVault refer to this process as "selecting settings." See Steven Taylor, Robert Bogdan and Marjorie DeVault, *Introduction to Qualitative Research Methods*, 4th edition (New Jersey: John Wiley & Sons, 2015), 40.
[165] Taylor, Bogdan and DeVault, *Introduction to Qualitative Research Methods*, 53 and 68. Interview access was negotiated through snowball techniques and leveraging personal relationships.

I spent at least the first part of every weekday for almost nine weeks in the donor programme office.[166] The programme was staffed by Nigerian professionals with deep knowledge of the sector, some of whom were trained lawyers. The staff members were generally perceived by others as apolitical experts, rather than activists or politicians by those working in the sector. This helped immensely in developing networks within the field. Their insights were also useful in testing assumptions and emerging narratives throughout the data collection period.

Approximately four hours of every week day for a month was dedicated to working from a commercial law firm office in Abuja. The law firm was valuable for its substantial law report library, without which comprehensive case law research would have been difficult. The law firm library also provided access to the staff that worked at the firm, particularly one senior partner, who shared his knowledge with me. The informal conversations held in the law firm proved to be a useful testing ground for trends and hypotheses that emerged as my research developed.

In addition to these primary sites of inquiry, I spent time in a range of government and commercial institutions when conducting interviews and while gathering documents and data. Through referrals from the law firm and the donor programme, I was able to gain unique access to places such as the National Oil Spill Detection and Response Agency (NOSDRA), the Nigerian National Petroleum Company (NNPC), and the National Assembly (NASS). Visiting these institutions was influential in shaping views about the relative prominence of various institutions. It was also valuable to see first-hand some of the concrete challenges facing lawyers both in and out of government, such as unreliable electricity.

[166] For information on the Facility for Oil Sector Transparency (FOSTER), see: "Facility for Oil Sector Transparency", http://www.opml.co.uk/projects/facility-oil-sector-transparency-and-reform-nigeria-foster (accessed August 22, 2017).

When visiting NOSDRA, it immediately became clear that the institution was not within the inner circle of decision-making.[167] The NOSDRA building was physically located significantly further away from key government institutions in the city (about 16 kilometres away from the Presidential Villa), and the building was in disrepair. In contrast, NNPC occupies a large complex of buildings, around the corner from the Central Bank and nearby the Ministry of Finance.

3.1.1 Identity Matters

In conducting socio-legal research, it is imperative that the researcher recognise their own position within the field of study.[168] Negotiating rapport with interview subjects and respondents proved easier in some settings and difficult in others due to the fact that I was a white American woman.[169] Over the course of fieldwork preparation, the nine weeks in-country, and the weeks following fieldwork, I had the opportunity to meet and discuss Nigeria's oil sector with renowned experts in the field. In speaking informally to actors working in the oil sector in Nigeria, it became apparent that this level of access was in part afforded me due to the fact that I was coming from a London-based University, and the fact that I was American.[170]

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[167] There is a body of research in the architecture and neuroscience literatures that speaks to the effect a building's appearance and construction can have on those who use the building. There has been work specifically done on courthouses and how their design can affect users' relationship with the rule of law more broadly. While there has not been a study of government buildings relative to each other in Nigeria, other studies suggest that there may be a relationship between how a building looks and where it is located and how it is perceived. See Karen Levy, Fred Kent, and Cynthia Nikitin, "Reinventing the Courthouse," *Project for Public Space,* https://www.pps.org/reference/courts-in-a-new-paradigm-of-place/ (accessed August 9, 2017); Judith Resnik and Dennis E. Curtis, "Representing Justice: From Renaissance Iconography to Twenty-First-Century Courthouses," *Proceedings of the American Philosophical Society* 151, no. 2 (2007): 139-183, http://digitalcommons.law.yale.edu/fss_papers/69 and Diana Budds, "The Subtle Way Government Architecture Shapes Governments Themselves," *Co.Design*, Sept 19, 2016, https://www.fastcodesign.com/3063810/the-subtle-way-government-architecture-shapes-governments-themselves (accessed August 9, 2017).

[168] For an in-depth discussion of the challenges of fieldwork for foreign researchers, see George Meszaros, "Researching the Landless Movement in Brazil," in *Research Methods for Law,* eds., Wing Hong Chui and Mike McConville (Edinburgh: Edinburgh University Press, 2007).

[169] Taylor, Bogdan and DeVault, *Introduction to Qualitative Research Methods*, 60.

[170] This was mentioned explicitly by interview subjects and other contacts in the field as I tried to gain access for interviews and data. One person went so far as to highlight that I should say that

There were also some other ways in which my identity likely shaped the way I was received in Abuja. Being a student, a foreigner, and having a target population of interviewees comprised of professionals, meant that those being interviewed and surveyed felt comfortable taking a professorial and candid tone with me when discussing the subject matter, thus allowing for frank discussions and exploration of sometimes sensitive issues. A vast majority of those interviewed or contacted to help with this research had university degrees and were open to sharing their views with someone they viewed to be a collegiate counterpart in a different setting. Being a student, rather than a journalist or business person, for example, meant people were more forthcoming with their insights and time.

3.3.3 Challenges of Fieldwork

Data collection in the field was more challenging than expected. There were general challenges that were anticipated, relating to the context, and challenges presented specifically by my research topic (oil in Nigeria) being an inevitably contentious issue. There were also external difficulties that could not have been anticipated when preparing for fieldwork and research design. A series of unexpected events – an Ebola outbreak in the region, a terrorist attack, and a judiciary strike – necessitated that I be resourceful and flexible with modalities for data collection and be prepared to limit the scope of research to what would be possible under the given circumstances. While this limited scope introduced new biases into the research, these obstacles also played an important part in shaping the way in which I understood the context and its research limitations, particularly as an outsider. Below, I outline the main challenges I encountered while in Abuja.

I am American and studying in the UK in all introductory contact with practitioners, as they would look on me more favourably.

3.3.3.1 Security and Public Health

There were a variety of ways in which security concerns affected my research. Particularly, one terrorist attack in central Abuja before the start of fieldwork, and ongoing instability in the Niger Delta meant that my travel was at times restricted.[171] For example, weeks before leaving to travel to Abuja, Boko Haram attacked a shopping mall in the centre of Abuja, known for its popularity with both Nigerians and foreigners.[172] This was considered to be an anomaly by Abuja residents; however, patterns of socialising outside of work were affected, which in turn curtailed my opportunities to socialise informally with key informants and others working in the sector.[173]

Beyond the threat of Boko Haram in Abuja, there was the additional issue of continued trepidation about foreign travellers going to the Niger Delta.[174] Given concerns by the Foreign Commonwealth Office and the US State department, my security advisors and academic advisors felt it would be irresponsible for me, as a young woman, to travel to the Niger Delta alone, even briefly, to conduct interviews with legal practitioners.[175] As stated earlier, given my dissertation's primary interest in Federal Government behaviour, this restriction was more of an unfortunate inconvenience rather than a serious limitation for the research.

Beyond security considerations, there were other challenges during my period of fieldwork. Firstly, the fieldwork period coincided with West Africa's Ebola

[171] I benefitted from security guidance and advice provided by my employer's security team. Oxford Policy Management assumed duty of care during this period and I ensured I followed all stringent protocols.
[172] See "Nigeria: Abuja bomb blast in Wuse district kills 21," *BBC News*, June 25, 2015, http://www.bbc.com/news/world-africa-28019433 (accessed August 9, 2017).
[173] This is a sentiment that was expressed by acquaintances and colleagues in informal discussion: more people were staying home at night instead of going out to socialise.
[174] The U.S. State Department states that "[m]ilitant groups have destroyed oil production infrastructure in Bayelsa and Delta states. U.S. citizens are advised to avoid the areas of these states where these incidents have occurred." See "Nigeria Travel Warning," *US Department of State,* April 5, 2015, https://travel.state.gov/content/passports/en/alertswarnings/nigeria-travel-warning.html (accessed August 9, 2017).
[175] I did reach Port Harcourt in June 2015 for two days with FOSTER, but was unable to conduct research while there.

outbreak, particularly in Liberia, Guinea, and Sierra Leone. This was for the most part not a challenge for Nigeria; however, the country did have a brief Ebola scare that began less than a month into my fieldwork.[176] At the time, it was not clear to what extent the virus might spread. The Ebola threat further restricted my movement due to uncertainty about the scale of the outbreak for weeks after.[177]

3.3.3.2 Judiciary Strike

Finally, and perhaps most directly affecting the research, there was a judiciary strike for the duration of my fieldwork.[178] The primary issue for the judiciary, and reason for the strike, concerned the way in which the judiciary is financed in the Federal structure. The judiciary felt that they were too reliant on the executive branch for funding, and this created an environment where they could be more susceptible to influence by the executive in decision-making.

The complaints raised by the judiciary provide an interesting insight into the relationship between the executive and the judiciary, but also posed practical challenges for research. The strike meant that judges were very hard to reach, and some had left the country for parts of the strike period. The strike also affected courthouses, which weren't operating at full capacity. This made acquiring assistance from clerks, even with references from Nigerian practitioners, difficult. The strike thus affected the research in a very material way: I was not able to interview any judges for the research, nor was I able to use the courts as a source of research material. Survey responses, secondary literature and interviews with lawyers provided a proxy for this perspective, but cannot fully account for the

[176] See the Centre for Disease Control's account here: "Ebola Virus Disease Outbreak — Nigeria, July–September 2014," https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6339a5.htm (accessed October 3, 2014).
[177] "WHO declares end of Ebola outbreak in Nigeria," *World Health Organization,* October 20, 2014, http://www.who.int/mediacentre/news/statements/2014/nigeria-ends-ebola/en/ (accessed October 25, 2014).
[178] Sani Tukur "Nigeria court workers begin nationwide strike," *Premium Times,* July 11, 2014, http://www.premiumtimesng.com/news/164735-nigeria-court-workers-begin-nationwide-strike.html (accessed August 9, 2017).

absence of this important viewpoint from the research. Any future research on this topic should endeavour to rectify this limitation.[179]

3.4 Data

Despite the challenges discussed above, I was able to collect three types of new data, all of which are unique contributions to the field of studies on environmental justice in Nigeria. In this section, I first discuss my survey and how it was administered, as well as details about the survey population and my approach to analysis.[180] Next, I detail how interviews were conducted and how these are used throughout the dissertation.[181] Finally, I outline my approach to systematic case law analysis, considering how cases were identified, organised, and ultimately analysed.

3.4.1 Survey

Using a survey for this research allowed the opportunity to collect a range of views from a specific population – lawyers practicing in the oil and gas sector in Nigeria – in a systematic way. More specifically, using a survey modelled from Frynas' 1998's questionnaire provided a rare occasion for the use of a repeated survey to gauge current attitudes relative to past attitudes toward A2EJ in Nigeria's oil sector. While there would have been advantages to designing a bespoke survey specifically for this research topic, the opportunity to use an existing dataset to develop and test hypotheses over time was deemed to be more important, both for this research and for future work in this area.[182] This section will discuss the

[179] There were also more minor challenges, like not being able to attend the annual Nigerian Bar Association conference, and the upcoming presidential election, which limited access to some politicians. The Nigerian Bar Association Conference was held from the 24th-29th August 2014, see: "Nigerian Bar Association 54th Annual General Conference," *Nigeria Bar,* http://www.nigeriabar.com/2014/08/nigerian-bar-association-54th-annual-general-conference#.WHTwLBsrLb0 (accessed August 29, 2014).
[180] The survey population was entirely anonymised and no personal information was retained.
[181] The thesis does not include any personal information about key informants, and transcripts were saved with anonymising codes so as to protect participants' identity.
[182] Friedman encourages developing datasets that can be reproduced for study over a long period of time, despite imperfections. See Friedman, "Opening the Time Capsule," 229-240.

survey and how it was used. Throughout this section, I will highlight how my approach to the survey differed or converged with Frynas' approach and explain the logic behind those decisions.

3.4.1.1 Survey Purpose

In this research, I used a systematic set of responses from the survey in order to address key questions related to A2EJ in the oil and gas sector. I did this to achieve a range of objectives:

a) to gain an understanding of practitioners' perceptions of legal institutions, and barriers to those institutions in Nigeria (courts and laws);
b) to highlight where there are differences in what is perceived as the *status quo* for access to justice in Nigeria more broadly, and in A2EJ the oil sector specifically;
c) to explore if there are inherent biases held by a range of stakeholders involved in oil pollution litigation that could affect the outcome; and,
d) to see if attitudes on these issues has evolved since the late 1990s.[183]

The survey results can only provide a partial view of the A2EJ landscape for victims of oil pollution in Nigeria, but when used in conjunction with other data, such as case law and key informant interviews, these results can be employed to test hypotheses empirically.

3.4.1.2 Survey Design

Design choices for this survey were limited due to the decision to use Frynas' questionnaire as a starting point. As stated earlier, using Frynas' questionnaire

[183] Frynas wanted to use his survey to "illustrate the incentives and disincentives of the legal process, which can either encourage or discourage litigants from engaging in litigation." In addition, Frynas sought to test if the "formal legal system is biased against oil companies or village communities." Frynas, *Oil in Nigeria,* 100.

as a baseline has considerable advantages for historical study, despite being limiting in other respects, such as the scope of inquiry.

In the original survey, Frynas asked 26 multiple choice questions and provided four opportunities for additional information.[184] As an updated version of Frynas' survey, my 2014 survey asks respondents 38 multiple-choice questions and provides six short answer sections.[185] Questions were rephrased or added in order to ensure anonymity of respondents, provide further clarity, make language more neutral, or to further probe findings from the 1998 survey.

The first grouping of questions in both surveys sketch the background of the respondents and include questions relating to their level of experience, as well as their educational and professional background. This introductory grouping of questions contextualises survey respondents as a sample, and elucidates potential inherent biases.

The second grouping of questions focuses on the practice of oil pollution litigation in Nigeria, particularly tort. The findings from these questions, discussed in depth in Chapter 7, provide insight into the practice of litigation, and form a core component of the dissertation's evidence on the experience of accessing gateways to environmental justice in practice in Nigeria.

The third and final section of the survey relates to oil sector and environmental legislation meant to govern oil sector activity, particularly oil spills. The findings from these questions form a core part of the research's analysis of the legal framework, discussed in Chapter 5, particularly understanding the degree to which legislative instruments effectively achieve their stated aims, and provide mechanisms for redress.

[184] Ibid., 242.
[185] See Appendix II for full the survey administered in 2014.

One of the survey's strengths is the wide scope of issues it covers, straddling regulatory frameworks and the court system. The wide scope did, however, also pose some challenges for respondents who specialise in litigation. Some trial lawyers, who were well versed in environmental tort litigation, found it difficult to respond to detailed questions about the legislative framework.[186] This is an interesting finding of the survey process, largely based on informal feedback from respondents. This finding raises questions about the role of legislation in environmental protection and redress, discussed in more detail in Chapters 5 and 6.

3.4.1.3 Survey Administration

The format of the 2014 survey also builds on Frynas' experience. It was clear from the outset that I would not be able to exactly replicate Frynas' approach to survey administration. This was due to the fact that Frynas' respondents participated anonymously and so would be impossible to trace for longitudinal study.[187]Another reason for this was that Frynas hand-delivered his questionnaire, in conjunction with a Nigerian researcher, to practitioners in Port Harcourt and Lagos – cities deemed unfeasible for my research for reasons discussed earlier in this Chapter. This section considers how survey administration differed from Frynas' approach, particularly with the introduction of online survey technology and online lawyer directories that allowed for a more systematic approach to identifying the survey's sample.

[186] One respondent explicitly described this as a frustration when filling out the comments section in the survey.

[187] This is a repeated survey rather than a longitudinal survey. Longitudinal studies follow the same exact respondents over time, administering the same survey questions. The approach used here uses broadly the same questions with the same *kind* of population (i.e. lawyers in Nigeria), but does not revisit the exact same respondents. For a definition, see "Glossary of Statistical Terms," *OECD,* https://stats.oecd.org/glossary/detail.asp?ID=3829 (accessed July 10, 2017).

3.4.1.3.1 Sampling Strategy

The target population for Frynas' survey was commercial lawyers. In order to repeat his survey, I used the same target population, and focused specifically on lawyers that had experience in both the oil sector and with environmental issues.[188] Based on Frynas' recommendations in personal communication with me, I attempted to randomise the process by which I identified a sample of the population for the survey.[189] Random sampling is considered preferable to purposeful sampling by quantitative researchers because it improves replicability of studies and robustness of results.[190] As will be described below, my sample was not entirely randomised, but it did make improvements on Frynas' sampling strategy.

Instead of using Frynas' referral approach to sampling, my target population was identified largely through two online law directories (HG.org and the Legal 500) and by contacting the Nigerian Bar Association branch offices, particularly those in Lagos, Abuja, and all of the oil producing southern states.[191] These lawyer directories and associations were comprised of firms and individuals who self-identified their specialisations, which accordingly meant that there was a higher likelihood that those contacted had first-hand experience in environmental law and oil and gas law.[192] In a few instances, personal contacts and snowball

[188] Like Frynas, I weighed the possibility of surveying potential litigants. However, lawyers' expertise, somewhat uniform training, and professional standing mean that the types of information that can be gleaned from lawyers provides a valuable dataset when studying A2EJ. Given the potential sensitivity of some of the types of questions asked, lawyers also serve as a more responsible and ethical sample pool, as they are able to answer questions from their professional experience, which further anonymises the experiences of their clients. See Frynas, *Oil in Nigeria,* 101-102.

[189] In personal communication via e-mail in June 2014, Frynas noted that he would have preferred using a randomised sample instead of the convenience sampling method employed in order to further increase methodological rigour in his research.

[190] Frynas made this point in personal communication with me.

[191] See: "Legal 500," http://www.legal500.com/c/nigeria (accessed August 9, 2017); "HG.Org," https://www.hg.org/firms-nigeria.html (accessed August 9, 2017); and "Nigerian Bar Association," http://www.nigerianbar.org.ng/ (accessed August 9, 2017).

[192] There was a slight bias toward firms that were responsive to e-mail inquiries regarding the survey. However, I had assistance from a junior lawyer at a Nigerian law firm who followed up with firms via phone that had been contacted.

referencing were used to target experienced practitioners. This hybrid approach resulted in contacting a semi-random list of 160 lawyers. My sample size was smaller than Frynas', but all of the responses I received were from practitioners with first-hand oil sector experience. In comparison Frynas found that about 83% of his respondents had actual oil industry experience.[193]

The drawback of my experimental approach to sampling was a lower response rate. My sampling yielded a 17% response rate (27 total responses). While the sample is relatively small, the profile of my respondents confirms that targeting was successful in getting responses from experts in the field, whose perceptions and opinions are a product of specialised work experience. Having a completely random sample may have provided a higher certainty that sampling could be replicated in future surveys, but would not necessarily have served to improve my understanding of A2EJ through experienced practitioners.

3.4.1.3.2 Administration Approach

How a survey is administered has a bearing on the quality of the results. Given the limitations of the technology of the time, Frynas' survey was necessarily administered in person and with paper surveys. This meant he had little ability to ensure that respondents answered all of the questions provided. He also had a limited amount of time in which surveys could be left with practitioners to be filled out. To address the challenges he faced, I chose to use an electronic survey format, which allowed me to reach a wider audience in relevant locations (all oil producing states, Abuja and Lagos) and use a format that required that respondents answer all of the survey questions.

[193] The names of the lawyers targeted for Frynas' sample were from a list provided by Nigerian colleagues who knew that these lawyers had worked specifically on oil-related issues. This means that Frynas' sample was not randomised, but Frynas has noted that the approach led to higher quality answers by weeding out lawyers who may not know anything about the industry. Frynas, *Oil in Nigeria,* 101-102.

While addressing problems identified by Frynas, these changes had some negative consequences for survey responses. Firstly, the electronic nature of the survey, which was emailed to recipients, required respondents to be familiar and comfortable with using the Internet – something that may have limited my sample to younger lawyers. To limit this effect as much as possible, a Nigerian associate lawyer followed up by contacting firms by phone and additional personalised e-mail, which stipulated that a paper survey was available as an option. Secondly, the mandatory answering requirement function on the survey was not entirely understood by all respondents – though it was explained in the introductory text of the survey. This led to a decrease in response numbers, as some respondents who did not understand the instructions could not successfully submit their incomplete surveys.

The methods used for both sample identification and administration were an improvement in terms of random sampling from Frynas' research, but response rates were lower. Given the significant gains on access to a target population, more could be done to ensure that the population responds in the future. In future, it would, for example, be useful to:

a) ensure that respondents have easy access to paper copies of the survey: while this was offered in e-mail communication, more could be done to ensure that respondents who may be uncomfortable with an online survey have access to an alternative.
b) increase face-to-face contact with prospective respondents: cold calling and e-mailing without face-to-face visits decreased accountability for respondents to return the survey. While there were a range of factors limiting my ability to meet with firms in person, future survey dissemination could work with local researchers from the outset to ensure more in-person contact with respondents.
c) use a new survey platform that makes requirements for submitting the form more clear: the Google survey platform did not clearly explain to

respondents why their survey was incomplete, leading some to either get frustrated and end the survey or close the survey without realising that it had not been submitted.

3.4.1.4 Sample

Thus far, I have discussed the design of my survey and its format. Here, I will outline the profile of the sample I targeted. The 2014 survey sample resembles that of Frynas' 1998 survey. This similarity between our respective surveys is useful for considering change in attitudes over time; it is more credible to compare similar samples rather than ones with dramatically different demographic profiles.

Based on their professional experience, my survey respondents were well placed to provide perspectives on oil pollution litigation. All responses to the survey were from lawyers and 63% of respondents have acted as counsel for an oil company, subsidiary or contractor, while 59% have acted as counsel against an oil company, subsidiary or contractor.[194] Many lawyers responded that they have worked on both sides of these cases, causing an overlap in my respondent pool and making it less feasible to disaggregate along the lines of "environmental lawyers" and "oil industry lawyers." Allowing lawyers to self-identify in this way means that my sample is nuanced in a different way from Frynas', where lawyers were either labelled "industry" or "community" practitioners.[195] Looking at the sample as a whole, instead of disaggregating further, allows me to focus on more high level conclusions, rather than potentially imposing a nuance to sub-groups of the survey that may be superficial.

My sample was comprised of mainly early and mid-career lawyers. About 60% of lawyers were called to the bar after 1999. On average, Frynas' respondents had

[194] In the 2014 Sample, a majority of respondents were men (81%), and a small minority were women. This is similar to Frynas' sample where the sample was 80% men.
[195] Frynas, *Oil in Nigeria,* 242.

been members of the bar for about 11 years.[196] Participants in my survey had typically been members of the bar for approximately 13 years (See Table 1).[197] This bias toward younger respondents might affect perceptions of certain types of policies, as a majority of respondents came to the bar after an increase in government policymaking on environmental issues.[198]

There are likely a few reasons why a high number of responses came from younger lawyers. Firstly, senior lawyers were more willing to meet face-to-face for in-depth interviews rather than fill out the survey. This could either be due to their unfamiliarity with online surveys or the fact that in-person interviews may be perceived as more respectful of status and hierarchy. The bias toward younger respondents could also be a strategic choice on the part of firms, who may have delegated the task to younger lawyers because it made economic sense from an opportunity cost perspective: more senior lawyers can bill more for their time, and so it would be uneconomical to have them focus on such a non-fee earning task.

Table 1: Q2: When were you called to the Bar?

1980-1989	**1990-1999**	**2000-2009**	**2010-2013**
3	8	10	6

3.4.1.4.1 Educational Background

My 2014 survey inquired about the educational background of the sample. Forty percent of respondents completed their higher education in Nigeria only, while 44% received one degree in Nigeria (primarily a first degree) and their second

[196] Ibid., 105.
[197] I did not ask respondents their birth year in order to add an additional layer of anonymity to the survey.
[198] See Chapter 5, Section 5.8.

degree abroad, most often in the UK. Three of the survey respondents received all of their higher education outside of Nigeria. Of the 85% of respondents who attended at least one university in Nigeria, all of them had one or more degrees from a university in the South of the country. Further, half of those attended at least one university in an oil producing state. This diversity of higher education shows that a majority of the sample has had experience outside of Nigeria and so perceptions of the Nigerian legal system may be coloured by exposure to other jurisdictions, potentially making respondents more critical of the Nigerian legal system.

Respondents were also asked a series of questions about the courses that they took throughout their higher education. A majority of respondents, 67%, had taken at least one module on Environmental Law. About half of respondents had taken modules on oil and gas law. About the same proportion (50%) had taken a module on human rights law. Eighty five percent of respondents had taken at least one module on Investment or Commercial law. This mix of experience with environmental law and commercial law proved useful in covering a range of dynamics that are explored in the survey – from exploring possible oil company bias in the courts to perceived adequacy of oil pollution compensation awarded.

3.4.1.5 Approach to Analysis

Analysis of the majority of the survey was straightforward. Google's survey platform used for the administration of the survey has an automatic calculation function, which I used to calculate results to most questions, eliminating opportunity for human-introduced error.[199] Long form answers were analysed by grouping responses into categories to identify themes.

Survey findings are used primarily in two chapters of this dissertation – Chapter 5 on Statute Law and Chapter 7 on Litigation in Practice. Chapter 5 covers the

[199] See "View and export results," *Google Surveys Help*, https://support.google.com/360suite/surveys/answer/2449690?hl=en (accessed August 9, 2017).

legal and regulatory framework for oil and gas exploitation in Nigeria, particularly as it pertains to oil pollution. The key source material for the Chapter is the law itself. However, as is pointed out in Chapter 5, working with source material without the historical or current context simply results in doctrinal analysis, which I deemed insufficient as an approach to socio-legal research. In Chapter 5, the survey plays an important role: to juxtapose what is written on paper with the perceptions of those who interact with these legal instruments on a professional basis. In Chapter 7, the survey results serve as the core source material, shaping the narrative around the experience of litigation in practice. In both chapters, findings are juxtaposed with Frynas' findings where comparable.

3.4.1.6 Summary

My survey allows me to gauge how much things have actually changed since the turn of the millennium and provides a snapshot of practitioners' perceptions on a range of questions related to A2EJ in the oil and gas sector in 2014. This data set was administered using a new electronic survey and received a 17% response rate. The survey was necessarily built on Frynas' work, but has some distinctive features in terms of identifying target populations. It also features some deviations from the original 1998 survey, and the survey administration itself. The resulting respondent population that I received was mainly male, educated both in Nigeria and abroad, with a majority of the sample having experience in environmental law, oil and gas law, as well as working with oil companies, and oil producing communities.

3.4.2 Interviews

My survey is a valuable dataset for investigating gateways to environmental justice in the oil sector in Nigeria. The findings from the survey can, however, only answer my research questions in light of the nature of the sample and the

limitations of quantitative surveying.[200] In order to account for this gap in my findings, I also conducted interviews with 21 key informants from the period of June 2014 to January 2015. These key informants provide a unique perspective, due to both their seniority, and different experiences with oil litigation and sector governance frameworks.[201] This section will outline who was interviewed, how interviews were conducted, how data was stored, what the sample of interview subjects looked like, and how interview data was analysed.

3.4.2.1 The Sample

Sampling for interviews was very different from the sampling of the survey. Instead of striving for a wide and randomised scope of a specific population, interview sampling focused more on ensuring representation from different institutions and individuals involved in oil sector governance. Interview subjects from the National Oil Spill Detection and Response Agency, the Nigerian National Petroleum Company, the Ministry of Justice, the judiciary, the National Assembly, and the Department of Petroleum Resources were all key institutions that I sought to target within government. Outside of government, well-known academics, activists, and private sector legal practitioners were targeted for extended discussions about access to environmental justice. I made contact with identified institutions primarily through snowballing, and through a network of Nigerian professionals working in the oil and gas sector who were familiar with my research and willing to provide introductions. This approach of asking for introductions rather than cold-calling target populations yielded strong results.[202] Only the Judiciary and DPR did not respond to requests for interviews.

The interview sample was successful in securing a diversity of viewpoints. Six informants currently hold jobs working for Government institutions, four are

[200] See Sam Sieber, "The Integration of Fieldwork and Survey Methods," *American Journal of Sociology* 78, no. 6 (1973): 1335–1359.
[201] See Taylor et al for information on in-depth interviewing in qualitative research. Taylor, Bogdan and DeVault, *Introduction to Qualitative Research Methods*, 105.
[202] Taylor, Bogdan and DeVault, *Introduction to Qualitative Research Methods*, 107.

primarily activists (with an additional two other professionals also working as activists in addition to their primary jobs). One respondent currently works for a donor-funded development programme concerned with security in the Niger Delta, and three others are employed as academics in the fields of oil, gas, and environment in Nigeria. Eight respondents work in the private practice.[203]

Most respondents felt comfortable responding with their personal perspective on the sector, and providing specific insight based on work experience. This meant that views expressed may be divergent from the institutions that were represented. I also generally observed that the more senior the interview subject, the more comfortable they were voicing views that may dissent from the organisation they work for.

3.4.2.2 Interview Format and Approach

Interviews took place primarily in interviewees' place of work, with a few choosing to meet elsewhere or to talk over the phone. Having the opportunity to visit their place of work was valuable because it enabled me to further contextualise the world in which they live, while also helping put interview subjects at ease.

The interview format was largely open-ended with key themes proposed and discussed with informants using an interview guide. These key themes were broadly the same as the survey questionnaire. The open-ended format allowed discussions to be driven by the informants themselves, all experts in their fields, and all with opinions about the challenges of oil sector governance, particularly regarding A2EJ.

[203] The interview subjects were primarily male, with the exception of one woman. A majority of interviews took place in-person, while some took place over the phone. Ten of the key informants are based in Abuja, seven are based in Port Harcourt, three are based in Lagos, and one is based in the UK.

3.4.2.3 Data Collection and Storage

This section briefly discusses how I collected, transcribed, and stored this interview data. This is an important component of an ethical interview procedure. Employing a secure data storage system and anonymising protocol also helped to gain the trust of my key informants.[204]

Depending on interviewee verbal consent, conversations were recorded on a digital voice recorder. Eighteen of the 21 key informants consented to recorded interviews on the condition of anonymity.[205] Once recordings were imported, each interview subject was assigned a code, the key for which was kept separate from the interviews themselves, adding an additional layer of anonymity and data protection for key informants.[206] The purpose of transcription was to allow myself to engage more closely with the data, while also ensuring that note-taking during interviews was not biased by pre-determined objectives.

3.4.2.4 Method of Analysis

The main function of this interview data in the present research is to triangulate findings from survey, case law, and legislative analysis.[207] As such, interview transcripts were coded, and then used throughout this dissertation to illustrate corroboration or divergence of opinion within and among data sources.

There were broad themes I was hoping to better understand through the perspectives of respondents, but I allowed topics to emerge from the interview subjects themselves rather than having a strict set of pre-determined questions. I

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[204] "Data Storage and Data Security," *The Ethics Guidebook,* http://www.ethicsguidebook.ac.uk/Data-storage-and-data-security-30 (accessed July 31, 2017).
[205] Taylor, Bogdan, and Devault, "Recording Interviews," in *Introduction to Qualitative Research Methods*, 127.
[206] On anonymising data sources, see "Anonymising your data," *The Ethics Guidebook*, http://www.ethicsguidebook.ac.uk/Anonymising-your-data-309 (accessed July 31, 2017).
[207] While key informant interviews were used primarily as a tool for triangulation for this research, there are ample opportunities to use the data collected in the future for further focused study on the transcripts. On triangulation, see Taylor, Bogdan, and Devault, *Introduction to Qualitative Research Methods*, 94.

also used these interviews as an opportunity to gain clarity from practitioners and experts if there were phenomena that I was struggling to understand. Some common themes emerged as the research progressed, such as perceptions of the State as an actor in the sector, the way law is made or prevented from being changed, and how court cases may or may not be delayed or manipulated due to various tactics employed by oil companies and communities.

Keeping these themes in mind, I read through the interview transcripts verbatim three times.[208] In this first reading, I simply read through all of the materials, while not taking any notes. I took notes during the second reading on what stood out to me as themes and lines of argument that either adhered to or contradicted information coming from secondary research, survey data, and the case law.[209] During this second round, I began to highlight and apply a first round of general codes to the transcripts, such as the actors being discussed, or themes, like "corruption" or "colonial rule."

The third and final round of reading occurred after grouping quotes with similar themes and actors together to see if a narrative was emerging from the respondents. The final reading was more focused on selected quotations and intended to make some preliminary findings about key themes relating to gateways to environmental justice in an oil dependent context. These preliminary findings were later paired with survey findings, legislation, and case law on the same topics to see if views conformed, complemented, or dissented from one another. Since these initial readings, the transcripts have been revisited throughout the analysis of other components of the research to see if my reading of interviews changed based on further findings from other data sources.

[208] Taylor, Bogdan, and Devault, *Introduction to Qualitative Research Methods*, 162.
[209] For a detailed discussion of the multiple steps of analysing interview data, see Kathleen W. Piercy, "Analysis of semi-structured interview data," Utah State University https://pdfs.semanticscholar.org/7a7b/b02a0a81d1698084d608d0af0558fb54120c.pdf (accessed August 9, 2017).

3.4.2.5 Summary

These interviews provide a nuanced view of the challenges of providing access to environmental justice over Nigeria's history, particularly in the past fifteen years. The dataset includes insights from some of Nigeria's main oil and gas institutions and individuals, and contributes to the claim made by this research: that the justice sector in Nigeria is complex and that justice is limited by a system that is shaped by the country's reliance on oil as main source of revenue.

3.4.3 Case law

In researching legal gateways to environmental justice, perceptions of how the system works are evidenced by surveys and interviews. A formalised manifestation of the outcomes of that system is illustrated by case law. Regarding environmental harms in Nigeria, case law is a key source of data that documents how events have occurred based on judges' interpretation of the law and litigants' strategies for going to court.

This research draws on the past 15 years of oil pollution litigation, as documented in law reports, to better understand how a key legal gateway to environmental justice in Nigeria functions. A review of case law, focusing on tort claims in particular, is important for the discussion of gateways to environmental justice for those negatively affected by Nigeria's oil sector. This is because tort litigation is one of the most popular legal gateways used in Nigeria to seek A2EJ for oil pollution. This section will first explain how case law was collected. Then I will outline how data was organised for analysis. Finally, I will detail the limitations of the law-report-focused approach.

3.4.3.1 Case Law Collection

It is not a straightforward task for a researcher to go about systematically collecting Nigerian case law. This is particularly true given the country's culture of unconditional appeal, making only appellate decisions relevant for making

assertions about precedent. As such, focusing on both Supreme Court and Court of Appeals decisions was a necessary choice for the research, both in order to account for the prevalence of appeal, and because appellate decisions are easier to access due to a range of law reports. This section explains the process for collecting case law.

First, I made a clear set of inclusion and exclusion criteria for identifying relevant case law in law reports. The first sift of cases included those that involved oil companies and communities. These were established by identifying cases in which NNPC, international oil companies, or well-known subcontractors were named, along with an individual opposing litigant. The second sift of cases excluded all cases that did not involve some form of environmental harm.

I applied these criteria to both paper copies of law reports and electronic law reports to compile the dataset of disputes between oil companies and communities. First, I accessed law reports that were housed in a commercial law firm in Abuja. I accessed these reports over the course of one month. Nigeria Weekly Law Reports (NWLR), Nigeria Monthly Law Reports (NMLR), and All Federation Weekly Law Reports (All FWLR) were the primary sources for data collection. Then, I used Law Pavilion to ensure my search was as exhaustive as possible. Law Pavilion's electronic law reports keep track of Court of Appeals and Supreme Court decisions in full, claiming to have the "Largest collection of Judgments of the Supreme Court (from 1970 till date) and Court of Appeal (from 2007 till date) in Nigeria – Over 9,000 cases".[210] This resource provided an invaluable quality assurance tool for my manual review of cases and also gave me access to digital versions of judge's decisions, which enabled me to verify judgments and details of cases that otherwise would have been impossible without visiting Nigeria for a second round of fieldwork. Finally, Law Pavilion is updated regularly and has consequently

[210] *Law Pavilion*, http://lawpavilionplus.com/reports.html (accessed June 10, 2017).

allowed me to make the case law as up-to-date as possible as decisions come down, ending in 2015.[211]

A first filter of these sources resulted in 133 cases where a company and an individual were named as parties to the case. However, upon second sift, only approximately 35% of these cases involved a dispute related to an environmental harm caused by oil industry activity.[212] The forty seven cases that suited my search criteria primarily involved Shell Petroleum Development Corporation (60%).[213] Two thirds of cases were related to large scale oil spills and the damage to land caused, as well as the loss of livelihoods caused by depletion of fish stocks and arable farming land.

3.4.3.2 Methods of Analysis

There were a number of questions that only a systematic review of the case law could answer. In order to organise the cases in a way that would allow for such analysis, both as individual cases and as a group, all case law was entered into a database. The fields in the database contained basic information, such as the name of the case, the litigants involved, the year it was filed and a short summary of notable points from the judgement. Additional fields included:

- the cause of the damage;
- which original court it was filed in (State or Federal High Court);
- what year was it originally filed;
- which tort was used;
- which party won the High Court case;

[211] For example, in 2015, the Supreme Court upheld a community's claims for compensation and rendered the oil company appeal as being without merit. See **SPDC v. Anaro & Ors.** (2015) LPELR-24750(SC).

[212] The remaining cases were primarily employment disputes between companies and employees as well as individual contractor disputes.

[213] Frynas posits that it is not necessarily that Shell is acting in a particularly abhorrent way or more so than other oil companies might. Rather it is because Shell was the first corporation in the country to exploit oil resources, and so they have a higher proportion of onshore licenses. Thus, they face the burden of dealing more with human populations than other concessions, such as those offshore. Frynas, *Oil in Nigeria,* 12.

- whether or not the cases were decided on a point of jurisdiction or another defence; and
- the year of the appellate judgement.

In combination, all this information provided a unique opportunity to ask questions of all of the cases as a whole. Through a simple search function, the database allowed for cases to be grouped either by the tort used by communities or by the defences used by companies. By interrogating the case law in this way, Chapter 6 is able to make a novel intervention in the Nigeria-specific research on oil company-community legal disputes.

3.4.3.3 Limitations

There are advantages to approaching case law analysis through law reports, such as bringing focus to unique or precedential judgements. This approach, however, also introduces notable limitations when researching the nature of oil pollution litigation in Nigeria.[214] Firstly, I assume that the case selection vastly under-represents the number of oil pollution cases that are actually filed in trial courts. For example, Frynas notes that from 1981-1986, Shell was involved in 24 compensation cases related to oil spills. By 1998 Shell was reporting involvement in more than 500 compensation cases, 350 of which were related specifically to oil spills.[215] While up-to-date figures are not available for numbers of recent cases, it is reasonable to assume that this number has only increased with time as oil installations have further aged and are more susceptible to spills and litigants have been exposed to more information about undertaking litigation. Secondly, the law reports used only provide full appellate judgements, constraining my ability to analyse trial court judgements and approaches by litigants. While these may have been shortcomings for providing a comprehensive view of the case law, law reports provided a systematic approach to building a dataset that can assist in

[214] Lee Epstein and Gary King, "The Rules of Inference." *University of Chicago Law Review* 69, no. 1 (2002):106-108.
[215] Frynas, *Oil in Nigeria,* 182.

answering a range of questions about A2EJ in the court system for victims of oil pollution.

3.4.3.4 Summary

Despite challenges in data collection, the case law collected represents a unique effort to collect a large sample of oil pollution cases since 1998 – an accomplishment in and of itself. A search of printed and online law reports identified forty seven cases involved oil companies and communities where the point of dispute was an environmental harm. A majority of cases involved Shell and large scale oil spills were the most common cause for dispute. The case law will provide a useful foundation for discussions about the use of litigation as a viable gateway to environmental justice.

3.5 Conclusion

This Chapter discussed in detail this dissertation's methodology.[216] The project is framed using the case study as method, an approach that allows for a context-specific interrogation of the research question. In order to collect necessary data to achieve this, I conducted fieldwork in Abuja. However, fieldwork was not without its challenges. Limited ability to travel to the Niger Delta due to security concerns and an Ebola scare, a Boko Haram attack in the capital around the time of research, as well as a judiciary strike lasting the duration of fieldwork, meant that access to some key actors and institutions was limited.

I developed three novel sets of data to interrogate the nature of legal gateways to environmental justice in the oil sector in Nigeria. The survey offered a significant occasion to follow up on Frynas' survey, while introducing some survey innovations that made the survey more widely accessible to practitioners across the country and also ensured that sample selection was more randomised. The profile of the

[216] The approach, as much as possible, has developed methods that can be replicated by researchers in the future working on this area in Nigeria.

candidates, younger lawyers, mostly male, who have represented both companies and communities, was similar to that of Frynas', providing a credible comparison for analysis. The interviews I conducted allowed for nuanced insights from a range of institutions involved in oil pollution redress in Nigeria – from the national oil company to the environmental regulator responsible for oil spill clean-up to the Ministry of Justice, responsible for drafting legislation in this area. The case law dataset provided a comprehensive picture of reported case law on oil pollution since 1999.

Despite some limitations, the methodology and the data I collected to support it, present one of the most rigorous studies of access to environmental justice in the era of the Fourth Republic in Nigeria. Moving forward into subsequent chapters, the survey, interviews, and case law will build an evidence-based investigation into the viability of gateways to environmental justice in Nigeria's oil sector, while simultaneously analysing how those gateways may have been shaped by their context over time.

4 Oil Sector Governance in Nigeria

4.1 Introduction

Governance of the oil sector has a direct effect on A2EJ for victims of oil pollution. This is because A2EJ is not simply concerned with a series of laws and court rulings, but rather with the ways in which rules are made *and applied*, as well as *who* has the opportunity to contribute to and shape that process.[217] As such, this Chapter analyses the actors involved in sector governance and the ways in which environmental governance is applied in practice.

This Chapter will first discuss the general tenets of oil sector governance (Section 4.2) and introduce the key institutions in Nigeria that are responsible for governing the sector. In this section, I also introduce the Norwegian approach to oil sector governance as a comparator to the Nigerian system, both in terms of institutional design and the outcomes produced. Section 4.3 discusses the scale of financial resources available to government institutions and the private sector in Nigeria in order to contextualise how access to finance to fulfil an institution's mandate can impact power relationships among actors. The purpose of highlighting the scale of finances is to ensure that A2EJ is being sufficiently considered within the Rentier State context, discussed in Chapter 2. Section 4.4 then focuses on one particular dimension of oil sector governance, oil spill response. I focus on oil spill response because of its particular significance to A2EJ in a context where oil spills are frequent and poorly addressed. This section again juxtaposes the Nigerian approach to oil spill response with that of Norway, and hones in on Nigeria's "joint investigation visit" mechanism, a particular aspect of sector governance in Nigeria, that has proven problematic for victims of oil pollution.

[217] See Chapter 2.

4.2 Governance

There are a series of primary functions that governments perform in managing their oil sectors, although the manner in which these functions are organised varies greatly. According to Lahn, et al,

> Petroleum sector governance refers to the system for making and implementing decisions concerning the exploitation of a nation's oil and gas resources. It includes the structural and hierarchical organization of the sector, its decision-making and communication processes, the policies and objectives governing its activities and the regulation of those activities.[218]

In practice this means that government institutions hold a multiplicity of roles, often as commercial operators, policy agenda-setters, regulators, revenue collectors and revenue distributors. Where one such function ends and another begins can be difficult to ascertain if distinctive institutional mandates and controls are not clear.[219]

International Financial Institutions, International NGOs, and policy practitioners have taken a normative view of what "good governance" looks like, often providing recommendations for changes to governance structures without delving into a context's idiosyncrasies.[220] This has meant that governments reforming their approach to sector governance are balancing local needs that are context-specific, while responding at the same time to external demands for specific types of reforms. As such, this trade-off can result in sub-optimal governance

[218] Keith Myers and Glada Lahn *et al*, "Good Governance of the National Petroleum Sector," *Chatham House,* https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Energy,%20Environment%20and%20Development/ggdoc0407.pdf (accessed July 17, 2017), 5.
[219] Michael Ross, "Nigeria's Oil Sector and the Poor," *DFID Paper.* May 23, 2003, https://www.sscnet.ucla.edu/polisci/faculty/ross/papers/other/NigeriaOil.pdf (accessed August 9, 2017).
[220] For example, see Valerie Marcel, ed., "Guidelines for Good Governance in Emerging Oil and Gas Producers," *Chatham House.* June 2015, https://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20150624GuidelinesGoodGovernanceMarcel.pdf (accessed August 9, 2017).

arrangements.[221] While the specific institutions and processes should be context specific, the ultimate objective of effective sector governance should be maximising benefit from oil reserves, while minimising negative effects of extraction.

4.2.1 The Norwegian Model

Norway's governance regime is deemed a model for effective sector governance practice. The country discovered oil in the North Sea in 1960, and by the 1970s had refined a governance model that is still used today.[222] Norway's governance model is comprised of three key institutions, each with clear mandates: 1) a state owned oil company to carry out commercial participation in the sector (Statoil), 2) a Ministry responsible for developing policy and strategy related to sector development and then distributing licenses to commercial actors to implement those plans (Ministry of Petroleum and Energy) and 3) a regulating and advisory agency (the Norwegian Petroleum Directorate) responsible for compiling data related to Norway's oil reserves, setting regulations, providing advice, and collecting fees.[223]

This governance model has contributed to the success of the Norwegian economy and has ultimately resulted in positive human development outcomes for Norway's citizens. Norway was ranked first in the 2014 Human Development Index, which measures a country's "achievement in key dimensions of human development: a long and healthy life, being knowledgeable and hav[ing] a decent standard of

[221] Andrews, Pritchett, and Woolcock argue that international development interventions have failed at building institutional capacity by influencing institutions in developing countries to adopt institutions designed to look like a post-industrial economy ideal, despite the lacking historical context. This is also similar to the debate in socio-legal studies about the pitfalls of legal transplants. See Matt Andrews, Lant Pritchett, Michael Woolcock, **"**Escaping Capability Traps Through Problem Driven Iterative Adaptation (PDIA)," *World Development* 51 (November 2013): 234–244; and Pierre Legrand, "The Impossibility of Legal Transplants," *Maastricht Journal of European & Comparative Law* 2, no. 111 (1997): 111-124.
[222] Mark Thurber, David Hults and Patrick Heller, "The Limits of Institutional Design in Oil Sector Governance: Exporting the 'Norwegian Model'," *Paper presented at the ISA International Convention*, New Orleans, LA, 18 February 2010, http://pesd.fsi.stanford.edu/sites/default/files/Thurber_Hults_and_Heller_ISA2010_paper_14Feb10.pdf (accessed Jul. 17, 2017), 17.
[223] Ibid.

living."[224] Norway is also ranked first in the 2013 Resource Governance Index, which measures the "quality of governance" in oil, gas, and mining sectors in top producers globally.[225] In addition to this, Norway is ranked fifth in the 2015 Corruption Perceptions Index, a measure of perceived public sector corruption globally.[226] Finally, Norway ranks 33rd in the 2014 Economic Complexity Index, which measures the quality of a country's economy in terms of diversification and complexity.[227] These rankings are a significant achievement in light of the obstacles identified in the literature for governance of oil-rich countries.[228]

It is important to note, however, that Norway did not begin with a blank canvas when it devised its model for oil sector governance. The country already had experience with governing other sectors that shared similar characteristics, such as minerals and water.[229] Norway was also relatively wealthy as it had a mature economy at the time it discovered oil, allowing it to continue with other successful sectors while managing concerns about developing a diverse economy in the face of a dominant oil sector.[230] Significant, too, is that Norway had a high level of institutional capacity within a well-formed civil service sector and a competitive democracy to ensure that its mandates would be carried out. Ultimately, such characteristics ensured that government and the private sector were both held accountable.[231]

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[224] "Table 1: Human Development Index and its components," *United Nations Development Programme*. http://hdr.undp.org/en/composite/HDI (accessed March 10, 2017).
[225] Much of the metrics for this Index are based on the Norwegian experience, so it makes sense that they should perform so well.
[226] "Corruption Perceptions Index 2015," *Transparency International.* http://www.transparency.org/cpi2015 (accessed March 10, 2017).
[227] "Country Rankings 2014," *The Atlas of Economic Complexity.* http://atlas.cid.harvard.edu/rankings/ (accessed March 10, 2017).
[228] See Chapter 2, Section 2.3 on the "Rentier State."
[229] Thurber, Hults and Heller, "The Limits of Institutional Design," 17.
[230] See Chapter 2, Section 2.3. Also, Thurber, Hults and Heller, "The Limits of Institutional Design," 15.
[231] Ibid. Norway's oil governance regime was actually designed by an Iraqi petroleum geologist. Also see Justin Fox, "How socialized health care made Norway an oil power," *Business Time,* August 31, 2009. http://business.time.com/2009/08/31/how-socialized-health-care-made-norway-an-oil-power/ (accessed March 10, 2017).

Many other countries have taken a three-institution approach to resource governance, like Norway, but in the absence of the unique characteristics that have made Norway such a success.[232] In a study on the Norwegian model of oil governance, Thurber, Hults, and Heller found that the tripartite governance structure (policy institutions, regulation, and commercial enterprise) could be disastrous without the right pre-conditions.[233] For example, if a country lacks the necessary capacity across government to fulfil and protect its mandates, its administration runs the risk of dispersing expertise thinly across institutions, thereby making all of the institutions ineffective in a field that requires a high concentration of technical proficiency.[234] In these instances, Thurber, Hults and Heller suggest consolidating limited government knowledge about the oil sector in one institution and instead holding one core institution responsible for a wider range of functions.[235]

Nigeria was one of the countries that Thurber, Hults, and Heller compared to Norway in their research. These researchers found that the pre-conditions for Nigerian oil sector governance differed greatly from Norway's existing structure, yet Nigeria established a similar institutional design.[236] In the next section, I will discuss what adopting a Norwegian-like governance model has meant for Nigeria.

4.2.2 Nigerian Governance Institutions

Nigeria discovered oil in commercial quantities in 1956, around the same time as Norway. However, unlike Norway's aforementioned governance structure, which was developed and consolidated by the 1970s, Nigeria continues to experiment

[232] Thurber, Hults and Heller, "The Limits of Institutional Design," 15.
[233] Ibid.
[234] Ibid, 6.
[235] Ibid.
[236] Thurber, Hults and Heller, "The Limits of Institutional Design," 15.

with its approach to oil governance, while underlying practices remain the same.[237] According to Thurber et al,

> Foreign oil companies control all operations, revenue flows to the Federal Government, and there are few independent regulatory checks on the sector. These basic realities have remained unchanged through numerous political realignments, including three transitions from civilian to military rule and three transitions back again. The basic structure of the industry has remained constant even in the face of numerous efforts to "reform" the oil sector.[238]

In Nigeria, sector governance is designed to be divided into institutions with regulatory functions, commercial functions and policy functions. However, there is considerable *de facto* and *de jure* overlap of the institutions' responsibilities. The national oil company, NNPC, is comprised of no fewer than thirteen subsidiary companies and at many times in history has also been home to the industry's regulatory authority.[239] In addition, NNPC is a joint venture partner with international companies exploring and producing oil in Nigeria.[240] These agreements account for 97% of oil extracted in Nigeria.[241]

Beyond NNPC, there is also the Ministry of Petroleum Resources (MPR), responsible for policy development, and the Department of Petroleum Resources (DPR), which regulates sector actors.[242] Both DPR and NNPC sit under the MPR

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[237] Mark Thurber, David Hults, and Patrick Heller, "Exporting the "Norwegian Model": The effect of administrative design on oil sector performance," *Energy Policy* 39, no. 9 (September 2011): 5366–5378.

[238] Mark Thurber, Ifeyinwa Emelife, and Patrick Heller, "NNPC and Nigeria's Oil Patronage Ecosystem," *Working Paper No. 95.* (Stanford: Program on Energy and Sustainable Development) https://fsi.stanford.edu/sites/default/files/WP_95 (accessed March 10, 2017), 7.

[239] "About the Nigerian National Petroleum Corporation," *NNPC Group.* http://www.nnpcgroup.com/AboutNNPC/CorporateInfo.aspx (December 7, 2016). NNPC is a statutory body under the Nigerian National Petroleum Corporation Act 1977 (Cap. 320 *Laws of the Federal Republic of Nigeria* 1990).

[240] "Joint Venture Operations," *NNPC Group.* http://www.nnpcgroup.com/nnpcbusiness/upstreamventures.aspx (December 7, 2016).

[241] "Oil and gas: Major industry policies – joint ventures," *Nigerian Investment Promotion Commission*. http://www.nipc.gov.ng/venture.html (December 7, 2016).

[242] State leaders often put themselves in charge of the Ministry of Petroleum Resources in Nigeria, including at time of writing, where President Buhari remains Minister. He has deputised day-to-day functions to Emmaneul Ibe Kachikwu, the Managing Director of NNPC.

as parastatal institutions.[243] The National Oil and Spill Detection and Response Agency (NOSDRA), within the Ministry of Environment (MEnv), is another oil sector regulatory agency mainly responsible for regulating response to oil spills.

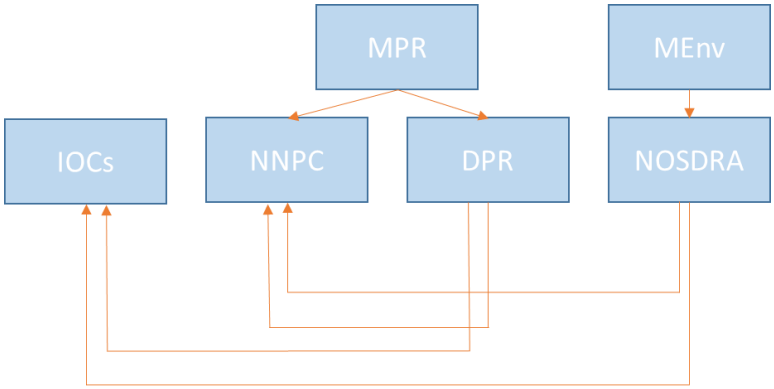

Figure 1: MPR and MEnv provide the policy direction for the institutions that sit under them. NOSDRA and DPR are meant to regulate the international oil companies ("IOCs") and the national oil company, NNPC.

In Nigeria, there are several key differences from the Norwegian experience that are indicative of the country's struggle to benefit from its oil reserves. In comparison to Norway's top ranking in the Human Development Index, Nigeria only ranked 152 out of 188 in 2014.[244] On the 2013 Resource Governance Index, while Norway was ranked number one, Nigeria was ranked fortieth out of the fifty eight countries measured. For reporting practices, Nigeria "received a score of '0' for environmental and social impact assessments" on the Resource Governance Index.[245] While Norway's approach to economic diversification meant that it ranked thirty third out of 124 on the Economic Complexity Index in 2014, Nigeria's substantial reliance on the oil sector for government revenue meant that the country ranked second to last, 123 out of 124.[246]

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[243] "Harnessing Mineral Resources in Nigeria," *Federal Ministry of Petroleum Resources* http://petroleumresources.gov.ng/ (accessed July 24, 2017).
[244] "Table 1: Human Development Index and its components," *United Nations Development Programme*.
[245] Norway received a perfect score. See "Oil, Gas and Mining for Development," *Natural Resource Governance Institute* (accessed August 9, 2017).
[246]"Country Rankings 2014," *The Atlas of Economic Complexity*. http://atlas.cid.harvard.edu/rankings/ (March 10, 2017).

On the Corruption Perceptions Index ("CPI"), Nigeria ranks near the bottom, at 136 out of 167.[247] The country's poor performance on the CPI underscores the fact that the government faces challenges in government accountability. This statistic is particularly worrying, when viewed alongside Thurber, Hults, and Heller's argument that strong government accountability for malpractice is a necessary precondition for good sector governance. This has also been corroborated in a range of key informant interviews with sector practitioners, which are drawn upon throughout this thesis.

The remainder of this section will analyse in further detail the three governance functions (policymaking, regulating, and commercial activity) most relevant to the remainder of this thesis. Where relevant, I will incorporate literature from other researchers who have conducted in-depth research on the institutions responsible for these functions.

4.2.2.1 Government as a Commercial Actor

It is not uncommon for governments to hold a commercial stake in their oil sectors.[248] This has been particularly true since the 1970s, when a number of Organisation of Petroleum Exporting Countries (OPEC) countries nationalised their oil sectors.[249] However, Nigeria's approach to state participation in commercial activities has been problematic. From a purely commercial perspective, NNPC has failed to finance their obligations for pipeline and equipment repairs, future capital investment projects, and clean up for operational oil spills.[250] In any other circumstance, foreign oil companies would find NNPC's debts untenable as a business partner. As of June 2016, the company was USD 7

[247] "Corruption Perceptions Index 2015," *Transparency International.* http://www.transparency.org/cpi2015 (March 10, 2017).
[248] "Parliamentary Briefing," *State Participation in Oil, Gas and Mining.* January 2015. http://www.resourcegovernance.org/sites/default/files/nrgi_StateParticipation_20150311.pdf (accessed March 10, 2017).
[249] Ibid.
[250] Thurber, Emelife, and Heller, "NNPC and Nigeria's Oil Patronage Ecosystem," 26.

billion in debt to its joint venture partners.[251] From a governance perspective, Nwokeji finds that NNPC plays both a commercial actor and is a key player in the "state administration" of the oil sector, including regulating its own activities with multi-national oil companies, even if informally.[252] Mahdavi's comparative analysis of oil governance regimes in countries with state-owned enterprises emphasises the challenges of corruption in this quasi-regulatory role.[253] By analysing Foreign Corrupt Practices Act ("FCPA") court in the United States, as well as NNPC board appointments, Mahdavi finds significant evidence to suggest Nigeria's national oil company and its oil governance regime are highly susceptible to corruption.[254]

Poor commercial performance coupled with an informal regulatory mandate has translated into poor environmental performance. The combination of low company funds due to mismanagement and a reputation for corrupt practices means that there is little incentive for NNPC to operate using international best practice in areas such as oil pipeline maintenance or oil spill clean-up.[255]

This was outlined by one of my interview subjects, who described the Government's attitude to addressing the environment when considering oil sector operations. This interviewee suggests that the state's ownership of oil reserves and its

[251] Oscarline Onwuemenyi, "Nigeria owes oil joint venture partners $7bn – NAPIMS," *Sweet Crude Reports*. June 1, 2016. http://sweetcrudereports.com/2016/06/01/nigeria-owes-oil-joint-venture-partners-7bn-napims/ (accessed August 1, 2017).
[252] Ugo Nwokeji, "The Nigerian national petroleum corporation and the development of the Nigerian oil and gas industry: history, strategies and current directions." *The Changing Role of National Oil Companies in International Energy* Markets (James A. Baker III Institute for Public Policy of Rice University: Rice University, 2007).
[253] Paasha Mahdavi, "Extortion in the Oil States: Nationalization, Regulatory Structure, and Corruption," in *The Politics of Oil Nationalizations,* Doctoral Thesis, University of California, Los Angeles, 2014, http://paasha.bol.ucla.edu/chapter4_NOCcorruption.pdf (accessed March 10, 2017).
[254] See also Paasha Mahdavi, "Google Correlations: New Approaches to Collecting Data for Statistical Network Analysis." Masters Thesis, University of California, Los Angeles, 2014 http://paasha.bol.ucla.edu/networkthesis.pdf (accessed September 1, 2017), 38. Mahdavi finds that top tier positions at NNPC are awarded to political cronies and the General Managing Director of the NOC comes and goes with changes in administration, if not more frequently leading to inconsistency in policy development and its implementation.
[255] Thurber, Hults and Heller, "The Limits of Institutional Design," 8.

mandate to exploit those reserves, along with commercial partners, led to the Nigerian government adopting a culture of extraction early on.[256] According to this interview subject,

> Government was interested in the resource, to own it, and to make money out of it. So it thought, this is a business we can go into. And so since it became a partner in the business, not [just] a policymaker and taking taxes, the joint partners like Shell, everybody, would say 'Ok we have this rubbish that we need to clean up. We are in this business together we have to do it together, and government will come and say 'how much will it cost us to do this?' and they will say millions of dollars and they will say 'oh forget it, forget it. It is our land. Let it stay there, let's continue with the business.[257]

This is not to say that all commercial actors have an incentive to enable the persistence of pollution, though this may be the case for some actors within NNPC. An NNPC lawyer, in another interview, confirmed much of the external criticism of the state owned enterprise's behaviour. This lawyer said that "we haven't been fantastic anyways. People have complained that the foreign companies are sometimes better than us in a way that pollution is treated, which is really, really shameful."[258]

Both the A2EJ literature and first-hand accounts from actors within the Nigerian government's apparatus have concluded that NNPC has failed to be an effective commercial actor in the oil sector. Poor performance is rooted both in the institution's central role in large scale corrupt practices, and that NNPC lacks the technical competence required to carry out basic commercial functions.[259] This poor performance prevents the national oil company from protecting the environment and people living in oil producing areas.

[256] A1G4 Interview, July 18, 2014.
[257] Ibid.
[258] A1L5 Interview, August 14, 2014.
[259] Thurber, Emelife, and Heller, "NNPC and Nigeria's Oil Patronage Ecosystem," 22.

4.2.2.2 Government as A Policymaker

Thurber et al find that when oil was first discovered in 1956, it was not in commercial quantities large enough to factor into Nigerian political life. However, by 1966, six years after Nigeria's independence, revenues began to play a role in political discourse and have an impact on policy decisions.[260] In 1969, the Petroleum Act required companies to have a Nigerian entity in order to hold an oil license in the country. In 1971, the Government set up the NNOC, NNPC's predecessor, and joined OPEC.[261] At the time, OPEC was encouraging its member states to establish firm control over their states' oil resources.[262] By the early 70s, global oil prices had quadrupled, which put petroleum at the centre of political discussions and bargaining, a position that oil has continued to hold ever since.[263]

Nigerian oil policy of the 70s and 80s was driven by a desire to attract major international investment into the country while maintaining control over its assets.[264] Key policy tenets included the use of incentives to keep investors interested in the country's oil sector, while simultaneously holding a share of oil assets back from foreign investors.[265] The incentives provided at the time — from tax holidays and capital cost write offs in the 70s, to MoUs in the 80s in order to ensure minimum tax burden for investors – had a lasting effect on government oil revenues. This in turn has directly impacted the amount of revenue available for providing basic service delivery to the Nigerian people, as well as the government's investment in environmental regulation.[266]

[260] Ibid., 9.
[261] Ibid.
[262] Ibid., 13.
[263] Ibid., 7.
[264] Thurber, Emelife, and Heller, "NNPC and Nigeria's Oil Patronage Ecosystem," 13.
[265] Ibid., 21.
[266] Ibid., 21.

4.2.2.3 Government as a Regulator

Historically, as a regulator, the Nigerian government has not had sufficient distance from commercial operators, partly due to NNPC's competing quasi-regulatory and commercial functions, discussed above.[267] The government has also not allocated the necessary funding or human capital to effectively govern a technically complex and highly lucrative oil sector.[268] One key informant said that

> You can see that government placed itself in a hard place where it cannot hold the operator responsible. If government was just taking taxes and royalties from them, they could have said you must deal with it, it is your mess. The spiller pays. But it can't because it has made itself an operator by default. It is hard to police oneself. That self-regulatory culture is not in ours.[269]

Thurber, Hults, and Heller also argue that there is no real incentive for the Nigerian elite to create a truly independent regulator, as they benefit from high levels of patronage from oil revenues.[270] This complicated relationship between regulation and commerce has been further exacerbated by overlapping institutional mandates, which have resulted in contestation between key institutions tasked to protect the environment from oil sector operations. The following sections concerning environmental governance in the sector will focus on DPR and NOSDRA, the two main institutions responsible for environmental protection and clean-up in the oil sector.

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[267] See Section 4.2.2.4.1 on DPR below.

[268] A hydrocarbon sector regulator is an institution, or set of institutions, which:
- Collects and houses data on current and planned hydrocarbon activities;
- Collects relevant fees from commercial actors involved in the oil sector;
- Develops regulations and ensures they are being followed; and
- Advises related line ministries on technical areas related to oil sector development.

This characterisation is a normative one. It assumes the Norwegian approach to regulatory functions can be considered a broader framework for regulatory functions. Mark Thurber, Hults, Heller, "The Limits of Institutional Design in Oil Sector Governance", 7.

[269] Interview A1G4, July 18, 2014.

[270] Thurber, Hults, and Heller, "Exporting the 'Norwegian Model'," 5366–5378. See also: Thurber et al, "NNPC and Nigeria's Oil Patronage Ecosystem."

4.2.2.3.1 Department of Petroleum Resources

DPR sits under the Ministry of Petroleum Resources and is characterised as "the technical Department of the Ministry that regulates and monitors activities of the oil and gas industry."[271] The DPR's chief function is to ensure that oil companies comply with laws, regulations, and guidelines for industry activity, including ensuring that health, safety, and environmental standards meet international best practice. Their remit includes reviewing environmental impact assessments for petroleum-related projects and oil spills response.[272]

DPR has a reputation for understanding the technical intricacies of sector operations well.[273] However, it is also known for being a heavily compromised regulator, with a revolving door of staff moving between the private and public sectors.[274] One key informant detailed that "people move around. Today the person is in NNPC, tomorrow is DPR, and tomorrow it's Chevron, like myself (laughs loudly). So it's a clock."[275] The former Minister of Petroleum, Diezani Alison-Madueke, is a key example of this compromised legitimacy. According to a key informant,

> She is still considered in Shell as a shadow director so…they like what she's doing, create the, you know, impression that we are working on it but she knows it's just a rocking chair no motion, no movement just motion and so that is where we are with it.[276]

As elucidated above, the constant shifting of personnel among institutions, even if no wrongdoing is found, can compromise the legitimacy of the regulator. A key informant described this as follows:

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[271] Ogunba Olusegun, "EIA systems in Nigeria: evolution, current practice and shortcomings," *Environmental Impact Assessment Review* 24, no. 6 (August 2004): 643–660.
[272] Ibid., 649. This is a point of contention, as the Ministry of Environment also claims this responsibility. Discussed further in Ingelson and Nwapi. "Environmental Impact Assessment Process for Oil, Gas and Mining Projects in Nigeria."
[273] Interview A1L5, August 16, 2014.
[274] Ibid.
[275] Ibid.
[276] Interview A1G4, July 18, 2014.

> So you have DPR, which is the one that comes closest to doing what I think we need in the process, but DPR is understaffed. And in my view rather too close to the oil industry. You know it's a very strong relationship, because they are dealing with each other all the time, and rather it is almost inevitable...they have this cosy way of resolving issues, so that frustrates the people who are at receiving end of the pollution.[277]

4.2.2.3.2 National Oil Spill Detection and Response Agency

NOSDRA is the regulatory body tasked specifically with oil spill mitigation, response and clean-up.[278] The agency was created in 2006 to establish an institution that would be accountable for the implementation of the National Oil Spill Contingency Plan, under the Federal Ministry of Environment, Housing, and Urban Development.[279] NOSDRA is unique in that it is primarily concerned with environmental protection within the oil sector (See Chapter 5).[280]

NOSDRA's status as a specialised agency charged with detecting and responding to oil spills has meant little in practice to oil sector actors.[281] Both its status as a new organisation and as an industry outsider has meant that the agency has had little space to fulfil its purpose, often being blocked by DPR. One informant suggests that the establishment of NOSDRA was only ever intended to be a signal to the international community that Nigeria was addressing its serious oil spill crisis, but there was little motivation to give the organisation any real authority:

> [Government] said, ok ok, let's [create NOSDRA] but let us mind that this is government business. And so when NOSDRA was set up in the first instance in 2006, it was just basically to find a way to explain to

[277] A1L5 Interview, August 12, 2014.
[278] National Oil Spill Detection and Response Agency (NOSDRA) (Establishment) Act (Cap. 157 *Laws of the Federation of Nigeria* 2006).
[279] Uchenna Jerome Orji, "An appraisal of the legal frameworks for the control of environmental pollution in Nigeria," *Commonwealth Law Bulletin* 38 (2012): 337.
[280] One key informant said that oil companies are powerful actors in Nigeria's economy, which makes it difficult for a regulator to do its job or enforce any sort of punishment on offending companies. - A1G6 Interview, August 16, 2014.
[281] Interview A1L5, August 12, 2014.

> the international bodies that yeah we are doing something about [oil spills]…however, that agency had no teeth. Could not bite. Cannot even enforce anything.[282]

4.2.2.3.3 The Overlap

NOSDRA and DPR may have complementary skills and agenda, but these institutions do not work well together, in part due to their implicitly overlapping remits. Both institutions have within their mandate the authority to regulate the oil sector's treatment of the environment. For example, Section 6(1)a of the NOSDRA Act states that the agency is "responsible for surveillance and [to] ensure compliance with all existing environmental legislation and the detection of oil spills in the petroleum sector." A further Section 6(2) empowers the Agency to collect fines if oil company operators do not report spills to the agency within 24 hours. DPR states that it is responsible for "[s]upervising all Petroleum Industry operations being carried out under licences and leases in the country," as well as "ensuring that Health Safety & Environment regulations conform with national and international best oil field practice." The DPR is also required to "ensure timely and accurate payments of Rents, Royalties and other revenues due to government."[283] Given that the NOSDRA Act is the most recent piece of legislation dealing with oil spill management in Nigeria, there may be an expectation that this was a *de facto* repeal of the DPR's oil spill management duties. However, without explicit *de jure* stipulations to that effect, neither institution intends to be deferential to the other.

The overlap among competing organisations has resulted in a situation where commercial oil sector operators are unsure which obligations they are required to meet – and this ultimately increases the cost of doing business while also compromising sector governance. As one interview subject said:

[282] Interview A1G5, July 23, 2014.
[283] See: *"What we do" Department of Petroleum Resources*. https://dpr.gov.ng/index/functions-of-dpr/ (accessed August 8, 2017).

> [t]he main issues is the multiplicity of agencies doesn't help effectiveness, I don't think. So operators are faced with a number of contradictory inconsistent requirements. So you can see how the agencies have evolved and that each one does have something to do with pollution. But it isn't helpful to have so many agencies we have more agencies that are not sufficiently resourced all over the place.[284]

Similarly, one NOSDRA employee noted that actors are often required to fill out double the paperwork to have one issue resolved within the Government system. This key informant noted that the overlap and lack of cooperation among agencies has grown into an acrimonious relationship over time. According to him,

> at a point it was becoming an unhealthy rivalry which ordinarily shouldn't be. We at a time tried to settle it at the ministerial level – maybe the ministers could meet and resolve it – tell, I mean politely tell, the DPR to relax about anything environment, forward to Ministry of Environment or to NOSDRA. We tried to organise that meeting in 2007.[285]

At the time of interview (in August 2014), this meeting had still not taken place, allowing a stalemate to continue, whereby NOSDRA is enforcing its legal mandate to manage oil spills and enforce oil sector legislation, while DPR continues to do much the same without substantive cooperation.

4.1.1.1.1 Summary

A review of Nigerian governance institutions responsible for commercial activity, environmental regulation, and industry policymaking shows that these institutions are not operating in a way that effectively governs the sector. "Conflict of interest" emerges as the key theme of this review; government actors move in and out of commercial and regulatory functions, while others jockey for relevance and position when met with overlapping regulatory remits. Across institutions, the government's financial interest in the sector's commercial performance means there are few incentives to encourage regulators to fulfil their roles legitimately,

[284] Interview A1L5, August 12, 2014.
[285] Interview A1G6, August 16, 2014.

as any punitive costs will not just fall to private sector companies, but also to the government itself. The next section will explore the financial flows of revenue in further detail, illustrating the way in which governance arrangements can be undermined by resource allocation.

4.3 Revenue Flow and Scale

Underpinning these governance arrangements are the financial resources that enable these institutions to do their jobs. This financing comes from the federal budget, which is primarily funded by oil revenues.[286] This section briefly outlines how revenues flow within the Federal Government and then compares this to the scale of financial resources available to private sector operators. The data from this section is drawn from the federal budgets, Nigeria Extractive Industries Transparency Initiative (NEITI) audits, and oil company annual earnings reports. The purpose of this section is to illustrate how the scale of an institution's finances can have a proportionate impact on its influence in sector governance. Indeed, the scale of oil companies' resources vastly overshadow those of DPR and NOSDRA and has a large impact on the power dynamic among those institutions.

As a starting point, Nigeria's Federal Government is the sole owner of the country's resources, including petroleum deposits.[287] The revenues generated from the oil sector is significant, accounting for more than 65% of government funds.[288] This money comes from the collection of bonuses, royalties, rents and NNPC profits and enters the Federal Government's consolidated account.[289] In the period between 2009 and 2011, the Nigerian government received approximately USD 143.5

[286] Amy Copley, "Figures of the week: Nigeria's 2017 budget," *Africa in Focus,* December 15, 2016. https://www.brookings.edu/blog/africa-in-focus/2016/12/15/figures-of-the-week-nigerias-2017-budget/ (accessed March 10, 2017).
[287] S. 4(3), Constitution of the Federal Republic of Nigeria 1999.
[288] Thurber, Emelife, and Heller, "NNPC and Nigeria's Oil Patronage Ecosystem," 5.
[289] "Financial Flows Reconciliation Report: 2009 – 2011 Oil & Gas Audit," *Nigeria Extractive Industries Transparency Initiative.* https://www.premiumtimesng.com/docs_download/NEITI%202009-2011%20OIL%20&%20GAS%20INDUSTRY%20AUDIT%20REPORT-FINANCIAL%20FLOWS%20(2).pdf (accessed March 10, 2017), 3.

billion in oil-related tax, revenue, and royalties.[290] The money that accrues in the Federation Account is distributed across levels of government, based on an appropriations proposal that is approved by the National Assembly.[291] As per a 2010 analysis, almost half of total revenue was allocated to the Federal Government, more than 26% to states, and 20% to local government councils with an additional 4% assigned to centrally-located special funds, such as the National Judicial Council.[292]

The revenue allocated to the Federal Government is then disbursed across a range of institutions, including the line ministries. These ministries, and their subsidiary departments and agencies are responsible for fulfilling a range of mandates, from devising policies and implementing health and education services, to shaping oil sector policy and regulating sector activities. With all governments, each ministry fights to secure as many resources as possible from a finite pool of funds. The ability to successfully lobby government for desired funds can be an indication of the importance of a ministry and its power relative to other institutions.

In 2013, the Federal Ministry of Environment, which is responsible for all environmental policy, regulation and enforcement of environmental protection in the country, ranked 23rd in budget allocation (more than USD 150 million) out of 41 ministries. In the same period, the Ministry of Petroleum Resources was ranked 15th (more than USD 375 million).[293] Of the Ministry of Petroleum Resources

[290] "Financial Flows Reconciliation Report: 2009 – 2011 Oil & Gas Audit," *Nigeria Extractive Industries Transparency Initiative.*
[291] S. 162(1) of the Constitution of the Federal Republic of Nigeria 1999, defines the Federation Account: "The Federation shall maintain a special account to be called "the Federation Account" into which shall be paid all revenues collected by the Government of the Federation, except the proceeds from the personal income tax of the personnel of the armed forces of the Federation, the Nigeria Police Force, the Ministry or department of government charged with responsibility for Foreign Affairs and the residents of the Federal Capital Territory, Abuja."
[292] Wumi Iledarei and Rotimi Suberuii, "The Management of Oil and Gas in Federal Systems: Oil and Gas Resources in the Federal Republic of Nigeria" 2010 (Washington DC: World Bank) http://www.eisourcebook.org/cms/February%202016/Nigeria%20Oil%20and%20Gas%20Management%20in%20Federal%20States.pdf (accessed August 9, 2017), 9.
[293] The top three spots for ministerial budget allocation go to Education, Defence, and Police. Budget data available at: "Data" BudgIT, http://yourbudgit.com/data/?data_year=2013 (accessed August 9, 2017).

budget, more than 50% went to funding the regulator, DPR. Of the Ministry of Environment's budget, which is almost a third of the size of the Petroleum Ministry, about 10% of its budget went to funding NOSDRA. The severely limited pool of resources available to NOSDRA versus DPR in part explains why NOSDRA, an organisation with a specific mandate to respond to oil spills, struggles to fulfil its responsibilities.

While the Ministry of Petroleum Resources' budget is significant, particularly relative to the Ministry of Environment, the policymaking and regulatory institution is dwarfed by the scale of private industry resources.[294] For example, the total 2013 Federal budget for Nigeria was about USD 31 billion.[295] In the same year, Royal Dutch Shell's total income before tax (profit after all other deductions for capital expenditure, purchases, research and development expenses, administrative expenses, etc.) was more than USD 33 billion.[296] Chevron's net

[294] NNPC is in a unique position in that it is a parastatal that receives funding from the Nigerian government, but does not possess an explicit line in the budget and also operates like a commercial actor. It is entrusted by the government to collect its stake of all oil sales revenue and deposit it thereafter into the Federation Account. According to Ross, it is normal for national oil companies to operate with such opacity. See Ross, "The Paradoxical Wealth of Nations," 6. This arrangement has proven controversial. An extensive report by the Natural Resource Governance Institute found, for example, that in a six month period during 2015, only a third of revenue collected by NNPC from export crude, domestic crude and one of its subsidiaries, NPDC, made it to the Federation Account. Almost USD 4 billion was left unaccounted for. NRGI reports that while some of these withholdings are to be expected to cover joint venture costs, the level of withholding is worryingly high. According to a NEITI audit, NNPC owes the Federal Government approximately USD 8 billion, further complicating the relationship between Nigeria's Federal Government and its powerful state owned enterprise. See Aaron Sayne and Alexandra Gillies, "NNPC still holds a blank check," *Natural Resource Governance Institute*, https://resourcegovernance.org/sites/default/files/documents/nrgi_nnpc-still-holds-blank-check_0.pdf (accessed September 1, 2017) and "Financial Flows Reconciliation Report: 2009 – 2011 Oil & Gas Audit."

[295] At a historical exchange rate for January 2013 of NGN 159.96 to the 2013 USD. Central Bank of Nigeria. "Monthly Average Exchange Rates." https://www.cbn.gov.ng/rates/exrate.asp (accessed March 10, 2017).

[296] "Royal Dutch Shell Annual Report," *United States Securities and Exchange Commission.* (Washington DC, 2013), 101. http://reports.shell.com/annual-report/2013/servicepages/downloads/files/entire_shell_ar13.pdf (accessed March 10, 2017).

income for the same year was more than USD 21 billion.[297] ExxonMobil's income in 2013 was USD 32 billion.[298]

In total, the top three multi-nationals operating in Nigeria had access to almost three times the amount of money that was needed to fund the entire Nigerian government budget. Above, I argued that NOSDRA struggles to fulfil its mandate in the face of DPR's significant financial resources. It then follows here that oil companies, given that their resources dwarf both DPR and NOSDRA funding combined, have even more of influence than both institutions on how oil spill response takes place.

4.4 Oil Spill Response and the Joint Investigation Visit

The preceding sections discussed Nigeria's oil sector governance regime, particularly as it relates to the environment. In addition, the section compared financial flows within and outside of government in order to understand the resources available to key actors in fulfilling regulatory mandates. This section considers how these governance arrangements and the private sector's disproportionately vast resources can negatively affect A2EJ directly through oil spill response, particularly, the "Joint Investigation Visit" (JIV). The first section will describe Norway's oil spill response regime as a comparator, followed by a high level description of Nigerian oil spills response regime. The section thereafter will then focus on the JIV and outline the reasons for its significance, followed by a critique of the JIV. The final section will discuss how flaws in the oil spill response system can have a lasting negative impact on A2EJ in the Nigerian legal system.

[297] "Chevron Corporation 2013 Annual Report," *Chevron*. https://www.chevron.com/-/media/chevron/shared/documents/Chevron2013AnnualReport.pdf (accessed August 9, 2017), 4.
[298] "Annual 2013 Report Summary," ExxonMobil. http://cdn.exxonmobil.com/~/media/Global/Files/Summary-Annual-Report/2013_ExxonMobil_Summary_Annual_Report.pdf (accessed March 10, 2017).

4.4.1 The Norwegian Experience

The government of Norway and the private companies operating there have a clearly articulated strategy for responding to a range of oil spill scenarios.[299] There are three key agencies involved in oil spill response under the Norwegian regime, with a range of others concerned with support functions. The Norwegian Environmental Agency (Klif) approves plans for oil spill response when oil companies submit plans to develop oil deposits.[300] The Petroleum Safety Authority (PSA) oversees oil production and exploration facilities to ensure operational compliance.[301] The Norwegian Coastal Administration (NCA) is responsible for ensuring an appropriate response from all parties in the event of an oil spill emergency.[302]

In practice, NCA's responsibilities are shared with oil companies if a spill is caused by one of their oil installations.[303] All of these institutions undertake annual drills to ensure their equipment and procedures are up to the task of responding to oil spills under a range of circumstances.[304] Following the multiple day drill, where oil is actually spilled into the water, these institutions publish a report.[305]

Critically, and contrary to the Nigerian case, Norway's Pollution Control Act clearly states that the "polluter pays principle" is in force.[306] This means that regardless of the cause, the owner of an asset is strictly liable for any pollution

[299] See Kristian Bergaplaas and Christian Eriksen, "Industrial Opportunities in Oil Spill Response in Norway: An Analysis of the Technological Innovation System of Oil Spill Response." *Master's Thesis.* (Trondheim: Norwegian university of Science and Technology, 2012). https://brage.bibsys.no/xmlui/handle/11250/266241 (accessed March 1, 2017).
[300] "Norwegian Environment Agency," *Miljodirektoratet*. http://www.miljodirektoratet.no/no/Om-Miljodirektoratet/Norwegian-Environment-Agency/ (accessed August 9, 2017).
[301] "RNNP Summary Report." *Petroleum Safety Authority Norway*. http://www.ptil.no/?lang=en_US (accessed March 10, 2017).
[302] Bergaplass and Eriksen, "Industrial Opportunities in Oil Spill Response in Norway," 32.
[303] Ibid., 35.
[304] Erin Blakemore, "Every year, Norway hosts an Oil Clean Up Drill," *Smithsonianmag*. 19 June, 2015. http://www.smithsonianmag.com/smart-news/every-year-norway-hosts-oil-cleanup-drill-180955650/ (accessed March 10, 2017).
[305] Ibid.
[306] Bergaplass and Eriksen, "Industrial Opportunities in Oil Spill Response in Norway," 12.

caused by its oil installations or ships.[307] While this principle seems to make the cost of doing business higher in Norway, it also sets the correct incentives in place for proactive oil spill response planning and collaboration among the public and private sectors in emergency situations.

The industry body, Norwegian Clean Seas Association for Operating Companies (NOFO), ensures appropriate clean-up by operators and compliance with government regulations. This private institution is always on call and provides a range of support depending on the nature of the spill and the operators' capability to respond. Outside government itself, "NOFO maintains the largest nongovernmental stockpiles of oil-spill response equipment in Norway."[308]

While this system works for Norway, where oil production takes place offshore in the North Sea, it is difficult to say whether it can be replicated elsewhere.[309] Indeed in the Nigerian context, where the major oil production is occurring onshore and in close proximity to local communities, it may be necessary to have more robust measures to ensure the appropriate precautions are taken.

4.4.2 Nigeria's Oil Spill Response Regime

Nigeria's oil spill response regime comprises a mixture of public and private sector institutions as well. NOSDRA is legislated as the first port of call for oil companies who identify an oil spill; it is also, depending on scale of the spill, responsible for leading response coordination.[310] However, as per the discussion in Section 4.2.2.4 above, DPR shares this role with NOSDRA, invoking its Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) as

[307] Bergaplass and Eriksen, "Industrial Opportunities in Oil Spill Response in Norway," 13.
[308] Ibid., 27.
[309] Statoil maps show the concentration of drilling activities offshore. See "Where we are," *Statoil*. https://www.statoil.com/en/where-we-are/norway.html (accessed March 10, 2017).
[310] National Oil Spill Detection and Response Agency (NOSDRA) (Establishment) Act (Cap. 157 *Laws of the Federation of Nigeria* 2006). See their website at: National Oil Spills Detection and Response Agency, http://nosdra.gov.ng/ (accessed September 9, 2017).

the governing framework for oil spill response.[311] EGASPIN is a guideline that sets out a range of directives for oil spill detection and response that pre-dates NOSDRA.[312] In addition to these key public sector actors, Clean Nigeria Associates is a private sector industry body founded in 1981 that supports its members in fulfilling their clean-up responsibilities.[313] Similar to the relationship between NOFO and oil companies in Norway, oil companies operating in Nigeria also play a major role in responding to oil spills.[314]

As the above description of institutions suggests, the chain of command for responding to oil spills has not been clear cut. The moment a spill is detected, the operator is technically required to inform both NOSDRA and DPR. Section 6(b) of the NOSDRA Act states that the Agency shall "receive reports of oil spillages and co-ordinate oil spill response activities throughout Nigeria." The DPR's EGASPIN guidelines also state the Department will be notified within 24 hours of a spill.[315] Evidence suggests, however, NOSDRA struggles to fulfil its responsibilities. A report by one watchdog group working in conjunction with NOSDRA found that the required forms that outline the details of an oil spill are rarely submitted on time, while less than 50% of these reports make it to submission at all.[316] This type of dysfunction was also highlighted in the UNEP Environmental Assessment of Ogoniland, which found that "[w]hile a National Oil Spill Contingency Plan exists in Ogoniland and NOSDRA has a clear legislative role, the situation on-the-

[311] "Environmental Guidelines and Standards for the Petroleum Industry in Nigeria," Environmental Studies Unit, Department of Petroleum Resources. https://www.scribd.com/doc/233481740/The-Environmental-Guidelines-and-Standards-for-the-Petroleum-Industry-in-Nigeria-EGASPIN-2002 (accessed August 9, 2017).
[312] Ibid.
[313] Clean Nigeria Associates, http://cleannigeria.org/ (accessed August 9, 2017).
[314] For example, see SPDC's oil spill response here: "Oil Spill Data" Shell Petroleum Development Company of Nigeria Limited, http://www.shell.com.ng/sustainability/environment/oil-spills.html (accessed September 1, 2017).
[315] DPR also requires this. See Paragraph 5.1.1 of "Environmental Guidelines and Standards for the Petroleum Industry in Nigeria."
[316] "Improving Oil Spill Response in Nigeria," *Stakeholder Democracy Network*. http://www.stakeholderdemocracy.org/wp-content/uploads/2016/06/Improving-Oil-Spill-Response-in-Nigeria.pdf (accessed August 9, 2017).

ground indicates that spills are not being dealt with in an adequate or timely manner."[317]

Regardless of which agency is leading efforts, the oil spill response regime in Nigeria places the onus on the industry to 1) provide the necessary equipment to respond to an oil spill, 2) respond in the event of an oil spill emergency, and 3) report on it. According to International Tanker Owners Pollution Federation (ITOPF), a global industry not-for-profit, "Nigeria relies on oil pollution clean-up resources provided by the oil industry and very little is maintained in government hands."[318] While this may be an efficient way to delegate responsibility, particularly when government financial resources are limited for stockpiling spill response equipment, it worsens an imbalance of power and information asymmetry between parties. Polluters are expected to both identify spills and clean them up, with little meaningful oversight of this process on the part of the government.

In addition to the limited involvement in clean-up, the Nigerian government knows very little about the extent to which companies actually clean up oil spills. NOSDRA requires companies to fill out "Form C" once an oil spill has been addressed by the company involved.[319] In theory, these forms would provide the Agency with a comprehensive view of oil spill clean-up activities and the extent to which the environment has been restored. However, a review of NOSDRA paperwork conducted in conjunction with an industry watchdog group found that NOSDRA only received this form 12% of the time between January 2010 and

[317] UNEP, "Environmental Assessment of Ogoniland."
[318] "Nigeria," *The International Tanker Owners Pollution Federation Limited.* http://www.itopf.com/knowledge-resources/countries-regions/countries/nigeria/ (accessed August 9, 2017).
[319] "Improving Oil Spill Response in Nigeria." *Stakeholder Democracy Network*. http://www.stakeholderdemocracy.org/wp-content/uploads/2016/06/Improving-Oil-Spill-Response-in-Nigeria.pdf (accessed August 1, 2017).

August 2015.[320] This means that the clean-up and remediation efforts for 5,600 oil spills went unreported in that period.[321]

4.1.1.2 The Joint Investigation Visit

As part of the fraught process outlined above, Nigerian regulations require a multi-stakeholder Joint Investigation Team (JIT) to embark on a Joint Investigation Visit (JIV) to the site of a spill to determine the cause and scope of the accident. These teams are comprised of members of state and federal government environmental agencies, international oil companies, NNPC, NOSDRA, DPR, and the communities affected.[322] All stakeholders gather at the site of the spill and assess damage, sometimes taking photographs of the spill site. Once the team has visited and assessed the cause and scope of damage, all parties sign the field report, which then becomes the document of record.

JIVs are an important process in determining the cause and scope of oil spills. [323] They are meant to serve as a participatory mechanism that facilitates a consensus view of the oil spill cause, which acts as a basis for determining compensation. The most recent iteration of the mechanism was born out of an industry regulation from NOSDRA in 2011.[324]

Although JIVs are not a formal "legal" process, they are nevertheless a critical mechanism for A2EJ. If the JIT finds an oil spill to be caused by operational

[320] See "Improving Oil Spill Response in Nigeria." A contrasting narrative is offered by Shell, who argue that "[a]fter completion of the clean-up and where necessary the remediation, close-out inspection and certification is carried out by the relevant Government regulators. The entire spill response process is governed by performance standards, as prescribed by Nigerian Law, in particular as defined in the DPR's Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) of 2002 and NOSDRA Act 2006." See "Oil Spill Data," *Shell.* http://www.shell.com.ng/sustainability/environment/oil-spills.html (accessed August 9, 2017).
[321] "Improving Oil Spill Response in Nigeria." *Stakeholder Democracy Network*, 16.
[322] See Amnesty International, "Bad Information: Oil Spill Investigations in the Niger Delta," *Amnesty International Report.* (London: Amnesty International Publications, 2013), 13. http://www.amnestyusa.org/sites/default/files/afr440282013en.pdf (accessed March 10, 2017).
[323] See "Improving Oil Spill Response in Nigeria," *Stakeholder Democracy Network*.
[324] Akpofure Rim-Rukeh, "Oil Spill Management in Nigeria: SWOT Analysis of the Joint Investigation Visit (JIV) Process," *Journal of Environmental Protection* 6 (2015): 259-271, 261.

failure, the oil company will be liable to pay for damages and clean-up. However, if it is found to be caused by sabotage, it is unlikely the community will receive any compensation from the oil companies and may have a difficult time securing a thorough clean-up of the affected area.[325] If the JIV report underestimates the extent of oil spill damage, even if it holds companies directly responsible, the amount of compensation available to communities may be severely diminished. At present, JIV reports are increasingly attributing spills to sabotage and oil theft, but there seems to be little evidence in these reports beyond oil company narratives to substantiate claims.[326] As a result, and unlike Norway where the "polluter pays" principle is in force, the impact on communities' ability to secure compensation is actively under threat.[327]

4.1.1.3 Flaws of the JIV System

While the JIV process appears to be a potentially progressive tool for coming to a consensus on the cause of oil spills, there has been severe scepticism of the process in practice.[328] Its critics argue that given the influence and financial resources available to oil company operators, it is impossible for all members of a JIT to have an equal voice in JIV practice.[329] An Amnesty International report found that "[i]n most cases the oil company has substantial influence in determining the cause of a spill, even when a regulatory representative is present. This is partly due to the fact that the company has the technical expertise and neither the regulators nor the communities have the means to challenge their assessment."[330] While conducting research for their report on JIVs, Amnesty International witnessed the

[325] In the best of circumstances, communities have a representative, who holds legitimacy within the community, attend these visits. In the worst of circumstances, these representatives are selected by the oil company and may not have any formal role or legitimacy within the community. These representatives are almost always men. See "Towards Improving the Joint Investigation Visit Following Oil Spills in Nigeria," *Stakeholder Democracy*. http://www.stakeholderdemocracy.org/wp-content/uploads/2015/05/JIV.pdf (accessed March 10, 2017) and "Bad Information: Oil Spill Investigations in the Niger Delta."
[326] "Bad Information: Oil Spill Investigations in the Niger Delta," 5.
[327] For an extensive analysis of the JIV process, see Ibid., 8.
[328] Rim-Rukeh, "Oil Spill Management in Nigeria," 261.
[329] Ibid., 263.
[330] "Bad Information: Oil Spill Investigations in the Niger Delta," 15.

control that the companies have over the process: one Amnesty International member reported that "a representative of NOSDRA received a text message from Nigerian Agip Oil Company, a major onshore operator, alerting them to a spill and providing information on when the investigation trip would take place."[331]

The Amnesty research also found that once at the site, oil companies are in charge of filling out the spill report form that is then signed by the rest of the group.[332] One key informant agreed with this description. He said that "the point about the attribution of oil spills is that the oil companies have all the power in their hands. They host the field trips, the NNPC guys are along for the ride, and the Shell guys are literally the ones that fill out the paper work. And everyone else just signs. There have been the most blatant cases of the field people re-labelling stuff."[333]

There is no uniform way for assessing the cause of oil spill damage, and thus no way to quality-assure the process. According to an analysis by Rim-Rukeh, different oil companies employ various methods for determining the cause of a spill.[334] For example, Nigeria Agip Oil Company uses visual observation and the use of Ultrasonic Thickness Measurements, which can help assess how much corrosion the pipeline has experienced. On the other hand, Shell and Total rely on visual observation alone, using pre-determined indicators, such as disturbance of the soil or the characteristics of the leaking point.[335] There is also no standard procedure for how the volume of oil spilled is determined, with teams relying on observations of the area covered by the spill and a calculation of the depth of the spill and the type of soil on which the oil has spread, which can indicate how deeply the oil may have travelled back into the ground.[336] This inaccuracy and inconsistency in the JIV process leaves room for manipulation of the outcome.

[331] Ibid.
[332] Ibid.
[333] Interview O1A2-PH, July 18, 2014.
[334] Rim-Rukeh, "Oil Spill Management in Nigeria," 262.
[335] Ibid.
[336] Ibid., 264.

In some instances, oil companies will go to great lengths to avoid having "operational failure" as the final written assessment of a JIV. The reason for avoiding this assessment is to shield themselves from any serious threat of liability in a court of law. In the case of the Batan oil spill at a Shell installation in 2002, two days before the JIV had taken place, Shell had already written to the Governor of Delta State to inform him that the cause of the spill had been sabotage.[337] When the JIV did take place days later, a professional diver was deployed to assess the cause of the spill by swimming the twelve feet below the water to the spill site. He found loose nuts and bolts consistent with operational failure. In a video recording of the JIV, Amnesty International reports that the diver is seen sharing his conclusion with the convened group, and the representative from Shell, supported by DPR, is seen trying to persuade the rest of the group not to document the spill as having been caused by operational failure.[338] Despite the attempted persuasion, the group agreed to document the spill as operational failure. The following day, the community received the following written correspondence from Shell:

> Our representatives have narrated to us the gruesome ordeal, duress and manhandling to which they were subjected by people of your community, including some members of its executive committee, in the process of carrying out the Joint Investigation and writing the Joint Investigation Report…Consequently, Shell hereby repudiates the purported Joint Investigation Report….in which our representatives were coerced into taking the cause of the incident as being production equipment failure, instead of an act of third party interference, sabotage, which it clearly was. The inspection report of the diver who inspected the leak point leaves no reasonable person in doubt that the leakage occurred due to unauthorized tampering, by unknown persons, with two nuts and bolts on the flange of the manifold. In fact, we have reasonable ground to suspect that some members of your community might be the culprits, and this suspicion has been reported to the appropriate authorities for the necessary action. We trust that you will prevail on the members of your community to respect the rule of law in order to prevent further strains on our usually cordial relationship.[339]

[337] "Bad Information: Oil Spill Investigations in the Niger Delta," 19.
[338] Ibid.
[339] Ibid.

Despite video evidence to the contrary, coupled with an investigation by a local NGO, which provided further evidence that the spill was likely caused by operational failure, Shell never admitted to any wrongdoing, nor did they admit to the fact that the spill was actually caused by their own operational failure.[340] However, as a concession, Shell did offer the community USD 100,000 as a "development package", which they ultimately accepted.[341]

Amnesty International found that beyond the imbalance of power at the actual site visit, oil companies have been successful at manipulating the narrative of oil spill visits *ex post facto*. Amnesty argued that:

> the forms that Shell puts on its website are not the forms that are completed and signed in the field. Shell was initially reluctant to admit this was the case; however, the forms are extremely neat and include multiple calculations and drawings that would be very difficult to carry out in field conditions in the Niger Delta. After pressing Shell Nigeria's Managing Director, Mr. Mutiu Sunmonu, on this issue, he confirmed that there are two forms, and stated that "the most important data is filled in in the field." The reason for two forms is to ensure the one put on the website is legible. Amnesty International asked Shell if we could see the JIV forms that communities sign in the field but Shell refuses to share these forms.[342]

Many have taken this flawed system as a starting point for reform.[343] However, these critics have failed to identify a fundamental flaw in this model: the fact that the communities themselves are expected to fight for their own rights to independent assessment of oil spills. While I do not dispute that it is necessary for all interested parties to visit the oil spill site to assess the extent and cause of damage, I do dispute the fact that actors without any formal training in oil spills

[340] Ibid., 20.
[341] Ibid.
[342] "Bad Information: Oil Spill Investigations in the Niger Delta," 18.
[343] See: "Bad Information: Oil Spill Investigations in the Niger Delta"; "Improving Oil Spill Response in Nigeria" and Rim-Rukeh, "Oil Spill Management in Nigeria." All provide suggestions and recommendations that involve bolstering the stakeholders involved in the process to reduce power imbalance.

or oil pipeline engineering should be involved in the process. At present, instead of engaging a team of independent professionals to carry out this task, JIVs bring together a range of actors who are not necessarily qualified to assess oil spills, and who have little incentive to agree with each other on the outcome of an investigation.

4.1.1.4 JIVs and the Courts

In this theoretically participatory process, oil companies, often with NNPC as the joint venture partner, are responsible for alerting authorities to an oil spill. These companies determine the method for assessing the cause and scope of spill, fill out the paperwork at the site, and subsequently publish the findings.[344] This level of control over the process has a very real impact for A2EJ, particularly when a dispute arises.[345]

In both **Oguru & Efanga v. RDS and SPDC**, and **Barizaa Manson Tete Dooh v. RDS & SPDC**, two cases heard in the Dutch Courts in 2011, communities refused to sign the JIV report, disagreeing with the oil companies' assertions that the cause of oil spills was sabotage. Despite the communities' refusal to sign, the JIV report was still submitted in court as evidence of a legitimate account of the spill, and was subsequently used by the judge to rule against the communities.[346]

As a mechanism for sector governance, JIVs should in theory act as a gateway to environmental justice, but extensive research by oil sector experts and watchdog groups have persuasively argued that the *status quo* does not provide a meaningful mechanism for oversight, essentially allowing oil companies to determine their own liability with no recourse for the affected communities.

[344] Ibid., 14.
[345] Interview A1G5, July 23, 2014.
[346] See Chapter 6, Section 6.6.3 for more on these cases. Also see "Bad Information: Oil Spill Investigations in the Niger Delta" for extensive examples.

4.5 Conclusion

This chapter has discussed why Nigeria's current governance regime is leading to perverse outcomes for A2EJ. This was evidenced by comparing Norwegian institutional design to that of Nigeria. Both countries discovered oil around the same time, and have employed similar institutional arrangements to govern the sector. However, due to the historical institutional environment and the capabilities of the civil service, the countries' outcomes have been starkly different. These differences were highlighted by the degree to which Nigerian regulators are constrained due to government's commercial participation, and the way revenues flow from oil ventures into state coffers. The difference in the countries' approaches to governance were also highlighted in oil spill response regimes; in Norway, the government has invested heavily in being able to act as a credible leader of oil spill response efforts, while in Nigeria this effort has been outsourced to the private sector, ultimately disenfranchising regulators.

This Chapter also showed how obstacles to environmental justice are built into the very governance structures of the sector, and are exacerbated by the financial resources available to sector actors. The JIV is an important example of how a process purportedly designed to enfranchise communities, actually marginalises them. From the moment an oil spill takes place through to when a judge makes a decision on clean-up and compensation based on JIV report findings, oil companies have the advantage in shaping the oil spill liability narrative.

In reviewing this flawed oil spill response mechanism, this Chapter also called into question the validity of using a participatory process to assess the cause and scale of oil spills altogether. While other critiques have highlighted areas for improvement – such as giving more financial resources to regulators to lead JIVs, or training participants to be more educated on the issues raised – I argued that regardless of improvements, the process will always be inherently flawed. All actors involved have incentives to disagree with each other and very few reasons to draw conclusions based on fact. From an A2EJ perspective, this tool as currently

conceived will always be used to placate and silence legitimate concerns raised by communities.

5 Statute Law

5.1 Introduction

The previous Chapter outlined the way in which the oil sector in Nigeria is currently governed. It detailed a range of challenges for A2EJ within that governance regime, particularly the imbalance in power and financial resources of key actors, and the inadequacy of JIVs for providing A2EJ for victims of oil pollution. This Chapter will review the major pieces of legislation that have shaped the current *status quo* in sector governance. In this Chapter, I analyse key features of legislation and any challenges they present for providing gateways to environmental justice. The Chapter takes a historical approach, emphasising that *when* a law is developed can be as important as *what* it says.[347] This framing presents the legislation chronologically, in order to appreciate how the historical context has shaped these different pieces of legislation.

The Chapter will also incorporate survey respondents' perceptions of many of the statutes and their efficacy, both in terms of fulfilling their stated purpose and for providing mechanisms for redress.[348] By combining the doctrinal, historical, and socio-legal approaches to interrogating the body of legislation I am able to add nuance to recent research in this field.[349] This combined approach probes the efficacy of these laws in practice rather than simply the quality of the drafting. In undertaking this approach, I acknowledge that not all laws will have the same

[347] Anderson sees colonial institutions as a key determinant of how power was exercised by independent states immediately following independence. Colonial leaders left behind constitutions that did not at all match the kind of centralised leadership that citizens had experienced under colonial rule, thus creating a situation where leaders following independence returned to power structures they recognised. In the case of Nigeria, that meant setting aside the constitution and focusing on centralising power and limiting individual rights. See Michael R. Anderson, "Access to justice and legal process: making legal institutions responsive to poor people in LDCs," *IDS Working Paper* 178 (February 2003): i-30; 12. https://www.ids.ac.uk/files/dmfile/Wp178.pdf (accessed August 1, 2017).

[348] While some discussion around the survey methodology will take place within this Chapter, see Chapter 3 on Methodology for an extensive discussion of the Survey.

[349] Frynas does this to great effect. However, he was not able to benefit from a historical baseline and so can only make limited assertions about change over time.

level of impact on A2EJ. Thus, some pieces of legislation require a more in-depth analysis than others in order to remain focused on the topic of legislation's role as a tool for A2EJ in the Nigerian oil sector.

First, the Chapter will provide an overview on law-making procedures in Nigeria. Then Section 5.2 will outline all of the laws included in this overview and will provide some overarching historical context. The subsequent sections (5.3-5.13) will be dedicated to the different pieces of legislation. Within each legislation section, key provisions of the law will be described, the historical context provided, and where available, survey findings will be analysed. I will conclude by commenting on what this collective body of legislation means for A2EJ in Nigeria's oil sector. My analysis of these laws is not meant to be exhaustive, rather the purpose here is to focus on provisions that may enable or inhibit A2EJ in the Nigerian oil industry.

5.1 A Brief Review of Law-Making in Nigeria

This section will review the way in which law is made in Nigeria. First, it considers how law was developed and enacted before the Fourth Republic. It does so in order to appreciate that a majority of Nigeria's most influential legal instruments for the oil sector, including the Constitution, were drafted and enacted by undemocratic regimes. Then, the section focuses on law-making in the Fourth Republic, primarily based on what is laid out in the Constitution of 1999.

5.1.1 Law-Making in Nigeria Before 1999

Many of Nigeria's laws currently in force were drafted and enacted under military rule in the form of decrees and later adopted by the 1999 Constitution. These laws "are treated by the Constitution as existing laws and deemed to have been made by the appropriate legislative body with competence to do so under the 1999

Nigerian Constitution."[350] Such an approach provides a degree of continuity and certainty for private citizens, companies and foreign investors. However, this wholesale adoption of laws from the country's military past presents a fundamental challenge to modern constitutionalism. A democracy cannot adopt military era laws without allowing for the remnants of military dictatorship under which those laws were drafted to seep into modern implementation.

Law-making under military rule in Nigeria was guided by Decree No. 1 of 1966.[351] This Decree outlined how law-making occurs under a military regime: primarily through a simple process, which requires no consultative or representative deliberation. The Decree empowers the Federal Military Government and Regional Military Government to make laws. To enact a law, Section 4(1) stipulates simply that decrees should be signed by the head of the Government. Once decrees have been signed, they are in force, and the government can choose to advertise them wherever they deem appropriate. In this way, decrees have been drafted with little accountability or redress for citizens and yet have severe consequences. Section 6 of the 1966 Decree states that: "No question as to the validity of this or any other Decree or of any Edict shall be entertained by any court of law in Nigeria."[352]

Key laws relevant to this research were initially formulated under these conditions as decrees, including the Oil Pipelines Act[353], the Petroleum Act[354], and the Land

[350] See "Guide to Nigerian Legal Information," *Hauser Global Law School Program*, http://www.nyulawglobal.org/globalex/Nigeria1.html (accessed August 10, 2017).
[351] Constitution (Suspension and Modification) Decree No. 1 of 1966.
[352] Constitution (Basic Provision) Decree No. 32 of 1975 and Decree No. 1 of 1983 built on this process by further consolidating the power of the head of the military government to legislate. First, this was done by requiring Governors to seek approval before legislating on the state level. Ultimately, this was done by prohibiting them to do so altogether. Carl Levan covers the historical structure of Nigerian policymaking in *Dictators and Democracy in African Development: The Political Economy of Good Governance in Nigeria* (Cambridge: Cambridge University Press, 2014).
[353] Then, Decree No. 31 of 1956, now Oil Pipelines Act 1956 (Cap 07 *Laws of the Federation of Nigeria* 2004).
[354] Then, Decree No. 51 of 1969, now Petroleum Act 1969 (Cap P10 *Laws of the Federation of Nigeria* 2004).

Use Act.[355] As shown in subsequent sections, these laws were drafted when Nigeria was in its infancy as a sovereign country. During this time, economic development was prioritised by policymakers at the cost of anything else.[356] To wholesale adopt laws made under that context, lawmakers at the dawn of the Fourth Republic were *de facto* choosing to adopt the same priorities as their military predecessors. This decision was to be to the detriment of any later attempts to improve A2EJ for residents of the Niger Delta through new legislation.

5.1.2 Law-Making in the Fourth Republic

Nigeria's current government structure is comprised of three branches of government that provide checks and balances.[357] In this system, law-making happens in the legislature.[358] Enforcement of those laws happens via the executive, and review of those laws takes place in the judiciary. The law-making procedure is of particular relevance to this research, as all post-1999 legislation relating to the oil and gas sector must undergo this process. Section 39 in the Part I Schedule II of the Constitution states that "Mines, minerals, including oil fields, oil mining, geological surveys, and natural gas," be legislated exclusively by the federal legislature.[359]

The Nigerian federal legislature – the National Assembly – is bicameral with a House and a Senate.[360] The Senate contains three members from each state and one from Abuja, the Federal Capital Territory.[361] The House is representative of the Nigerian population and currently has 360 members.[362] Section 58 of the

[355] Then, Decree No. 6 of 1978, now Land Use Act 1978 (Cap L4 *Laws of the Federation of Nigeria* 2004).
[356] Thurber, Emelife, and Heller, "NNPC and Nigeria's Oil Patronage Ecosystem," 9-13.
[357] Constitution of the Federal Republic of Nigeria 1999.
[358] For a comparative account of legislatures see Peter Ademu Anyebe, "Rules and Procedures Governing Legislative Process in Nigeria," *Journal of Law, Policy and Globalization* 48 (2016): 71-83.
[359] S.39, Constitution of the Federal Republic of Nigeria 1999 [Second Schedule].
[360] S.47, Constitution of the Federal Republic of Nigeria 1999 [Cap. V].
[361] S.48, Constitution of the Federal Republic of Nigeria 1999 [Cap. V].
[362] "National Assembly | Federal Republic of Nigeria." http://www.nassnig.org/page/about-the-house (accessed August 3, 2017).

Constitution gives the National Assembly's powers to make laws. Bills can originate in either house of the National Assembly, and once passed in the house in which it was proposed, move to the other house for approval. After being passed in both houses, a bill goes to the President for approval. Should the President not approve the bill, it can still be passed with two thirds majority vote in both houses of the Assembly.[363] While the process is more democratic than legislating by decree, it also takes much longer to accomplish reform in such a setting; for example, the Petroleum Industry Bill, a large sector governance reform bill, has been stalled for more than decade due to the politics involved in consensus building.[364]

5.2 Body of Laws for Analysis

The historical context of law-making is an important lens for analysing legislation's role in A2EJ for residents of the Niger Delta. This section will outline which laws have been selected for analysis and discuss how that analysis will be approached.

5.2.1 Statute Selection

Statutes were selected for analysis after a review of the sector's statutory framework.[365] Frynas' survey included the review of five pieces of key legislation: the Oil Mineral Producing Areas Development Commission (OMPADEC) Act, the Land Use Act, the Petroleum Act, the Federal Environmental Protection Agency Act, and the Associated Gas Re-injection (AGRA) Act. Two of the laws Frynas analysed in 1998 (the OMPADEC Act and the FEPA Act) have since been repealed

[363] S.58, Constitution of the Federal Republic of Nigeria 1999, [Cap. V]. For more on legislative procedures, see "Federal Republic of Nigeria National Assembly," http://www.nassnig.org/page/the-legislative-process (accessed August 10, 2017).
[364] Part of the Petroleum Industry Bill (PIB) has been passed by the Senate but is stalled in the House (as of September 2017). See PM News. "NASS tasked on passage of other segments of PIGB before December." July 26, 2017, https://www.pmnewsnigeria.com/2017/07/26/nass-tasked-passage-segments-pigb/ (August 10, 2017).
[365] The review involved drawing on Frynas' analysis, a further scan of secondary literature, and discussions with practitioners in the field.

and replaced with new legislation, which I review instead. I expand Frynas' analysis to include eleven laws in total, including the Nigerian Constitution, which did not yet exist when he conducted his research.[366]

Table 2, below, chronologically lists the legislation chosen for analysis and highlights the era and the head of state in power when it was passed. As is shown, the Fourth Republic ushered in legislation meant to improve oil spill clean-up and Niger Delta development. However, a majority of the sector's governing legislation was enacted well-before democracy.

5.2.2 Methodology

For each piece of legislation analysed, my research interrogates what the law does and does not say with respect to redress for victims of environmental harms. I also consider:

- the social, economic, and political context of the time,
- whose interests the law serves,
- whether legal practitioners think it does what it is meant to do effectively, and
- whether they think it provides mechanisms for redress.

I developed these questions in order to understand, beyond a doctrinal interpretation, what legislation is able or unable to do for those seeking environmental justice.[367] In most cases, this means that I interrogate whether or not the law provides remedy for environmental harms. However, for some legislation, A2EJ is conceived in a broader sense, from preventing environmental harms in the first place (like the NOSDRA Act and the EIA Act) to ensuring that

[366] Initially, the research also included the Hydrocarbons Oil Refineries Act and the National Investment Promotion Commission Act, but found it more effective to focus on core pieces of legislation rather than those at the periphery without a clear role to play in providing prevention or redress for environmental damage caused by industry activity.
[367] In 1964, Chambliss already noted the importance of understanding the genesis and use of legislation as shaped by its social context. See William J. Chambliss, "A Sociological Analysis of the Law of Vagrancy." *Social Problems* 12, no. 1 (1964): 67–77.

residents of oil-producing regions benefit proportionately to the burden laid upon them by oil exploitation (such as the NDDC Act).

Table 2: Selected legislation for analysis

Law	**Year**	**Era**
Oil Pipelines Act	1956	British Rule
Oil in Navigable Waters Act	1968	Military – Gowon
Petroleum Act	1969	Military – Gowon
AGRA	1978	Military – Obasanjo
Land Use Act	1978	Military- Obasanjo
Harmful Waste Act	1988	Military- Babangida
EIA Act	1992	Military- Babangida
Constitution	1999	Military - Abubakar
The Fourth Republic	1999	
NDDC Act	2000	Fourth Republic – Obasanjo
NOSDRA Act	2006	Fourth Republic - Obasanjo
NESREA Act	2007	Fourth Republic – Obasanjo

To place legislation in its historical context, the Chapter draws on secondary literature, doctrinal analysis, news articles, key informant interviews, and survey findings. Survey respondents were asked whether a) the legislation achieves its stated aims and b) provides sufficient mechanisms for redress.[368] Asking if the

[368] This was a departure from Frynas' approach, which simply asked to what extent "legislation has been effectively enforced." Despite the modification in wording, it is reasonable to assume

laws achieve their stated aims allows us to understand whether the respondents feel the law is an effective legal instrument. Enquiring if the law provides sufficient mechanisms for redress allows us to better comprehend the laws' ability to provide a gateway to environmental justice.[369]

This section has framed the eleven laws that will be analysed in the remainder of the Chapter by presenting the paradox that lies at the heart of Nigerian legislation. This paradox is found in the fact that Nigeria's democratic law is expected to provide better A2EJ, but it is limited in its ability to do so because it is circumscribed by military era law that remains in force even in Nigeria's current, democratic era.

5.3 The Oil Pipelines Act 1956

Nigeria is home to thousands of kilometres of oil pipelines.[370] These pipelines span the country and are concentrated in the Niger Delta region, running through extensive tracts of land that cut through nearby communities living in the area.[371] In some places, these pipelines sit above ground, susceptible to the elements and to human interference. The pipelines are often the first site of environmental harms; when oil spills, it most often comes from an oil pipeline.[372] The pipelines have also long been a staging ground for the big debates in Nigeria's oil sector governance; they are the sites around which stories of activism, vandalism, and

that "effectively enforced" and "achieving stated aims" can be considered comparable. Frynas, *Oil in Nigeria,* 244.

[369] Further, splitting the questions also allows the respondents to answer the first question based on their implicit biases (e.g. they may consider a law to be effective if it enables industry activity, even if at the cost of oil communities).

[370] **The Bodo Community and Ors. v. SPDC** [2014] EWHC 1973 (TCC): 3. and "The World Factbook," *Central Intelligence Agency,* https://www.cia.gov/library/publications/the-world-factbook/fields/2117.html (accessed August 10, 2017).

[371] See "Nigeria Gas and Oil Map," http://www.lib.utexas.edu/maps/africa/nigeria_gas_1979.jpg Accessed via "Perry-Castañeda Library Map Collection," *University of Texas Libraries*, http://www.lib.utexas.edu/maps/nigeria.html (accessed August 10, 2017).

[372] This is true of cases analysed for this dissertation. A majority of oil spill cases originated with an oil pipeline, according to the case law dataset used in Chapter 6.

company neglect are told.[373] This section will review the Oil Pipelines Act which governs the construction and maintenance of oil pipelines.

The Oil Pipelines Act (OPA) precedes Nigerian independence, having been brought into force in October 1956 under British Rule. In January 1956, Shell had discovered the first commercially viable quantities of oil in colonial Nigeria, a time when the country's economy was not yet dependent on oil exports.[374] The OPA was developed to regulate the process of granting licenses for the installation and maintenance of oil pipelines. The OPA is a key piece of legislation in the body of laws that address oil pollution and details how victims of environmental harms caused by industry activity might seek redress. Unlike other colonial era legislation governing the sector (such as the Mineral Ordinance discussed in section 5.5), the OPA was formally incorporated into Nigeria's regulatory framework after independence.[375]

There are thirty four sections in the OPA, primarily concerned with the process of licensing the installation of oil pipelines.[376] Of those sections, sixteen include provisions for rights of individuals living near pipelines, particularly land-owners.[377] In the OPA, oil company operators must seek permission and provide a minimum of fourteen days' notice before an intended visit to land or buildings that belong to, or are occupied by, private individuals.[378] The same clause also provides

[373] For example, see Kenneth Omeje, "The state, conflict & evolving politics in the Niger Delta, Nigeria," *Review of African Political Economy* 31, no. 101 (2004): 425-440; "Nigeria's Criminal Crude: International Options to Combat the Export of Stolen Oil," *Chatham House*, https://www.chathamhouse.org/publications/papers/view/194254 (accessed August 10, 2017) and Ken Wiwa, "Finally, it seems as if Ken Saro-Wiwa, my father, my not have died in vain," *The Guardian,* Nov 10, 2015, https://www.theguardian.com/commentisfree/2015/nov/10/ken-saro-wiwa-father-nigeria-ogoniland-oil-pollution (August 10, 2017).
[374] Frynas, *Oil in Nigeria*, 9.
[375] S.315(1), Constitution of the Federal Republic of Nigeria 1999, [Cap VIII].
[376] Excluding definitions and titles.
[377] This is a high number of protective provisions for those negatively affected by sector activity, particularly in a piece of legislation that is meant to serve a primarily commercial objective. This assertion is based on a rough comparison of number of provisions for redress in other legislation analysed in this Chapter.
[378] S.6(1), Oil Pipelines Act 1956 (Cap 07 *Laws of the Federation of Nigeria* 2004).

for compensation for any damaged caused to land, property, or cash crops by oil pipelines. [379]

The OPA lays out a clear process for advertising proposed pipeline routes. It also details how objections to these pipeline routes can be filed.[380] Advertising the pipeline routes must be done in not just the State Gazette, but also in local newspapers and other media that are likely to target individuals in the communities that will ultimately be affected by pipeline construction. The OPA states that "the Minister may specify such numbers of copies of such notice as the minister may require for distribution to the occupiers or owners of land in the areas so affected who might not otherwise become aware of such notice."[381] In contrast, the Environmental Impact Assessment (EIA) Act from 1992 provides that the public will be given the opportunity to comment on assessments filed with the Ministry of Environment, but offers no clarification on how the Ministry will inform the public that the studies have been completed and are available for review.[382] The process for filing objections to oil pipeline development under the Oil Pipelines Act includes the ability to file written and verbal objections, making the process potentially more accessible to persons who are illiterate.[383]

5.3.1 Compensation Under the OPA

The OPA also includes comprehensive guidelines for paying compensation to victims of oil spills.[384] The compensation scheme that is set out pertains not only to landowners, but also to those who have an "interest in land". For individuals to receive compensation, they need to be:

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[379] S.6, Oil Pipelines Act 1956.
[380] S.8, Oil Pipelines Act 1956.
[381] S.8(2)(d), Oil Pipelines Act 1956.
[382] Environmental Impact Assessment Act 1992 S.7 (CAP. E12 *Laws of the Federation of Nigeria* 2004).
[383] S.9(1), Oil Pipelines Act 1956. Verbal complaints may theoretically ensure that filing objections is easier for the illiterate, however the process of filing a verbal objection could also be susceptible to intimidation, because verbal complaints must be filed in person.
[384] Frynas, *Oil in Nigeria*, 95. The Petroleum Act, discussed in the following section, lays out a compensation framework in its regulations.

- "injuriously affected by the exercise of the rights conferred by the licence,"
- "suffering damage by reason of any neglect on the part of the holder or his agents, servants or workmen to protect, maintain or repair any work structure or thing executed under the licence," and
- "suffering damage (other than on account of his own default or on account of the malicious act of a third person) as a consequence of any breakage of or leakage from the pipeline or an ancillary installation, for any such damage not otherwise made good."[385]

These rights to compensation provide a rather broad scope of individuals who may seek compensation from a company operating oil pipelines. The compensation scheme provided by the OPA addresses many legal issues that have since appeared in tort cases relating to oil pollution disputes, such as liberalising interpretations of *locus standi* to include suing in a representative capacity. For example, in Section 21, the OPA states that:

> Where the interests injuriously affected are those of a local community, the court may order the compensation to be paid to any chief, headman or member of that community on behalf of such community or that it be paid in accordance with a scheme of distribution approved by the court or that it be paid into a fund to be administered by a person approved by the court on trust for application to the general, social or educational benefit and advancement of that community or any section thereof.[386]

In the event of a dispute, the OPA stipulates that grievances should be dealt with by the Magistrate courts and State High Courts.[387]

[385] S.5, Oil Pipelines Act 1956.
[386] S.21, Oil Pipelines Act 1956.
[387] This provision would later come into conflict with the 1999 Constitutional provision that all cases related to oil and gas must be heard by Federal courts, see Section 5.10.

The Act also makes clear that even if a claimant has been paid by an oil company in an out-of-court settlement, they are still able to take the oil company to court for further compensation. When hearing such disputes, courts are instructed to:

> award such compensation as it considers just in respect of any damage done to any buildings, lion crops or profitable trees by the holder of the permit in the exercise of his rights thereunder and in addition may award such sum in respect of disturbance (if any) as it may consider just.[388]

According to the OPA, compensation is to be calculated by taking the difference of the value of the land or other damaged property before the incident and the value after the incident.[389] Frynas notes that the compensation rates provided for by the government regime are significantly lower than what the industry itself deems as reasonable compensation for damages to private property.[390]

The legislation also introduces a provision that protects oil companies from liability in the event of "a malicious act of a third person."[391] Provisions that remove corporate liability for third party vandalism can have an outsized negative effect on oil spill redress. This is due to the fact that it is often difficult to determine the cause of pipeline spills and because oil companies have historically controlled the process of determining the cause of spills, as shown in Chapter 4.[392]

As Frynas' analysis of compensation rates shows, gauging the OPA's ability to provide sufficient mechanisms for redress requires not simply an understanding of the legislation, but also the broader legal context. This is made evident when

[388] S.20, Oil Pipelines Act 1956.
[389] S.20(3), Oil Pipelines Act 1956.
[390] Frynas, *Oil in Nigeria,* 96. See also S.32, Oil Pipelines Act 1956. The Act, in its final clause, sets out clearly that there will be criminal consequences for bodies corporate and their employees, making both company and individual liable for wrong doing under the Act. This type of clause is not seen in other sector legislation and provides an indication that the legislation attempts to leave few with immunity in the event of misconduct.
[391] S.5(c), Oil Pipelines Act 1956.
[392] See Chapter 4, Section 4.4.

comparing two interpretations of the quality of the OPA for Nigerians seeking redress. Below, I first discuss a British judge's interpretation of the OPA, to illustrate how analysis can be skewed without context, and then will contrast that view with survey findings from 27 Nigerian lawyers.

In a preliminary judgment of the **Bodo Community v. SPDC** extra-territorial case heard in the UK in 2014, Judge Akenhead at the Technology and Construction Court in London heavily relied on the OPA in his initial reasoning. In the case, a Niger Delta community sued Shell in UK Courts for damages following two large oil spills that ruined the livelihoods of community members, who are primarily farmers and fishermen.[393] The British judge weighed the statute alongside Nigerian tort case law to determine the best mechanism for determining liability and the amount of any compensation to be paid.[394] In his reading of the OPA, Judge Akenhead argued that the legislation provides

> a broad largely causation based compensation scheme, specific procedures relating to compensation such as were not available elsewhere at the time and procedures at the end of the licence…the oil business was undoubtedly anticipated in 1956 to be of massive potential strategic and commercial importance to the country and it is reasonable to assume that the legislature felt that it needed to get effective procedures and mechanisms into place even before the oil business had really been fully proved to be the enormous business it became.[395]

Judge Akenhead felt so strongly that the OPA was sufficient to provide means for redress for victims of oil pollution that he claimed that tort law should not be used in Nigeria in compensation cases relating to oil spills altogether. He deemed the OPA to be more "generous" to victims than common law remedies.[396] The Judge's

[393] John Vidal, "Shell announces £55m payout for Nigeria oil spills," *The Guardian,* Jan 7, 2015, https://www.theguardian.com/environment/2015/jan/07/shell-announces-55m-payout-for-nigeria-oil-spills (accessed August 10, 2017).
[394] **The Bodo Community and Ors. v. SPDC** [2014] EWHC 1973 (TCC) 28,29.
[395] Ibid.
[396] Ibid., (64).

analysis shows that, if reading the law out of context, the OPA may be applied to give reasonable gateways to environmental justice.

However, what is missing from the analysis of a foreign expert is an appreciation for how the broader context shapes legal practice within Nigeria. The OPA may technically be a prevailing and comprehensive framework for determining compensation, but its ambiguity on third party vandalism and a broader cultural preference toward tort litigation, in part because compensation rates can actually be higher in tort, means the legislation does not have the impact anticipated by Justice Akenhead.[397]

Nigerian survey respondents were less optimistic about the legislation's effectiveness in practice. This is likely due to their familiarity with Nigerian legal culture and the broader political challenges of the oil sector. When surveyed in 2014, only 30% of respondents felt the piece of legislation fully, or somewhat, achieves its stated aims.[398] Importantly, only 18% of respondents believe that it provides sufficient or partial mechanisms for redress. This means that despite progressive provisions for compensation, the OPA's other mechanisms that curb access to justice weighed more heavily on the Nigerian respondents' assessment of the law's effectiveness and reach.

OPA Summary

The Oil Pipelines Act is one of the most progressive pieces of legislation in terms of making provisions for gateways to environmental justice for victims of oil pollution. It is also the oldest of Nigeria's oil sector laws, pre-dating the country's independence. This presents a challenge to the notion that Nigerian environmental law is actually improving governance of the oil sector over time with the introduction of new frameworks for sector governance in the democratic era. Further, while one Judge in the UK interpreted the OPA as a sufficient

[397] See Chapter 6, Section 6.5.1 for more on the Nigerian preference for tort litigation.
[398] Frynas did not include the OPA in his survey.

mechanism for redress, a majority of Nigerian lawyers who responded to my survey believed the law did not provide sufficient pathways to redress for victims of oil pollution. This law, in particular, highlights the importance of coupling a doctrinal approach with a socio-legal approach. Divorced of its context and history, the OPA may be seen as a legitimate tool for A2EJ. However, considering the law in its broader context quickly reveals that the progressive nature of drafted provisions are functionally irrelevant if unused by litigants and the courts.

5.4 The Oil in Navigable Waters Act 1968

The Oil in Navigable Waters Act (ONWA), 1968, was brought into force in order to implement the International Convention for the Prevention of Pollution of the Sea by Oil.[399] The ONWA legislates against the dumping of hydrocarbon products – crude oil, fuel, lubricating oil, diesel, etc. – into waterways. The International Convention for the Prevention of Pollution of the Sea by Oil was agreed to in London in 1954, before Nigerian independence. Nigeria made the international convention domestic law eight years after independence through ONWA. At the time of signing, most of Nigeria's oil operations were onshore and largely dominated by Shell.[400] ONWA is technical in nature, focusing primarily on the functions of oil barges and the way in which the activities of oil barges should be performed in order to prevent oil pollution.

ONWA provides a framework for preventing pollution in Nigerian territorial waters, but it also provides numerous defences that make it hard to conceive how any suit brought against a polluter under ONWA would be successful. Defences include accidental dumping caused by vessel damage and subsequent leakage, as well dumping in order to protect the vessel or on-board cargo.

[399] Oil in Navigable Waters Act 1968 (Cap 06 *Laws of the Federation of Nigeria* 2004); Orji, "An appraisal of the legal frameworks," 328.
[400] Frynas, *Oil in Nigeria*, 12.

The ONWA Act also gives the Minister sweeping discretion for exemptions.[401] Furthermore, the Act exempts Government vessels from being subject to the Convention's stipulations.[402] These provisions grant the government the license to decide, potentially arbitrarily, to whom this law applies and to whom it does not. This level of discretion also opens up opportunities for abusive, corrupt practices and preferential treatment based on what the government perceives to be optimal for the economy.[403]

Should a party be found to be in breach of the Act, criminal proceedings against the party can only be taken forward "by or with the Attorney General."[404] This means that without the Attorney General's action, individual citizens are not able to seek recourse against polluters through ONWA.[405] Should the Attorney General decide to take the case forward and a fine is levied upon the polluter, it is not specified that the fine would be remitted to parties who were adversely affected by the oil spill, or used to clean up the oil spill.[406]

Vesting this responsibility to sue in the Attorney General is problematic if the interests of the State – the Attorney General's employer – differ from the interests of communities negatively affected by oil pollution. The potential failings of this approach are put in stark relief when considering that ONWA was signed into force amidst the Biafran War, a civil war fought between the central government and part of the Niger Delta, partially over control of oil production.[407]

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[401] S.15, Oil in Navigable Waters Act 1968.
[402] S.16, Oil in Navigable Waters Act 1968.
[403] In 2015, Flag Officer Commanding, Central Naval Command, Rear Admiral Apochi Suleiman appealed to Navy personnel to take their jobs seriously and avoid aiding and abetting corrupt practices with respect to large scale oil theft. See "Oil theft: Navy boss warns commanders against corruption," *Sweet Crude Reports,* http://sweetcrudereports.com/2015/09/16/oil-theft-navy-boss-warns-commanders-against-corruption/ (accessed September 25, 2015).
[404] S.12, Oil in Navigable Waters Act 1968.
[405] Orji, "An appraisal of the legal frameworks," 329.
[406] S.12, Oil in Navigable Waters Act 1968.
[407] Cyril Obi, "Nigeria's Niger Delta: Understanding the Complex Drivers of Violent Oil-related Conflict," *Africa Development* XXXIV, no. 2 (2009): 103–128; 115.

In my 2014 survey, many respondents echo concerns about the legislation's utility. A large majority of respondents, approximately 75%, view the Act as only minimally achieving, or not achieving its aims at all. In addition to this, respondents view the Act's mechanisms for redress as similarly disappointing; only 15% of respondents state that ONWA provides sufficient or minimally sufficient mechanisms for redress. These results suggest that the law is not seen as a credible tool to regulate sector activities.

ONWA Summary

Those negatively affected by oil spills in waterways are communities and individuals who rely on clean water and the fragile ecosystems supported by that clean water for their livelihoods, such as fishing and farming. This rarely-cited law does little in practice to provide gateways to justice for these groups. It also provides little material protection or redress for the natural environment it is meant to protect. This law has its roots in an international convention rather than in domestic policymaking. This background suggests that without a domestic imperative to meaningfully precipitate change, it is unlikely that such a law would be successful given prevailing incentives of the political elite to focus on economic growth, often at the expense of environmental protection.

5.5 Petroleum Act 1969

The Petroleum Act 1969 is the overarching piece of legislation governing Nigeria's oil sector. It sets up the institutional structure for sector governance, focusing heavily on building an enabling environment for the private sector. This Act precedes the Constitution in its assertion that all oil in Nigeria is the sole property of the Federal Government.[408] It is an act that seeks to "provide for the exploration of petroleum from the territorial waters and the continental shelf of Nigeria and to vest the ownership of, and all onshore and off-shore revenue from petroleum

[408] S.1, Petroleum Act 1969 (Cap P10 *Laws of the Federation of Nigeria* 2004).

resources derivable therefrom, in the Federal Government and for all other matters incidental thereto."[409]

The Petroleum Act repealed the Mineral Oil Ordinance introduced by the British Colonial government.[410] While much of the legislation looks similar to its predecessor, the Petroleum Act was developed at a very different moment in West African history. The law was drafted when newly independent Nigeria was operating under the Gowon military regime and struggling to quell the secessionist movement in Biafra, and as a consequence, was looking to reinvigorate the country's economy.[411] Gowon's vision for economic growth included indigenising key sectors, like oil and gas, which had been primarily dominated by foreign interests. [412] This meant that while processes remained similar to the colonial era for granting and revoking licenses to operators, the duration of time for such licenses was cut almost in half (from 30 or 40 years to 20).[413]

Gowon's economic vision also meant that in the trade-off between fast and profitable business and responsible sector development, environmental protection was not a policy priority. One key informant shared a narrative about the mind-set around the Petroleum Act at the time of its development. According to this informant,

> [w]hen it became law, finally, what we now call the Petroleum Act of 1969…essentially, nobody was thinking environment. Everyone was thinking the resource. How do we get it out? How do we make money out of it?[414]

The Act itself is a short piece of legislation, just seven pages long, with more than one hundred pages of accompanying regulations. The Petroleum Act stipulates

[409] Petroleum Act 1969 (Cap P10 *Laws of the Federation of Nigeria* 2004).
[410] Frynas, *Oil in Nigeria*, 81.
[411] Fiona C. Beveridge, "Taking control of foreign investment: a case study of indigenisation in Nigeria," *International and Comparative Law Quarterly* 40, no. 2 (1991): 302-333.
[412] Beveridge, "Taking Control of foreign investment," 307.
[413] Frynas*, Oil in Nigeria*, 81.
[414] Interview A1G4, July 18, 2014.

that the Minister is given the power to suspend operations "which in his opinion are not being conducted in accordance with good oil field practice.[415]" What "good practices" are, however, not explicitly outlined in the primary Act or in its Regulations. Beyond the vague reference above, environmental protections are not explicitly provided for in the primary legislation governing the sector.

The First Schedule of the Petroleum Act also includes provisions that may make companies liable to pay fair and adequate compensation to those who own or lease land that has been disturbed by company activity.[416] Despite these provisions for compensation, Frynas' research found that levels of compensation under the Drilling and Production Regulations do not reflect market rates for goods.[417] In order to make this case, Frynas showed how an industry group, the Oil Producers Trade Section, regularly released guidelines on pricing that surpassed the official guidelines.[418] These higher rates indicate that oil companies have some incentive to pay compensation to communities to avoid conflict. However, Frynas found that these company rates were still inadequate compared to actual market rates.[419] Having a compensation framework that even oil companies undermine may have weakened the Petroleum Act's Regulations as a legitimate mechanism for redress.

Further elaborations on environmental protection and compensation for damage to individuals' property in light of industry activity are enshrined in the Petroleum Act's regulations, though lingering questions of enforcement remain. The Petroleum Regulations[420] state that no petroleum should be released "or allowed to escape" into the water surrounding the port or into drains connected to sewers,

[415] S.8(d), Petroleum Act 1969.
[416] Judge Akenhead in the Technology and Construction Court points out that the Petroleum Act calls for 'fair and adequate' compensation compared to the OPA provision for "just" compensation, but it is not clear which is substantively better for communities. **The Bodo Community and Ors. v. SPDC** [2014] EWHC 1973 (TCC) [66].
[417] Frynas, *Oil in Nigeria*, 96.
[418] Ibid.
[419] Ibid. Frynas looked at a World Bank assessment of crop prices and compared this assessment to prices outlined by oil companies and the government guidelines.
[420] S.9, Petroleum Regulations 1967.

but no further elaboration is given with respect to providing ways of ensuring that this is monitored, and no detail is given about punitive and restorative measures in the event of misconduct.[421]

The Petroleum Act's (Drilling and Production) Regulations, includes provisions that outline companies' responsibilities toward communities. In particular, Section 17 prevents companies from undertaking activities on land declared to be sacred, under cultivation, part of a village, or a public space without permission from the Minister. Sections 21 and 23 stipulate that licensees will be liable to pay compensation for cutting down productive trees or infringing on fishing rights. Finally, Section 25 requires companies to use up-to-date equipment to prevent oil pollution, but no other directive is given in the event of an accident except for one sentence which states that "where any such pollution has occurred, [the company] shall take prompt steps to control, and if possible, end it."[422]

While provisions of the Petroleum Act's (Drilling and Production) Regulations afford some protections and mechanisms for relief, they also introduce ambiguity on communities' ability to be their own advocates in the event of disagreements. The way in which the Regulations are written suggests that: [423]

a) Companies are meant to monitor their own use of local water consumption, so as to ensure there is still water for local communities to use;[424]
b) Companies with licenses are allowed to enter public and private property so long as they have written permission from the Minister (not the communities themselves);[425]

[421] S.13 and S.67, Petroleum Regulations 1967. S.104 is a catch-all clause that allows for a licence to be revoked in the event that a license holder has infringed upon any of the conditions of the licence or of the Regulations, but provides no further indication of how accidents caused by license holders will be addressed.
[422] S.25, Petroleum (Drilling and Production) Regulations 1969.
[423] Petroleum (Drilling and Production) Regulations 1969.
[424] S. 15(1)(c), Petroleum (Drilling and Production) Regulations 1969.
[425] S. 17(1)(b,c), Petroleum (Drilling and Production) Regulations 1969.

c) To access private land, companies can pay the land owner fair and adequate compensation, as deemed appropriate by the Minister, but it is not explained how compensation may be calculated;[426] and
d) In the event of a dispute, the money to be paid to a private individual can be transferred directly to a State authority without clear indication of what happens to aggrieved landowners.[427]

The Petroleum Act was assessed both in Frynas' 1998 survey and my own. This provides a unique opportunity to ask what has changed in legal practitioners' views since 1998. Both surveys show that legal practitioners (60% in 1998 and 50% in 2014) believe this law somewhat achieves its stated aims.[428] Frynas hypothesised that the Petroleum Act was favourably reviewed because of its focus on commercial issues of interest to the private sector, rather than other pieces of legislation that may be more empowering for communities in oil producing areas, such as the Associated Gas-Reinjection Act or the Federal Environmental Protection Agency Act.[429] This may remain the case.[430] As will be shown in the remainder of this Chapter, laws that provide significant protections for communities, or create systems for oil spill clean-up are perceived to be less effective by survey respondents than commercially focused legislation.

5.5.1 Petroleum Act summary

For communities living in areas where oil production is taking place, the change from being colonial subjects to independent citizens brought little change in terms of mechanisms for environmental justice.[431] The Petroleum Act does little to protect citizens from oil pollution due to the degree to which the act allows government to abdicate its regulatory responsibility towards the oil companies. In other cases of ministerial discretion to protect the environment, the Petroleum Act

[426] S. 17(1)(c)(ii), Petroleum (Drilling and Production) Regulations 1969.
[427] S.17(2), Petroleum (Drilling and Production) Regulations 1969.
[428] Frynas, *Oil in Nigeria,* 142. "Don't know" responses excluded.
[429] Ibid.
[430] Ibid., 143.
[431] Ibid., 82.

plays a proactive role in curbing communities' gateways to environmental justice by creating vague regulatory provisions that may be susceptible to abuse.[432]

In contrast to other pieces of industry legislation, the Petroleum Act's deficiencies are well-recognised by activists and lawmakers.[433] In response to the Act's inadequacies, there have been attempts to pass versions of a "Petroleum Industry Bill" (PIB), an omnibus piece of legislation, for more than 12 years.[434] Drafts of the PIB have been longer than 200 pages, clearly indicating that much has changed in both the sector and in the Government's mentality toward the oil industry since the original legislation was enacted in the late 1960s.

5.6 Land Use Act 1978

The Land Use Act of 1978, then a military decree, introduced a drastic re-imagining of property rights in Nigeria by nationalising all land under government ownership.[435] The primary purpose of the Act was to put Nigerian land into the trust of Governors presiding over the States. This was done at a time when the government was trying to push forward a development agenda that required investors having easier, more affordable, access to land.[436] This decree subverted an array of customary land tenure systems in place across the country and has had

[432] Ibid. Similar to the OPA, the Petroleum Act has provisions discouraging communities from protesting oil company operations with fines and imprisonment (GBP 100 or six months in prison, in 1969). See S.7(4), Petroleum Act 1969.
[433] For example see Nigeria Natural Resource Charter "Benchmarking Exercise Report," http://nigerianrc.org/sites/default/files/NNRC_2014BenchmarkingExerciseReport.pdf (accessed September 1, 2017), 19 and 194.
[434] Overview of the Nigerian Petroleum Industry Bill, *Hogan Lovells,* http://www.hoganlovellsafrica.com/_uploads/Publications/Africa_September_2012_newsletter_-_Nigerian_Petroleum_Industry_Bill.pdf (accessed August 10, 2017). Most recently, part of the Petroleum Industry Bill (PIB) has been passed by the Senate but is stalled in the House (as of September 2017). See PM News. "NASS tasked on passage of other segments of PIGB before December." July 26, 2017, https://www.pmnewsnigeria.com/2017/07/26/nass-tasked-passage-segments-pigb/ (August 10, 2017); and "Petroleum Industry Governance Bill," *United Capital Research*, http://www.unitedcapitalplcgroup.com/wp-content/uploads/2017/05/The-Petroleum-Industry-Governance-Bill-2017.pdf (accessed September 1, 2017).
[435] Land Use Act 1978 (Cap L4 *Laws of the Federation of Nigeria* 2004).
Also see Ehi Oshio, "The Indigenous Land Tenure and Nationalization of Land in Nigeria," *Boston College Third World Law Journal* 10, no. 1 (1990): 43-62.
[436] Kekong Bisong, *Restorative Justice for Niger Delta* (Antwerpen: Maklu Publishers, 2009).

a lasting effect on communities' ability to secure land rights as well as fair compensation for expropriation of land by government.[437]

Provisions of the Land Use Act dictate the transfer of land rights to Governors to be "held in trust and administered for the use and common benefit of all Nigerians."[438] It also establishes that State bodies – Land Use and Allocation Committees – are to handle the relocation of displaced persons, disputes, and land allocation. Inhabitants of land, in the new system constituted by the Act, are no longer owners of their land; rather they have a "right of occupancy."[439]

The Act also clearly sets out instances where the Government may revoke a right to occupancy. The list of instances is heavily dominated by "overriding public interest," where oil and gas exploitation features prominently.[440] Section 29 includes a provision for compensation for those occupying land that has been revoked for oil exploitation. The section stipulates that compensation can be payable to:

> (a) to the community; or
> (b) to the chief or leader of the community to be disposed of by him for the benefit of the community in accordance with the applicable customary law; or
> (c) into some fund specified by the Governor for the purpose of being utilized or applied for the benefit of the community.[441]

The right to occupancy conferred on a land holder, either formally in urban settings or through customary practice in rural settings, affords the occupier the right to use the land and make improvements upon it. This means that so long as an individual or community has the right to occupancy, they are entitled to the right

[437] Frynas, *Oil in Nigeria,* 77.
[438] S.1, Land Use Act 1978.
[439] S.5, Land Use Act 1978. Frynas notes (p.79) that despite *de jure* changes to Nigeria's land tenure regime, many rural communities have continued with traditional customary land practices. See Frynas, *Oil in Nigeria,* 71-80 for more on pre-1978 land tenure regimes in Nigeria.
[440] S.28, Land Use Act 1978.
[441] S.29, Land Use Act 1978.

of free enjoyment of the land and compensation for any damage that may be caused to their improvements upon it through negligence or misconduct of others. The Act is less favourable in the event of expropriation, whereby fair compensation is not guaranteed, nor is redress easily possible. This means that so long as an individual or community retains the right to occupy land, the Land Use Act has not materially affected their ability to use the most common torts employed in oil pollution claims to seek damages.[442]

The Act's change to land ownership affected how oil companies operated in the Niger Delta. Before the Land Use Act of 1978, oil companies were required, through the Petroleum Act, to formally obtain a license and pay rent to the Government, while also working with communities to agree on prices for purchasing, either through rent or lease, land from which to launch their operations to explore for and extract oil.[443] With the promulgation of the Land Use Act, the government could more easily seize land deemed to be in the public interest without providing adequate compensation.

Despite the powers afforded to land holders in the Oil Pipelines Act (see Section 5.3), the Land Use Act created a new negotiation dynamic which explicitly excluded communities. Companies were to now negotiate with State Governors on behalf of their citizens.[444] This fundamental change in the way in which oil operations were negotiated in oil producing areas fuelled the beginnings of regional discontent and early signs that access to environmental justice in the age of oil exploitation would not be guaranteed.[445] According to Ako, "the Act legitimized the appropriation of land in the [Niger Delta]."[446]

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[442] As will be seen in Chapter 6, Section 6.5, the use of nuisance may be the only tort affected by the way in which the Land Use Act is drafted, though even that assertion is not well tested in the case law.
[443] Frynas, *Oil in Nigeria, 7*5. Frynas states that, under special circumstances, the government could expropriate property.
[444] S.12, Land Use Act 1978.
[445] Rhuks T Ako, "Nigeria's Land Use Act: An Anti-Thesis to Environmental Justice," *Journal of African Law* 53, no. 2 (2009), 289-304.
[446] Ako, 296

When the Land Use Act was first drafted, it was a military decree under the Obasanjo administration. At the time, Major General Obasanjo was preparing the country for democratic transition to the short-lived Second Republic.[447] During this period in Nigeria's history, environmental justice was not yet in the national consciousness. Rather, government was still focused on how to economically thrive as an independent state.[448] Government officials in the early 1970s cited the difficulty in acquiring land for development projects as a hindrance to national development.[449] There were legal mechanisms available to expropriate land, but government officials complained that it was too expensive to either expropriate or for developers to rent directly, particularly in urban centres.[450] In response, a Land Use Panel was tasked with investigating the land tenure systems across the country and provide recommendations on ways to consolidate the range of regimes in place.[451]

A majority report that came out of the Panel advised government against nationalising land. However, a minority endorsed the idea, citing the land tenure system used by some states in the north of the country as precedent.[452] The minority report was chosen and has ever since dictated the way in which land is allocated in Nigeria. Ako suggests the decision to use the minority report was politically and financially motivated. He argues that "A salient inference that may be drawn from the adoption of the minority report to nationalize land tenure as practised in northern Nigeria is that it would benefit the major ethnic groups that controlled the nation's political power."[453] Shortly after its dissemination as a Decree, the Act was annexed to the 1979 Constitution and subsequently the 1999 Constitution without consultation.[454]

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[447] Ibid., 294.
[448] Indeed, this was only the beginning of the EJ movement in the United States, see Chapter 2.
[449] Ako, "Nigeria's Land Use Act," 294.
[450] Ibid.
[451] Ibid.
[452] Ibid.,295.
[453] Ibid.
[454] S.315(5), Constitution of the Federal Republic of Nigeria 1999 [Cap VIII]. See Section 5.10 for more on how the Land Use Act came to be annexed to the Constitution.

Frynas' respondents in the late nineties reported that the Land Use Act was the most enforced piece of legislation relating to the oil sector.[455] The 2014 survey respondents also found the Land Use Act to be effective relative to other legislation; 54% stated that the legislation somewhat achieved its stated aims. A possible reason for this is that the legislation, similar to the Petroleum Act, had been shaped to suit corporate interests, making it in the government and the private sector's interest to see that its provisions are enforced. This explanation is given further credence by the fact that a combined 63% of respondents in 2014 found that the Act was "minimally sufficient" or "insufficient" in providing mechanisms for redress, meaning that almost as many respondents think it is effective as those that do not think the Act provides mechanisms for redress.

The Land Use Act has had a severe impact on the way in which land tenure is secured and expropriation is compensated for in Nigeria. It has removed certainty and security from communities that have long held customary land rights in situations where community priorities conflict with those of government or large oil companies. However, the Land Use Act has not had a dramatic impact on the use of environmental torts in the event of pollution or other oil industry related harms. In the cases studied in Chapter 6, the Land Use Act was never cited as a reason for a tort claim being invalid. This is due to the fact that with rights to occupancy, which supplanted previous ownerships structures, have come rights to seek damages for improvements upon the land that may have been harmed by oil sector activity. In a majority of cases researched, damages sought by communities were tied to specific assets *on* the land, such as crops, fisheries, and/or buildings, rather than the land itself.

5.6.1 Land Use Act summary

In Nigeria, the Land Use Act provides certainty to investors, subverting informal

[455] Thirty four percent stated it was effectively enforced and 50% stated it was partially enforced. See Frynas, *Oil in Nigeria,* 142.

land tenure regimes. In the process, communities are bypassed entirely.[456] The Land Use Act raises concerns for communities who have historically inhabited areas on or near oil deposits and the security of their historic tenure. Ako has gone so far to say that the Act is "antithetical to environmental justice," particularly for those who live in the Niger Delta.[457] While the Act has proven detrimental for inhabitants of the oil producing region to assert their land rights ~~in some ways~~, it has largely left intact access to remedies available under the law of tort, as is shown in the analysis of the case law concerned with damage caused by oil pollution: in none of the reported judgments were communities denied the right to sue for damages to their assets on the basis of any infirmity in their title to or ownership of land. As such, the Land Use Act of 1978 is one of the most significant challenges for inhabitants of the Delta seeking justice for expropriation of their land for use in oil sector activities and other activities, but it has had little impact for victims of oil pollution seeking damages for environmental torts.[458]

5.7 The Associated Gas-Reinjection Act of 1979

The Associated Gas Re-injection Act of 1979 (AGRA) is the key piece of legislation that addresses an oil industry-specific pollution challenge, gas flaring.[459] The Act is meant to curb the toxic and hazardous practice of gas flaring by setting out a framework indicating how associated gas should be used, along with punitive measures for oil field operators that do not follow these practices.[460] Unlike other pieces of legislation governing the sector in Nigeria, the sole purpose of the AGRA is to provide some environmental relief from one of the most hazardous practices in the sector.

[456]See: "The Financial Risks of Insecure Land Tenure," *The Munden Project,* http://rightsandresources.org/wp-content/uploads/2014/01/doc_5715.pdf (accessed July 27, 2017); Frynas, *Oil in Nigeria,* 71.
[457] Ako, "Nigeria's Land Use Act," 303.
[458] Ibid., 290-291.
[459] Associated Gas Re-injection Act 1979 (Cap A25 *Laws of the Federation of Nigeria* 2004).
[460] For a brief explanation of the practice of gas flaring, see Appendix I.

When the Act passed in 1979, it included a target – by January 1984, there would no more gas flaring in Nigeria. The initial penalty for non-compliance with the deadline was the forfeiture of concessions where flaring took place.[461] It was not long, however, before the Federal Government realised that their extreme approach to curbing flaring would fail. Factors contributing to AGRA's failure may have been due to the fact that the measures were so severe that oil companies rejected them as illegitimate, or because AGRA allows for generous ministerial exemptions for flaring.[462]

In 1985, with the initial deadline to cease all flaring passed, the Minister of Petroleum introduced regulations to make the legislation more effective, such as financial penalties for gas flaring past the legislated stop date.[463] The focus on reforms has, until recently, been on punitive measures, rather than providing incentives to change behaviour.[464] Because the scale of the sector is so vast, and fines are so small in comparison, the gas flaring reduction reform agenda has struggled to resonate with the oil industry.[465] This is most clearly evidenced by the fact that even though flaring fines are considered to be affordable by oil companies, the Department of Petroleum Resources (DPR), has made a decision to stop collecting what is owed to them altogether.[466] Recently, the head of DPR said that AGRA had not achieved much and the regulator was now working on finding new ways to incentivise companies to stop flaring, primarily through creating a commercially viable domestic market for gas.[467]

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[461] S.4(1), Associated Gas Re-injection Act 1979.
[462] S. 3(2), Associated Gas Re-injection Act 1979.
[463] Orji, "An appraisal of the legal frameworks," 332.
[464] "Nigeria's Flaring Reduction Target," *The World Bank,* http://www.worldbank.org/en/news/feature/2017/03/10/nigerias-flaring-reduction-target-2020 (accessed May 2, 2017).
[465] Orji, "An appraisal of the legal frameworks," 334.
[466] "Why has the DPR decided to drop gas flare fines?," *Stakeholder Democracy Network,* http://www.stakeholderdemocracy.org/why-has-the-dpr-decided-to-drop-gas-flare-fines/ (accessed August 12, 2017).
[467] "DPR Drops Gas Flaring Sanctions to Woo Investors," *Business Day,* http://www.aitonline.tv/post-dpr_drops_gas_flaring_sanctions_to_woo_investors (accessed August 12, 2017).

While the legislation is admirable in it aspirations to reduce flaring significantly, it has failed to do so in practice. Nearly two thirds of Frynas' respondents found AGRA to be a failure, with just 35% believing that the legislation was even partially being enforced.[468] My 2014 survey found that respondents' views of AGRA were also negative; they were significantly more critical than the respondents of 15 years ago. In 2014, in line with popular criticism of the legislation today, no survey respondents believed that the Act achieves its aims.[469] Respondents were similarly critical of the legislation's provision for redress mechanisms, with 56% reporting that the law's redress mechanisms were insufficient.

5.7.1 AGRA Summary

Thirty years after its introduction, AGRA remains a failure, primarily due to misaligned incentives. As cited in a 2009 report, no flaring sites have ever been closed since the introduction of the AGRA.[470] The penalties on flaring companies were never high enough to deter the practice. Rather perversely, the legislation has put a reasonable price tag on flaring, as fines are much more reasonable than the cost of retrofitting old installations with new equipment to use the gas in other ways.[471] Even in the event of being fined, the Department of Petroleum Resources has decided to no longer collect fines altogether in an effort to attract further investment to the sector. [472]

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[468] Frynas, *Oil in Nigeria,* 142.
[469] Daniel Adugbo, "Up in flames: How Nigeria lost N223bn to gas flaring," *Daily Trust,* Oct 16, 2016 http://www.dailytrust.com.ng/news/general/up-in-flames-how-nigeria-lost-n223bn-to-gas-flaring/166995.html (accessed August 12, 2017).
[470] Philip E. Agbonifo, "The Dilemma in Nigerian Petroleum Industry Regulations and Its Socioeconomic Impact on Rural Communities in the Niger Delta," *International Journal of Management Science* 2, no. 5 (2015): 84-92. This has begun to change in recent years with an increase in financial incentives for oil companies to reduce flaring and sell the associated gas on a domestic market.
[471] As of November 2015, penalties for gas flaring in Nigeria were USD 3.50 per 1000 standard cubic feet.
[472] The Ministry of Petroleum Resources and DPR will not collect the outstanding fines, worth up to USD 945 million because there are concerns that companies will lash out at government and threaten to take their investment elsewhere. See EITI "2014 Oil and Gas Industry Audit Report" https://eiti.org/sites/default/files/documents/neiti-oil-gas-report-2014-full-report-301216.pdf (accessed September 1, 2017),131-132; and Stakeholder Democracy Network, "Why Has the DPR Decided to Drop Gas Flare Fines?" http://www.stakeholderdemocracy.org/why-has-the-dpr-decided-to-drop-gas-flare-fines (accessed September 5, 2017).

In spite of legislation, some industry experts believe that the attitude toward flaring may be changing due to more conducive commercial conditions for producing gas for domestic use.[473] One key informant, a commercial lawyer specialising in Nigeria's gas sector, told me that he believed that providing incentives for the sector and requiring all new operators to have an integrated oil and gas field development plan is the most promising way forward to curb flaring, rather than having punitive measures in place that are meant to punish oil sector actors for misconduct. This informant described this course of action as follows: "Of course, we still have a long way to go, but at least now more than ever we have a better combination of initiatives to actually address gas flaring beyond just mandating that flares go down."[474]

5.8 The Harmful Waste Act 1988

The Harmful Waste Act of 1988 is described as "An Act to prohibit the carrying, depositing and dumping of harmful waste on any land, territorial waters and matters relating thereto."[475] While there could theoretically be applications of the law to the oil sector, it was drafted as a direct response to the Koko spill, where an Italian company dumped barrels of toxic waste into a port in Nigeria.[476]

The Koko incident came at a time when European and American standards for dumping toxic waste were becoming stricter and more expensive to abide by domestically. To save money, Global North companies began brokering deals with countries in West Africa to dump toxic waste there.[477] The spill in Koko, an area

[473] "Nigeria's Flaring Reduction Target," *The World Bank.*
[474] Interview L1L4, July 23, 2014.
[475] Harmful Waste Act 1988 (Cap H1 *Laws of the Federation of Nigeria* 2004).
[476] James Brooke, "Waste Dumpers Turning to West Africa," *The New York Times,* July 17, 1988, http://www.nytimes.com/1988/07/17/world/waste-dumpers-turning-to-west-africa.html?pagewanted=all (accessed August 10, 2017) and S. Gozie Ogbodo, "Environmental Protection in Nigeria: Two Decades After the Koko Incident," *Annual Survey of International & Comparative Law* 15, no. 1 (2009): 1-18. The definition for harmful waste in the Act would easily include crude oil, as it is an "injurious, poisonous, toxic or noxious substance."
[477] Ogbodo, "Environmental Protection in Nigeria."

in the Niger Delta, caused public outrage in Nigeria. A foreign company had abused its position to purposely pollute and the government of the Babangida military regime, initially complicit in the toxic waste dumping, was forced to respond.[478]

The incident resulted in the drafting of Nigeria's first comprehensive environmental policy, as well as the Harmful Waste (Criminal Provisions) Act.[479] While there were significant oil spills occurring in similar areas during the timeframe, the Koko waste dumping occurrence provided an unexpected impetus to revisit scarce environmental regulation in the country.

The incident's disconnect to the oil industry was both a blessing and a curse for environmental policy moving forward. As a blessing, it forced government to formalise their approach to environmental regulation for the first time. They did this quickly for two reasons: a) there was public pressure to respond to the Koko spill and b) the Act did not take direct aim at oil companies, a group that generally does not shy from voicing opposition to legislation meant to regulate their activity.[480] However, without the oil industry explicitly named in the legislation, it is unclear whether the oil industry ever felt pressure to comply with the Act's provisions.

The drafters of the Act took the Koko incident seriously. The Act clearly states that diplomatic immunities would not extend to anyone connected with a harmful waste dumping crime.[481] The Act also provides for life imprisonment for anyone found to be guilty of committing a dumping crime.[482] Beyond punishment for individuals, the Act emphasises that body corporates, whether by consent or neglect, can also

[478] Brooke, "Waste Dumpers Turning to West Africa."
[479] Ogbodo, "Environmental Protection in Nigeria."
[480] "Oil firms in Nigeria lobby for 2010 gas-flaring deadline," *Alexander's Gas and oil Connections,* January 21, 20008, http://www.gasandoil.com/news/africa/2f4264abed014fed72d581d8d2e8fdac (accessed August 10, 2017).
[481] S.9, Harmful Waste Act 1988.
[482] S.6, Harmful Waste Act 1988.

be found guilty of a crime under the Act.[483] While the punishment for offenders is strict, the law does not provide a framework for compensation to any victims of harmful waste dumping, nor does it indicate how harmful waste pollution would be cleaned up.

Respondents have not looked favourably on this Act both in terms of effectiveness and in terms of providing mechanisms for redress. Only 4% of my survey respondents felt that the law achieves its stated aims.[484] Sixty three percent found that the law provided only minimally sufficient or insufficient mechanisms for redress.

5.8.1 Harmful Waste Act summary

The Act is a case study in how government may use the swift enactment of legislation as a political tool to quell public outrage, yet there may be little interest in enforcing legislation after the fact. Despite its potential to act as mechanism to prevent pollution, the Harmful Waste Ac fails to enforce provisions for environmental protection or provide gateways to environmental justice.

5.9 Environmental Impact Assessment Act 1992

Environmental Impact Assessment (EIA) has been an important tool for environmental governance since their first introduction in the United States in the late sixties under the US Federal National Environmental Policy Act.[485] EIA, in all its forms across a wide range of jurisdictions, is meant to ensure that the public have an opportunity to comment on planned projects that might impact on the environment. It is also meant to ensure that policy-makers have the necessary evidence available to make decisions regarding these projects.[486] Despite the many

[483] S.7, Harmful Waste Act 1988.
[484] This was not one of the law's included in Frynas' original survey, and so results are only available for 2014.
[485] Jane Holder and Donald McGillivray, "Taking Stock," in *Taking Stock of Environmental Assessment: Law, Policy and Practice*, Jane Holder and Donald McGillivray, eds. London: Routledge-Cavendish, 2008.
[486] Ibid, 4.

forms that EIAs may take, at their core they are a tool "to secure participation, encourage information exchange, foster partnerships, and joint responsibility;" environmental governance in line with the principles of participation articulated in both the Rio Declaration and the Aarhus Convention.[487]

Despite EIAs' often clear procedures for gathering evidence, collecting public opinion, and making detailed arrangements for environmental mitigation, the actual decision-making around proposed new projects is a larger process fraught with complexity. According to Holder and McGillivray, examining the use and effectiveness of EIAs, often the planning of projects is a process where the social, legal, scientific, economic and political are all vying for pride of place in decision-makers' minds.[488] In the struggle for prominence, concerns about environmental impact itself often loose out to more pressing concerns.[489] While environmental impact assessment can change decision-makers' minds regarding a given project, EIAs were never intended to derail development or the execution of large projects. Rather, its framers intended for the environmental management tool to provide a process for awareness-raising and consultation with affected populations, while also ensuring full information at the time a decision was taken and sufficient mitigation measures were developed before potentially detrimental projects commenced.[490]

In the case of Sub-Saharan Africa, Kakonge shows that EIA practice is varied, ranging from the complex and transparent (in jurisdictions such as the Seychelles) to basic and opaque (such as in Botswana and Angola). In other countries in the region, EIA processes are deemed incomplete or reserved for only certain sectors

[487] Holder and McGillivray*, "*Taking Stock," in *Taking Stock,* 5.
[488] Ibid.
[489] Ibid, 15.
[490] In fact, 'empirical evidence from the UK in the mid-1990s suggests that 'EIA was not determinative, but gave planners added confidence that their consideration of the proposals was sufficiently well informed.'Carys Jones *et al, "*Environmental Assessment: Dominant or Dormant?" in *Taking Stock*, 31.

(such as Nigeria, Tanzania, and Mali).[491] Kakonge's review paints a region with poor environmental management practices, which in many cases start at the EIA stage of project development. In addition to the challenges presented by Holder, McGillvary and others, Kakonge identifies a range of Sub Saharan Africa-specific obstacles to EIA's being used as a tool for public participation and for decision-making by government officials. Specifically, he notes that governments' prior relationships with companies seeking project approval, poor capacity to scrutinise EIAs prepared by those companies, and poor consultation practices are all contributing factors to poor use and enforcement of EIA findings in the region.[492]

Nigeria's EIA Act was introduced in the early 1990s and legislates that all projects that will likely have a significant impact on the environment must first conduct an environmental impact assessment and have their project approved.[493] According to the Act, these assessments are meant to provide evidence on the potential impacts of proposed activities before a decision is made by government authorities.[494]

This Act should be particularly important for the oil sector in Nigeria, where activity takes place in close proximity to communities that may be directly affected by the nature of a given project.[495] The remainder of this section will analyse the features of the legislation as they pertain to oil and gas sector development, and then discuss the barriers to its use as a tool for environmental justice. While my

[491] John O. Kakonge, "Environmental Planning in Sub-Saharan Africa: Environmental Impact Assessment at the Crossroads." Working paper no. 9. School of Forestry and Environmental Studies, Yale University. (2006) Yale Publishing Services Center, 10-11.
[492] Ibid, 16-17.
[493] Environmental Impact Assessment Act 1992 (CAP. E12 *Laws of the Federation of Nigeria* 2004). Kakonge notes that Nigeria's EIA Law 1992 was in part a response to Agenda 21 and the Rio Declaration "Environmental Planning in Sub-Saharan Africa", 7.
[494] S.1(a), Environmental Impact Assessment Act 1992; Stephen Jay, Carys Jones, , Paul Slinn, Christopher Wood," Environmental impact assessment: Retrospect and prospect," *Environmental Impact Assessment Review* 27, no. 4 (2007): 287-300.
[495] The Act includes a Schedule of activities that require a mandatory EIA. The list includes projects that are significant in terms of their potential impact on both the environment and the communities that depend on it for their livelihoods and health. Section 12 of the Schedule includes Petroleum activities, including oil and gas field development, pipeline construction, oil processing and storage, and oil refining.

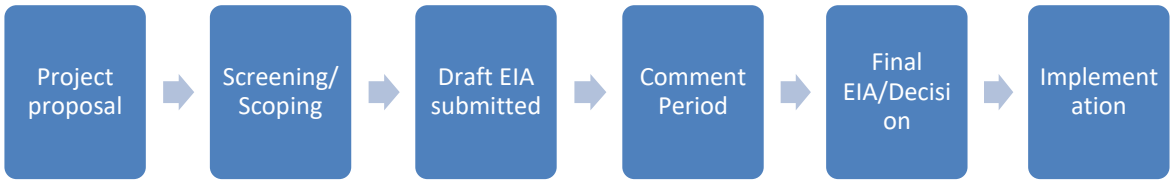
analysis finds that there are deficiencies in the legislation, it also recognises that some of these challenges are not unique to the Nigerian context and are indeed challenges faced by EIAs across the world.[496]

The enactment of the legislation in 1992 means that all oil and gas projects after this period have been required to submit a mandatory study report, and face public scrutiny.[497] The Act provides for a formalised and open EIA process that allows for interested parties to request the report, and ensures that National Environmental Standards and Regulations Enforcement Agency (formerly the Federal Environmental Protection Agency) publishes the report in a way that targets people who may be interested in its findings.[498] The process also requires a level of public participation at the decision-making stage, though Ingelson and Nwapi identify a range of constraints to public concerns meaningfully informing the outcome of an EIA process in Nigeria.[499]

Ingelson and Nwapi have noted that overlapping institutional arrangements for governance have complicated the EIA process by introducing a tension between the Ministry of Environment and DPR. Both institutions claim responsibility for reviewing and approving EIAs related to oil sector activity, and so industry actors are left trying to appease both institutions ahead of starting new projects.[500]

[496] For in-depth analysis of the EIA Act, see Ingelson and Nwapi. "Environmental Impact Assessment Process for Oil, Gas and Mining Projects in Nigeria." Also see Holder and McGillivray, *Taking Stock*.
[497] S.23, Schedule(12), Environmental Impact Assessment Act 1992.
[498] S.9, S.25(1) stipulates the same requirement specifically for "mandatory study reports," which include EIA's related to the oil sector.
[499] Ingelson and Nwapi. "Environmental Impact Assessment Process for Oil, Gas and Mining Projects in Nigeria: A Critical Analysis," 17.
[500] Ibid., 20.

Figure 2: A stylised account of the EIA process, according to the EIA Act[501]



The Act includes punitive measures for those that do not conduct, and have approved, an EIA before beginning an activity that requires one.[502] There are also penalties for not fully complying with the findings of the report. However, the penalties for not completing an EIA are small (between approximately USD 400 and USD 6,000) when compared with the potential money to be made on a controversial project.[503]

In the event that a party finds fault with the way in which an EIA has been conducted or any other matter related to the provisions of the EIA Act, they may seek a judicial review under Section 57 of the Act. S.57, headed 'Defect in form or technical irregularity,' provides for judicial review in connection with anything done under the Act unless the grounds for review are solely based on a technical irregularity.[504] Presently, while there is scope for judicial review in the Nigerian context, the mechanism under section 57 has not as yet been successfully used to challenge administrative decisions related to EIA processes.

In the use of penalties for non-compliance - rather than the provision of injunctive relief or revoking permits - , Nigerian law diverges, and could learn, from the approach taken in the UK. [505] In the UK, for example, if a company does not comply with the EIA process, the project would not be allowed to proceed, and any other

[501] Illustrated based on description from Ingelson and Nwapi, "Environmental Impact Assessment Process."
[502] S.62, Environmental Impact Assessment Act 1992.
[503] Orji, "An appraisal of the legal frameworks," 336.
[504] S.57, Environmental Impact Assessment Act 1992.
[505] Town and Country Planning (Environmental Impact Assessment) Regulations 2017, No. 571 (United Kingdom), S.11(8) and Part 8.

permissions given associated with the project may be invalidated.[506] In the Nigerian context, invalidating any permission given without a prior EIA would provide a stronger remedy than the one currently available, especially if coupled with a more effective judicial review mechanism. [507]

While the Act technically advances the state's ability to anticipate and mitigate the environmental impact of a project, evidence suggests that it often fails to enforce the requirement for an EIA to be carried out.[508] This was clearly the case in **Douglas v. SPDC,** where the claimant, a prominent activist for A2EJ in the Niger Delta, had his case against Shell, the Attorney General of Nigeria, and NNPC struck out by the trial court for lack of standing. Douglas had requested that Shell (SPDC) comply with the EIA Act before moving forward with a planned liquefied natural gas project. The refusal of Douglas' *locus standi* was consistent with the courts' pattern of restrictive reading of provisions for standing.[509] Etemire's in-depth analysis of the Act highlights the statutory challenges that would arise in court for a private individual who wants to bring a claim against a company due to non-compliance with an EIA. [510] He also notes that EIA-related claims are precluded from the services offered by Nigeria's legal aid service, one of the tools a disenfranchised individual would otherwise have available in the case of an expensive and lengthy legal undertaking.[511]

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[506] Ibid.

[507] While the above may provide a practicable solution for addressing EIA non-compliance from a European or American perspective, a locally driven solution may require further nuance. Carys, et al emphasise that "Local context is very important in determining how improvements in EA effectiveness can be achieved." Jones *et al* in *Taking Stock,* Holder and McGillivray eds., 39.

[508] Ibid. For more, see Etemire's extensive critique of the EIA Act, as compared to international standards in the 1998 Aarhus Convention. Uzuazo Etemire, *Law and Practice on Public Participation in Environmental Matters: The Nigerian Example in Transnational Comparative Perspective* (Oxon: Routledge, 2016). See also Ingelson and Nwapi, "Environmental Impact Assessment Process."

[509] Douglas later appealed this decision. His case was ultimately remitted back to the High Court to be heard again. See Section 6.4.2.1 for more on this case.

[510] Etemire, *Law and Practice on Public Participation in Environmental Matters,* 226.

[511] Ibid.

The **Douglas v. SPDC** case highlights a persistent challenge with EIAs, both in the Nigerian context, but also more broadly. The international community and a wide range of sovereign governments have determined that EIAs should be an important part of considering any project that could alter the natural environment. There is, however, limited evidence to suggest EIAs actually sway decision-makers or businesses to execute projects differently.[512] In Nigeria, only 27% of survey respondents believe the EIA Act somewhat achieves its stated aims, while a similar amount believes it provides somewhat sufficient mechanisms for redress. This is consistent with research conducted in the 1990s in the UK that suggests decision-makers did not rely on EIAs to ultimately take decisions regarding proposed projects.[513]

Historical factors have likely contributed to the ineffectiveness of the EIA Act to date. It was enacted in 1992, four years after the Koko dumping incident, discussed above.[514] However, as discussed in section 5.8 on the Harmful Waste Act, the Koko incident incited a political response rather than a substantive legal response. Not long after the EIA Act's enactment, General Abacha came into power and commanded the country in a top-down, dictatorial governance regime that saw the hanging of environmental activists, including Ken Saro Wiwa, in 1995.[515] While the EIA Act was still technically in force during this time, it is unlikely that EIA report findings, if conducted at all, were challenged.

5.9.1 EIA Act Summary

On paper, the EIA Act opened a gateway for public participation in oil production activities more than ever before. It compelled companies and the government to

[512] Jay et al, "Environmental impact assessment," 290, 291.
[513] Jones *et al* in *Taking Stock,* Holder and McGillivray eds., 31.
[514] The Act also came into force six years before the Aarhus Convention (Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters). The Convention significantly changed the international view of community agency in decision-making. "The Aarhus Convention," *The European Commission*, http://ec.europa.eu/environment/aarhus/ (accessed August 10, 2017).
[515] "The Death of Ken Saro-Wiwa," *Arts Activism Education Research*, http://platformlondon.org/background/the-death-of-ken-saro-wiwa/ (accessed August 10, 2017).

consider the effects of development activities on the environment and communities living nearby, and to publish those findings. In order for the EIA Act to be effective, it would require Ministries of Petroleum and Environment to be proactive in scrutinising EIAs and ensure that there are sufficient and enforceable punitive measures in the event of non-compliance. The historical imperative for economic development in Nigeria has meant that this proactive role has often been unfulfilled, or in the event of an EIA being conducted, decision-makers have prioritised other factors, such as political and economic drivers to make their decision. According to the global research on EIAs, discussed above, this prioritisation is not uncommon when policymakers face competing political and economic demands in decision-making.

5.10 The 1999 Constitution

The 1999 Constitution represents an important fault line for analysis. With the promulgation of the 1999 Constitution, Nigeria entered its longest democratic era since independence. The Constitution itself, however, shares similarities with previous iterations, all of which were developed by non-democratic regimes (colonial or military) and had, in part, been suspended during periods of military rule.[516] Like its predecessors, the 1999 Constitution has proven to be more of a compromise with previous regimes rather than a contract between government and its citizens.[517] Nigerian academic Ebeku says of the 1999 Constitution: "[it] was not made by the people as it proclaims, but created by a military dictatorship with the collaboration of some political elites."[518]

[516] The 1960 Constitution from Independence, and the Constitution of the First Republic of Nigeria in 1963 both employed the Westminster Model of governance. The 1979 Constitution was a turning point, where the Legislative and Executive were separated, modelled after the United States branches of government, including a bicameral legislature. The "Executive Presidency" was seen as more palatable to military leadership than the Westminster preference for a Prime Minister. James S. Read, "Nigeria's New Constitution for 1992: The Third Republic," *Journal of African Law* 35 (1991): 174-193.
[517] Tunde I Ogowewo, "Why the Judicial Annulment of the Constitution of 1999 Is Imperative for the Survival of Nigeria's Democracy." *Journal of African Law* 44, no. 2 (October 2000): 135–66.
[518] Kaniye S. A. Ebeku, "Making a Democratic and Legitimate Constitution in Nigeria: Lessons from Uganda," *Sri Lanka Journal of International Law* 17 (2005): 183-232.

Never has a constitution in Nigeria been born of, or enacted by, the people.[519] This is clear as Ogowewo outlines the iterations of the Nigerian Constitution from 1914 to 1999.[520] From 1914 to 1960 the British Government drafted constitutions to govern Nigeria, then a British colony. With the exception of the 1951 MacPherson Constitution, all of the constitutions drafted during this period were done so without consultation of Nigerian citizens.[521] The 1963 Constitution of the First Republic of Nigeria was decided in one day by a few powerful men.[522] While it represented an opportunity to create a constitution born out of a consultative process, the 1963 Constitution simply adopted the imperial version that came before it, incorporating minor edits to account for the country's independence.[523]

In 1966, Nigeria experienced its first military coup, which suspended the Constitution for thirteen years.[524] A new Constitution, created in 1979, ushered in Nigeria's second democratic republic and provided hope that the country's leadership might take a constituent-led approach to constitutionalism. The 1979 Constitution is regarded as the most consultative Constitution in the country's history, with most of the technical input and drafting proffered by a well-regarded group of experts.[525] However, as Ogowewo notes, "[t]he process by which a Constitution is fashioned is determinative of the contents of that Constitution."[526] Thus, in spite of the broadly representative consultation and expert drafting of the

[519] Ogowewo, "Why the Judicial Annulment of the Constitution of 1999 Is Imperative for the Survival of Nigeria's Democracy," 135–66.
[520] Ibid.
[521] Ibid.
[522] Ibid.
[523] Ibid.
[524] Ibid.
[525] Almost fifty experts were selected as part of a drafting committee, who then presented the Constitutional draft to a constituent assembly comprised of more than 200 elected members that were broadly representative of the country's regional diversity, including some military representation. See Ogowewo, "Why the Judicial Annulment of the Constitution of 1999 Is Imperative for the Survival of Nigeria's Democracy," 140 and Shola Omotola, "Elections and Democratic Transition in Nigeria under the Fourth Republic," *African Affairs* 109, no. 437 (October 1, 2010): 535–53.
[526] Ogowewo, "Why the Judicial Annulment of the Constitution of 1999 Is Imperative for the Survival of Nigeria's Democracy," 138.

Constitution, the military government still had final review and input on the document before it was enacted.[527] This resulted in the addition of some sections that were not vetted by the expert committee or approved by the representative, elected, constituent assembly. One such amendment was the codifying in the Constitution the validity of the Land Use Act. As I have shown in Section 5.6, the Land Use Act is seen as one of the most detrimental pieces of legislation in Nigeria for access to environmental justice for those living in the Niger Delta.[528]

In 1983, the Constitution of 1979 was suspended by a coup, led by current Nigerian President Buhari, then Major General of the Nigerian military. On and off from 1983 until the June 1998, the 1979 Constitution remained partially in force, with the suspension of its supremacy clause.[529] This partial enforcement left the judiciary intact, but unable to fulfill its mandate as an independent arbiter of disputes. The judiciary was further sidelined by parallel military tribunals set up to address cases considered to be contentious by the military regime.[530]

On the 9th of June 1998, General Abubakar repealed the 1979 Constitution and introduced the 1999 Constitution – an even less consultative document. The 1999 Constitution purportedly only updated the 1979 Constitution to reflect the current Nigerian context. Ogowewo notes, however, that if this were indeed the case, military leadership would have simply amended the 1979 Constitution, rather than establishing a new governance regime that clears them of any culpability in overthrowing the previous democratic regime.[531] The following section will discuss two particular dimensions of the 1999 Constitution and how the constitution-making process created the pre-conditions for a deficient founding document.

[527] Read, "The New Constitution of Nigeria," 146.
[528] Ogowewo, "Why the Judicial Annulment of the Constitution of 1999 Is Imperative for the Survival of Nigeria's Democracy," 140.
[529] Ibid., 141.
[530] Okechukwu Oko, "Lawyers in Chains: Restrictions on Human Rights Advocacy under Nigeria's Military Regimes," *Harvard Human Rights Journal* 10 (1997): 257–90; 267-275.
[531] Ogowewo, "Why the Judicial Annulment of the Constitution of 1999 Is Imperative for the Survival of Nigeria's Democracy," 145.

5.10.1 Chapter II and Chapter IV – An Evolution of Principles and Rights

Here, I discuss the main Chapters relevant to the present research. In particular, I cover Chapter II (Fundamental Objectives and directive Principles of State Policy) and Chapter IV (Fundamental Rights).[532] As much of the 1999 Constitution is based on the 1979 Constitution, discussed above, both are referenced here.

Fundamental Rights were first enshrined in Nigerian law at independence, with the 1960 and then the 1963 Constitutions. According to Akpan, the inclusion of the rights provisions in the first instance stemmed from recommendations by the Willink Commission, a British Colonial Administration response to concerns from minority groups in Nigeria about their rights following independence.[533]

The 1979 and the 1999 Constitutions also included these fundamental rights in Chapter IV, which provide for all of the rights enshrined in the European Convention on Human Rights.[534] The rights covered by this Chapter also closely mirror those of the International Covenant Civil and Political Rights, which Nigeria ratified in July 1993. (See Figure 3).[535] Section 46 of the 1999 Constitution, like Section 42 of the 1979 Constitution, make these rights justiciable in State High Courts.

[532] Chapter I covers general provisions, including the supremacy clause (Section 1), Chapter III covers citizenship, Chapter V covers the legislature, and Chapter VI covers the Executive, Chapter VII covers the judiciary. A discussion about the set up and jurisdiction of the judiciary is found in Chapter 6 of this thesis.
[533] See Moses E Akpan, "The 1979 Nigerian Constitution and Human Rights," *Universal Human Rights* 2, no. 2 (1980): 23–41; 27, 28.
[534] Read, "The New Constitution of Nigeria," 148.
[535] "International Covenant on Civil and Political Rights," *United Nations Human Rights Office of the High Commissioner*, http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx (accessed July 25, 2017).

Figure 3: Rights provided for in Chapter IV, 1999 Constitution

- Right to life
- Right to dignity of human persons
- Right to personal liberty
- Right to fair hearing
- Right to private and family life
- Right to freedom of thought, conscience and religion
- Right to freedom of expression and the press
- Right to peaceful assembly and association
- Right to freedom of movement
- Right to freedom from discrimination
- Right to acquire and own immovable property
- Right to compensation in the event of compulsory acquisition of property

Particularly relevant to A2EJ, Chapter IV on Fundamental Rights of the Constitution (both in 1979 and in 1999) also states that the Federal Government owns Nigeria's oil, gas and minerals. Both Constitutions outline that

> All minerals, mineral oils and natural gas in under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly.[536]

The purpose of this provision within the Chapter on Fundamental Rights is to limit personal rights related to occupying land in the event of necessary expropriation for the purposes of accessing the government's mineral reserves. In such instances, Chapter IV affords the right to compensation for lost land, and the right to have the quantum of compensation decided by the appropriate court of law.[537] As will be shown in Chapter 6, making use of this provision has been complicated by changing jurisdiction for oil gas and minerals issues, outlined most recently in Chapter VII of the 1999 Constitution.[538]

[536] S.44(3), Constitution of the Federal Republic of Nigeria 1999, and S.40(3) of the Constitution of the Federal Republic of Nigeria 1979.
[537] S.40(1)(a),(b), Constitution of the Federal Republic of Nigeria 1979 [Cap IV].
[538] S.251(1)n, Constitution of the Federal Republic of Nigeria 1999 [Cap VII].

In addition to Fundamental Rights, the drafting committee of the 1979 Constitution thought it prudent to incorporate guiding directives and principles into the new Constitution. This was intended to set the tone that constitutions are more concerned with mutual obligations and duties rather than simply a conference of power on elected officials.[539] These principles are enshrined in Chapter II, which focuses on Fundamental Objectives and Directive Principles of State Policy.[540] Chapter II of the 1979 Constitution included commitments to principles of democracy and social justice,[541] unity and national integration free from discrimination[542], balanced economic development[543], and equality,[544] including in access to quality education.[545] Further augmenting these principles in 1983, Nigeria ratified the African Charter on Human and People's Rights, which includes the provision "All peoples shall have the right to a general satisfactory environment favourable to their development."[546]

Both the 1979 provisions for fundamental objectives and state principles, as well as the African Charter on Human and People's Rights, were incorporated into Chapter II of the 1999 Constitution. For the first time in Nigeria's history, there was a constitutional provision on the environment. Section 20 stipulates that, "The State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria." In line with the 1979 Constitution, Chapter II provisions are non-justiciable, per Section 6(6)c of the 1999 Constitution.

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[539] Obinna Okere, "Fundamental Objectives and Directive Principles of State Policy under the Nigerian Constitution," *The International and Comparative Law Quarterly* 32, no. 1 (1983): 214–28; 214; and Read, The New Constitution of Nigeria," 136.
[540] Nigeria ratified both the International Covenant on Economic, Social and Cultural Rights and the International Covenant Civil and Political Rights just five months before the repressive regime of military leader Sani Abacha began in July of 1993. "OHCHR," *Nigeria Homepage*, http://www.ohchr.org/EN/Countries/AfricaRegion/Pages/NGIndex.aspx (accessed August 2, 2017).
[541] S.14, Constitution of the Federal Republic of Nigeria 1979, [Cap II].
[542] Ibid., S.15.
[543] Ibid., S.16.
[544] Ibid., S.17.
[545] Ibid., S.18.
[546] Art.24, African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act 1983 (Cap A 9 *Laws of the Federation of Nigeria* 2004).

To date in Nigeria, non-justiciable truly means that Chapter II principles and directives cannot be used as the basis for a suit in a court of law. The 1981 case of **Okogie v. Attorney General for Lagos State**[547] is still precedential in determining that Chapter II of the Constitution should be read as a moral guiding policy and not as a Chapter that can be adjudicated in a court of law.[548] In this case, the provisions in Chapter II of the Constitution were seen as adversarial to those justiciable rights afforded in Chapter IV of the Constitution. The Okogie judgement justifies the court's stance by citing early Indian jurisprudence on similar subject matter, in particular the case of **Madras v. Champakam Dorairajan**.[549] In this suit, the Supreme Court of India prioritised individual rights over the rights of a group.[550] As I will illustrate in Chapter 6, this is significant because India drastically changed its approach to interpreting Directives of State Policy in the early 1980s, elevating them to be justiciable by linking them to Fundamental Rights.[551] In the case of environmental issues, the Indian courts have linked Article 48A in the Constitution on protecting the environment to the right to life, justiciable under Part III's Fundamental Rights.[552] What the Okogie case highlights is that, while Indian jurisprudence has developed over the last three decades, present-day Nigeria maintains a restrictive interpretation of its constitutional objectives and principles.

In 2009, then Chief Justice of Nigeria Idris Legbo Kutigi introduced the Fundamental Rights (Enforcement) Procedures (hereafter FREP).[553] Unlike previous iterations of these procedures, the 2009 FREP introduced concepts that

[547] **Okogie v. Attorney General for Lagos State** (1981) INCLR 218.
[548] Constitution of the Federal Republic of Nigeria 1999 [Cap II]. See Okere, "Fundamental Objectives and Directive Principles of State Policy under the Nigerian Constitution," 226.
[549] **Madras v. Champakam Dorairajan** AIR 1951 SC 226.
[550] Okere, "Fundamental Objectives and Directive Principles of State Policy under the Nigerian Constitution," 226.
[551] Emeka Polycarp Amechi, "Litigating Right to Healthy Environment in Nigeria: An Examination of the Impacts of the Fundamental Rights (Enforcement Procedure) Rules 2009, in Ensuring Access to Justice for Victims of Environmental Degradation." *Law, Environment and Development Journal* 6 (2010): [xxxvii]-334, 326.
[552] See Chapter 6, Section 6.4.
[553] Constitution of the Federal Republic of Nigeria 1999 [Cap IV].

are similar to approaches taken by the Indian Supreme Court in pursuit of public interest litigation (See Chapter 6 for more). In particular the 2009 FREP liberalises standing for cases related to a breach of fundamental rights, as outlined in Chapter IV of the Constitution. This was a clear departure from the 1979 rules, which stated that only individuals whose rights have been directly breached would have standing to sue.[554] The 2009 FREP, Section 3(e), directs that:

> The Court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of *locus standi*. In particular, human rights activists, advocates, or groups as well as any non-governmental organisations, may institute human rights application on behalf of any potential applicant. In human rights litigation, the applicant may include any of the following:
>
> (i) Anyone acting in his own interest;
> (ii) Anyone acting on behalf of another person;
> (iii) Anyone acting as a member of, or in the interest of a group or class of persons;
> (iv) Anyone acting in the public interest, and
> (v) Association acting in the interest of its members or other individuals or groups.[555]

As discussed more fully in Chapter 6, restrictions to standing is one of two barriers in public interest environmental litigation in Nigeria. The 2009 FREP bolsters the notion that there is scope for public interest litigation in Nigeria. However, this is constrained in the case of environmental litigation, where the courts continue to interpret breaches of environmental rights as non-justiciable.

5.10.2 Constitution Summary

The development and enactment of the 1999 Constitution at the dawn of the Fourth Republic was not an exercise in modern constitutionalism. While the current constitution has inherited the provisions of the 1979 Constitution, seen by

[554] Onakoya Olusegun, "Fundamental Rights (Enforcement Procedure) Rules 2009: A Paradigm Shift in Human Rights Protection in Nigeria," *US-China Law Review* 10 (2013): 494–509, 502.
[555] S.3(e), Fundamental Rights (Enforcement) Procedures 2009.

many to be the most consultative constitution in the country's history, it also inherited that document's flaws. The result of this is that provisions such as the detrimental Land Use Act, forced into the 1979 Constitution by military leadership, remains enshrined in the Constitution, making it difficult to amend or repeal.

The one nominally positive development in the Constitution is its incorporation of Chapter II, Section 20 on the right to a healthy environment. Despite this inclusion, Nigerian jurisprudence continues to interpret Chapter II of the Constitution as non-justiciable in a court of law, despite developments in India, a jurisdiction drawn on in the past by Nigerian jurists. This means that Section 20 is of little use to those seeking redress from the constitution for environmental harms until jurisprudence develops.

5.11 The Niger Delta Development Commission Act 2000

The Niger Delta Development Commission (NDDC) Act of 2000 repeals the Oil, Mineral Producing Areas Commission Decree (OMPADEC) 1998 and establishes

> a new Commission with a re-organised management and administrative structure for more effectiveness; and for the use of the sums received from the allocation of the Federation Account for tackling ecological problems which arise from the exploration of oil minerals in the Niger-Delta area and for connected purposes.[556]

The NDDC was established not long after the Fourth Republic and represents a fresh start for the Niger Delta development vision. Unlike other legislation that focuses on redress for environmental harms, the NDDC Act ensures that communities in oil producing regions are positively affected by the revenue generated from oil industry activity. In this section, I will discuss the NDDC Act,

[556] Niger-Delta Development Commission (Establishment) Act 2000 (Cap N86 *Laws of the Federation of Nigeria* 2004).

map out the purpose that it serves, and consider how this compares to past attempts to promote regional development.

The Niger Delta has an estimated population of 30 million people, about 20% of the country's entire populace.[557] This oil producing region also has a history of violence and youth unrest often linked to oil production. Non-violent forms of resistance began as early as the 1970s and have increased since democracy in 1999.[558] At the beginning of his presidency, President Obasanjo sought to quell the Niger Delta security crisis through improved economic and development opportunities in the region.[559] The NDDC was seen as the institution that would lead these regional development efforts in the Fourth Republic.[560]

Obasanjo's interest in setting up the NDDC was not unique. Historically, the government has responded to the region's instability by earmarking funds and housing them in an institution dedicated to the region's development. Table 3 below illustrates the institutions that have been responsible for the region's development since independence. Using the Human Development Index as a measure, these institutions have been unsuccessful in promoting development in the Niger Delta. The Niger Delta's development remains stunted relative to other regions with similar levels of oil reserves globally, such as Venezuela and Indonesia, though funds toward addressing the problem in Nigeria have increased substantially over time.[561]

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[557] Based on the 2006 Census, with a total population at 140 million for 2006. "Regional Inequality and the Niger Delta," *Overseas Development Institute,* https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/3383.pdf (accessed August 1, 2017).
[558] Annegret Mähler, "Nigeria: A Prime Example of the Resource Curse? Revisiting the Oil-Violence Link in the Niger Delta," *GIGA Working Paper no.* 120, German Institute of Global and Area Studies, January 1, 2010. https://papers.ssrn.com/abstract=1541940 (accessed August 1, 2017).
[559] "The Death of Ken Saro-Wiwa," *Arts Activism Education Research*.
[560] Kenneth Omeje, "The state, conflict & evolving politics in the Niger Delta, Nigeria."
[561] "Regional Inequality and the Niger Delta," *Overseas Development Institute,* https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/3383.pdf (accessed August 10, 2017).

The Act gave NDDC a broad mandate. It is responsible for developing policies and guidelines for the Niger Delta development, covering everything from infrastructure, education, health, urban development, water supply, power and more.[562] In addition to developing these plans, the NDDC is expected to implement these projects. Particularly relevant to A2EJ in the oil sector, the NDDC is also meant to:

a) assess and report on all CSR projects from oil companies in the Delta;

b) tackle ecological and environmental problems that arise from the exploration of oil mineral in the Niger-Delta area and advise the Federal Government and the member States on the prevention and control of oil spillages, gas flaring and environmental pollution; and

c) liaise with the various oil mineral and gas prospecting and producing companies on all matters of pollution prevention and control.[563]

Table 3: Institutions responsible for Nigeria Delta development and their financing models

Institution	**Year**	**Resources allocated**
The Niger Delta Development Board (NDDB)	1960	N/A
Presidential Task Force (1.5%)	1980	1.5% Oil revenue
OMPADEC – 1992 (3%)	1992	3% Oil revenue
NDDC	2000	15% of states' allocation from derivation payments, 3% of oil companies' total budgets, 50% of the Ecological Fund Allocations due to states, among other revenue streams.)[564]

In addition to the NDDC, in 2008 Nigerian President Yar'Adua established a new Ministry of Niger Delta Affairs, under which the NDDC would sit. The remit of the

[562] S.7(1)(b), Constitution of the Federal Republic of Nigeria 1999 [Cap I].
[563] S.7 (g,h,i), Constitution of the Federal Republic of Nigeria 1999 [Cap I].
[564] S.14(2)(a) Niger-Delta Development Commission (Establishment) Act 2000.

new parent institution is very similar to that of the NDDC and it is not immediately clear how they differ operationally. Budgetary allocations for the two institutions highlight their vast overlap. The federal budget for the Ministry was almost USD 560 million in 2014, more than USD 300 million of which went to the NDDC itself.[565] More than USD 245 million of NDDC's budget was allocated to paying the salaries and wages of its personnel, leaving USD 55 million to implement development projects across the region.[566]

This budgeting behaviour is consistent with literature on clientelism and public sector employment.[567] Robinson and Verdier find that providing public sector jobs is a legitimate way of securing votes from a specific body of constituents (versus more "traditional" forms of bribery, such as exchanging cash for votes). Robinson and Verdier argue that "the appeal of offers of employment in the bureaucracy is precisely that a job is a credible, selective, and reversible method of redistribution, which ties the continuation utility of a voter to the political success of a particular politician."[568] This is particularly salient in the Niger Delta region, which is an important region for the Federal Government to secure support and manage regional instability, given the region's economic significance to the country more broadly.[569]

The broader Ministry of Niger Delta Affairs had a budget of USD 235 million to implement large programmes across the Niger Delta to help mitigate the negative effects of oil production, while also building infrastructure and service delivery to

[565] "2014 Federal Government of Nigeria Budget Proposal," Federal Government of Nigeria, http://www.budgetoffice.gov.ng/pdfs/2014_budget_proposals/38.%20Summary_Niger%20Delta.pdf (accessed August 10, 2017).
[566] Ibid.
[567] James A. Robinson, "The Political Economy of Clientelism," *The Scandinavian Journal of Economics* 115, no. 2 (2013): 260-291.
[568] Robinson, "The Political Economy of Clientelism," 260-291.
[569] Ibid., 261. See also: "Managing Government Compensation and Employment: Institutions, Policies, and Reform Challenges" *International Monetary Fund* https://www.imf.org/external/np/pp/eng/2016/040816a.pd (accessed August 1, 2017). The author does not have specific statistics on number of Niger Delta residents employed.

improve the overall economic development of the region.[570] The 2014 Ministry of Niger Delta Affairs Budget outlines around 200 projects that the Ministry and the NDDC planned to undertake in the following year.[571] Only five of these projects involved work relating to the oil sector, and just one concerned the clean-up of areas impacted by an oil spill.[572] The remaining projects primarily focused on road construction, land reclamation, and other infrastructure and construction projects.

An in-depth assessment of the impact of the NDDC found that the institution has not had enough of an impact on poverty, considering the financial resources available to it and compared with what is allocated to other regions in the country.[573] The Human Development Index finds:

> that poverty reduction progress has been slow, particularly given the Niger Delta's substantial natural resource endowments and additional Federal Government resources…according to UNDP, the worsening of the [Human Development Index] has been more acute for the Niger Delta states than for the rest of Nigeria.[574]

Respondents in my 2014 survey agree that the institution is not working: only one fifth of survey respondents believed that the NDDC Act achieves or somewhat achieves its stated aims.

Poor performance could be caused by a range of factors, but in addition to clientelism causing a bloated wage bill, there is also mounting evidence to suggest

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[570] Personal correspondence with public financial management experts Nicholas Travis and Albert Pijuan suggests that there is not an optimal ratio between capital expenditure and salaries across all ministries. However the particular context of a given ministry should be taken into account. For instance, a Health Ministry charged with delivering health services will have a high percentage of budget going to salaries because the Ministry is responsible for paying health workers' salaries. The same would be true of education. Extrapolating this logic, it then becomes apparent that a ministry and commission charged with undertaking regional development projects should likely have a higher percentage of overall budget going to investing in development projects rather than paying people's salaries.
[571] Author's own calculations based 2014 budget proposal. "2014 Federal Government of Nigeria Budget Proposal," Federal Government of Nigeria.
[572] Ibid.
[573] "Regional Inequality and the Niger Delta," *Overseas Development Institute.*
[574] Ibid.

that while NDDC is still the statutory body responsible for Niger Delta development, it is a co-opted institution plagued by the corruption and misappropriation associated with its predecessors.[575] For example, the Oil Mineral Producing Area Development Commission (OMPADEC), the NDDC's predecessor, was largely seen as a failure due to corruption.[576] Two of the organisation's leaders were removed from office on charges of embezzling or otherwise misappropriating hundreds of millions of dollars during their tenure.[577] One of those leaders, Eric Opia, was removed from his position in 1998 after he could not account for USD 80 million of OMPADEC funds, while some estimate that during his time at the organisation, he embezzled up to USD 200 million in development funds.[578]

5.11.1 NDDC Act Summary

The NDDC Act, much like its predecessors, did not create an institution that improves development outcomes in the Niger Delta. Instead, it created an institution that has been used to more deeply entrench a system of clientelism. Similar to other legislation assessed in this Chapter, such as the NESREA Act, discussed in Section 5.13, the NDDC Act was enacted in order to start over after its predecessor had failed. However as this section has shown, starting over with

[575] The OMPADEC Act No.23 of 1992, the NDDC Act's predecessor, did not perform well under Frynas' survey in the late nineties, with only 3.3% reporting that the law was effectively enforced. Julia Hanson, "Corruption and the NDDC," *The Nation,* August 31, 2015, http://thenationonlineng.net/corruption-and-nddc/ (accessed August 10, 2017); Chika Ebuzor, "Militants accuse NDDC officials of corruption," *Pulse,* January 28, 2017, http://pulse.ng/local/niger-delta-militants-accuse-nddc-officials-of-corruption-id6130155.html (accessed August 10, 2017); Samson Atekojo Usman, "Senate angry as NDDC shuns corruption investigation panel," *Daily Post,* October 26, 2016, http://dailypost.ng/2016/10/26/senate-angry-nddc-shuns-corruption-investigation%E2%80%8E-panel/ (accessed August 10, 2017); Destiny Ugorji, "Niger Delta youths allege massive corruption in NDDC," *News Express,* February 08 2017, http://www.newsexpressngr.com/news/34303-Niger-Delta-youths-allege-massive-corruption-in-NDDC (accessed August 10, 2017); and "Regional Inequality and the Niger Delta," *Overseas Development Institute.*

[576] Akeem Ayofe Akinwale, Re-Engineering the NDDC's Master Plan: An Analytical Approach," *Journal of Sustainable Development in Africa* 11, no.2 (2009): 142-159; 146.

[577] Ibid, 145.

[578] J. Shola Omotola, "From the OMPADEC to the NDDC: An Assessment of State Responses to Environmental Insecurity in the Niger Delta, Nigeria," *Africa Today* 54, no.1 (2007): pp. 73-89, 79-80.

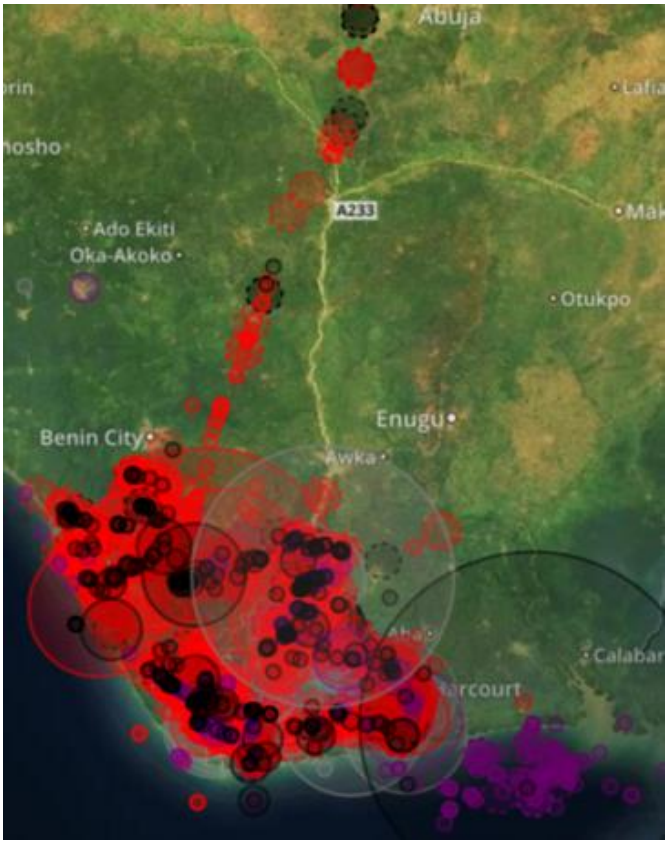
a new name does not erase the historical and political economic factors that ultimately lead to an institution's failure.

5.12 NOSDRA Act of 2006

This section will discuss the Act that established the National Oil Spills Detection and Response Agency, the government institution tasked with addressing the mitigation and clean-up of these spills.[579] In the period between January 2006 and the end of December 2015, Nigeria experienced more than 10,000 oil spills.[580] These spills ranged in size, severity and cause – including everything from small spills caused by equipment failure or local actors' efforts to siphon oil directly from the pipeline, to large spills equivalent to the Deepwater Horizon spill in the Gulf of Mexico caused by ageing equipment, corroded pipelines and large-scale pipeline theft. Figure 4 depicts the oil spills that occurred in the Niger Delta in 2013.[581] These spills have had a direct impact on the health and livelihoods of communities living in and nearby damaged and polluted areas.[582]

[579] See: Chapter 4, Section 4.2.2.4.3.
[580] "Nigerian Oil Spill Monitor," https://oilspillmonitor.ng/#/23011.PPMC/KAD/HSE/OSR/14/56 (accessed, April 6, 2016).
[581] Ibid.
[582] UNEP, "Environmental Assessment of Ogoniland," 183.

Figure 4: A map showing oil spills in 2013, mainly concentrated in the Niger Delta region. Red spills are classified as caused by third party interference, black oil spills are classified as oil company operational spills, and purple are spills that have been reported, but have not been visited and assessed.[583]



The NOSDRA Act of 2006 is the key piece of the legislation that governs the preparing for and responding to oil spills. The Act was enacted in 2006 to establish an agency that would be responsible for the implementation of the National Oil Spill Contingency Plan.[584] The NOSC is part of Nigeria's obligation under the "International Convention on oil pollution preparedness, response and cooperation, 1990."[585] The international agreement followed a string of serious oil

[583] "Nigerian Oil Spill Monitor," https://oilspillmonitor.ng/#/52400.NPDC/HSE/EMA/001/16 (accessed 1 October 2015).
[584] Orji, "An appraisal of the legal frameworks for the control of environmental pollution in Nigeria," 337; and "NOSDRA", Federal Ministry of the Environment, http://environment.gov.ng/nosdra.html (August 10, 2017).
[585] "International Convention on oil pollution preparedness, response and cooperation", London, 30 November 1990, United Nations Treaty Series, vol. 1891, No. 32194, 78. Available from: https://treaties.un.org/doc/Publication/UNTS/Volume%201891/volume-1891-I-32194-English.pdf (accessed August 10, 2017).

spills globally in the preceding decades – the Torrey Canyon spill off the coast of the UK in 1967, the Amoco Cadiz Spill off the coast of France in 1977, and the Exxon Valdez spill off the coast of Alaska in 1989.[586] It aimed to compel countries and oil shipping companies to be more prepared for oil spills.[587]

The NOSDRA Act lays out the Agency's primary objective; to ensure "a safe, timely, effective and appropriate response to major or disastrous oil pollution."[588] This includes identifying areas at risk for spills and prioritising current areas for clean-up, as well as acting as a liaison between Nigeria and international experts in an effort to clean up oil spills. The Act outlines a range of functions, all of which involve ensuring that the Nigerian government and operators are well prepared to respond to oil spills, and that they do so in a coordinated fashion.[589]

As a primary function of the law, the Act explains how NOSDRA should respond in the event of a major oil spill, including Schedules that outline the way in which the Agency should work with other public and private bodies in its efforts to respond to emergency oil spill situations. [590]

In addition to its oil spill preparation and response duties, NOSDRA is responsible for levying fines on oil companies who fail to report oil spills to the agency

[586] Ashok Mahapatra, "International Convention on Pollution Preparedness, Response and Cooperation," International Oil Spills Conference, 1995, http://www.ioscproceedings.org/doi/pdf/10.7901/2169-3358-1995-1-775 (accessed August 2, 2017).
[587] Ibid. The international agreement was written in a way so as to avoid imposing legal liabilities; this was seen at the time as a key factor in the convention's ability to appeal to private sector to ensure enforcement.
[588] S.5, Constitution of the Federal Republic of Nigeria 1999 [Cap I].
[589] S.7, Constitution of the Federal Republic of Nigeria 1999 [Cap VII]. See Chapter 4, Section 4.2.2, for more on NOSDRA's functions and the overlap with DPR.
[590] Schedule Two of the Act lays out a detailed plan for how NOSDRA will work with other ministries and government agencies to respond to major oil spills. The list includes thirteen ministries and other institutions, including an industry trade group, the Oil Producers Trade Section. Notably missing, is the Ministry of Petroleum Resources. Despite having a member on NOSDRA's board, the Ministry is not involved in NOSDRA's plans for Oil Spill Response. It should be noted that while created before NOSDRA was established, technically DPR's own oil spill response guidelines do not include the Ministry of Environment. See Chapter 4, Section 4.2.2 for more on the overlap and tension between NOSDRA and DPR.

expediently.[591] The fines for not reporting the spill are a little over USD 3,000 a day, while fines for failure to clean up the spill will cost approximately USD 6,000 a day.[592] Both are relatively inexpensive fines when considered in tandem with how much an oil operator in the Niger Delta make in profit per day.[593]

Figure 5: NOSDRA Oil Spill Response

According to the legislation, NOSDRA response to an oil spill should include:

a) In the event of a major spill, in collaboration with other agencies, co-opt, undertake, supervise all provisions of Second Schedule
b) Assess extent of damage to the environment – based on what was there before
c) Post spill impact assessment to determine long-term effects
d) Advise government on health effects of people to ensure remedial action
e) Assist in mediation between polluter and community
f) Monitor Response efforts
g) Assess oil spill damage
h) Approve requests to use dispersants by companies
i) Ensure protection of sensitive areas
j) Monitor clean up

As shown in Chapter 4, there are serious limitations to NOSDRA's ability to fulfil its oil spill response mandate. There are financial pressures on the organisation, which is not well-resourced relative to other institutions or to the tasks required of them.[594] There are also political and territorial limitations to what NOSDRA can achieve given its limited ability to exert influence on key decision-makers.[595] While not a shortcoming of the legislation, these financial and political pressures create barriers to environmental protection for communities in oil producing areas.

The flaws of the current NOSDRA Act have not escaped proactive policymakers. As of 2014, there was an aggressive amendment circulating in the National Assembly that would introduce significantly more stringent guidelines for

[591] S. 6(2), Constitution of the Federal Republic of Nigeria 1999 [Cap I].
[592] Orji, "An appraisal of the legal frameworks for the control of environmental pollution in Nigeria," 337.
[593] See Section 4.3 on scale of revenue of oil companies *vis a vis* government.
[594] See Chapter 4, Section 4.4.
[595] Ibid.

improving oil spill response, with accompanying steep penalties for non-compliance.[596] One lawyer involved in drafting the Amendment said:

> Now you will notice that the penalties are onerous [in the draft amendment]. Let's face it, but it's intentional because you know what, if you make the penalties weak they will still say 'no this is terrible, we can't do this, this is…bring it down, bring it down', so we make it as high as possible so that when you now concede, the point you now concede is the same point that would have shocked them in the first place.[597]

Even with their bargaining approach, lawmakers know that passing the Amendment bill will be a struggle. One interviewee cites regional dynamics, entrenched interests and longstanding relationships between the political elite and the private oil sector actors as major constraints to more progressive legislation. He informed me that

> A lot of people who have got interest in the oil industry don't want [the NOSDRA Amendment]. Secondly, is the paradigm of proximity -- those close to the challenge and feel it support the bill, those who are far away from it feel, 'what is my own with it if they want to die drinking oil water? That's their business.'[598]

Despite actions taken by policymakers to "give teeth" to the legislation, survey responses and key informant interviews suggest that NOSDRA will need more than simply the power to levy punitive measures against oil companies; it requires *legitimacy*.

Not one survey respondent in 2014 felt that the NOSDRA Act fully achieved its stated aims. Fifty-four percent of respondents believe it only minimally achieves its aims.[599] Respondents had a similar view of its ability to provide sufficient

[596] Interview A1G4, July 18, 2014.
[597] Ibid.
[598] Ibid.
[599] An additional 22% believe it does not at all achieve its stated aims. Percentages taken after removing "I don't know" responses from results.

redress mechanisms. Various interviews with actors in and outside of government provide further insight into why the NOSDRA Act is considered by the majority of people to be a failure. In some interviews, NOSDRA was referred to as "aggressive" or a group of "rascals," for trying to enforce their mandate, but also as "not having [enough] industry expertise" to do the job properly.[600] This, then, appears to be more of a problem of reputation than anything substantively related to their remit.

5.12.1 NOSDRA Act Summary

Despite the powers conferred upon it by the Act, NOSDRA has struggled to act as a gateway to environmental justice for those living in the environment it is legislated to protect. This is, however, more a problem of politics, funding, and the territorial nature of government agencies, than a lack of motivation by the institution itself to do its job or the drafting of the legislation. While better legislation has been viewed by some lawmakers as the way to provide A2EJ in the case of oil pollution, the effectiveness of the NOSDRA Act suggests that barriers to oil spill response are comprised of political and economic disincentives rather than legal provisions.

5.13 NESREA Act 2007

The NESREA Act established the Nigerian Environmental Standards and Regulations Agency and confers upon it

> Responsibility for the protection and development of the environment, biodiversity conservation and sustainable development of Nigeria's natural resources in general and environmental technology, including coordination and liaison with relevant stakeholders within and outside Nigeria on matters of enforcement of environmental standards, regulations, rules, laws, policies and guidelines.[601]

[600] Interview A1L5, August 12, 2014. Interview A1G5, July 23, 2014.
[601] S.2, National Environmental Standards and Regulations, Enforcement Agency (Establishment) Act, 2007.

It has been heralded by some as a watershed moment for environmental legislation in Nigeria.[602] Ladan, for example, was optimistic about what the NESREA Act meant for environmental governance. He wrote that the law represented a "new dawn" for environmental governance in Nigeria, particularly for compliance and enforcement.[603] Ajai offered a less sanguine view of the NESREA Act's ability to affect change. While acknowledging the aspirations of the Act, he noted that "Implementing [the NESREA Act] in an environment of national politics and diverse and competing interest groups within a federal system is bound to be herculean."[604]

The NESREA Act is a successor to the FEPA Act, which was considered "the most important piece of environmental legislation in Nigeria" in the late 1980s and 1990s.[605] The institution was the first of its kind in Nigeria. Before the FEPA Act passed in 1988, there had been no government entity responsible for ensuring that the environment was protected.[606]

As with other legislation discussed in this Chapter, FEPA was created following the toxic waste dumping scandal in Koko.[607] The legislation had some novel features, including the establishment of mobile courts to process environmental violations in remote parts of the country, and it outlined a specific coordination role with the Department of Petroleum Resources in the event of oil and gas-

[602] The Senate President at the time said that the Act ensured that Nigeria was following international treaties for environmental protection, helping to balance effects of economic development. See Ojeifo, Sufuyan. "Nigeria: Senate Proposes Environmental Regulatory Agency," *This Day (Lagos)*, May 15, 2007. http://allafrica.com.ezproxy.soas.ac.uk/stories/200705150089.html (accessed September 1, 2017).
[603] Muhammed Tawfiq Ladan, "Review of NESREA Act 2007 and Regulations 2009-2011: A New Dawn in Environmental Compliance and Enforcement in Nigeria", *Environment and Development Journal* 8, no. 1 (2012): 116 – 140.
[604] Olawale Ajai, "Balancing of interests in environmental law in Nigeria," in *The Balancing of Interests in Environmental Law in Africa*, eds. Michael Faure and Willemien du Plessis, 379-411. (Pretoria: Pulp, 2011), 389.
[605] Frynas, *Oil in Nigeria,* 84.
[606] Ibid.
[607] Ogbodo, "Environmental Protection in Nigeria."

related pollution.[608] Frynas asserted that the creation of FEPA showed an increased awareness of, and interest in, environmental challenges in Nigeria.[609]

While Frynas was somewhat optimistic, the FEPA Act was considered to have some limitations for environmental protection. For example, FEPA might have been allowed to carry out its remit as environmental regulator in the oil sector, but the Ministry of Petroleum Resources sat on FEPA's governing board.[610] Frynas also found that the institution had little influence in the oil sector and struggled to fulfil its mandate.[611] This is similar to the phenomena I observed with NOSDRA.

The NESREA Act of 2007[612] repealed the FEPA Act, and created a new environmental agency under the Federal Ministry of Environment. Its enactment introduced even more uncertainty into the legal landscape for environmental protection in the face of oil industry activity. NESREA is responsible for enforcing all environmental laws and regulations in Nigeria.[613] Critically, however, oversight of the oil and gas sector is excluded from many of its core functions, unlike the broader remit of FEPA. Section 7 of the NESREA Act stipulates that the Agency is responsible for the functions outlined in Table 4. There are thirteen provisions in Section 7 that detail the responsibilities of the Agency. Five of these provisions have been clearly marked as excluding NESREA's involvement in the oil and gas sector. Confusingly, one provision, Section 7(a), clearly *includes* oil and gas sector activities in its remit, to the contradiction of other parts of the law.

Since the oil and gas sector is included in the Act on an ad hoc basis, it is unclear where NESREA's remit substantively begins and ends with respect to oil and gas

[608] Ibid., 13.
[609] Frynas, *Oil in Nigeria,* 84.
[610] Ibid.,85.
[611] Ibid.,70.
[612] For a comprehensive review of the NESREA Act and accompanying regulations, see Ladan, "Review of NESREA Act 2007 and Regulations 2009-2011,"116-140.
[613] Including international treaties concerning oil pollution. See National Environmental Standards and Regulations, Enforcement Agency (Establishment) Act, 2007, S.7(d) and Ladan, "Review of NESREA Act 2007 and Regulations 2009-2011," 123.

sector activities and how this interacts with other institutions with specialised regulatory remits, such as DPR and NOSDRA. For example, Section 7(c) charges NESREA with enforcing international agreements in the oil and gas sector, while Section 7(h) prevents NESREA from monitoring compliance of regulations pertaining to "noise, air, land, seas, oceans and other water bodies" in the oil and gas sector.[614] As has been seen in previous sections of this Chapter, there are at least two pieces of oil sector legislation that are founded on international agreements, yet also pertain to bodies of water (Oil in Navigable Waters Act and NOSDRA Act). It is unclear in such circumstances whether NESREA would be involved or recuse itself.

The Act also stipulates that the Agency does not have the power to investigate oil spills nor can it recommend "proposals for the evolution and review of existing guidelines, regulations and standards on environment" in the oil and gas sector.[615] In total, "oil" is mentioned seventeen times in the legislation, and fourteen of those mentions are explicitly for the purpose of removing NESREA's mandate from sector environmental regulation activities.

One key informant in Government conjectured that NESREA's clear exclusion of the oil and gas sector could have been the result of pressure by DPR, the main industry regulator, to prevent any interference with its mandate. He informed me that,

> [W]hen the NESREA Act was being enacted, it specifically excludes deregulating the oil and gas industry…I want to assume that, that was done simply you know…it is a fallout of the territorial madness…I'm sure that those who must have advocated or fought for its exclusion most likely would be DPR and they don't want any form of interference and what is the national [interest].[616]

[614] Ladan has also noted this contradiction within Section 7 of the Act. See Ladan, "Review of NESREA Act 2007 and Regulations 2009-2011."
[615] S.8 (g)(k), National Environmental Standards and Regulations, Enforcement Agency (Establishment) Act, 2007.
[616] Interview A1G5, July 23, 2014.

The NESREA Act is not considered an overwhelming success or failure relative to other pieces of legislation analysed in this Chapter. One third of survey respondents believe the NESREA Act has achieved or somewhat achieved its stated aims. However, these survey responses can be misleading, as they do not specifically ask about the Act's effectiveness in environmental regulation of the oil sector.[617] Given the high instance of oil and gas sector exclusion in the legislation, it would be likely that the Act would not be deemed effective in regulating the oil and gas sector's environmental impact.

[617] This is worth noting for anyone who might consider administering this survey again in the future.

Table 4: NESREA Functions

Section 7	Functions of the Agency
a)	enforce compliance with laws, guidelines, policies and standards on environmental matters;
b)	coordinate and liaise with stakeholders, within and outside Nigeria, on matters of environmental standards, regulations and enforcement;
c)	**enforce compliance with the provisions of international agreements**, protocols, conventions and treaties on the environment, including climate change, biodiversity, conservation, desertification, forestry, **oil and gas**, chemicals, hazardous wastes, ozone depletion, marine and wild life, pollution, sanitation and such other environmental agreements as may from time to time come into force ;
d)	enforce compliance with policies, standards, legislation and guidelines on water quality, environmental health and sanitation, including pollution abatement ;
e)	enforce compliance with guidelines and legislations on sustainable management of the ecosystem, biodiversity conservation and the development of Nigeria's natural resources;
f)	enforce compliance with any legislation on sound chemical management, safe use of pesticides and disposal of spent packages thereof;
g)	enforce compliance with regulations on the importation, exportation, production, distribution, storage, sale, use, handling and disposal of hazardous chemicals and waste **other than in the oil and gas sector;**
h)	enforce through compliance monitoring, the environmental regulations and standards on noise, air, land, seas, oceans and other water bodies **other than in the oil and gas sector;**
i)	ensure that environmental projects funded by donor organizations and external support agencies adhered to regulations in environmental safety and protection;
j)	enforce environmental control measures through registration, licensing and permitting systems **other than in the oil and gas sector;**
k)	conduct environmental audit and establish data bank on regulatory and enforcement mechanisms of environmental standards **other than in the oil and gas sector;**
l)	create public awareness and provide environmental education on sustainable environmental management, promote private sector compliance with environmental regulations **other than in the oil and gas sector** and publish general scientific or other data resulting from the performance of its functions;
m)	carry out such activities as are necessary or expedient for the performance of its functions.

5.13.1 NESREA Act Summary

The NESREA Act is a regressive piece of legislation for protecting the environment from oil sector activity. The drafters of this law intended for NESREA to be excluded from core environmental regulation functions in the oil and gas sector. The purpose of including the Act in this analysis of statute law is more to highlight how it is irrelevant to A2EJ in the oil sector, despite what might be expected of an overarching environmental protection institution. NESREA has been stripped of any ability to monitor, develop, or enforce environmental policies in the oil sector. This is a departure from the legislative provisions of its predecessor, FEPA. This omission leaves the sector with two institutions – Department of Petroleum Resources and NOSDRA – with incomplete, but overlapping regulatory remits.

5.14 Conclusion

This Chapter reviewed 11 laws that underpin environmental governance for Nigeria's oil sector. In doing so, I discussed a series of findings. Doctrinal, along with historical and socio-legal methods were used to create a comprehensive assessment of the framework's strengths and shortcomings. Few laws were deemed effective, in terms of achieving their own stated objectives or in providing mechanisms for redress by survey respondents. What my analysis found is a clear divide in perceived quality between legislation catered toward oil industry and government objectives and those laws, which are framed as a means for protecting the environment from oil sector activity, such as the ONWA, AGRA, EIA, and the 1999 Constitution itself.

My investigation of individual laws produced some common themes:

1) Fines and penalties imposed in legislation are either too low to modify behaviour, or too severe to be enforced (e.g. AGRA and NOSDRA);
2) In the course of repealing and adding legislation over the years, core functions have never been appropriately realigned with new institutional structures, leaving some responsibilities without clear lines of

accountability, while others find overlap in many institutions, creating a culture of competition and confusion (e.g. NOSDRA and NESREA);

3) Commercially-focused legislation, may be regarded as more effective than other legislation, but there are few opportunities to leverage these laws to the benefit of citizens negatively affected by sector activity (e.g. OPA);
4) Repealing a failing law and replacing it with a new one, particularly those that establish institutions, is not a solution to fixing underlying political challenges as to why institutions fail in the first place (e.g. NESREA and NDDC); and
5) Legislation derived from international treaty obligations struggle to be relevant or effective in the domestic context (e.g. NOSDRA and ONWA).

The development of a governance framework over multiple regime types, which date back to colonial rule, presents particular challenges for the framework's ability to provide A2EJ in present-day Nigeria. This is evident in the analysis of the evolution of Nigeria's Constitution, which is itself a non-consultative document that houses military era provisions, such as the legitimisation of the Land Use Act.

This dissonance comes from an incompatibility with the historical contexts under which laws were drafted. Some laws were written during a time where oil was not yet the mainstay of the economy, while others were written explicitly to bolster the extractive economy. Some laws were responses to domestic and international political pressure. Some laws were introduced as part of a policy framework introduced with the dawn of the Fourth Republic. However, these fault lines in the legal landscape and maintenance of the *status quo* are not accidental. This dissonance is a rational choice made by a Rentier State that controls and relies upon the country's natural resources to function. What is clear from this analysis is that, despite the current democratic regime, the state continues to prioritise commercial gain for the Federal Government over justice for a relatively small fraction of the total Nigerian population.[618]

[618] See Chapter 2, Section 2.3 on the Rentier State for more.

This Chapter has illustrated that current legislation does not provide meaningful mechanisms for redress in the Nigerian context. However, this does not mean that citizens are not accessing the legal system in their search for environmental justice; rather these findings show that statute law is rarely their entry point for airing their grievances in court. The poor quality and lack of legitimacy of statute law has thus resulted in a *de facto* preference for the use of tort law in oil pollution disputes.[619] In this context, the following Chapter will explore the use of tort as the primary mechanism for redress in oil pollution litigation between oil companies and communities.

[619] In a 2014 UK court case, **The Bodo Community and Ors. v. SPDC** [2014] EWHC 1973 (TCC), a British judge applied Nigerian Law in his preliminary comments on the case, before it settled.

6 Case Law

6.1 Introduction

This Chapter analyses case law with the aim of better understanding the degree to which the courts serve as a legitimate gateway for justice for victims of oil-related environmental harms. The Chapter closely attends to strategies used by litigants to seek redress, and by oil companies defending suits against them. Analysis of litigation here will be restricted to cases that are concerned with environmental harms caused by petroleum exploration and extraction, with particular emphasis on cases since 1999, the dawn of the Fourth Republic.

By way of introduction, this Chapter will first describe the current composition of the Nigerian judiciary. It will then discuss its evolution over time, beginning with pre-colonial dispute resolution mechanisms. Section 6.3 will then provide the methodology for the case law analysis. This section will also provide relevant descriptive statistics from the case law dataset as a whole.

The Chapter will then provide an analysis of the case law, as grouped by relevant themes. I will do this first by addressing public interest litigation, in Section 6.4, a tool popularised in other jurisdictions, such as India, but which is broadly absent in the Nigerian context. The Chapter will then move on to discuss more traditional tort litigation in Section 6.5 by beginning with a brief discussion of the reasons why tort has become a preferred litigation strategy in Nigeria. Following on from this, I analyse case law that involves the three most common torts used by communities in bringing claims against oil companies. After understanding the tactics of those seeking redress, I analyse oil company litigation strategies, emphasising the jurisdiction defence. Finally, in Section 6.6, I discuss the challenges related to the emergent use of extra-territorial litigation for seeking redress in oil pollution disputes.

6.2 The Judiciary

As this is a socio-legal dissertation, understanding how the courts are arranged and the way in which they came to exist in their current state is an integral part of the analysis of the case law itself.[620]

6.2.1 The Judiciary, As Provided for in the 1999 Constitution

The Nigerian judiciary in the Fourth Republic is comprised of federal and state courts whose jurisdictions are outlined in the 1999 Constitution.[621] State and Federal courts have jurisdiction based on a mix of geography and subject matter. There are four categories of trial courts (High Courts, Industrial Courts, Customary courts, and Sharia Courts) and two levels of appellate courts. The Supreme Court lies at the apex of the Nigerian court system.[622] In addition to the Supreme Court's apex appellate function, it also has original jurisdiction over disputes between the Federal Government and a State, as well as disputes between States.[623] The Supreme Court consists of a Chief Justice, appointed by the president following a recommendation for the National Judicial Council, and up to twenty additional Supreme Court Justices.[624]

[620] Cotterrell notes that "The political power of the state which guarantees the decisions of certain official legal interpreters, puts an end to argument, determines which interpretive concepts prevail, asserts favoured normative judgments as superior to all competing ones, and guarantees normative closure by the threat of official coercion." See Cotterrell, "Why must legal ideas be interpreted sociologically?" 181.

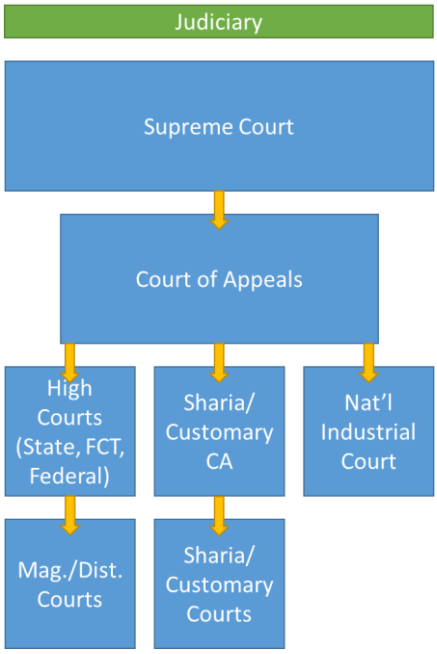
[621] The Constitution of the Federal Republic of Nigeria 1999 [Cap.VII].

[622] See Figure 7.

[623] S.232(2) The Constitution of the Federal Republic of Nigeria 1999 [Cap.VII].

[624] The NJC is a constitutional body, which has the key function of "insulat[ing] the Judiciary from the whims and caprices of the Executive; hence guarantee the independence of this Arm of Government, which is a sine qua non for any democratic Government." See "National Judicial Council Profile," National Judicial Council, http://www.njcgov.org/aboutus/aboutusprofile (accessed August 22, 2017). For a range of examples of how the NJC performed its job in disciplining justices, see Okechukwu Oko, "Seeking Justice in Transitional Societies: An Analysis of the Problems and Failures of the Judiciary in Nigeria," *Brooklyn Journal of International Law* 31, no. 1 (2005): 10-82.

Figure 6: Illustration based on 1999 Constitution



The Court of Appeals is the appellate body directly below the Supreme Court and consists of a President of the Court of Appeal, also appointed by the President following a recommendation from the National Judicial Council. There are up to forty-nine additional Court of Appeal Justices, including three who are experienced in Islamic Law and three who are experienced in Customary Law.

Under the Court of Appeals, there is a layer of High Courts. These courts deal with Federal and State issues, as well as issues pertaining to the Federal Capital Territory and relating to appeals from lower Sharia and customary courts. The Federal High Courts hold original jurisdiction for a range of economic issues of national interest outlined in the Second Schedule to the 1999 Constitution. Areas covered exclusively by federal courts that are relevant to this research include:

- oil and minerals,
- taxation,
- customs,
- banking,
- companies,
- intellectual property,
- admiralty, and
- trade.[625]

[625] Before 1993, State High Courts were the first port of call for oil-related disputes. See Frynas, *Oil in Nigeria,* 93. See also Section 6.5.2.1 for more on Jurisdiction. Trade matters, and all civil matters related to employment, labour, and "industrial relations" became the exclusive

The Sharia and Customary Courts of Appeal are primarily reserved for matters of appeal in personal and family law disputes.[626] The Federal Capital Territory High Court and the State High Courts thus have original jurisdiction to "hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person."[627] Below the State High Courts, the first port of call for a range of legal issues primarily relating to family law and personal law may be Magistrate or District Courts, Sharia or Customary Courts, depending on the issue and the preference of the litigants.[628]

6.2.2 Evolution of the Courts

The current structure of the judiciary is conditioned by the history of dispute resolution in Nigeria. According to Aka, the evolution of the judiciary in Nigeria falls into three stages: Pre-colonial, colonial, and post-colonial.[629] Each of these three stages has left a lasting impact on the way in which the judiciary is structured and behaves in its present form. As Aka points out, the judiciary served different functions at each point in history. Since democratic Nigeria has only existed for an extended period from 1999, social justice simply was not a primary objective of the courts until very recently in Nigeria's history.[630]

In the pre-colonial era, the modern day conception of a unified independent Nigeria did not exist. Aka focuses his analysis during this period instead on the judicial systems of the Igbo, Yoruba, and Hausa-Fulani tribes – the three major tribes that occupy Nigeria today.[631] Each system's construct of a judiciary differed, but all

jurisdiction of the National Industrial Court in 2010 with the introduction of a constitutional amendment. See "Jurisdiction and Power," *National Industrial Court of Nigeria* http://nicn.gov.ng/jurisdiction-and-power (accessed September 2, 2017).
[626] S.272, Constitution of the Federal Republic of Nigeria 1999 [Cap VII].
[627] Ibid., S.257(1) and S.272(1).
[628] Yemisi Dina, John Akintayo & Funke Ekundayo, "Guide to Nigerian Legal Information," *GlobaLex*, http://www.nyulawglobal.org/globalex/Nigeria.html (accessed August 4, 2017).
[629] Philip C. Aka, "Judicial Independence under Nigeria's Fourth Republic: Problems and Prospects," *California Western International Law Journal* 45 (2015): 1–78; 19-25.
[630] Aka, "Judicial Independence under Nigeria's Fourth Republic," 24.
[631] Ibid., 20.

were tools for "social control geared toward dispute reconciliation and maintaining peace, order, and stability in the community."[632] For the Igbos, elders performed the judicial function by applying customary law in Council.[633] In the case of the Yoruba tribe, it was the job of the traditional leader, the Oba, to apply customary law in the councils.[634] For the Hausa-Fulani, Islamic law was administered by Emirs with the support of Islamic law experts.[635]

The colonial period formalised the courts into a unified structure, first with separate courts in northern and southern Nigeria, followed by a period of consolidation in 1914, "where the judicial structure consisted, in order from lowest to highest tribunal: native courts, provincial courts, the Supreme Court, and the West African Court of Appeal."[636] Aka characterises the colonial era judiciary as "an executive tool"[637] that served a similar control function to pre-colonial courts. However, instead of focusing on internal dynamics and ensuring stability, Nigeria's colonial judiciary was focused on ensuring access to economic opportunities for Britain.[638] As such, Aka notes that the judiciary during this time had no social justice imperative.

The post-colonial period can be broken into periods of military and democratic rule, both of which illustrate different conceptions of the judicial function. As might be expected during periods of military rule, "military dictators disbanded the legislature and ruled by military decrees, as well as suspended many sections of the constitution, including those dealing with fundamental freedoms."[639] In addition to suspending parts of the constitution, military rulers instituted military tribunals, stripping the judiciary of some of its core functions.[640] Aka notes that during this period the courts were used in a similar way as they were during the colonial period: to consolidate executive power.

[632] Aka, "Judicial Independence under Nigeria's Fourth Republic," 24.
[633] Ibid., 20-21.
[634] Ibid.
[635] Ibid.
[636] Ibid., 22.
[637] Ibid., 21.
[638] Ibid., 21-22.
[639] Ibid., 24.
[640] Ibid.

Nigeria has experienced two judiciary cultures in periods of democracy. The first brief period was modelled after the British (1960-1966), during which there was a preference for the primacy of the legislature as is the case in the British tradition.[641] In later democratic periods, the judiciary was based on the American presidential system (1979-1983, then 1999-present).[642] Aka argues that it is under the American judiciary model that Nigeria's courts could have scope for judicial independence.[643] This is because the presidential system features more of an explicit role for the judiciary to undertake judicial review, rather than the parliamentary system, where there is less of a tradition of "judge made law."[644]

The evolution of Nigeria's courts is a useful starting point for analysis of the case law in this Chapter and for putting into context the survey responses that will follow in Chapter 7. Firstly, it must be noted that it is only in recent history that Nigeria's courts have been constructed to enable judicial independence. Secondly, present day courts carry with them a heavy history of the legal culture that came before them, when judiciaries did not prioritise social justice, and when courts were seen as a natural extension of executive power. In this context, it is more tenuous for a relatively young democratic judiciary to function in a way that may look familiar to those who hail from jurisdictions where there is a long tradition of judicial independence.

6.3 Methodology, Case Law Profile and Trends

In this section, I provide a brief discussion of methodology for the Chapter, and then present an overview of the body of case law that will be analysed. I also provide some high-level findings about recent reported case law on oil pollution.[645]

[641] Ibid., 24-25.
[642] Ibid., 24-25.
[643] Ibid.
[644] Ibid.
[645] These "macro findings" should be read with awareness of the implicit biases of the sample (See Chapter 3, Section 3.4.3 on Methodology), primarily that these are only cases that have appeared in Law Reports or academic literature on the subject and as such may have an implicit reporting bias. The cases are also at different stages of the judicial process, with only a few cited decisions from trial courts and most at different appellate courts. Given a culture of appeal in Nigeria, it is not to be assumed that a decision is final unless it is a decision of the Supreme Court.

These findings from a systematically collected sample constitute a unique contribution to the literature on post-democracy oil pollution litigation in Nigeria.

6.3.1 Methodology

This Chapter takes as its foundation original data collected on litigation between oil companies and communities between 1999 and 2015. In addition to the domestic case law, I include a selection of cases from other jurisdictions where extra-territorial litigation is used for Nigerian oil pollution cases. This section will briefly review how domestic case law was collected and analysed. A more thorough discussion of the case law methodology is available in Chapter 3.

6.2.2.1 Collection

Collecting a specific sample of case law required that I identify the types of cases that would provide data to help answer my one of my key research questions: how effective are courts in acting as a gateway to environmental justice for victims of environmental harms in Nigeria? Answering this question requires that I draw on data from cases where oil companies and communities are in dispute over environmental harms. Research in the past has looked at some such cases, but in order for the case selection process to be more rigorous and substantial, my project develops a more systematic approach to identifying case law – by applying inclusion and exclusion criteria to available law reports. [646]

There are two primary sources of law reports that I used to create the dataset of cases.[647] The first is a collection of law reports from 1999-2012, which were housed in a library at a commercial law firm in Abuja – these law reports are actively used by litigators in their case law research. The second source was an online database that covered cases from 1999 to 2015, *Law Pavilion*.[648] The same inclusion and exclusion criteria were applied to both sources. For cases to be included in my analysis, they needed to meet the criteria of being between an oil company and an

[646] See Gilbert Kodilinye, *Nigerian Law of Torts* (London: Sweet & Maxwell, 1982) for a non-systematic case law selection.
[647] See Chapter 3, Section 3.3.2 for more information about how the law reports were accessed.
[648] Law Pavilion, http://lawpavilionplus.com/reports.html (accessed June 10, 2017).

individual and/or community between 1999 and 2015.[649] This original sift resulted in 133 reported cases that involved an oil company in a dispute with an individual or a group of individuals. I then excluded cases that did not concern some type of pollution, alteration of the natural environment, or otherwise environmental harm. For example, I would include a case if it involved Shell and Individual X, but then exclude a case if Individual X was filing a suit for an employment dispute.[650] On the other hand, I would include a suit involving Elf and Individual Y because it involved damage to Individual Y's farming land due to an oil spill. After I had excluded non-pollution disputes, the search returned forty-eight relevant cases for analysis.

6.2.2.2 Analysis

Once cases were collected, I input key information of each case into a spreadsheet that organised significant points of information, such as which companies were being sued, and on which legal grounds they were being sued. I also organised cases based on what grounds appellate judges were making decisions, which parties were successful at which level of the court system, and when cases where being filed and ultimately decided. This approach allowed me to analyse cases at the aggregate level in order to identify trends in reported case law. The approach also provided me with a mechanism to focus my analysis on the individual level, such as organising cases by which torts were used.

While this approach ensured that I had a comprehensive sample for analysis, it also presented a bias toward reported case law, which by its very nature focuses on precedential or novel judgements. In light of this, it is reasonable to assume that this research only covers a fraction of litigation relating to oil pollution in Nigeria. There may be a broader approach to judicial decision-making at the trial court level not captured, given my focus on appellate courts and final judgements. With this limitation in mind, the next section will discuss the aggregate trends identified by the research.

[649] Oil companies were identified by searching for NNPC, as well as major international oil companies known to have oil blocs in Nigeria, such as Shell, AGIP, Elf, Chevron, etc.
[650] A majority of suits not related to oil spills in the first sift were related to employment disputes.

6.3.2 Case Sample – Trends

As mentioned above, the methodology enables me to identify some useful findings by looking at the cases on the aggregate level. This section will discuss some of these aggregate findings, which shed light on which companies are most often named in reported case law (6.3.2.1), the amount of time it takes for cases to make it through the appellate system (6.3.2.2), and the success rate of communities at different levels of the court system (6.3.2.3). The findings discussed below were gleaned specifically from analysing the case law as it is written.[651]

6.3.2.1 Who is Being Sued and Why?

A majority of the reported case law available from 1999-2015 involved Shell as named tortfeasor.[652] While Shell is named in a vast majority of cases, it may not necessarily mean that they are somehow more at fault, or are conducting their oil operations in a more risky fashion than other oil majors operating in Nigeria. Indeed, Shell's prevalence in oil pollution litigation may instead be explained by their long history of oil exploitation in Nigeria.[653] As the first major oil company to exploit oil reserves in commercial quantities, a majority of the onshore concessions in the country belong to Shell.[654] Onshore oil exploitation by its very definition comes closer to the everyday lives and economic activities of local communities, where offshore spills may have a more disparate negative effect on communities.

[651] Chapter 7 will discuss the litigation experience in a broader sense by using results of a survey conducted in 2014; Chapter 7 will also cover issues such as barriers to filing claims and provide further understanding to drivers of court delays.
[652] Figure 8 shows that more than 50% of cases involved Shell's Nigerian subsidiary, SPDC.
[653] Frynas, *Oil in Nigeria*, 46.
[654] Ibid.

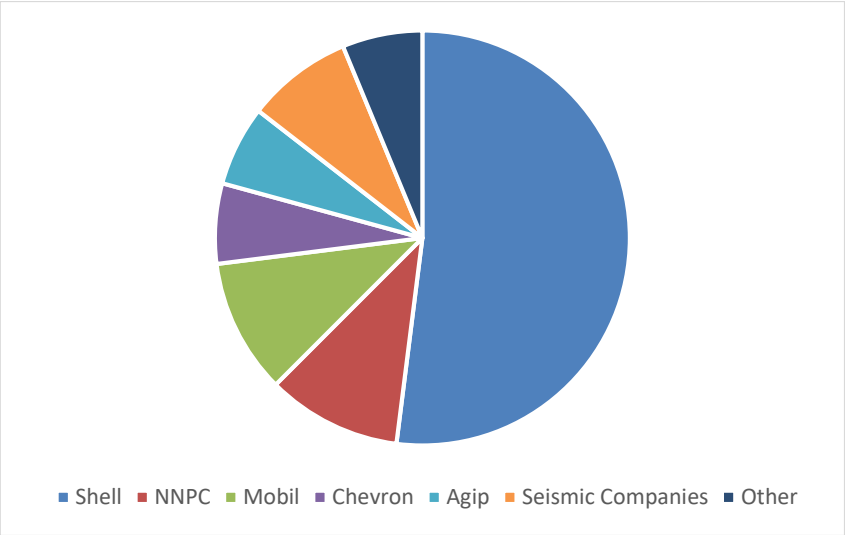


Figure 7: Shell 52%, 10.5% NNPC. 10.5% Mobil. 6.25% Chevron. 6.25% Agip. 8.25% Seismic Companies. 6.25% Other (Total, Gulf, etc.).

More than half of the cases in my 1999-2015 Dataset were related to large scale oil spills. This Dataset shows that a) the inclusion and exclusion criteria outlined in the methodology worked well to identify cases relating to oil pollution and b) that communities in oil affected regions are using the courts to seek redress. The remedies sought in these oil spill cases were primarily related to the damage caused to communities' and individuals' land, in particular the loss of livelihoods caused by depletion of fish stocks and arable farming land. The remaining half of reported cases covered a range of issues, including damage caused to land as a result of oil company operations, as well as damage caused by seismic activities undertaken by oil companies during the oil exploration phase.

6.3.2.2 Delay

Analysis of the Dataset also indicates severe court delay.[655] Addressing cases in a timely manner is a cornerstone of modern conceptions of access to justice. Lord Bingham felt the concept to be so self-explanatory that, in outlining the tenets of rule of law, he simply said, "that [the Rule of Law] should also be available without excessive delay is so obvious as to make any elaboration unnecessary."[656] Heise

[655] See Chapter 7, Section 7.2 for more on delay.
[656] Lord Bingham, "The Rule of Law," *The Cambridge Law Journal* 66, no. 1 (2007): 67–85.

notes that delays not only inhibit justice from being served, but also "erode public confidence in the civil justice system, disappoint and frustrate those seeking compensation through the legal system, and generate benefits for those with the financial ability to withstand delays or otherwise benefit from them."[657] The Nigerian Constitution itself recognises the importance of a timely trial, enshrining within the Constitution an obligation of the judiciary to provide a judgement within 90 days of "the conclusion of evidence and final address."[658]

My analysis of oil-related litigation in Nigeria found that an average of ten years passed from the time a case is filed in a trial court to when a final judgement is received in an appellate court.[659] The date of the trial court filing was often not readily available in the dataset of reported cases, but a conservative estimate, based on data available, would be that it might take three to four years for a case to be heard in the trial court.[660] According to the Dataset that I collected, once an oil pollution case has been filed with the Court of Appeals, litigants experienced an average of 3.7 years wait for a decision between the time of filing in the appellate court and the judgement.[661] For a further appeal to the Supreme Court, an average

[657] Michael Heise, "Justice Delayed: An Empirical Analysis of Civil Case Disposition Time," *Case Western Reserve Law Review* 50, no.4 (2000): 813-850; 814-815.
[658] S.294(1), Constitution of the Federal Republic of Nigeria 1999 [Cap VII]. For more, see: Nwauche, E. S. "An Appraisal of the Constitutional Provision for the Delivery of Judgments in Nigeria," *Commonwealth Law Bulletin* 27, no. 2 (2001): 1278–90; 1279.
[659] Onyema places this estimate between five and twenty years. See Emilia Onyema, "The Multi-door Court House (MDC) Scheme in Nigeria: A Case Study of the Lagos MDC," *Apogee Journal of Business, Property & Constitutional Law* 2, no. 7 (2012): 96-130.
[660] Data is based on what trial dates could be found in my sample, as averaged, and then triangulated with broader research. I could not identify accurate statistics on the total number of relevant suits that were filed at the trial stage, so used broader literature on the justice sector to corroborate findings. For example, see "Assessment of Justice System Integrity and Capacity in three Nigerian States," *United Nations Office on Drugs and Crime,* https://www.unodc.org/pdf/crime/corruption/Justice_Sector_Assessment_2004.pdf (accessed August 1, 2017); John Agbonika and Alewo Musa, "Delay in the Administration of Criminal Justice in Nigeria: Issues from a Nigerian Viewpoint," *Journal of Law, Policy and Globalization* 26, no. 0 (2014): 130–38 and Obiokoye Onyinye Iruoma, "Eradicating delay in the administration of justice in African Courts: A comparative analysis of South African and Nigerian Courts," *LLM Dissertation*, the University of Pretoria, South Africa, 31 October 2005, 41.
[661] These are my calculations based on calculating time between judgements for each case at each level of the court system and then averaging all of them. This calculation is confirmed by other studies as well. See Peter A. Anyebe, "Towards Fast Tracking Justice Delivery in Civil Proceedings in Nigeria," in *Judicial Reform and Transformation in Nigeria*, eds. Epiphany Azinge, Dakas C. J. Dakas, 136-169 (Lagos: Nigerian Institute of Advanced Legal Studies, 2012), http://www.nials-nigeria.org/journals/Peter%20Anyebe-%20Towards%20Fast%20Tracking.pdf (accessed August 1, 2017).

of 4.3 years passed between filing and judgement. This means that most litigants were waiting an average of eight years simply to resolve a complete appeal process. From a comparative perspective, Nigeria's delays in civil proceedings are poor, even when compared to other Sub-Saharan African countries and to other lower-middle income countries.[662]

While Chapter 7 will discuss some of the key drivers of delay in the context of the "litigation experience," it is prudent to discuss here the culture of appeal in Nigerian litigation. This is of particular relevance to the case law discussed in this Chapter due to the fact that all cases discussed are appellate decisions. Nigeria has a universal right to appeal enshrined within the Constitution that drives delay and congestion in the courts.[663] One study found that in 2000/2001, 504 appeals cases were lodged with the Supreme Court.[664] Of those filed, 275 received opinions by the court, compared with the average of 80 – 90 cases that receive attention from the U.S. Supreme Court annually.[665]

This right to appeal stems from Section 241 of the 1999 Constitution, which provides for the right to appeal, even if that appeal is frivolous in nature.[666] Of particular significance to establishing a universal right to appeal is section 241(1)a, which states that a litigant has a right to appeal "Final decisions in any

[662] On the World Justice Project's Rule of Law Index, Nigeria scored lower than the regional average for Sub-Saharan Africa, and lower than the average for other lower-middle income countries. See "Rule of Law Index," *World Justice Project,* https://worldjusticeproject.org/sites/default/files/documents/RoLI_Final-Digital_0.pdf (August 1, 2017).
[663] Ogowewo, Tunde I. "Self-Inflicted Constraints on Judicial Government in Nigeria." *Journal of African Law* 49, no. 1 (April 2005): 39–53, 46.
[664] Ibid., 40.
[665] Ibid., 39. Also see "The Justice's Caseload," *Supreme Court of the United States* https://www.supremecourt.gov/about/justicecaseload.aspx (accessed August 22, 2017). Based on published Supreme Court judgements from the Center of the Nigerian Judicature, the Supreme Court's caseload has fluctuated, from high points, such as more than 300 cases in 2001 to historic lows, such as 8 cases in 2011. See for all Supreme Court judgements "2016 Judgements of the Supreme Court and Court of Appeals," *Center for the Nigerian Judicature,* http://www.lawnigeria.com/FEDERATION-JUDGMENTS.html (accessed August 1, 2017).
[666] In addition to the drafting of S.241, a possible contributing factor to this culture of appeal is the way in which Nigerian lawyers become Senior Advocates of Nigeria (SAN), roughly equivalent in status to a Queen's Counsel in the UK. In order to gain SAN status, a lawyer must fit a number of criteria, including having tried 8 cases at the High Court, 6 at the Court of Appeal, and 3 at the Supreme Court. This designation incentivizes lawyers to push cases to the Supreme Court, and thus has an adverse effect on the efficiency of the courts. See Ogowewo "Self-Inflicted Constraints on Judicial Government in Nigeria," 46.

civil or criminal proceedings before the Federal High Court or a High Court sitting at first instance." This means that the only true restriction to appeal would be if an appellant was filing suit on anything other than a final decision, for example if a litigant appealed a preliminary judgement. Section 241(1)b states that appeals can be heard based on "questions of law alone," but it is not an overriding requirement of all appeals.[667] The result of such drafting is that appellate courts are required to hear cases as a matter of constitutional right, even if there is no question of law raised. This creates a straightforward mechanism to delay final judgements in cases, a tactic which is always advantageous to the party that has the most to lose financially from the suit.[668]

One key informant described the universal right as follows:

> So court number one throws it out, fine, you can appeal to court number two, court number two throws it out, you go over to the Supreme Court. Seven to ten years have passed because of the congestion of the court…not only are appeals a right, the court has to hear it. Therefore the courts are congested because many of them lack in any merit, but it's a right.[669]

The frivolity of some of these appeals can be egregious. One senior legal practitioner cited a case he worked on where a community's filing was severely delayed due to the fact that the court paperwork was filed against "Shell Petroleum Development Company" rather than "The Shell Petroleum Development Company of Nigeria." The lawyer calls the tactic of filing such a paltry objection "legal filibustering."[670] Six months after filing the objection, the community was asked to amend their paperwork to correct the clerical error. By that point, the community was confused, alienated from the legal system and asked the lawyer to remove their claim from court. A year later, the community informed their former counsel that they had received payment for the pollution caused in their community, without continuing with their claim. The lawyer recounts:

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[667] PH1L3 adds that the Rules of Court grant lower courts the right to give leave of court for appeals where a question of fact is being appealed versus questions of law, which do not require such a leave of court. Interview PH1L3, June 29, 2017.
[668] Chapter 7's Sections on Delay and Enforcement discuss this further.
[669] Interview A1L5, August 12, 2014.
[670] Ibid.

> They told me "we've gotten paid". I said "how?" [The community said] "We just got our youths to go and block the location and seize their stuff and they came and negotiated with us and we got paid."[671]

This section has discussed the scope of delay in Nigeria's courts.[672] From filing a suit to receiving a final judgement, a claimant can expect to undergo an average of ten years of legal proceedings before they receive a final decision. As expedient judgements are a cornerstone of access to justice and the rule of law, this lengthy time frame to resolve disputes is an entrenched barrier to environmental justice. These delays have real implications for the lives of people who have suffered from oil pollution. From further deteriorating health or continued loss of livelihood from polluted farmland, delays in judgements almost exclusively serve as a beneficial mechanism for oil companies in suits where communities are seeking damages.

6.3.2.3 Bias of Decisions

Investigating bias in court judgements simply by analysing the case law is a fraught exercise.[673] Larkins cautions against assessing bias by counting how many times a court judged in favour of a particular litigant or against another. Larkins notes that judging a court as lacking bias simply because it grants judgements evenly across litigant groups does not mean that both parties are always equally legally right.[674] Keeping this in mind, Chapter 7 provides a more nuanced discussion of bias of decisions based on perceptions of legal practitioners that regularly interact with the courts. While the nuance provided in Chapter 7 helps to determine bias more definitively, this section will briefly discuss how each level of the courts in my dataset decided cases, either in favour of oil companies or communities. This information is useful to dispel assumptions about the way in which courts decide cases (particularly, to show that oil communities do win in court sometimes, but that the level of the court matters).

[671] Interview A1L2–PH, January 12, 2015.
[672] See Chapter 7, Section 7.2 for more on delay across the litigation cycle.
[673] See Christopher M Larkins, "Judicial Independence and Democratization: A Theoretical and Conceptual Analysis," *The American Journal of Comparative Law* 44, no. 4 (1996): 605–26.
[674] Ibid., 617.

Of the cases I analysed, a majority of trial judges ruled in favour of parties harmed by oil industry activity. This could be for a variety of reasons. It could be that the cases are simply clear instances of a valid legal claim filed for egregious conduct on the part of the oil company. There has also been the suggestion that lower courts are putting a larger emphasis on the substantive case rather than procedural bottlenecks that have historically hindered these cases moving forward in the courts.[675] Finally, it may be that there is a cultural, age, or educational difference at various levels of the court, meaning that justices could approach the same material differently.

At the Court of Appeals level, 55% of the cases analysed were decided in favour of oil companies.[676] This slight gap widens dramatically at the Supreme Court level, however. Seventy two percent of cases can be classified as clear wins for oil companies in the Supreme Court, versus less than a third for communities. It could be that oil companies simply have more cogent legal claims a majority of the time, and so make it through a successful appeals process based on the merits of their claims. Alternatively, it could be due to the fact that the culture within the Supreme Court is one that takes a more technicality-driven approach than the lower courts, which oil companies could exploit. Finally, this could be the case because Supreme Court justices are more sympathetic to oil company interests than in the trial courts due to reasons such as the economic influence of oil revenue or extrajudicial pressure imposed on judges at the final stage of the appeals process. These hypotheses will be explored in more detail in Chapter 7, where survey findings suggest there is a real bias in the courts in favour of oil companies.

[675] Assertions came from Interviews A1G1 and A1G2, July 14, 2014. This could be due to the Federal High Court Rules, which place an emphasis on doing substantive justice. See Nigeria Fed. High Court CPR 2009.

[676] In the instances where communities won a favourable judgement, a victory might be that their case is remitted back to a lower court to be heard again, or in some instances they won the appeal outright, which still leaves them with uncertainty at the Supreme Court hearing. In the instances where a company wins a favourable judgement in the Court of Appeal, a "win" is getting the suit thrown out by the judge altogether, a somewhat common outcome. This means that the Court of Appeal, as an institution, can do little to provide substantive redress for victims of oil pollution. Remitting cases back to a lower court introduces further uncertainty of when the case may be definitively resolved and provides no assurances that the next suit will have a positive outcome. A favourable decision for a pollution victim will likely result in a Supreme Court appeal.

6.3.3 Summary

This section provided an overarching framing for the analysis that will follow. Of the forty-eight cases analysed, Shell is the most named oil company in disputes. The section also found that while more than half of cases are concerned specifically with oil spills, there is still a large group of cases where claimants filed disputes over other negative environmental externalities of sector activity, such as seismic activities. This significant group of cases suggests that in reviewing and reforming future gateways to environmental justice in the oil and gas sector, considerations must be made for environmental damage beyond oil spills.

I also made use of anecdotal assertions by key informants and literature in order to show that judgements are substantially delayed. Based on analysis of the Court of Appeal, Supreme Court, and some high court cases, along with the literature, the modest estimate is an average of 10 years to receive a final judgement in a case. As I will show in Chapter 7, this figure may be broadly consistent with the severity of delays across the Nigerian legal system, but the tactics used to delay may differ. Finally, this section highlighted that some litigants fare better at different levels of the court system. The following section will discuss one particular type of lawsuit that was broadly absent from the dataset: public interest environmental litigation.

6.4 Public Interest Environmental Litigation

In some regions of the Global South, Public Interest Environmental Litigation (hereafter PIEL) is considered an important gateway to environmental justice.[677] The litigation strategy involves an individual or group that may or may not be directly affected by a certain environmental harm instituting a legal action in the public interest.[678] PIEL suits can cover a range of environmental issues – from

[677] See Razzaque for her seminal work on PIEL in India, Pakistan, and Bangladesh. Jona Razzaque, *Public Interest Environmental Litigation in India, Pakistan, and Bangladesh*. (The Hague: Kluwer Law International, 2004).
[678] Michael G Faure and A.V. Raja, "Effectiveness of Environmental Public Interest Litigation in India: Determining the Key Variables," *Fordham Environmental Law Review* 21, no. 2 (2010): 239–94; 239.

ensuring that certain economic activity does not pose a threat to citizens' health to ensuring that activities such as mining or quarrying do not negatively affect the "ecological balance" of a particular ecosystem.[679] PIEL has been used effectively in India to hold government to account and to provide protection to society's most vulnerable citizens.[680]

Razzaque notes that PIEL has a range of benefits in the contexts she studies (India, Pakistan and Bangladesh), which share similarities to Nigeria.[681] Razzaque notes that PIEL is an effective tool because governments face constraints that make the enforcement of environmental regulations challenging. In particular she argues that "insufficient funds, inadequate staff, and lack of expertise" in government regulators make PIEL an attractive alternative for seeking environmental protection in the public interest.[682] Further, Razzaque notes that "agencies may be unwilling to bring actions against violators due to political pressure or the agencies themselves are promoting the activity that they should be regulating."[683] In these cases, PIEL serves as a tool for citizen-initiated action, which can help to overcome government apathy.[684] Chapter 4 of this dissertation illustrated that these constraints – insufficient funds, expertise, and political motivation – apply not only to countries in South Asia, but also to the Nigerian context.

One of the starkest observations that emerged in reviewing my Dataset was that there is a lack of PIEL in the Nigerian context. This is particularly striking given the considerable benefits of PIEL found in India, where the country's constitutional framework shares similar approaches to Nigeria in conferring rights on citizens.[685]

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[679] Razzaque, *Public Interest Environmental Litigation in India, Pakistan, and Bangladesh*, 48.
[680] Faure and Raja, "Effectiveness of Environmental Public Interest Litigation in India," 248.
[681] Razzaque, *Public Interest Environmental Litigation in India, Pakistan, and Bangladesh*, 11. Cha also makes the point that PIEL can be used when environmental laws are ineffectively enforced. See Cha, "Applying Lessons Learned from the United States," 202.
[682] Ibid., 11.
[683] Ibid.
[684] Ibid.
[685] See Emmanuel E. Okon, "The Environmental Perspective in the 1999 Nigerian Constitution." *Environmental Law Review* 5, no. 4 (December 1, 2003): 256–78; Read, "The New Constitution" and Okere, "Fundamental Objectives and Directive Principles of State Policy under the Nigerian Constitution."

In order to better understand this dearth of PIEL in Nigeria, I will briefly compare the Nigerian and Indian approaches to interpreting their respective constitutions' provisions for fundamental rights and fundamental objectives and directive principles.[686] I will also note each jurisdiction's approach to standing, a liberal interpretation of which is a key precondition to successful PIEL.[687] Then, in 6.4.2, the section will discuss three cases in Nigeria where PIEL was attempted in relation to oil sector activity. As the literature on Indian public interest litigation is extensive, this section intends only to be illustrative, rather than comprehensive.[688]

6.4.1 Enabling An Environment For PIEL: India and Nigeria

Since the 1980s, India has been a leader in Public Interest Environmental Litigation in the Global South and has introduced a range of innovations for expanding access to courts for cases in the public interest.[689] In this section I draw attention to two innovations in Indian law which have been instrumental in developing a tradition of public interest environmental litigation. These two innovations – liberalising standing and introducing a new interpretation of the fundamental right to life – are useful comparators to the Nigerian context, where the pre-conditions for innovation are similar, and yet the judiciaries have chosen different paths with respect to public interest environmental litigation.

In the late 1970s, India began to liberalise standing. Before this, the Indian courts employed a restrictive interpretation of standing, which required a litigant to have direct interest in a case in order to file a valid claim.[690] However, this began to

[686] More on the Nigerian Constitution and its approach to rights is discussed in Chapter 5, Section 5.10.
[687] Jamie Cassels, "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?" *The American Journal of Comparative Law* 37, no. 3 (1989): 495–519; 498.
[688] For more on PIEL in India see, Razzaque, *Public Interest Environmental Litigation in India, Pakistan, and Bangladesh* and Perry-Kessaris, "Global Business, Local Law: The Indian Legal System as a Communal Resource in Foreign Investment Relations."
[689] See Geetanjoy Sahu, "Implications of Indian Supreme Court's Innovations for Environmental Jurisprudence", *Law, Environment and Development Journal* 4, no. 1 (2008): 1-19; 1.
[690] See Sahu, "Implications of Indian Supreme Court's Innovations for Environmental Jurisprudence", 5*;* and Cassels, "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?,"498-499.

change in 1976 with **Maharaj Singh v. Uttar Pradesh.**[691] The Supreme Court found that standing needed to be interpreted in a way that was sensitive to community, rather than purely individual interests.[692] Almost three decades after India, Nigerian courts similarly expanded their interpretation of standing, noting that it is acceptable for a member of a community to sue in a representative capacity in order to address community interest in environmental harms.[693]

However, this is where their jurisdictions' interpretive similarities end. Where Nigeria has relaxed standing slightly, India has continued to broaden the scope of standing for public interest cases. By 1982, Chief Justice Bhagwati consolidated a developing view of liberalised standing by stating in **SP Gupta v. Union of India** that:

> Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons ... and such a person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for appropriate direction...[694]

The expansion of standing, along with other developments discussed below, led to a now entrenched tradition of public interest environmental litigation with a range of actors filing cases in Indian courts for the public good. Sahu finds that "out of 104 environmental cases from 1980-2000 in the Supreme Court of India, 54 were filed by individuals who were not directly the affected parties and 28 were filed by NGOs on behalf of the affected parties."[695]

More than three decades after the Indian judiciary was laying the groundwork for an expansive interpretation of standing, the Nigerian judiciary still viewed public

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[691] **Maharaj Singh v. Uttar Pradesh** 1976 AIR 2602.
[692] Cited in Cassels, "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?,"498.
[693] See **SPDC v. Tiebo & Ors.** (2005) LPELR-3203(SC) and **SPDC v. Edamkue & Ors.** (2009) LPELR-3048(SC) discussed later in this chapter.
[694] Quoted in Cassels, "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?," 499.
[695] Sahu, "Implications of Indian Supreme Court's Innovations for Environmental Jurisprudence", 6.

interest groups as distinct from communities, treating them with hostility. In the case of **Centre for Oil Pollution Watch v. NNPC,** discussed below, a judge went so far as to call a watchdog NGO a "faceless busybody."[696] Without the first necessary step toward liberalising standing to allow for NGOs and unaffiliated individuals to file suits, it would be difficult for other innovations in interpretation to improve the avenues for public interest environmental litigation in Nigeria.[697]

For PIEL to develop in India, the Supreme Court also had to find grounds to make a breach of the right to a healthy environment justiciable.[698] Like Nigeria's Chapter II Fundamental Objectives and Directive Principles, the Indian Constitution's Directive Principles of State Policy are not written as justiciable.[699] Article 37 of the Constitution of India states that the directive principles "shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."[700] This is the section of the Indian constitution that contains Section 48(a), which stipulates that "The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country."[701]

Initially, Indian courts interpreted this to mean that these directives of state policy could not be justiciable, viewing them as adversarial to individual rights.[702] However, by the early 1980s, Indian courts were finding ways to make these directives justiciable in a court of law by linking them to Fundamental Rights. In **Francis Coralie Mullin v. Administrator, Union Territory of Delhi** in 1981 and **Olga Tellis v. Bombay Municipal Corporation** in 1985, the Supreme

[696] **Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation** (2013) LPELR-20075(CA).
[697] As noted in Chapter 5, The Fundamental Rights (Enforcement) Procedures 2009 have begun to liberalise standing for cases related to fundamental rights, as outlined in Chapter IV of the Nigerian Constitution, however this development is moot for environmental cases, which currently are not interpreted as fitting under Chapter IV's S.33 on the right to life.
[698]Rhuks Temitope, "The Judicial Recognition and Enforcement of the Right to Environment: Differing Perspectives from Nigeria and India," *NUJS Law Review* 3 (2010): 423–46; 440.
[699] Part IV, the Constitution of India 1950.
[700] Art.37, the Constitution of India 1950.
[701] This was first introduced in a constitutional amendment in 1976.
[702] See Okere, "Fundamental Objectives and Directive Principles of State Policy under the Nigerian Constitution," 224-225; and Okon, "Fundamental Objectives," 271.

Court of India asserted that infringements on one's right to livelihood and right to dignity were tantamount to breaching an individual's right to life.[703] In 1991 in **Subhash Kumar v. State Of Bihar & Ors.** the Supreme Court asserted that there is a justiciable right to live free from pollution as part of the Article 21 justiciable right to life.[704] This line of jurisprudence created a complementary relationship between rights and principles and built on previous developments in PIL in India in order to allow for PIEL.[705]

6.4.2 Nigeria

While this new cannon of case law was developing rapidly in India, Nigerian precedent remained, and continues to remain, much more stringent in its approach to constitutional interpretation. This analysis shows that there remains a reluctance by the Nigerian courts to liberalise standing and interpret the Constitution's Fundamental Objectives and Directive Principles in a way that would allow for the right to a healthy environment to be justiciable.

6.4.2.1 Oronto Douglas v. SPDC

Oronto Douglas spent a majority of his career fighting government institutions for better oil sector governance.[706] Douglas was one of the lawyers on Ken Saro Wiwa's defence team ahead of the Niger Delta activist's execution in 1995.[707] In the case

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[703] Art. 21, the Constitution of India 1950. Cited in Cassels, "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?" 503.

[704] **Subhash Kumar v. State Of Bihar And Ors.** 1991 AIR 420, 1991 SCR (1) 5**.** See John Lee, "The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law," *Columbia Journal of Environmental Law* 25 (2000): 283–346; 290.

[705] India is now further developing its stance toward PIEL with the introduction of the National Green Tribunal. See Rosencranz and Sahu; and Gill for more on India's National Green Tribunal. Armin Rosencranz and Geetanjoy Sahu. "Assessing the National Green Tribunal after Four Years, "*Journal of Indian Law and Society* 5 (2014): 191–200. See also Gitanjali Nain Gill, "The National Green Tribunal of India: A Sustainable Future through the Principles of International Environmental Law," *Environmental Law Review* 16, no. 3 (2014): 183–202 and Sudha Shrotria, "Environmental Justice: Is the National Green Tribunal of India Effective?," *Environmental Law Review* 17, no. 3 (2015): 169–88.

[706] Before he passed away, Oronto Douglas was acting as special advisor to the former President Goodluck Jonathan. See Musikilu Mojeed, "President Jonathan's top aide, Oronto Douglas, is dead," *Premium Times,* April 9, 2015 http://www.premiumtimesng.com/news/180816-president-jonathans-top-aide-oronto-douglas-is-dead.html (August 1, 2017).

[707] Ibid.

of **Douglas v. SPDC & Ors**[708]**,** Douglas filed suit against Shell, NNPC, Nigerian LNG Ltd, Mobil and the Attorney General of Nigeria for not adhering to the provisions of the Environmental Impact Assessment Decree No.86 of 1992 when developing a new liquefied natural gas project.

Douglas asked the Federal High Court for an injunction on the new LNG project until an up-to-standard EIA was produced. SPDC argued that Douglas had no standing to file the suit in the first place, despite being a member of one of the communities affected by the new LNG project. The trial judge agreed with the oil companies named in the suit and struck out Douglas' case, which he went on to appeal.[709] In his judgement, the trial judge noted that Douglas' filing was "confused," and that "[t]he action is frivolous and the plaintiff a busy body [who] should not be allowed to bring the court into contempt and ridicule."[710]

In his judgement, Court of Appeal Justice Musdapher ruled that the trial judge did not have sufficient information from the respondents at the time of their objection to throw out Douglas' suit based on standing, nor on any other grounds.[711] Justice Musdapher remitted Douglas' case back to the Federal High Court to be heard anew by a different justice. However, by the time the appellate court delivered its decision, the LNG project in question had been completed and thus the retrial never went ahead.[712]

The case was a disappointment for advancing PIEL in the Nigerian context, particularly on the point of liberalising standing. In making his judgement, Court of Appeals Justice Musdapher clarified his interpretation of standing, which maintained a restrictive interpretation. He argued that "for a plaintiff to establish his *locus standi* in an action for declaratory order he must prove that his legal right or interest which he seeks to protect is not a right common to the community at

[708] **Douglas v. SPDC & Ors.** (1998) LPELR-6457(CA).
[709] Ibid.
[710] Ibid.
[711] Ibid.
[712] Rhuks Temitope, "The Judicial Recognition and Enforcement of the Right to Environment: Differing Perspectives from Nigeria and India." *NUJS Law Review* 3 (2010): 423–46; 439.

large, unless he can show that he suffered damages more than any person."[713] While this judgement did not require Justice Musdapher to assess Douglas' standing specifically, with such a restrictive interpretation it is unlikely that Douglas' case would have been successful.

6.4.2.2 Gbemre v. SPDC

One Federal High Court case has become commonplace in the literature on judicial activism and access to environmental justice in Nigeria, despite both the judge and the case facing serious challenges later on.[714] In the case of **Gbemre v. SPDC & Ors**[715], Gbemre sued Shell for gas flaring persistently in his community.[716] According to the Gbemre judgement, flaring:

> a. Poisons and pollutes the environment as it leads to the emission of carbon dioxide, the main greenhouse gas; the flares contain a cocktail of toxins that affect their heath, lives and livelihood.
> b. Exposes them to an increased risk of premature death, respiratory illness, asthma and cancer.
> c. Contributes to adverse climate change as it emits carbon dioxide and methane which causes warming of the environment, pollutes their food and water.
> d. Causes painful breathing chronic bronchitis, decreased lung function and death.
> e. Reduces crop production and adversely impacts on their food security.
> f. Causes acid rain, their corrugated house roofs are corroded by the composition of the rain that falls as a result of gas flaring saying that the primary causes of acid rain are emissions of sulphur dioxide and nitrogen oxides which combine with atmospheric moisture to form sulphuric moisture to form sulphuric acid and nitric acid respectively. The acidic rain consequently acidifies their lakes and streams arid damages their vegetation.[717]

[713] **Douglas v. SPDC & Ors.** (1998) LPELR-6457(CA).
[714] For example, see Amechi, "Litigating Right to Healthy Environment in Nigeria," 320; Temitope, "The Judicial Recognition and Enforcement of the Right to Environment;" and David R Boyd, "The Implicit Constitutional Right to Live in a Healthy Environment," *Review of European Community & International Environmental Law* 20, no. 2 (2011): 171–79; 176.
[715] **Gbemre v. SPDC and Ors.** (Unreported) Suit FHC/B/CS/53/05 on 14th November 2005.
[716] In Nigeria, flaring is still a persistent challenge, with ineffective statutory remedies to curb the practice. See Chapter 5, Section 5.7.
[717] **Gbemre v. SPDC and Ors.** (Unreported) Suit FHC/B/CS/53/05 on 14th November 2005.

Gbemre used both the Nigerian Constitution and the African Charter on Human and Peoples' Rights to file suit against SPDC for infringing on the Iwherekan Community's right to life and a clean environment due to persistent and illegal flaring near the community.[718] The rights-based claim was a rare departure from the tradition of using tort law to seek redress.[719]

The allegations were damning. From the respondents flaring without licenses, to the fact that there was never an EIA conducted on the activity, there was strong evidence to support a case that communities were suffering from the practice.[720] Throughout the proceedings, the first and second respondents (SPDC and NNPC) submitted an affidavit that directly opposed every paragraph in Gbemre's affidavit and employed countless tactics to delay court proceedings.[721]

Despite delays, Federal High Court Justice Nwokorie submitted a judgement that upheld the claim that this instance of flaring, illegal under the Environmental Impact Assessment Act and The Gas Re-Injection Act, did infringe on the community's fundamental rights, as outlined in Chapter IV of the Nigerian Constitution.[722] Justice Nwokorie also declared that parts of the Gas Re-Injection Act were unconstitutional because they were infringing on citizens' right to life, similar to the line of reasoning taken in Indian PIEL jurisprudence that linked a right to environment (non-justiciable) to the right to life (justiciable).[723] As a remedy, the Justice called for an injunction on flaring activity. The Judge did not award any compensation or damages to the community; rather he ordered that Shell and NNPC cease gas flaring and that the National Assembly introduce amendments to legislation that aided in the unconstitutional practice of flaring.

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[718] Ibid.

[719] There is at least one other case that tried to use a rights-based claim in a flaring suit against oil companies in Nigeria, but it was dismissed on grounds of insufficient standing of a community to sue. See "Gas flaring lawsuit (re oil companies in Nigeria)," *Business and Human Rights Resource Center,* https://business-humanrights.org/en/gas-flaring-lawsuit-re-oil-companies-in-nigeria (accessed September 1, 2017).

[720] **Gbemre v. SPDC & Ors.** (Unreported) Suit FHC/B/CS/53/05 on 14th November 2005.

[721] See "Gas flaring lawsuit (re oil companies in Nigeria)."

[722] **Gbemre v. SPDC & Ors.** (Unreported) Suit FHC/B/CS/53/05 on 14th November 2005.

[723] See Lee, "The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment."

At the time of Orji's analysis in 2005, this decision seemed to be a promising example of judicial activism.[724] However, it was not long before the seemingly progressive judgment was made that Justice Nwokorie was removed from the case and moved from his Benin State post to the far north in Katsina State.[725] This irregularity, in addition to the numerous delays by the respondent and the failure to comply with the ruling,[726] came under the scrutiny of civil society actors, who suggested that political interference was to blame: according to a lawyer at Climate Justice, "the fact that the judge has been removed from the case, transferred to the north of the country, and [considering that] there have been problems with the court file for a second time, suggests a degree of interference in the judicial system which is unacceptable in a purported democracy acting under the rule of law".[727]

The case is still cited today as a progressive step forward for PIEL in Nigeria. The circumstances around the case suggest otherwise, however; the way in which academics and practitioners' cling to the Gbemre decision shows how scarce this kind of progressive decision-making is in the Nigerian judiciary. Justice Nwokorie's judgement was indeed progressive and activist; he attempted to challenge a major oil company, legislation and the behaviour of a branch of government. The deterioration of his career after the fact and general disregard for the judgement illustrates how stoking tensions with the Executive and the Legislature leave the judiciary vulnerable to external actors and personal persecution.

6.4.2.3 Centre for Oil Pollution Watch v. NNPC

Around the same time that Justice Nwokorie was giving his landmark decision in the Gbemre gas flaring case, another Justice made the decision that an NGO did not have standing in a suit against NNPC. The Lagos-based NGO, Centre for Oil Pollution Watch, was suing NNPC for a 2003 oil spill attributed to a corroded oil

[724] Orji, "An Appraisal of the Legal Frameworks for the Control of Environmental Pollution in Nigeria," 333.
[725] "Shell Fails to Obey Court Order to Stop Nigeria Flaring, Again," *The Climate Law Database*, http://www.climatelaw.org/shell-fails-obey-court-order-stop-nigeria-flaring/ (accessed August 2, 2017).
[726] Ibid.
[727] Ibid.

pipeline.[728] The NGO was asking for the "reinstatement, restoration, remediation of the impaired and/or contaminated environment."[729] NNPC challenged the NGO's standing to institute the action in the first place and the trial judge upheld the objection. The Centre for Oil Pollution Watch appealed the trial court's decision and in 2013 the Justice of the Court of Appeal agreed that the NGO did not have the standing to institute an action, upholding the lower court's decision to throw the case out.

Upon first glance, this decision may be interpreted as another judge being too literal and technical in his interpretation of the law. A more in-depth reading of the judge's decision, however, shows that Justice Augie was making an explicit choice to keep the public interest litigation gateway closed for communities seeking redress for oil pollution. This does not mean that Justice Augie may not have wanted to open this legal gateway, but she acknowledged that Nigeria's legal system has not "evolved" to that point.

In her judgement, Justice Augie said that:

> The position of the law may have changed [in the UK] to cloak "pressure groups, NGOs and public spirited taxpayers" with *locus standi* to maintain an action for public interest, as argued by the Appellant, but that is in other countries, not Nigeria...The truth of the matter is that there is a remarkable divergence in the jurisprudence of *locus standi* in jurisdictions like England; India; Australia, etc., and the Nigerian approach to same, which has not evolved up to the stage, where litigants like the Appellant can ventilate the sort of grievance couched in its Amended Statement of Claim. [730]

[728] **Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation** (2013) LPELR-20075(CA).

[729] This is not a common remedy asked for in Nigerian courts, where often victims of pollution focus on compensation awards rather than clean up.

[730] **Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation** (2013) LPELR-20075(CA). This contradicts other statements made by justices and lawyers in Nigeria in terms of the persuasiveness of British precedent. While Nigerian courts are not bound by British precedent after 1900 due to S.32(1) of the Interpretation Act (Cap. 123 *Laws of the Federation of Nigeria* 2004), in other instances, modern British law has been at least been regarded as persuasive. See **Access Bank plc v Akingbola** [2012] EWHC 2148 (Comm) at [10], "It is agreed between the experts that, although English decisions are not part of Nigerian law and not binding on Nigerian courts, they are nevertheless of highly persuasive value…" Additional research would be required to conclusively say how much modern British precedent is cited in Nigerian cases, but

Not only did the judge declare that she was not able to proactively open a gateway for PIEL in Nigeria, she did so while acknowledging that many other parts of the world, Global South countries included, had already begun to shift their own understanding of *locus standi* to open the gateway for more PIEL. In an assenting opinion, Justice Saulawa made it clear he believed the Centre for Oil Pollution Watch did not have a standing, nor should they.[731]

This is perhaps one of the most overt and explicit rejections of the possibility for PIEL in Nigeria, despite the fact that judges are recognising that other jurisdictions around the world are moving forward in an attempt to provide better gateways to justice for citizens. This line of reasoning is at odds with past practice of the Nigerian judiciary, which has relied on India's interpretation of its Constitution's Directives of State Policy in order to justify its stance toward the Nigerian Constitution's Chapter II Fundamental Objectives and Directive Principles.

6.4.3 Summary

In India, the judiciary has led the way for public interest litigation to be an effective tool for redress from environmental harm. While acknowledging that the practice has become commonplace in other common law jurisdictions, Nigeria's higher courts remain hesitant to open this gateway. The Gbemre case indicates that there may be judges trying to make decisions based on substantive grounds in favour of communities and individuals affected by oil pollution. However, a rigid system at higher levels of the courts does not allow for judicial activism for PIEL.

At present, the key difference between the Indian and Nigerian jurisdictions is their interpretation of the relationship between fundamental objectives and

I can at least state that from reading the cases cited in this research, there is an impression of a departure from British tort precedent. This departure is despite the fact that the evolution of British tort law may contain judgements that would support social justice objectives in the Nigerian courts during the Fourth Republic.

[731] **Centre for Oil Pollution Watch v. Nigerian National Petroleum Corporation** (2013) LPELR-20075(CA).

directive principles and fundamental rights. India has made a progressive choice to view the non-justiciable objectives and principles as complementary and interlinked with fundamental rights, and thus justiciable. Nigerian jurisprudence continues to differentiate the two Chapters of its constitution (Chapter II and IV) in more adversarial terms. Despite the introduction in 2009 of somewhat progressive Fundamental Rights (Enforcement Procedure) Rules, the right to a healthy environment will not be a viable line of argument in a Nigerian court of law until the relationship between Chapter II and Chapter IV rights is changed.[732]

6.5 Common Law Approaches

The dearth of PIEL does not mean, however, that there is a shortage of environmental litigation in Nigeria. It simply means that environmental litigation has taken a distinctive approach, and has been developed to suit a highly politicised context in which neither judicial activism, nor regulation, can be expected to provide redress for oil pollution victims. This section reviews cases that highlight the torts most frequently used by those seeking redress for environmental damage caused by the oil and gas sector, as well as the litigation strategies pursued by oil companies in their defence.

6.5.1 The Use of Tort

In Chapter 4, I showed that the current governance regime is not effectively providing redress procedures for oil spills, the reason in part being the government's conflicting role as oil sector regulator and commercial operator. In Chapter 5, I further showed that oil-related legislation and regulations provide only a few mechanisms for A2EJ, partly due to the government's historic interest in maximising the economic benefits of oil exploitation that accrue to the state. Given the perverse environment within which oil sector regulation exists in Nigeria, it is reasonable to assume agencies will not carry out enforcement of regulations in a way that would be to the benefit of those living closest to oil exploration and production activities. It is for these reasons that that victims of oil

[732] Fundamental Rights (Enforcement Procedure) Rules 2009 is discussed further in the Section 5.10 of Chapter 5.

pollution in Nigeria often resort to the use of tort law to seek oil pollution redress once an environmental harm has been committed.[733] Tort litigation is a common law instrument concerned with redress for a civil wrong. As Shapo writes, "It is plain that tort law cleans up messes. It provides remedies to those injured by the activities of others that fit into various categories of culpability and analogous classifications."[734]

The torts used in oil pollution litigation in Nigeria today are derived from the English Common Law tradition. These solutions remain legally valid in Nigeria under Section 32 of the Interpretation Act, which stipulates that common law remedies, as they existed before 1900, remain in force.[735] The three main torts used in oil-related environmental litigation in Nigeria are negligence (when the accused did not actively intend to cause harm, but may have done so by not being as vigilant as required), nuisance (where an activity of the accused caused harm, in the form of a disturbance to the *status quo* living or working conditions, by its very conduct

[733] It is reasonable to expect regulations to be concerned with setting standards and defining codes of practice. In a contextual vacuum, they are the preferred method for environmental protection, as regulations and legislation are preventative as well as being the product of elected officials purportedly making decisions in the public interest. In the debates about the merits of regulation over litigation for environmental protection, it is noted that tort litigation can only address problems brought forward by private groups and so the decisions that are made may not always be for the greater public benefit. However, legislation and regulation as a preferred mechanism becomes tenuous when the underlying assumption – that lawmakers make law in the public interest – is called into question. Brenner highlights legislation in nineteenth century industrialising England that was ineffective in protecting the environment due to the state imperative to develop the economy through industrialisation. He argued that "Such legislation as the Nuisance Removal and Sanitary Acts had no teeth as far as air pollution went. Terms were loose, exceptions were many, and fines were small enough so that large enterprises could treat them with contempt." On the topic of regulation versus tort litigation, see Pamela Tolosa, "Advantages and Restrictions of Tort Law to Deal with Environmental Damages," *Revue générale de droit* 38, no. 1 (2008): 111-130 ;113; Christopher H. Schroeder, "Lost in Translation: What Environmental Regulation Does That Tort Cannot Duplicate," *Washington Law Journal* 41 (2001-2002): 583-606; 583, 589; and Joel Franklin Brenner, "Nuisance Law and the Industrial Revolution," *The Journal of Legal Studies* 3, no. 2 (1974): 403-433; 424, 427.

[734] Marshall S. Shapo, "Tort Law and Environmental Risk," *Pace Environmental Law Review* 14, no. 2 (1997): 531-544, 531.

[735] S.32(1). Interpretation Act (Cap. 123 *Laws of the Federation of Nigeria 2004),* "Subject to the provisions of this section and except in so far as other provision is made by any Federal law, the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st day of January, 1900, shall, in so far as they relate to any matter within the legislative competence of the Federal legislature, be in force in Nigeria."

of a given activity), and strict liability (where proof that an action took place is enough to find the accused guilty).[736]

Of the three torts, negligence and strict liability were the most widely used in my 1999-2015 Dataset, with nuisance only appearing as the prevailing tort in two cases.[737] The following sections will review the main torts used in order of frequency, citing case law, including both historically significant cases, as cited by other literature, and the recent cases identified in my Dataset. As will be shown in Section 6.5.2 on oil company litigation strategies, despite clear litigation logic by oil communities, these tactics are rarely effective. This is particularly due to the challenges of unclear jurisdictional limits, which have changed over the course of the last two decades and introduced an additional layer of ambiguity to court proceedings. This means that while litigants have valid substantive claims, their suits are often dismissed on a procedural basis.[738]

6.5.1.1 Negligence

In **Chevron & Anor. v. Omoregha & Ors.**,[739] Justice of the Court of Appeals Saulawa describes negligence as follows:[740]

> The term negligence denotes the failure to exercise the standard of care that a reasonably prudent person would normally have exercised in a similar situation. That's to say, any conduct falling below the legal standard established to protect others against unreasonable risk of harm, as against conduct that is intentionally, wantonly, or wilfully disregardful of other's rights...I think, it was Patrick Devlin, who once aptly remarked that – "Negligence in law ranges from inadvertence that is hardly more than accidental to sinful disregard of the safety of others".[741]

[736] Trespass also technically falls into the category of possible environmental torts; however, it did not feature significantly in the case law dataset developed for this research. See V. K. Beena Kumari," Environmental Pollution and Common Law Remedies," *Cochin University Law Review* (1984): 101-114; and Razzaque, *Public Interest Environmental Litigation in India, Pakistan, and Bangladesh*, 199.
[737] Some cases cited more than one tort – the dataset only counts the tort upon which appellate judges identified as the most salient.
[738] See Chapter 7, Section 7.4 for more on the courts' preference for process than substance in decision-making.
[739] **Chevron & Anor v. Omoregha & Ors.** (2015) LPELR-24516(CA).
[740] Ibid.
[741] **Chevron & Anor v. Omoregha & Ors.** (2015) LPELR-24516(CA), 20.

In this section, I will discuss six cases where negligence was the prevailing tort used by litigants to seek damages against oil companies for harms caused in the course of industry activity. The first two cases were those that Frynas identified as significant in his research. The four cases after that are taken from my Dataset.

6.2.2.2.1 Pre-1999 Cases

In the case of **Seismograph Service v. Mark**,[742] it could not be proven that damage caused to property by a seismic boat was due to any sort of behaviour that could be considered negligent (the judge noted that this damage did not take place because the boat was speeding, for example).[743] The court made its decision based on the boat's conduct in view of explicit rules for boat driving conduct. While taking a narrow view of negligence in that case, in **Mon v. Shell-BP**,[744] a decision was taken that an oil spill was the fault of the oil company in question under the *res ipsa loquitur* principle. In this instance, the burden of proof was shifted to Shell-BP to prove that they did not act negligently, a situation that is considerably more favourable to the litigant with fewer resources at its disposal.[745] The judge made the claim that

> Negligence on the part of defendants has been pleaded, and there is no evidence of it. None in fact is needed, for they must naturally be held responsible for the results arising from an escape of oil which they should have under control.[746]

6.2.2.2.2 Developments Since 1999

The cases before 1999 paint an inconclusive picture of how negligence can be used successfully in oil-related cases. The following more recent cases, however, provide

[742] Cited in Frynas, *Oil in Nigeria*, 191.
[743] Seismic boats can cause damage to building structures and other immovable assets due to the intense vibrations caused by sound waves sent through the water as a way of prospecting for oil. See "What are seismic surveys and their impacts?," *David Suzuki Foundation*, http://www.davidsuzuki.org/issues/oceans/science/marine-planning-and-conservation/what-are-seismic-surveys-and-their-impacts/ (accessed August 22, 2017).
[744] Frynas, *Oil in Nigeria,* 190.
[745] Ibid.*,* 191.
[746] Ibid., 73.

support for the use of negligence in Nigerian courts in particular instances. For example, in **Ikontia & Ors v SPDC**[747]**,** negligence on the part of SPDC was proven in the trial court and upheld by the Court of Appeal. In this case, SPDC was being sued for a well the company dug in Uquo Ibeno Local Government Authority, Akwa Ibom State, which was not appropriately cordoned off with a fence or any other protection. The unprotected well resulted in the death of a seven-year old child who fell into the unmarked well and drowned. Not only had the community brought the uncovered well to the attention of Shell before the accident, they went so far as to publish a warning about it in a local newspaper, calling on Shell to fix the well. Even after the precaution and warnings of the community, Shell had done nothing to fix the well, which neighboured the community's land.[748]

Despite losing in the trial court, Shell unsuccessfully appealed the decision in the Court of Appeal, raising a litany of issues, all of which the Court of Appeal eventually dismissed. The range of issues cited by Shell's attorney's in the suit suggest that the company knew they were likely to lose the appeal, but were willing to attempt any and all tactics to seek a favourable judgment and delay payment in the event of a loss. Perhaps the most egregious of Shell's issues raised on appeal took the form of an attempt to cast doubt on the reliability of the death certificate of the child who fell into the well as proof of the death.[749]

Even when the courts decide against an oil company, the delayed decisions can have lingering effects on access to justice. In the Ikontia case, Shell appealed the trial court's decision, originally filed in 1996, in 2005. The Court of Appeal judgment came down in 2010, almost 15 years after the original case was filed. In other words, it took 15 years after the death of their seven-year-old for the Ikontia family to receive a favourable judgement.

In the 2015 case of **Chevron & Anor v. Omoregha & Ors.**,[750] the Court of Appeal upheld a trial court's 2011 decision to award damages to a community for damage

[747] **Ikontia & Ors v. SPDC** (2010) LPELR-4910(CA).
[748] Ibid.
[749] Ibid.
[750] **Chevron & Anor v. Omoregha & Ors** . (2015) LPELR-24516(CA).

caused to its fishing nets, a key source of livelihood for riverine communities. Damage to the community's nets was caused by oil company tugboats speeding through their community's area without providing warning by ringing a bell or other alarm.

Chevron tried to discredit the fishermen's claim by questioning their ability to sue as a group, to which the Court of Appeal judge cited the Federal High Court Rules (Civil Procedure) 2009, 12(1): "Where there are numerous persons having the same interest in one suit, one or more of such persons may sue or be sued on behalf of or for the benefit of all persons so interested."[751] Chevron also attempted to take issue with the fishermen's submissions to the court, by arguing that they did not comply with Federal High Court Rules 2009. Both the trial judge and appellate judge agreed that Chevron's arguments did not apply, as the case was instituted in 1996. In the course of the trial, Chevron called witnesses to the stand to testify; however the Judge dismissed their testimony, as they were not actually physically at the scene of the incident the day it occurred and so could only recite the information given to them by the company. Though the case was ultimately successful, damages were awarded to the community 19 years after the original filing in the trial court.

In **Onyeemukwuru & Ors. v. NNPC,** Onyeemukwuru and others sued in a representative capacity for the Umuoma Autonomous Community in Ihette/Uboma LGA in Imo State for damage to their land caused by an oil spill.[752] The Umuoma community rely on the riparian land for their livelihoods, growing crops like Cassava, and farming snails and fish. In 2003, the community found oil on their land and in the streams running through it. Water was undrinkable and unusable for farming. The community informed NNPC without effect and the spill continued for six months.[753] In support of their suit, they presented witnesses and a Registered Estate Valuer estimate of damage, including photographs of damage and medical records of those whose health was affected by pollution.[754] NNPC did

[751] Nigeria Fed. High Court CPR 2009.
[752] **NNPC v. Onyeemukwuru & Ors.** (2011) LPELR-8826(CA).
[753] Ibid.
[754] Ibid.

not cross examine witnesses nor did they provide any of their own evidence in the case, or ever appear in court. The hearing first took place in December 2006 and the oil company did not appear for the hearing. The trial judge made a decision in the case in 2008, without the presence of NNPC and in favour of the community. NNPC appealed the decision. Upon examining NNPC's claims, the Court of Appeals dismissed NNPC's grounds for appeal.[755]

The case is interesting for several reasons. First and most importantly, the case is significant because the community was able to prove negligence on the part of the oil companies involved for oil pollution by using extensive evidence and a registered Estate Valuer to support their claim. Secondly, the trial judge who decided in favour of the community, Justice Nwokorie, had a reputation for being an activist judge, yet despite this reputation, the Appellate Justice's upheld his decision. Finally, the case highlights tension between branches, particularly if NNPC (which sits under the Executive) does not respect the judiciary enough to appear before the court when called.[756]

There are also other litigants that have used the tort of negligence at trial and have been successful in doing so. However, many of the cases are later thrown out on other grounds, often regarding jurisdiction, upon appeal. For example, in **Goodluck & Ors. v. SPDC**[757], the trial judge awarded damages to a community whose lakes, creeks, and farmland were all damaged by the dumping of oil-contaminated top-soil in Oshika City, despite preliminary objections from SPDC that the initial court, the Rivers State High Court, did not have jurisdiction. On appeal, the appellate judge acknowledged likely negligence on the part of SPDC but stated that he could do nothing due to lack of jurisdiction.[758] This means that negligence may be easier for practitioners to prove moving forward, in the event they are able to premeditate and safeguard against other defences and grounds for appeal that oil companies may use in future.

[755] **NNPC v. Onyeemukwuru & Ors.** (2011) LPELR-8826(CA).
[756] See Section 6.4.2.2, above.
[757] **SPDC v. Goodluck & Ors**. 2008 14 NWLR Pt 1107 294 CA.
[758] **SPDC v. Goodluck & Ors.** 2008 14 NWLR Pt 1107 294 CA.

6.2.2.2.3 Summary

The litigant experience using the tort of negligence has developed positively over the last 15 years and since Frynas' research. While some positive precedent has developed, analysis shows that the tort of negligence will continue to be unsuccessful if oil companies invoke a few standard defences, such as jurisdiction.

6.5.1.2 Strict Liability

In the case of **SPDC v. Anaro & Ors**.[759], Justice of the Supreme Court Ogunbiyi explains the strict liability tort based on the **Rylands v. Fletcher** rule, noting:[760]

> The principle laid down in Rylands V. Fletcher (supra) is to the effect that an occupier of land who brings and keeps upon it anything likely to do damage if it escapes is bound to take responsibility and prevent its escape. In the event of escape however, the occupier will be liable for all the direct consequences of its escape, even if he has been guilty of no negligence.[761]

This late 1860s English judgment sets an important precedent for strict liability in the event of a person or a corporation chooses to engage with inherently dangerous substances on their property. Today in England and Wales, the principle of **Rylands v. Fletcher** is a subset of nuisance torts, due to a series of decisions in the 1990s and early 2000s, which limits its potency as a mechanism for redress for victims of certain environmental harms, in part by requiring claimants to hold property rights.[762] However, in Nigeria the principle of strict liability under **Rylands v. Fletcher** remains a separate action, as it once was in England.[763]

By preserving the original scope of **Rylands v. Fletcher,** Nigerian law does not define who may, or may not, use the tort to seek redress for damage caused by the escape of a dangerous substance stored on one's property. This means that despite

[759] **SPDC v. Anaro & Ors**. (2015) LPELR-24750(SC).
[760] Ibid.
[761] Ibid, 59.
[762] John, Murphy, "The Merits of Rylands v Fletcher." *Oxford Journal of Legal Studies,* 24, no. 4 (December 01, 2004): 643-69.
[763] Ibid.

the changes to land tenure introduced by the Land Use Act (discussed in Section 5.6), those who have the right to occupancy on a piece of land affected by oil pollution have the right to seek compensation for the damage caused to crops, animals, buildings or other improvements on the property.

Given the right of anyone occupying land affected by oil pollution to seek damages and the general nature of oil production, namely a private company holding a hazardous substance, strict liability torts is being used in Nigeria in certain types of oil-related pollution cases, because **Rylands v. Fletcher**[764] imposes strict liability when something hazardous escapes from the area in which it was contained and causes harm.[765] The application of strict liability is promising for those seeking redress, as it limits oil companies from using a third party interference defence to avoid liability. While an old legal principle dating back to 1868, the utility of this principle as a gateway for environmental justice in the context of Nigerian oil pollution litigation is emerging, and being used successfully, in some modern tort cases. This section will discuss five cases where strict liability was a core legal mechanism employed by litigants in seeking damages against oil companies.

[764] **Rylands v. Fletcher** (1868) L.R. 3 H.L. 330.
[765] Ibid.

6.2.2.2.4 Pre-1999 Cases

This strict liability principle has direct implications for the oil and gas sector, particularly in the Delta, where oil spills – understood here as a hazardous substance escaping the confines of a protected area (pipelines and associated equipment) – are a regular occurrence. Kodilinye's tort law research in the 1980s noted that at the time of his analysis, "there appear so far to be very few cases in which the principle has been involved or discussed."[766] The one significant case named in Kodilinye's analysis was **Umudje v. Shell-BP**.[767] In this case, the litigant sued under the strict liability tort for damages following the altering of a waterway for the construction of a road. This inhibited fish from moving freely between two previously connected areas. While in the first instance, Umudje was awarded compensation under a strict liability ruling, the Supreme Court later overturned the decision, arguing that the alteration of water flow did not cause an escape of a substance that could cause harm (i.e. flooding), rather it caused a substance to cease its natural flow, which is not covered under Rylands v. Fletcher.

According to Frynas, one of the most serious inhibitors to the development of strict liability tort law in Nigeria has been the exception of sabotage.[768] Sabotage, bunkering, or pipeline vandalism, are all terms used to describe a type of third party inference; tampering with pipelines and other oil installations to either disrupt production or siphon off oil for illegal refining.[769] Sabotage is also deemed an "act of God" under strict liability tort and so is an important defence for companies building a case to avoid liability.[770] Their success in using sabotage to avoid strict liability has been mixed, however. Case law during Frynas' window of analysis shows that judges were unsympathetic to the third party interference defence by companies in some cases, such as is evidenced in **Shell v. Enoch**[771] and

[766] Kodilinye, *Nigerian Law of Torts*, 116.
[767] Ibid., 112, **Umudje v. Shell-BP** (1975) 8-11 S.C. 155.
[768] Frynas, *Oil in Nigeria*, 192.
[769] Freedom C Onuoha, "Oil pipeline sabotage in Nigeria: Dimensions, actors and implications for national security", *African Security Review* 1, no. 3 (2008): 99-115.
[770] Christina Katsouris and Aaron Sayne, "Nigeria's Criminal Crude: International Options to Combat the Export of Stolen Oil," *Chatham House*, September 2013, https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Africa/0913pr_nigeriaoil.pdf (accessed July 2, 2017).
[771] Frynas, *Oil in Nigeria*, 196. **Shell v. Enoch** (1992) 8 NWLR (Pt. 259) 335

Shell v. Isaiah,[772] but in other cases, such as **Shell v. Otoko**[773], companies were able to use the defence successfully against communities.[774]

6.2.2.2.5 Developments Since 1999

Two relatively recent Supreme Court decisions show promise for the future of the strict liability defence for communities. One case clearly pushes back on the third party interference defence used by oil companies, while the other elaborates the ways in which communities can use this defence successfully, even when contending with sabotage allegations. In both instances, the Supreme Court delivered definitive judgements into the body of case law after multiple appeals from Shell. While ultimately victories for the communities seeking redress, both appeals processes delayed judgements for decades.

In Supreme Court case **Edamkue & Ors. v. SPDC**,[775] communities sued Shell under the strict liability and negligence torts for "damages each of them suffered as a result of a serious explosion and spillage of crude oil from the Appellant's Yorla Oil Field or station in the Khana Local Government Area of Ogoniland in Rivers State which occurred on the 31st July, 1994."[776] They won their suit on the basis of strict liability, and while Shell appealed the decision twice, they lost both times. The Supreme Court's judgement focused on the fact that Shell had not done enough to prove that they had done everything they could to prevent such interference, if it had indeed occurred. The Court of Appeal Decision claimed that:

> The point is that if proper care is taken such a spillage would not have occurred. The onus was therefore on the appellant as defendant to prove that there was no negligence on its part. In an effort to discharge the onus placed on it to disprove that it was not negligent, the defendant alleged that the accident was caused by the hostile act of some people who caused the damage that resulted in the spillage. That allegation was however in conflict with the evidence of the

[772] Ibid. **Shell v. Isaiah**. (1997) 6 NWLR (Pt.508) 326
[773] Ibid. **Shell v. Otoko** (1990) 6 NWLR (Pt. 159) 693.
[774] Ibid.
[775] **Edamkue & Ors. v. SPDC** (2009) LPELR-3048(SC).
[776] Ibid.

> policemen at the scene whose account was quite different from that given by the defendant.[777]

The Supreme Court Justice Ogbuagu further emphasised the dismissal of Shell's allegations of vandalism by stating that to make a criminal allegation, Shell would have to have proven beyond reasonable doubt that the act was committed to be relieved of the onus of the tort, which they were not able to do. Shell's counsel also challenged the quality of the Estate Valuers called upon by community members; however, they never called their own Valuers to the stand to challenge their assessment. In the eyes of the court, this meant that Shell implicitly accepted the assessment of damage brought forward by the communities and therefore left Shell unable to prove beyond reasonable doubt that vandalism could have been the cause of the spill.[778] Both Shell's inability to prove vandalism beyond a reasonable doubt and their liability under **Rylands v. Fletcher** and the *res ipsa loquitor* principle meant that this decision has set a clear precedent for future cases. [779]

The Supreme Court's decision in 2015 in **SPDC v. Anaro**[780] was one such case that built on this precedent**.** In this case**,** Obotobo, Sokebolo, Ofogbene, and Ekeremor Zion communities sued Shell for damages caused by oil spills from pipelines that, if "well-maintained and fault-free...would not ordinarily burst, crack or rupture and spill their contents."[781] The trial judge and both subsequent appellate courts found Shell to be liable under the strict liability tort of **Rylands v. Fletcher.** The Supreme Court made its final decision in the case in June of 2015, more than thirty years after the initial spill occurred, but has consolidated important precedent for future cases looking to use the Rylands v. Fletcher principle in oil pollution disputes.

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[777] Ibid. Court of Appeal quoted in Supreme Court decision.
[778] Ibid.
[779] In India, the case of **M.C. Mehta v. Union of India, WP 12739/1985 (1986.12.20) (Oleum Gas Leak Case)** simplifies this challenge by introducing a new legal principle. In this case, Chief Justice Bhagwati (one of the instigators of India's PIEL movement), develops the concept of "absolute liability" in order to address industries that are inherently dangerous or pose risk to human health and safety.
[780] **SPDC v. Anaro** (2015) LPELR-24750(SC).
[781] Ibid.

6.2.2.2.6 Summary

Recent Supreme Court decisions suggest that there is more certainty in using the strict liability tort in the Nigerian oil pollution context. The recent cases show that it is possible to get favourable judgements using the strict liability tort, notably at the Supreme Court level. Both recent cases were also significant because they explicitly dismissed Shell's attempts to suggest that sabotage had caused the spill and thus they should not be held liable. In contrast to the unsuccessful **Umudje v. Shell-BP** waterway alteration case, both of these successful cases involved oil escaping a defined area and polluting the surrounding area. Moving forward, this should be a key pre-condition for litigators before employing this tort in oil pollution proceedings.

6.5.1.3 Nuisance

In his research on nuisance law during the industrialisation of England, Brenner writes that "Nuisance law protects peace and quiet, clean air, sanitation, and good neighbourly relations in general."[782] The branch of environmental tort covers a "condition, activity, or situation (such as a loud noise or foul odour) that interferes with the use or enjoyment of property."[783] In the case of oil production in Nigeria, nuisance can be caused by a range of activities, from the air and sound pollution caused by gas flaring, to the damage caused by the activity of seismic boats, which emit strong vibrations in using seismic waves to test for optimal drilling locations throughout the Delta.

While theoretically a tool for litigating against environmental wrongs, nuisance is the least commonly used environmental tort in the dataset, a finding which is consistent with Frynas' research from the 1990s.[784] Its lack of popularity among litigants could be for a range of reasons. To begin with, in the context of Nigeria, all references to the tort of nuisance must be considered as private nuisance following the promulgation of the 1979 Constitution. At this point, public nuisance

[782] Joel Franklin Brenner, "Nuisance Law and the Industrial Revolution," *The Journal of Legal Studies* 3, no. 2 (1974): 403.
[783] 497.
[784] Frynas, *Oil in Nigeria*, 193.

became a separate criminal offence contained in the Nigerian Penal Code Act 1960.[785] While not evidenced in the case law in this dataset, there is also the possibility that **Rylands v Fletcher** has become a more actively used tort following the promulgation of the Land Use Act due to the fact that it is less strict on property ownership requirements. Should this be the case, it would further bolster the logic behind keeping **Rylands v Fletcher** a separate action, as Nigeria has. Doing so means that those seeking redress do not have to prove land ownership to seek damages, while that may be required under private nuisance.

Brenner's study of tort law during English industrialisation found that in an era of aggressive development, judges exercised a double standard for nuisance; the nuisance tort was not permissible if targeted at large, economically significant, enterprises or public enterprises.[786] Brenner's research on nineteenth century England bears a striking resemblance to protections of NNPC in Nigeria. He argues, for example, that "Insofar as polluting enterprises were public and quasi-public works, such as docks and railways, indictments were of course useless. There enterprises had statutory authorisation and were therefore protected from indictments."[787] While not wholly protected from indictments, NNPC does benefit from special treatment in the Nigerian legal system, for example by having a severely truncated statute of limitations.[788]

As this section on nuisance will outline, the Nigerian experience with the use of nuisance to seek redress for harms caused by oil sector activity has been mixed. I illustrate this point with three cases for discussion. The case selection was determined by identifying cases in the dataset and the literature where nuisance was identified by appellate judges as a key area of law requiring further interrogation. It is worth noting that the three cases selected do not address oil

[785] See FN 730 for an explanation on Nigeria's Interpretation Act, which explains how Nigerian precedent has been empowered to diverge from English precedent.
[786] Brenner writes that "what the Lords meant when they said that location was a factor to be weighed in evaluating the plaintiff's complaint was that they were going to be more forthright in striking a balance between comfort and health on the one hand and economic interests on the other." Brenner, "Nuisance Law and the Industrial Revolution," 415.
[787] Ibid., 421.
[788] See Section 6.5.2.2 for more on this.

pollution specifically, rather they focus on other negative externalities of industry activity, such as flooding caused by oil company construction activities and structural damage caused by seismic boat activities.

6.2.2.2.7 Pre-1999 Cases

In **Akporuovo v. Seismograph Service**,[789] the litigant sued for private nuisance for damages to personal property as a result of the use of seismic equipment. A judge initially ruled in Akpuruovo's favour; however, following multiple appeals, the Supreme Court ruled that the initial judge hearing the case had failed to visit the site in question in order to confirm the damage, and thus his ruling had to be set aside.[790] This insistence on a site visit was not common practice in the cases in the Dataset, and as such can be construed as procedurally arbitrary, proving detrimental to the individual seeking redress.

In **Amos v. Shell-BP**,[791] the company and a Nigerian subcontractor were sued by Amos on behalf of the Ogbia community for public nuisance when a project to build a bridge across a river was abandoned in favour of a dam that allegedly caused flooding in the area, resulting in negative knock-on effects for farming and other income generating activities. The case was eventually dismissed on the grounds that a group of individuals could not sue for public nuisance. Further, since the damage they each experienced was different, the court ruled that the group should have tried separate cases as individuals.[792]

6.2.2.2.8 Developments Since 1999

In **Awillie-Odele-Okogbo & Ors. v. SPDC**,[793] a group of communities sued Shell for the activities of its contractor, Wilbros Nigeria Limited, which trespassed onto the communities' land by building waste dump areas that extended onto their property and caused flooding of the communities' farmland. The trial judge awarded the communities damages for the nuisance and Shell appealed,

[789] Frynas, *Oil in Nigeria*, 193.
[790] Frynas, *Oil in Nigeria*, 193.
[791] Ibid.
[792] Ibid.
[793] **SPDC** v. **Awillie-Odele-Okogbo & Ors.** (2011) LPELR-4951(CA)

appealing, in particular, its liability for the work of a contractor. The Court of Appeals leading judgement affirmed that:

> The liability of the defendant cannot be removed because he employed an independent contractor to perform the act. There is no doubt that the consequence of the dump i.e. the flooding of the farmland of the plaintiff (now respondents) was reasonably foreseeable by the appellants.[794]

The Justice of the Court of Appeal Awotoye also highlighted that Shell had already paid some compensation to the communities for a similar incident and could not avoid the fact that it was liable for the contractors' tort. In the appeal, Shell sought to dismiss the communities' filing for special damages. While this is a key issue that has in the past lost communities nuisance cases on appeal, it did not apply to this case as Shell only raised this issue for the first time upon appeal. This made it a straightforward matter for the Appellate justice to ignore the issue, as it was first being raised in an appeal.

Section Summary: Trends?

The negligence case law analysed provides one development for the use of tort law more broadly. As a positive development, precedent has developed to hold oil companies to account for the activities of their sub-contractors. This is significant in an industry in which much of the production of oil can be carried out through various subcontractors.[795] The actual viability of nuisance as a useful tort for oil pollution litigation remains unclear, however. This is largely due to a small sample size of cases analysed and is supported by Frynas' findings from the 1990s.[796]

6.2.2.3 The Use of Tort Summary

This section has shown that there have been some developments in the way in which tort remedies are used in oil-related environmental disputes. For negligence

[794] Ibid.
[795] See the Deepwater Horizon case for more on the integral role sub-contractors play in oil field safety in John M. Broder, "U.S. Acts to Fine BP and Top Contractors for Gulf Oil Spill," *New York Times*, October 12, 2011, http://www.nytimes.com/2011/10/13/us/us-cites-bp-and-contractors-for-deepwater-horizon-spill.html (accessed August 22, 2017).
[796] Frynas, *Oil in Nigeria*, 193.

and strict liability torts, my analysis highlights instances of positive outcomes for oil communities that both consolidate and develop precedent. The use of nuisance in tort continues to produce mixed outcomes. However, as will be indicated below, a majority of cases are not decided on the substantive grounds of the initial tort filed. Instead my Dataset finds that in 60% of cases, judgements are decided in favour of oil companies based on procedural and technical issues.

6.5.2 Oil Company Litigation Strategies

Just as communities and their legal counsel have preferred litigation tactics, so too do oil companies in defending themselves from these claims. There are only a few tactics systematically used by oil companies to achieve a range of desirable outcomes such as extreme delay in court proceedings, remitting cases back to the original court, or dismissal of suits altogether.

According to one legal practitioner:

> Whenever I see a case thrown out by technicalities, it tells me one of two things; this judge does not want to get involved or this judge has been bought not to get involved. Because technicality for me is the ultimate copout. There is injustice, there is a problem out there, somebody's farm land has been flooded by crude oil and you telling me we shall file it on Monday file it on Tuesday, it's like, are you kidding me. And somebody will say, because you didn't come ten seconds earlier they can't hear your case.[797]

Employing my Dataset, this section identifies a set of tactics used by oil companies, and discusses the degree to which they remain to be effective. This section discusses the three most common defences in more detail – jurisdiction, statutes of limitation, and *locus standi* – providing case law examples of some of the ways in which the defences are used.

6.5.2.1 Jurisdiction: The State and Federal High Courts

[797] Interview A1L1, July 13, 2014.

One of the most persistent legal challenges for litigants seeking to sue oil companies is the issue of jurisdiction. It is also the only legal defence in my Dataset that appears to have been deliberately designed so as to prevent communities from being able to seek redress for oil pollution disputes through the courts.[798] Of the cases in my Dataset where judges made their decision based on Jurisdiction, 93% were decided in favour of oil companies.

[798] Jurisdiction on environmental issues need not be ambiguous. In 2010, India established the National Green Tribunal (NGT), a special environmental body with jurisdiction over "all civil cases which raise the substantial question of environment and arise from the implementation of the Acts stated in Schedule I of the NGT Act." This includes providing relief and compensation for damage caused. This tribunal has proved to be a useful tool for continuing the precedent-setting decisions of the Indian Supreme court on environmental matters while also clearly delineating jurisdiction for a range of environmental issues. See Rosencranz and Sahu, "Assessing the National Green Tribunal after Four Years," 199. Also see Gill, "The National Green Tribunal of India: A Sustainable Future through the Principles of International Environmental Law." and Shrotria, "Environmental Justice: Is the National Green Tribunal of India Effective?"

6.2.2.3.1 The Evolution of Jurisdiction for Oil and Gas

For the first thirty years of independence in Nigeria, individuals could file law suits in State or Federal courts on issues related to oil pollution.[799] Concurrent jurisdiction meant that those living far from State capitals had easier access to courts both due to their proximity and the simple fact that there were more courts who could hear these kinds of cases. The number of courts able to hear oil-related disputes also spread the burden of these technically challenging and technicality-intensive cases around many different court houses, preventing a backlog for judges and for those seeking redress.

In **SPDC v. Anaro & Ors.**[800], Supreme Court Justice Aka'ahs outlined a history of the courts' jurisdiction to hear cases related to oil and gas. Aka'ahs asserts that Nigeria's first Constitutions in 1960 and 1963 were crafted in a way so as to explicitly provide increased access to courts on Federal matters by empowering State and Magistrate courts to hear cases related to certain Federal issues.[801] Indeed, for more than a decade after independence, there were no Federal courts present in states at all. The first Federal courts in states were only created in 1973, through the Federal Revenue Court Decree (Decree No. 13 of 1973). The courts were then developed into the Federal High Courts with the introduction of the 1976 Federal High Court Act.[802] The introduction of the FHC was a signal that the exclusive jurisdiction of the Federal Courts was going to expand.

Early on, the nascent courts were still sharing jurisdiction on Admiralty matters, which was broadly seen as the area of law most relevant to oil and gas pollution disputes, where spills might take place in creeks or other waterways.[803] This practice continued until the early 1990s when the legislature took a clear departure from its previous liberal views of jurisdiction for oil and gas-related disputes.

[799] **SPDC v. Anaro & Ors.** (2015) LPELR-24750(SC)
[800] Ibid.
[801] Ibid.
[802] Ibid.
[803] Ibid.

The Federal Military Government in 1991 imposed Decree 60 of 1991, which amended the High Court Act to give exclusive jurisdiction to Federal High Courts in matters relating to oil, gas and minerals.[804] This was overturned not long after in 1992 with Decree 16 of 1992, which restored jurisdiction in these cases to State High Courts, only for it to return to the Federal High Courts again in 1993, through Decrees 60 and 107.[805] This definitive change in 1993 was then enshrined in the 1999 Constitution, "which include claims for liability incurred for oil pollution damage affecting fresh water creeks and fisheries."[806]

Year	Instrument	Jurisdiction
1960-1991	1960 & 1963 Constitutions 1962 Admiralty Jurisdiction Act	SHC & FHC
1991-1992	Decree 60 of 1991	FHC
1992-1993	Decree 16 of 1992	SHC & FHC
1993	Decree 9 of 1993	FHC
1993	Decree 107 of 1993	FHC
1999-Present	Section 251(1)n of 1999 Constitution	FHC

Figure 8: Courts' Jurisdiction over oil, gas, and minerals cases

The effect of these changes in jurisdiction is still being felt today by victims of oil sector activity. More than 30% of all cases in the Dataset were dismissed upon appeal on the grounds that they were filed in the incorrect court in the first instance, usually in the State High Courts. Some believe the change in jurisdiction was a direct result of lobbying from oil companies. One key informant who has been an oil and gas litigator in Nigeria for decades was a side-line observer to oil

[804] Rufus Akpofurere Mmadu, "Judicial Attitudes towards Environmental Litigation and Access to Environmental Justice in Nigeria: Lessons from Kiobel," *Journal of Sustainable Development Law and Policy* 2, no.1 (2013): 153-174, 157.
[805] Ibid.
[806] **SPDC v. Anaro & Ors.** (2015) LPELR-24750(SC), 23-27.

company objections in the early nineties. He believes that oil companies have shaped how and where cases are currently heard.[807]

This informant told me that the oil companies' motivations in lobbying for sole federal jurisdiction were particularly in search of a more favourable audience in the courts. He said, "the oil companies believe that the State High Courts would be very sympathetic to the people of the state where they are established and manned by judges who are indigenes of that state and who from that, saw the tragedy and the degradation themselves so as to be more than likely to be sympathetic with the plaintiffs and award plenty damages."[808]

He further recounts:

> [The oil company's] calculation is that there are many State High Courts so that several litigations can go on at the same time and there will be an avalanche of judgments against them. As against the Federal High Court, at a time in the whole of eastern Nigeria, there were only two federal….three federal high courts. One in Enugu, one in Port Harcourt and one in Calabar. Only three judges. And most of these judges are from areas that are not oil producing in Nigeria. So imagine that the judges will be so overwhelmed by too many cases, and they don't stay more than three years in any station before they are transferred.[809]
>
> And so [oil companies] lobbied for everything related to oil, to be taken to the Federal High Court and that is how the military under the Decree 107 and Decree 60 took away the jurisdiction of State High Court, and put them in the Federal high court and proceeded to insert it in the Constitution.[810]

A Nigerian litigator writes that the issue traces back to the military government of Ibrahim Babangida.[811] During that administration, then-Attorney General Clement Akpamgbo usurped jurisdiction from state courts to hear civil matters

[807] Interview A1L4, August 15, 2014.
[808] Ibid.
[809] Ibid.
[810] Interview A1L4, August 15, 2014.
[811] Lucius Nwosu, "Chapter 8: Niger Delta Crisis: A Tragic Failure of the Legal Profession," in *Rethinking the Administration of Justice: Essays in Honour of Hon. Justice Abdullahi Mustapha*, eds. Rickey Tarfa, Olanrewej Fagbohun and Gbolohan Gbadamosi, (Lagos: Book Company Limited, 2011) 143, 147.

related to oil, gas, and minerals, and gave exclusive jurisdiction to the federal courts[812]. Decrees No. 60 of 1991, No.107 of 1993 and then ultimately Section 251(n) of the 1999 Constitution mean that considerably fewer courts in each state (about two per state) were now able to hear all cases related to the oil industry. In 1993, when the Decree 107 was enacted, there were 12 Federal High Courts across Nigeria, versus 500 State High Courts.[813]

One key informant said, "I didn't see agitations from the people saying 'no, no we are tired of what we have, so let's get it there,' so how did it now go into FHC?"[814]

6.2.2.3.2 Developments Since 1999

In the Dataset, there are fifteen cases where jurisdiction was called into question at some point in legal proceedings, mostly to the detriment of a community's case. There are three broad categories under which these cases fall. There are a) clear cut cases in which communities simply filed in the wrong court, b) grey area cases where communities filed in the wrong court, but were close to cut off periods, and c) anomaly cases in which judges go against well-established precedent in order to make judgements in favour of oil companies.

6.2.2.3.3 Clear Cut Cases

In **SPDC v. Ezeukwu**[815] the Court of Appeal allowed Shell's appeal based on jurisdiction and struck out the compensation case, which was originally filed in the Imo State High Court in 2000. In **Chevron Nigeria Ltd. v. Nwuche & Ors**.,[816] the Court of Appeal allowed Chevron's appeal based on jurisdiction and struck out the community's compensation case, noting that the trial judge in the Imo State High Court never should have heard it in 2000 to begin with. In **Seismograph Services Nigeria Ltd v. Meduoye**[817] the Court of Appeal allowed the seismic surveying company's appeal based on jurisdiction, noting that Meduoye's

[812] Ibid.
[813] Frynas, *Oil in Nigeria,* 129.
[814] Interview A1L2 – PH, January 12, 2015.
[815] **SPDC v. Ezeukwu** (2010) LPELR-4911(CA).
[816] **Chevron Nigeria Ltd. v. Nwuche & Ors.** LN-e-LR/2016/9 (CA).
[817] **Seismograph Services Nigeria Ltd v. Meduoye** (2013) LPELR-21973 (CA).

compensation claim from 1999 was filed in the Delta State High Court in Warri, rather than in a Federal Court. In **SPDC v. Goodluck**,[818] the Court of Appeal allowed SPDC's appeal, based on jurisdiction and struck out the case, which was originally filed in the Port Harcourt division of the Rivers State High Court in 1998. All of the above cases are without ambiguity as they were much after the 1993 Decree granting exclusive jurisdiction to the Federal Courts for matters relating to oil and gas.

In such cases, it is not easy to understand why the State High Courts would entertain a case for which they clearly do not have jurisdiction. In any of the cases that were filed after 1993, there should have been little uncertainty among State High Courts that oil-related cases should be heard in the Federal Courts, and yet there are repeated examples of judges taking on these cases anyway, often actively ignoring objections on jurisdictional grounds by oil companies. In the case of SPDC **v. Anaro & Ors.,**[819] Supreme Court Justice Aka'ahs says of the phenomenon: "There is no atom of doubt about it, that courts of record jealously protect and guard against laws that tend to remove jurisdiction from them," but it is difficult to get any further clarity of reasoning from the State High Courts as to why they keep jurisdiction when the lines have been drawn so clearly.[820]

While in most instances jurisdiction defences have worked to the oil companies' favour, there are examples of communities successfully leveraging this defence. For example, in **SPDC v. Anaro & Ors.,** the Supreme Court dismissed SPDC's appeal based on jurisdiction and stated that at the time of the original filing of the case, Bendel State High Court did have jurisdiction to hear it. This was a hard-won victory for the community, who originally filed the case in 1983 and received their final judgement in 2015. More broadly, the new judicial precedent was significant for re-aligning the courts with general principles of predictability as a core pillar of the rule of law.[821]

[818] **SPDC v. Goodluck** 2008 14 NWLR Pt 1107 294 CA.
[819] **SPDC v. Anaro & Ors.** (2015) LPELR-24750(SC).
[820] Ibid.
[821] As will be shown below, Aka'ahs' decision was reversing a string of bad precedent.

6.2.2.3.4 Cases in the Crosshairs

Some cases were caught in the cross hairs between old and new jurisdiction rules by a matter of weeks, such as in **NNPC & Anor. v. Sele & Ors.**[822]. In this case, the Supreme Court decided in 2013 that a case that commenced in a State High Court in December of 1993 did not have jurisdiction in the first instance.

In this case, Sele filed suit against the state-owned oil company for NGN 20 million in damages following an oil spill. Sele, representing his community, Ogbe-Udu, in Okpe Local Government Area of Delta State, was awarded NGN 15 million for special damages and NGN 3 million in general damages by the State High Court, but this was later overturned by the Supreme Court, which found that Sele had missed the deadline by less than three weeks to be considered under the old jurisdictional rules. The Supreme Court Justice Rhodes Vivour stated that, "[The] trial commenced for the first time on 1/12/93, i.e. after 17/11/93 when Decree No.107 of 1993 came into force. The Federal High Court had exclusive jurisdiction as at 17/11/93." This decision goes against the Court of Appeal's judgement affirming the State High Court's ruling.[823]

6.2.2.3.5 The Dangerous Anomalies

There has been a clear trend in precedent emerging that defines jurisdiction for oil and gas disputes; Federal Courts must hear cases related to oil and gas sector activity, from laying pipelines, addressing oil spills, and addressing damages caused by seismic activity. However, even as a trend emerges, there are still some anomalies in judicial decision-making that go against developing precedent, often to the advantage of oil companies.

For example, in **NNPC v. Zaria & Anor**,[824] the Court of Appeal allowed NNPC's appeal based on jurisdiction, stating that Zaria and others should have filed their

[822] **NNPC & Anor. v. Sele & Ors.** (2013) LPELR-20341(SC).
[823] Before this Supreme Court decision was taken, the **Sele case** was seen as a positive development by the Court of Appeal in its favourable interpretation of suits in a representative capacity. It is not yet clear if this has had an impact on litigants filing suit in a representative capacity.
[824] **NNPC v. Zaria & Anor** (2014) LPELR-22362(CA).

suit in a State Court because their claim that NNPC unlawfully occupied and polluted their land related to land matters, which is on the exclusive legislative list for State Courts. This particular decision is notable because in most other cases where the respondents are being sued because of their oil-related activities, judges have been quick to claim federal jurisdiction, often disadvantaging communities for filing in State courts. This case is a rare example where a community filed a dispute in a Federal Court, following precedent, but then were told that a State court was more appropriate. This case calls into question the motivations and incentives of the deciding Justice in going against precedent in order to provide a victory for an oil company.

A year before **NNPC v. Zaria**, the Court of Appeals decided on a similar case, asserting that a claim related to damage of land from oil operations fell clearly to the Federal courts. In **Alagoma & Ors. v. SPDC**[825], an oil community filed suit against SPDC for compensation following an oil spill on their communal lands, which caused injury to their property. The Federal High Court in this instance threw out the case based on Shell's jurisdiction defence that the case was about a land dispute rather than about oil and should thus be heard in a State High Court, rather than the Federal High Court. The Court of Appeals found this line of reasoning to be inconsistent with the body of case law developed since **SPDC v. Isaiah**[826] in 2001, which clearly delineates that anything to do with oil production would be heard exclusively in Federal Courts.[827] The Court of Appeals remitted the case back to the Federal High Court to be heard again. What is particularly interesting is that SPDC's counsel chose to argue against precedent in the trial court that has historically been in its favour (that FHCs should hear oil-related suits, not SHCs) in order to avoid a successful claim from oil communities. In this rare instance, the oil company was trapped by its own precedent and the Court of Appeals' insistence on recognising that precedent.

[825] **Alagoma & Ors. v. SPDC** (2013) LPELR-21394(CA).
[826] Frynas, *Oil in Nigeria*, 94.
[827] **Alagoma & Ors. v. SPDC** (2013) LPELR-21394(CA).

The above cases show how, to varying degrees of success, oil companies manipulate basic legal principles, flouting precedent, to try and avoid a loss in court. However, **SPDC v. Isaiah** is probably the most detrimental case for the credibility of the courts as institutions that uphold the rule of law.[828] In this suit, a landmark case cited as delineating federal jurisdiction for oil sector cases, the courts took a view that amounts to the application of retrospective law.

In the original suit, Abel Isaiah filed a case in a State High Court, requesting NGN 22 million in compensation following an oil spill caused by replacement of a pipeline on his property in 1988. Both the trial court and the Court of Appeals decided in favour of Isaiah's claim. However, despite the action occurring before new limits to states' jurisdiction to hear oil-related cases, the Supreme Court ruled in 2001 that since the High Court judgement came down in 1994, after Decree 107 of 1993, the trial court no longer held jurisdiction in the matter.[829] Justice Mohammed stated that

> [f]rom that moment when the Decree was signed into Law the jurisdiction of the State High Court to determine any matter connected with or pertaining to mining and minerals, including oil fields, oil mining, geological surveys and natural gas has been ousted.[830]

This decision was detrimental to cases that were filed during this confusing time. It showed a Supreme Court justice proactively removing certainty, and *de facto* creating retrospective laws of jurisdiction. These plaintiffs unequivocally filed in the appropriate court at the time of filing. The legal reasoning behind this decision is in direct contrast to general notions of the rule of law, particularly that of predictability.

The **Isaiah** case enabled judges to apply jurisdiction in unconventional ways, ultimately harming communities' cases for justice. For example, in **SPDC V.**

[828] **SPDC v. Isaiah** (2001) LPELR-3205(SC).
[829] Mmadu, "Judicial Attitudes towards Environmental Litigation and Access to Environmental Justice in Nigeria," 157.
[830] **SPDC v. Isaiah** (2001) LPELR-3205(SC).

Halleluja Fishermen Multi-Purpose Co-Operative Society[831], the Court of Appeal in 2001 allowed Shell's appeal based on jurisdiction because the State High Court of Rivers State gave judgment on July 10th, 1995, two years after the appellate judge said Decree No. 107 came into force on November 17, 1993, despite the fact that the case was first filed in the SHC in 1990, pre-dating changes to State's jurisdiction to hear these cases.

Justice of the Court of Appeal Ogebe said,

> There is no dispute whatsoever that a cause of action is governed by the prevailing law when the cause of action arose…Jurisdiction however has to do with the authority of the court to adjudicate on the matter. A plaintiff may have a very good cause of action supported by existing law and if he takes his case to a court which has no jurisdiction over the subject-matter or the cause of action, he cannot ventilate his claims before that court. Even if parties are before a court that has jurisdiction and a new law comes into existence which withdraws the jurisdiction of a court from hearing the case, that court automatically ceases to have jurisdiction to continue with the case.[832]

This kind of reasoning created decades of delays for some seeking justice. It meant that cases were re-filed in Federal Courts to go through all of the same uncertainty again. For example, in **Agbara v. SPDC**,[833] a case previously dismissed on jurisdictional grounds following the precedential decision of **SPDC v. Isaiah**, re-filed in a Federal High Court. Nwosu recounts how

> [SPDC's counsel] so busied himself with one preliminary objection or the other and petitions against trial judges until the case passed through three Federal Judges. The last judge called his bluff and proceeded to hearing. This was after a total of 27 interlocutory applications and 5 appeals…against adverse rulings.[834]

[831] **SPDC v. Halleluja Fishermen Multi-Purpose Co-Operative Society** (2001) LPELR-5168(CA).
[832] **SPDC v. Halleluja Fishermen Multi-Purpose Co-Operative Society** (2001) LPELR-5168(CA).
[833] Cited in **SPDC v. Agbara** (2015) LPELR-25987(SC).
[834] Nwosu, "Chapter 8: Niger Delta Crisis: A Tragic Failure of the Legal Profession," 149.

Following a period of severe delays, Nwosu suggests "extra judicial pressure" was applied to the judge, causing him "like the one before him [to] remit the case file to his Chief Judge for further directives."[835] As of 2011, the case was not yet settled, more than 20 years later.[836]

While the Isaiah case has proven to be detrimental to fundamental principles of the rule of law, its effect on litigation moving forward may be waning. In **SPDC v. Anaro** in 2015, Justice Aka'ahs clarified the Supreme Court's position on retrospective law. He argued that

> There is a strong leaning against construing a statue so as to oust or restrict the jurisdiction of the superior courts. Where a cause of action accrued before the advent of an alteration of the law governing same, the applicable law is the one which was in operation at the time when the cause of action accrued unless the subsequent legislation manifestly and unambiguously provides that the altered law takes retrospective effect. Section 6(1) of the Interpretation Act clearly deals with such a situation. It provides: "6(1) The repeal of an enactment shall not- (a) affect anything not in force or existing at the time when the repeal takes place; (b) affect the previous operation of the enactment or anything done or suffered under the enactment…[837]

6.2.2.3.6 Summary

This section has analysed the way in which changes to jurisdiction for oil-related disputes have negatively affected A2EJ in Nigeria. Developments have restricted access to courts, due to the fact that there are simply fewer Federal High Courts and because judges have applied jurisdiction rules irregularly in some cases, reducing certainty for future litigants.

Nwosu and other practitioners have argued that the changes in jurisdiction in the 90s were directly a response to oil sector lobbying in order to get more favourable judgements. While claims such as these are never easy to prove, a simple calculation of the cases analysed for this research indicates that the change has had a direct and materially negative effect on communities trying to access the

[835] Ibid.
[836] Ibid.
[837] **SPDC v. Agbara** (2015) LPELR-25987(SC).

legal system for redress. Of the cases that were analysed where judges made their decision based on Jurisdiction, 93% (14 of the 15 total) were decided in favour of oil companies.

Based on the 1999-2015 case law sample the change in jurisdiction has clearly been to the benefit of oil companies, but the frequency with which this defence can be successfully used against victims of oil pollution may be waning. The exclusive Federal jurisdiction for oil and gas related cases has been unambiguously enshrined in law for more than two decades and it is likely that the prevalence of cases being thrown out on jurisdictional grounds will begin to diminish as "legacy" cases make their way through the system. However, despite a clear increase in certainty in how judges will rule on jurisdictional defence claims, there are still anomalies that suggest that even if affected individuals or communities file in the correct court, jurisdiction may still be used against them in a court of law.

6.5.2.2 Statutes of Limitation

According to Black's Law Dictionary, a text cited by Nigerian jurists, a statute of limitation is "A law that bars claims after a specified period."[838] This Dictionary stipulates that a statute of limitation is specifically "a statute establishing a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered)."[839] Statutes of limitation can be a valuable instrument for incentivising parties to resolve disputes in a timely manner – i.e. while evidence is still available and witnesses to the dispute still have the incident in question fresh in their minds. However, this defence does not always provide a clear gateway to justice for environmental disputes, as the lines are often blurred between when an incident occurs and when the effects of that incident might be felt.

Limitation laws are particularly complicated in Nigeria, where each of the thirty-six states has its own Limitation Law, though most cap statute of limitations in

[838] Bryan A. Garner, ed., *Black's Law Dictionary*, 3rd Edition, (Minnesota: Thompson West, 2006), 677.
[839] Ibid.

civil suits at six years.[840] For cases in which NNPC is named, the limitation period is reduced to twelve months, based on specific limitations within the NNPC Act.[841] Analysis of my case law sample suggests that the largest barrier to environmental justice posed by Limitations Laws is the specific nature of oil pollution and the delayed effects it can have on both the environment and the health of individuals living near sites of pollution.

The parameters around where a limitation begins and ends are not clear in Nigerian oil pollution case law. Oil spills can take place over a long period of time before anyone notices.[842] This is because oil pipelines criss-cross the country over more than 1000 kilometres, often in remote areas. There can thus be a lag time between when a spill occurs and when it is discovered, at which point damage to land, water, and health may already be severe.[843] Further, communities affected by oil sector activity may be illiterate and unaware that such statutes exist, putting into jeopardy their ability to seek legal recourse in the allowed timeframe.[844]

This lack of clarity has been exploited by oil companies to bar claims relating to environmental damage, the effects of which often continue to plague communities long after the initial harm has taken place. This section will discuss why statutes of limitation are a complex defence, why oil spills can be difficult to litigate due to statutes of limitation, and highlight four cases in which oil companies invoked a statute of limitation as a defence.

6.2.2.3.7 Pre-1999 Cases

The case law has not been conclusive on how the courts approach the complicated matter of statutes of limitation and oil pollution. In **Horsfall v. Shell-BP**[845], justices recognised the tension between the statute of limitations for claims and

[840] Frynas, *Oil in Nigeria,* 197-198.
[841] Ibid., 197.
[842] Ibid., 199.
[843] Even if the spill is discovered quickly, a community can spend a significant amount of time trying to negotiate an out-of-court settlement with an oil company. That settlement time does not stop the limitation clock from running.
[844] Ibid., 198. See Chapter 7 for more on barriers to filing suits in Section 7.3.
[845] Frynas, Oil in Nigeria, 199.

the realistic amount of time for the negative manifestations of pollution to take root. However, this did not ultimately affect their decision to rule in favour of Shell-BP and dismiss the suit. Further, in **Shell v. Farah**,[846] the case explicitly ruled out the possibility that illiteracy and ignorance of legal rights might be considered relevant when considering the fact that the statute of limitations on the case had run out.[847]

6.2.2.3.8 Developments Since 1999

Early case law in the Fourth Republic involving statutes of limitation continued to be to the detriment of affected individuals and communities. In 2002 in **Gulf Oil Co. v. Oluba**,[848] the appellate judge decided that the lingering negative effects of an oil spill did not constitute a continuance of the action itself. In this case, the judge argued that it is reasonable to expect damages to remain from an action that causes permanent damage, but it is not the same as instituting a new action. This judgement means that a community would not be able to sue an oil company beyond the statute of limitations from when the spill occurred, even if their community continues to suffer from the pollution that the spill caused.

There are, however, indications, as seen in the 2011 case of **Amachere & Anor v. SPDC**,[849] that this stance may be changing. In this case, Mark Amachere and his community sued Shell for nuisance caused by 1,500 barrels of oil that was spilled into their community's rivers, swamps, and ponds. The trial judge deemed the action statute barred, despite two arguments: a) that SPDC admitted liability in 2001 and thus extended the statute of limitations, based on a provision in Rivers State Statute of Limitations Law, and b) that the oil spill from 1995 is still causing lingering and continuous damage, meaning that action did not end in 1995.

Upon appeal, the Appellate Justice found fault with the way in which the trial judge made his decision to strike out the Communities' suit before hearing more of

[846] Ibid., 198.
[847] Ibid.
[848] **Gulf Oil Co. v. Oluba** (2002) 12 NWLR (Pt.780) 92 at 112.
[849] **Amachere & Anor. v. SPDC** (2011) LPELR-4474(CA).

the case. He said the trial judge did not have enough information to determine whether or not there was indeed continuing damage to the environment from the spill and whether there was evidence that Shell had indeed admitted liability. The Appellate Justice noted that "Each spillage and pollution it caused thereafter…constitute a cause of action in tort. That is distinct from the first spillage and/or pollution."[850] This suggests that the Court of Appeals may be more open to liberalising their view of how continuing oil pollution might extend a limitation period. The Court of Appeals also argued that an admission of liability would restart the statute of limitations clock in some circumstances. In this instance, the appellate judge sent the case back to the Federal High Court to be heard by a new judge 15 years after the oil spill occurred.

6.2.2.3.9 Summary

In 1998 Frynas observed that "statutes of limitation in Nigeria do not take account of the delay between economic activities and their long-term effects."[851] The 2011 Amachere decision may indicate that this view is changing in the Court of Appeals. The earlier Oluba case confirmed a long-held precedent that lingering damage did not constitute a fresh action. But the more recent Amachere case suggests that judges may be moving closer to trying to find a solution that keeps statutes of limitation in place, while broadening how they might be interpreted in cases of ongoing oil pollution.

6.5.2.3 Locus Standi

Locus Standi has historically been a barrier to justice in disputes in Nigeria where a group of people, or a representative of a group, file suit for damage caused to communal land.[852] In **Centre for Oil Pollution Watch v. NNPC**, Justice of the Court of Appeal Saulawa defined *locus standi* as follows: "[t]he term *locus standi* in Latin simply denotes a party's right to make a legal claim, or seek judicial

[850] Ibid.
[851] Frynas, *Oil in Nigeria,* 199 and Peter Newell, "Access to Environmental Justice? Litigation against TNCs in the South," *IDS Bulletin* 32, no. 1 (2001): 83-93.
[852] This is true of other jurisdictions as well. See Newell, "Access to Environmental Justice? Litigation against TNCs in the South," 87.

enforcement of a duty or right."[853] Along with jurisdiction and statutes of limitation, it is an important first procedural step in establishing whether or not a case has merit to proceed in the courts. In early Nigerian case law on oil spills, *locus standi* arguments were made to discredit communities from filing suit in a way that was consistent with sociological constructs of their communities and the way in which those communities use land.[854] However, this has changed over the past two decades, creating more opportunities for gateways to justice in the legal system.[855]

Christman outlines three categories of courts' stances toward *locus standi* across jurisdictions:

> 1) legal rights standing (the most restrictive),
> 2) Sufficient interest standing (a more flexible idea of who has been affected by the action filed),
> 3) *actio popularis* (the most flexible stance, enabling any person to sue when there has been misconduct according to the law).[856]

Nigeria is somewhere in the middle on this spectrum when it comes to oil pollution litigation. While standing is not as restrictive as it once was, Nigerian courts have still not fully embraced sufficient interest standing, as was seen in the **Douglas v. SPDC** case.

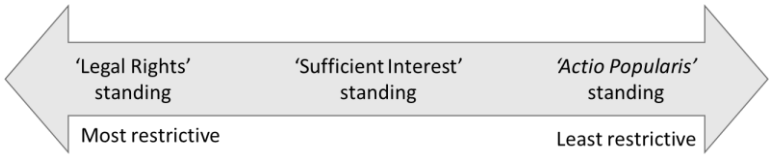

Figure 9: The spectrum of standing-courts' stance on *locus standi* (based on Christman)

[853] **Centre for Oil Pollution Watch v. NNPC** (2013) LPELR-20075(CA).
[854] See Frynas, *Oil in* Nigeria, 202-204.
[855] With notable limitations, discussed in Section 6.4.
[856]Benjamin Christman, "The Poor Have No Lawyers: Scotland's Non-Compliance with the Access to Environmental Justice 'Pillar' of the Aarhus Convention," *King's Inn Student Law Review* (2014): 105-132; 113.

6.2.2.3.10 Pre-1999 Cases

The ruling in **Adediran v. Interland Transport**,[857] a case unrelated to the oil sector, was considered a watershed decision in Nigerian case law for removing barriers to establishing *locus standi* for cases in which collectives tried to sue on the grounds of public nuisance.[858] Previously, collective public nuisance claims were at the mercy of government, leaving it to the discretion of the Attorney General to try cases on behalf of Nigerian citizens.[859] In the Adediran case, a group of residents formed a housing association. The association subsequently sued Interland Transport, whose offices were adjacent to the collectives' homes, for nuisance from excessive noise, and won. This case opened a new potential gateway for collective action in other sectors, such as oil-related cases claims.

6.2.2.3.11 Developments Since 1999

As of the late nineties, there was some indication that filing suit on behalf of a community in oil-related disputes was a more viable option, building on precedent such as the **Adediran** case. While in **Chinda v. Shell-BP**[860] in 1974, individuals attempting to sue on behalf of their community in Rivers State were told by the judge that they could only sue with regard to their particular individual damages, in **Shell v. Tiebo & Ors.**[861] in 2005, the case was able to move forward on the basis that litigants were suing on behalf of their community in Peremabiri. In that case, Shell tried to appeal for a misjoinder of parties in the latter case, but the Court of Appeals upheld the original decision.[862]

SPDC v. Edamkue & Ors.[863] built on the momentum of this ruling in 2009. In the **Edamkue** case, two sets of plaintiffs filed suit following an explosion and oil spill from Shell's Yorla Oil Field in Khana, a local government authority in Ogoniland in Rivers State. The original cases were filed in 1994 and joined together

[857] Frynas, *Oil in Nigeria*, 206.
[858] See Section 6.5.1.3.
[859] Frynas, *Oil in Nigeria*, 193.
[860] Ibid., 208.
[861] **SPDC v. Tiebo & Ors.** (2005) LPELR-3203(SC).
[862] Frynas, *Oil in Nigeria*, 208.
[863] **SPDC v. Edamkue & Ors.** (2009) LPELR-3048(SC).

in 1995. The trial case was decided in 1999, in favour of Edamkue & Ors. Shell appealed the decision and in 2003, the Court of Appeal affirmed the lower court's awards.[864] Again, Shell appealed to the Supreme Court, asking for clarity on a range of issues, including the plaintiff's ability to sue in a representative capacity. The Supreme Court justice presiding over the case made it clear that:

a) Shell had no *locus standi* to object to Edamkue & Ors. suing in a representative capacity for their communities and families, as they are not members of either.
b) Amendments can be made in a suit if a plaintiff did not file in a representative capacity, but then proceeded to carry out the case clearly in a representative capacity, being justified by evidence and the merits of the case.
c) Even if the plaintiff does not file in a representative capacity, a judge can amend the suit and enter a decision on that basis, in a representative capacity for the plaintiff's family and/or community.[865]

In upholding the decision, Justice of the Supreme Court Ogbuagu made it clear that suing on behalf of one's community or family in oil and gas disputes such as an oil spill should no longer be legitimate grounds for oil company appeal. Beyond affirming the more than USD 1.5 million already awarded to the plaintiffs, the Justice added, "I wish the Rules of this Court had given me a discretion in respect of award of costs as this is one of the appeals, where the costs to the 1st and 3rd sets of Respondents, should have been more in the circumstances of this case." The Edamkue case is both an important development in the Supreme Court's interpretation of standing in oil-related cases, as well as its normative view of quantum of compensation for such claims.

Section Summary: Trends

This section has shown that there has been an evolution in the case law over the past two decades, in terms of how standing is viewed by the courts. This evolution is a departure from Frynas' criticism that lawyers and judges have been reluctant

[864] Before proceeding, the Court of Appeal instructed Shell to take out a bank guarantee. If Shell lost the appeal, the bank would pay the plaintiffs who had suffered damages from the spill and explosion. Upon losing, the Bank released NGN 225,806,601.00 (roughly USD 1.5 million) to the respondents.
[865] **SPDC v. Edamkue & Ors.** (2009) LPELR-3048(SC).

to depart from conventional practice of the British Common Law tradition in terms of considering "communal issues."[866] The Edamkue decision consolidated the developing precedent that began in the 1990s that the misjoinder of parties defence would no longer be a suitable defence against communities negatively affected by oil pollution.

6.2.2.4 Oil Company Litigation Strategy Summary

This section has shown that oil companies use a predictable set of tactics in an attempt to win, or at least severely delay, cases. My analysis introduces one judgement that provides for new precedent in determining statutes of limitations that is advantageous for communities. My review of the case law also indicates that there have been some positive developments over the last two decades in liberalising standing. My analysis suggests that standing has evolved to account for "communal" issues, which means that cases that would otherwise have been set aside for misjoinder of parties or inability for someone to sue in a representative capacity are now able to proceed.[867] As seen above, the expansion of standing has been positive for filing suits as communities, but remains ineffective for public interest environmental litigation.

Perhaps most significantly, I showed that a change in jurisdiction in the early 1990s has had long-run negative effects on access to environmental justice. There are now fewer courts for claimants to file their suits, and legacy cases caught in between two jurisdictions tend to only negatively affect outcomes for communities. In instances where cases are dismissed on jurisdictional grounds, communities face decades of uncertainty if they choose to re-file their suits in the appropriate courts. My key informant interviews suggest that the change in jurisdiction was pursued not to improve the justice system for citizens; rather, jurisdiction was restricted in order to centralise power to decide these cases in fewer courts that have a closer relationship to the federal executive branch.

[866] Frynas, *Oil in Nigeria*, 203.
[867] While a positive development, the Nigerian conception of standing is still not interpreted to the degree that public interest environmental litigation can be pursued. See Section 6.4, above.

6.6 If All Else Fails: Extra-Territorial Litigation

Nigerian activists and concerned international actors have struggled to apply sustained pressure to the Nigerian Federal Government apparatus in order to improve the state of the environment in the Niger Delta.[868] As Chapters 4 and 5 have attested, there is a steep imbalance of power and misalignment of interests between those trying to restore the environment and provide redress to victims of oil pollution, and those that are interested in ensuring the Government continues to profit from the oil sector by sustaining current investment, as well as attracting future investment. The delay and uncertainty associated with domestic litigation has led many to believe that seeking fora outside of Nigeria is the only gateway to justice that remains for victims of oil pollution.

Extraterritorial jurisdiction (ETJ) concerns one state using a variety of legal and policy tools in order to compel actors outside of its physical borders to behave in a certain way.[869] ETJ can take the form of statutes or litigation (referred to as extra-territorial litigation, or ETL), using courts to "adjudicate and resolve private disputes with a foreign element."[870]

The Nigerian legal professionals who I surveyed were broadly optimistic that ETL for oil pollution cases specifically allows for redress that would otherwise be unattainable in Nigeria's domestic legal system. Forty-one percent of respondents from my 2014 survey feel that ETJ is the most effective institution for resolution of oil pollution conflict. This is compared to 26% who feel that litigation is best, 19% who support mediation, and 7% who support out of court settlement. To probe whether this optimism is misplaced, the following sections analyse extra territorial

[868] For example, see: UNEP, "Environmental Assessment of Ogoniland Report."; "Home," *Stake Holder Democracy Network,* http://www.stakeholderdemocracy.org/ (accessed August 1, 2017); "Nigeria Human Rights," *Amnesty International,* https://www.amnestyusa.org/countries/nigeria/ (accessed August 1, 2017).
[869] Jennifer A. Zerk, "Extraterritorial jurisdiction: lessons for the business and human rights sphere from six regulatory areas," *Corporate Social Responsibility Initiative Working Paper* No. 59, Cambridge, MA: John F. Kennedy School of Government, Harvard University, 2010, 13.
[870] Ibid.

cases from four different courts – two regional African courts and two courts in European countries.[871]

6.6.1 SERAC & Anor v. Nigeria (African Commission on Human and Peoples' Rights)[872]

The Organization of African Unity (now, the African Union) adopted the African Charter in 1981, and with it, enshrined social, cultural, economic, civil and political rights into a regional human rights mechanism.[873] Nigerian NGOs have tried to use the forum to put pressure on the Nigerian State and its joint venture partners to improve environmental conditions in the Niger Delta.

6.6.1.1 The Commission

The African Charter created the Commission for Human and Peoples' Rights, which was inaugurated in 1987.[874] The Commission has been given the power to hear "Communications" both from one state against another, and from individuals and groups against a State in order to "protect the rights and freedoms guaranteed in the Charter under conditions laid down therein."[875] The Commission encourages parties to reach "friendly settlements;" however if no such settlement is reached, the Commissioners will determine whether or not to hear a Communication on its own merits. Once a Communication is heard, the final judgement is referred to as a Recommendation, as a means of highlighting the non-binding nature of the decision. The Commission refers to its dispute resolution function as "quasi-judicial," as nothing decided by the Commission can be binding unless the African

[871] Interestingly, when respondents were asked the same question of other instances of non-oil related pollution, their answers changed significantly. Only 15% still support ETL as the most effective, while both mediation and litigation (30% each) are seen to be more viable avenues for redress. Out of court settlement is also seen to be more promising (19%). This implies that lawyers view legal proceedings in oil-related litigation to be substantively different from other kinds of litigation.
[872] **SERAC and Anor. v. Nigeria** (2001) AHRLR 60 (ACHPR 2001).
[873] "History" http://www.achpr.org/about/history/ accessed August 22, 2017).
[874] "Part II," *African (BANJUL) Charter on Human and Peoples' Rights*, http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf (accessed August 1, 2017).
[875] Art. 55, "Communications Procedure," *African Commission on Human and Peoples' Rights*, http://www.achpr.org/communications/procedure/ (accessed August 9, 2017).

Union heads of state agree to adopt the decision in their annual Activity Reports.[876] Even then, the Commission highlights its lack of monitoring and enforcement capabilities.

6.6.1.2 The Case

Two Nigerian NGOs filed a communication with the African Commission on Human Rights in 1996 on behalf of the Ogoni people, a group in Nigeria that has long been on the frontlines of oil exploitation in the country.[877] The complaint alleged that Shell and NNPC, in their joint venture activities, had violated key provisions of the African Charter through the pervasive and ongoing oil contamination of Ogoniland, affecting access to safe drinking water, clean fishing waters, and uncontaminated farming land. Not only were commercial actors NNPC and Shell named in the complaint, but the Nigerian government itself was accused of using military force to ensure that oil company operations could continue despite local protest.[878]

The African Commission first had to determine if the parties had exhausted all local remedies before bringing the case forward to the regional body, providing special consideration when domestic remedies may be "unduly prolonged."[879] In their decision to accept jurisdiction, a series of then-military government decrees were cited as preventing the possibility of domestic remedy. According to SERAC's Communication, "domestic remedies do not bar the communication because of the futility of legal action in Nigeria resulting from the operation of ouster clauses contained in military decrees removing jurisdiction of the courts from entertaining human rights cases".[880]

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[876] "Communications Procedure," *African Commission on Human and Peoples' Rights*, http://www.achpr.org/communications/procedure/ (accessed August 9, 2017).
[877] Fons Coomans, "The Ogoni Case before the African Commission on Human and Peoples' Rights," *International and Comparative Law Quarterly* 52, no. 3 (2003): 749-760.
[878] "Communication" http://hrlibrary.umn.edu/africa/comcases/nigeriapetition2001.pdf (accessed September 1, 2017).
[879] "Communications Procedure," *African Commission on Human and Peoples' Rights*, *African (BANJUL) Charter on Human and Peoples' Rights*, S.56(5).
[880] "Communication" http://hrlibrary.umn.edu/africa/comcases/nigeriapetition2001.pdf (accessed September 1, 2017).

The Commission then found in 2001 (five years after filing) that Nigeria had violated the Ogoni Peoples' right to health and clean environment, their ability to use their wealth and natural resources, and that the State has the duty to protect its people, and was liable for the activity of private actors that were committing human rights abuses.[881] The case compelled the Nigerian government to provide compensation to those negatively affected by oil operations and clean-up areas that had been polluted due to oil company activity.

In the time between the filing and the Recommendation of the Commission, Nigeria underwent a period of regime change, making it less clear how the case would hold those accused accountable, particularly when, in late 2000, the new Obasanjo democratic government agreed with the assertions of wrongdoing in a *Note Verbale,* stating that "there is no denying that a lot of atrocities were and are still being committed by the oil companies in Ogoni Land and indeed in the Niger Delta area"."[882] Other than this *Note Verbale*, the Nigerian Government never participated in the proceedings.

6.6.2 SERAP v. Nigeria (ECOWAS)[883]

SERAP v. Nigeria is one in a series of cases that the Nigerian NGO, the Socio-Economic Rights & Accountability Project (SERAP), brought against the Federal Government in international fora. In this case, and in a series of other disputes ranging in allegations from corruption in the education sector to mismanagement of public funds, SERAP accused the Government of breaching a range of fundamental rights laid out in the African Charter on Human and Peoples' Rights. SERAP says that its approach is to both win cases, but also to draw attention to important social issues in order to change opinions and influence policy.[884]

[881] **SERAC and Anor. v. Nigeria** (2001) AHRLR 60 (ACHPR 2001), pt.57.
[882] Fons Coomans, "The Ogoni Case before the African Commission on Human and Peoples' Rights," 749-760.
[883] **SERAP v. Federal Republic of Nigeria,** 14 December 2012, ECW/CCJ/JUD/18/12.
[884] SERAP, *Who we are,* http://serap-nigeria.org/who-we-are/ (accessed September 1, 2017).

6.6.2.1 The ECOWAS Court

SERAP has been increasing its use of the Economic Community of West African States (ECOWAS) court in the past decade for filing rights-based claims. While at first glance this may seem an unlikely platform for rights-based claims, the ECOWAS court has made a strategic choice in the past decade to expand its remit beyond purely trade and commercial disputes.[885] The court has decided against the Gambia, Niger, and Nigeria in a variety of cases where private citizens have filed suit against countries for human rights violations.[886]

The rules for accessing the Court are quite liberal, particularly when considering fora established earlier in Sub-Saharan Africa, like the AU's Commission on Human and Peoples' Rights. There is no requirement by the Court that litigants must prove they have exhausted all domestic remedies before approaching the court, and interpretation of *locus standi* is liberal.[887] Though the Court has struggled to ensure that its judgements are complied with, it has taken a proactive stance to ensuring that its judgements are developed in a way that makes them more likely to be enforced in a given context.[888] The court has also employed campaigns to pressurise member states into recognising their obligations through public information efforts, among other tactics.[889]

6.6.2.2 The Case

SERAP filed suit in the ECOWAS Court of Justice in 2009 against the Federal Government and the six main multinational oil companies in Nigeria (Nigerian National Petroleum Company, Shell Petroleum Development Company, ELF Petroleum Nigeria LTD, AGIP Nigeria PLC, Chevron Oil Nigeria PLC, Total Nigeria PLC and Exxon Mobil). Beyond the Federal Government of Nigeria and

[885] Ibid.
[886] The jurisdiction of the ECOWAS Court of Justice was expanded in 2005 to allow the court to adjudicate human rights cases. See Karen J. Alter, Laurence R. Helfer and Jacqueline R. McAllister, "A New International Human Rights Court for West Africa: The ECOWAS community Court of Justice," *The American Journal of International Law* 107, no. 4 (2013): 737-779.
[887] Alter, Helfer and McAllister, "A New International Human Rights Court for West Africa," 737-779.
[888] Ibid., 737.
[889] Ibid., 765-766.

the oil companies, SERAP also joined the Attorney General of Nigeria in the suit.[890] The grounds for the suit was that the Government and its commercial partners' behaviour in the oil sector amounted to violations of basic human rights, such as the right to food, work, health, water, life, a healthy environment, and more.[891] Upon filing, all of the oil companies, including NNPC, raised preliminary objections to the court's jurisdiction to hear the case, similar to litigation tactics in Nigerian courts. Taking into consideration these objections, the court decided that it had jurisdiction to hear the case, but did not have jurisdiction over the corporations, whose names were struck out of the suit.[892]

Unlike previous attempts at using international mechanisms to hold the Nigerian government to account for poor governance of the oil sector, in this case both the Federal Government and the Attorney General participated in the hearing, filing a joint statement of defence.[893] Their strategies for building their defence were similar to those employed by oil companies in Nigeria's domestic courts, such as objecting to SERAP's standing, invoking a statute of limitations, and questioning the ECOWAS Court's jurisdiction.[894]

The Court was quick to dispose of these defences, however. The court responded to the criticism that it did not have jurisdiction by citing Article 9(4) of the Supplementary Protocol A/SP.1/01/05 of 19 January 2005, which enables the court to determine any case in a member state where there has been a violation of human rights, spanning a variety of international and regional human rights instruments that member states are signatory to.[895]

In 2012, the ECOWAS Court of Justice ruled in favour of SERAP. The Court's judgement found the Federal Government of Nigeria guilty of not protecting its citizens from company activities and violating articles of the African Charter on

[890] **SERAP v. Federal Republic of Nigeria,** 14 December 2012, ECW/CCJ/JUD/18/12, pt.2.
[891] Ibid., pt.14.
[892] Ibid., pt. 8.
[893] Ibid., pt.10.
[894] Ibid., pt.103-105.
[895] Ibid, pt. 25.

Human Rights.[896] According to the decision, the government's inaction, both in terms of not creating an effective legal and regulatory framework, and its reticence to punish perpetrators of the current system, amount to breaches of many international obligations.[897] However, having learned from previous judgements of the ECOWAS court that went unenforced, the court did not award the USD 1 billion in damages that had been requested by SERAP.[898] The Court said it would not be possible to pay out such a sum, as SERAP did not have specific victims named in their suit and that paying out such a sum would not be possible to execute equitably.[899] In finding Nigeria guilty of SERAP's accusations of misconduct, the Court compelled the Federal Government of Nigeria to ensure environmental clean-up and see to it that multi-national actors would be held accountable for misconduct. It was never made clear how they might do this or what the consequences might be if they did not comply.[900]

The **SERAP v. Nigeria** decision was a landmark case for regional litigation relating to oil pollution. Its significance lies in the Nigerian government choice to participate, which *de facto* provided some legitimacy to the proceedings and inferred that the government felt compelled to respond to SERAP's claims. However, the lack of a meaningful award or enforcement mechanism in the ruling means that the case broadly amounts to a news story rather than ensuring lasting impact for those negatively affected by oil sector activity in the Delta.

6.6.3 The Milieudefensie Cases, The Netherlands

The Netherlands is home to the headquarters of the most influential and oldest oil producer in Nigeria, Royal Dutch Shell. Dutch jurisdiction is increasingly open to hearing civil ETL on a rather broad interpretation of liability, or the developing concept of "enterprise liability." According to Zerk, "[t]his theory of liability is

[896] In Paragraph 33 of the ECOWAS judgement, the Court criticises the government for inaction when citizens' well-being was threatened due to industry activity.
[897] **SERAP v. Federal Republic of Nigeria,** 14 December 2012, ECW/CCJ/JUD/18/12, pt.105.
[898] Ibid., pt.115-117.
[899] Alter, Helfer, and McAllister, "A New International Human Rights Court for West Africa," 737-779.
[900] Ibid., 767.

based on the idea that multinational groups that are highly integrated ought to be held jointly and severally liable for wrongs committed by members of that group."[901] Enterprise liability, if successfully applied, could have implications for Royal Dutch Shell and its international operations in the future.

6.6.3.1 The Dutch Courts

The legal basis for the Dutch courts' approach to hearing ETL on environmental wrongs rests on two EU regulations, the Brussels I Regulations and the Rome II Regulations.[902] The Brussels I Regulations allow for EU courts to hear cases involving companies, of any nationality, which have a presence in the EU state. The Rome II Regulations allow the domestic law of the foreign state where the action occurred to be used in an EU court of law, referred to as the use of *lex loci*.[903]

6.6.3.2 The Cases

Below, I discuss a group of cases against SPDC and Royal Dutch Shell that were tried in the Netherlands for environmental damage caused by oil spills in Nigeria. The Dutch cases address a range of issues in transnational litigation, particularly with regards to how, or if, one state has jurisdiction over events that occurred in another country, and whether the laws of the forum's state or the state where the action was instituted are applied.[904]

In **Oguru & Efanga v. RDS and SPDC**, two farmers sued Royal Dutch Shell and SPDC in the Netherlands for the damage caused by a spill in Oruma, in Bayelsa State in 2005. In **Dooh v. RDS and SPDC**, one farmer in Goi, in Ogoniland, sued RDS and SPDC in the Netherlands for the damage caused by the spill on the land that Dooh occupies.

[901] Zerk, "Extraterritorial jurisdiction: lessons for the business and human rights sphere from six regulatory areas," 171.
[902] Cedric Ryngaert, "Tort Litigation in Respect of Overseas Violations of Environmental Law Committed by Corporations: Lessons from the Akpan v Shell Litigation in the Netherlands," *McGill International Journal of Sustainable Development Law & Policy* 8, no. 2 (2013): 249-250.
[903] Ibid., 245.
[904] Ibid., 248.

In both cases, the farmers, alongside the Dutch NGO, Milieudefensie (the Dutch branch of Friends of the Earth), were suing for:

- compensation for damaged crops,
- for an order for Shell to clean up the environment,
- replace outdated pipelines that had been the source of the spill,
- and for the oil company to be subject to steep penalties should they be found to be breaching any stipulations of the eventual judgment.[905]

In a separate motion, SPDC asked the court to declare that it did not have jurisdiction to hear the case.[906] The judge dismissed SPDC's motion and accepted jurisdiction to hear the case under Dutch Code of Civil Procedure, Section 7, which stipulates that

> In the event that the Dutch court has jurisdiction over one of the defendants in matters that must be initiated by a writ of summons, the Dutch court also has jurisdiction over other defendants involved in the same proceedings, provided the claims against the various defendants are connected to such an extent that reasons of efficiency justify a joint hearing.[907]

Joining Royal Dutch Shell to the suits and holding them liable for the same damages as SPDC meant that both parties had to be assessed.

In affirming their jurisdiction in **Oguru & Efanga v. RDS and SPDC**, the Dutch court noted emerging international trends in extra-territorial jurisdiction that are developing to hold parent companies accountable for the actions of their subsidiaries. Justices Wien, Nijenhuis, and Bus stated that the very trend itself was enough for Royal Dutch Shell to foresee that they might be implicated in these kinds of proceedings.[908]

[905] **Oguru and Efanga v. Royal Dutch Shell** Hof Den Hague 30 January 2013 C/09/337058 / HA ZA 09-1581.
[906] Ibid., pt.4.2.
[907] S.7, DCCP.
[908] **Oguru and Efanga v. Royal Dutch Shell** Hof Den Hague 30 January 2013 C/09/337058 / HA ZA 09-1581, pt. 4.6.

The central substantive issue in these cases was the cause of the oil spills. Following a spill, it is standard practice for a multi-stakeholder team to visit the site in order to assess the damage and cause of the spill, the JIV, which is discussed in further detail in Chapter 4. The practice has been criticised as playing directly to oil company power dynamics, often using oil company resources to make the visits and having the oil companies themselves fill out the final reports that state the cause of the oil spill.[909]

In both of the cases before the Dutch court, the communities had refused to sign the JIV reports because they disagreed with the oil company findings that sabotage had taken place. Despite not being signed by the communities, the reports were still accepted by the Dutch court and weighed as evidence in determining the cause of the oil spills.

The farmers and the NGO Milieudefensie had expert testimony, in both cases that explained all of the plausible ways in which these ruptures could have been naturally occurring, due to the age of the pipelines and where they were physically buried. In both instances, SPDC insisted that the spills were caused by vandalism, which would absolve them of all liability. In weighing both arguments, the court stated that the evidence provided by Shell was much stronger than the more general doubts and scepticism raised by the plaintiffs. The judge's decision to determine these pipeline ruptures as sabotage ultimately decided the outcome of the cases in favour of the oil companies.[910]

The **Oguru and Efanga** case also confirmed that Nigerian courts have not before entertained environmental litigation on the ground of a breach of fundamental rights. In **Oguru & Efanga v. RDS & SPDC**, the judge said, "As far as the District Court was able to verify, to date there have been no Nigerian rulings (precedents) in which a reprehensible failure in horizontal relationships such as the one at issue and in the event of sabotage by third parties is considered to be an

[909] See Chapter 4, Section 4.4.2 for more on this.
[910] As shown in Section 6.5.1.2, Supreme Court justices in Nigeria are making more progressive judgements with regards to sabotage than this decision.

infringement of a human right. For this reason, the declaratory judgment demanded under II will be dismissed (Section 4.63)." The Nigerian courts' interpretation of fundamental rights in this instance has also had a negative impact on the ability to use extra-territorial litigation to the advantage of litigants suing oil companies for environmental harms.

The final judgments of the cases were heard in 2013, and found that neither SPDC nor Royal Dutch Shell were liable under torts of negligence, nuisance, trespass of chattel, or **Rylands v. Fletcher**. The judge also dismissed SPDC of any obligation to pay compensation to the affected individuals through the compensation mechanism stipulated in the Oil in Pipelines Act because of alleged sabotage.

Despite these unsuccessful cases, the same District Court judges ruled differently in another case in the same year involving a Nigerian farmer and oil pollution caused by SPDC operations in the Niger Delta.[911]

In 2006 and 2007, a series of oil spills took place near Ikot Ada Udo from the IBIBO-I well, a long-abandoned Shell exploratory well, fitted with what is termed a "Christmas tree" installation from 1959. The spills, it was reported, were the result of sabotage at the installation point. Good oil field practice dictates that these installations, an above-ground apparatus comprised of valves and spools, be removed and decommissioned entirely or filled in with cement.[912] Instead, in the case of the IBIBO-I well, the installation remained intact and vulnerable to tampering. As a result of third party sabotage, more than 600 barrels of oil spilled on to Akpan's land, affecting his livelihood and access to a healthy environment. Akpan and Milieudefensie filed suit against Royal Dutch Shell and SPDC in the Dutch court.

[911] **Akpan v. Royal Dutch Shell** Hof Den Hague 14 September 2011 337050 / HA ZA 09-1580.
[912] For example, see: BP, *Don Field Decommissioning Programme* http://www.bp.com/content/dam/bp-country/en_gb/uk/documents/Don_programme_Decommissioning.pdf (accessed August 1, 2017).

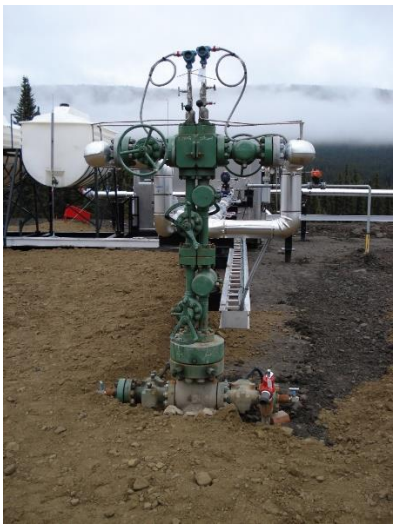

Figure 10: Example of a Christmas Tree wellhead in Northeastern BC, Canada

The suit was filed in 2009, and in 2010 SPDC replaced the Christmas Tree wellhead with a concrete plug to seal the well and prevent further vandalism. Their actions were, however, too little, too late. Citing the Nigerian domestic case of **Shell v. Otoko** where the court found Shell to be negligent under a strict liability tort, the Dutch judge ruled that SPDC had indeed committed a tort of negligence by not securing the well head against sabotage.[913] The key distinction made between this case and the other cases filed in the Dutch court was the wellhead installation and the length of time that it remained unprotected following well abandonment.

6.2.2.5 Summary of Dutch Cases

The judges' decisions in the cases present emerging trends that may be used in future, both as litigation tactics in extra-territorial and domestic cases. There are two notable areas that emerge when looking at these cases as a whole: jurisdiction and sabotage.

In the above cases, the Dutch court confirmed its jurisdiction over the cases, further establishing the court's liberal interpretation of its jurisdiction over foreign entities that may only have a connection to the Netherlands through their relationship with a parent company based there. However, this liberal

[913] **Shell v. Otoko** (1990) 6 NWLR (Pt. 159).

interpretation that initially allows court's to take jurisdiction over the case, does not translate into increased accountability for the parent entity. In all cases, Royal Dutch Shell was removed from the case once jurisdiction was established. Thus, while these cases may provide an avenue for victims of oil pollution to have a means for redress, they do little to put pressure on the parent company to improve the practices of its subsidiaries. For example, in **Dooh v. RDS & SPDC**, the Court found that

> the special relation or proximity between a parent company and the employees of its subsidiary that operates in the same country cannot be unreservedly equated with the proximity between the parent company of an international group of oil companies and the people living in the vicinity of oil pipelines and oil facilities of its (sub-) subsidiaries in other countries.[914]

The cases also draw out distinctions that exist in establishing liability for acts of vandalism, similar to case law developments in Nigeria. In two of these cases, sabotage allegedly occurred on parts of a pipeline that were deemed difficult to reach and so unnecessary to protect. In those cases, despite the communities disagreeing with the cause of the spill, the companies were not held liable for damage. In **Dooh v. RDS & SPDC**, the court said that

> the sabotage of the underground oil pipeline in October 2004 near Goi was not easy to carry out. After all, the oil pipeline was dug in so that it was necessary to first dig relatively deeply to reach the steel oil pipeline. Then the pipeline had to be damaged with a tool such that oil could start to leak. For this reason, in October 2004 near Goi there was no specific and/or exceptional risk of sabotage for people living in the vicinity such as Dooh, which was considerably larger or essentially different than the general risk of sabotage for all other people living in the vicinity of oil pipelines and oil facilities of SPDC in Ogoniland or elsewhere in Nigeria.[915]

In the Akpan case, the Court applied similar reasoning used in the Nigerian **Otoko v. Shell** case from 1990, where the oil company was found negligent for not better protecting its exposed assets from vandalism. The difference between hard to reach

[914] **Dooh v. Royal Dutch Shell** Hof Den Hague 30 January 2013 C/09/337058 / HA ZA 09-1581.
[915] **Dooh v. Royal Dutch Shell** Hof Den Hague 30 January 2013 C/09/337058 / HA ZA 09-1581.

places where vandalism occurred (as in the **Dooh** and **Oguru & Efanga** cases), and easy to reach places subject to vandalism (as in Akpan) is thus far the only clearly articulated delineation in determining corporate liability for vandalism in ETL and domestic litigation.

6.6.4 The Bodo, Ogale, and Bille Cases (The English High Court)

Two recent cases in the UK Courts further expose the limitations of ETL. These cases also demonstrate how interpreting law devoid of its socio-cultural context can be detrimental to A2EJ.

In the UK, courts have historically been cautious about accepting jurisdiction for ETL cases.[916] Where UK courts have decided to hear ETL cases, developments in UK domestic law since 1995 have meant that most cases are tried by applying the laws of the country where the action took place, *lex loci*.[917] These "choice of law" rules, like those in the Netherlands, are meant to mitigate any misgivings that might exist between parties, or the perceptions of unfairness, by applying the law that parties would have been expecting to be bound by at the time of the action. There is an implication that by applying the local law, the judge is respecting local norms, while removing any extra-judicial pressures that might exist if the same law were to be applied in its home jurisdiction. As I will show below, alongside the merits of the *lex loci* approach, lie significant challenges for A2EJ.

6.6.4.1 The Court

The cases discussed in the below sections were heard by the Technology and Construction Court (TCC) in London. The Court hears cases involving a range of specialised issues, including everything from disputes arising from services rendered by engineers or surveyors to environmental issues caused by industry,

[916] Zerk, "Extraterritorial jurisdiction: lessons for the business and human rights sphere from six regulatory areas,"149.
[917] Ibid., 198.

including pollution.[918] The specialist courts normally hear only high value cases (of more than GBP 250,000) and have a track record of hearing international cases.[919]

6.6.4.2 The Bodo Litigation

In the first case, a London-based personal injury and human rights law firm, Leigh Day, represented a community in its suit against Shell in London. The community was suing for compensation and clean up following two severe oil spills in 2008 in the Bodo community, Gokana LGA, Rivers State.[920] The suit was filed on behalf of more than 15,000 members of the Bodo community. The community filed suit only after negotiations with Shell broke down over the low level of compensation Shell was willing to pay.[921] In these preliminary negotiations, Shell admitted liability for the spills. The Bodo case is a landmark case for UK courts; it marks the first time an oil company had been sued for oil-related pollution within the jurisdiction.

The 2008 spills, one caused by a pipeline leak and one from equipment failure, poured 600,000 barrels of oil into the Bodo Creek area, causing severe damage to local lands as well as damage to mangroves and waterways used for fishing.[922] The case offered a unique opportunity for a foreign common law jurisdiction judge to hear a Nigerian oil pollution case and apply Nigerian law with an outsider's perspective. As such, Justice Akenhead's preliminary hearing judgement provides insight into what might occur when the Nigerian legal system is interpreted without cultural context. In research terms, this would mean the judge took a doctrinal approach to understanding the law, rather than a socio-legal approach, as is applied in this project.[923]

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[918] "History," Courts and Tribunals Judiciary, https://www.judiciary.gov.uk/you-and-the-judiciary/going-to-court/high-court/queens-bench-division/courts-of-the-queens-bench-division/technology-and-construction-court/history/ (accessed August 22, 2017).
[919] Ibid.
[920] **The Bodo Community and Ors. v. SPDC** [2014] EWHC 1973 (TCC).
[921] Ibid.
[922] Abigail Daisy Morgan. "Long-Term Effects of Oil Spills in Bodo, Nigeria." *Al Jazeera,* July 28, 2017, http://www.aljazeera.com/indepth/inpictures/2017/07/long-term-effects-oil-spills-bodo-nigeria-170717090542648.htm (accessed September 3, 2017).
[923] In order provide some context for Nigerian jurisprudence, both parties were represented by expert testimony from retired Nigerian Supreme Court justices.

Before delving into the details of the preliminary judgement, it is important to note that this case took place between SPDC, Shell's Nigerian subsidiary, and Nigerian claimants, without an "anchor defendant" to tie the case to British jurisdiction.[924] This was not the case when the suit was initially filed. Another UK TCC judge later noted that in the Bodo Case, "Claim forms were issued in this jurisdiction against RDS and SPDC in 2012, but the claims proceeded against SPDC alone on the basis of an agreement that it would voluntarily submit to the jurisdiction SPDC also admitted liability."[925]

The fact that RDS, the British holding company for all of Shell's other companies, was removed from the case while the Nigerian subsidiary remained is significant; this suggests that the parent company was not willing to take the risk that they might have been found to be liable in the suit. At the same time, RDS was sufficiently influential that it was able to instruct the subsidiary to subject itself to the British jurisdiction. As was shown in the Dutch cases and as will be shown in the below Ogale-Bille case, Shell has invested a great deal of resources to ensure that its parent companies cannot be held liable in courts outside of Nigeria.

Once defendants were agreed, the Bodo preliminary judgement mainly focused on which mechanism was appropriate for governing compensation claims in Nigeria. In his preliminary judgement, Justice Akenhead relied heavily on the Oil Pipelines Act deeming it the prevailing legal instrument that should govern compensation for oil spills in the sector. Justice Akenhead weighed the merits of statutory frameworks over the use of tort law remedies and found the Oil Pipelines Act compensation framework to be comprehensive enough so as to be considered the primary and preferred mechanism for deciding compensation cases related to oil pollution.[926] However, as I have already argued, use of statutes to decide compensation rates for oil pollution is in direct contrast to praxis in the Nigerian courts.

[924] **The Bodo Community and Ors. v. SPDC** [2014] EWHC 1973 (TCC).
[925] **Okpabi and Ors. v. Royal Dutch Shell and SPDC** 2017 EWHC 89 (TCC).
[926] Justice Akenhead does acknowledge, however, that the OPA does not exclude the use of Common Law remedies. **The Bodo Community and Ors. v. SPDC** [2014] EWHC 1973 (TCC), pt.23.

Justice Akenhead's argument that legislation should be used instead of tort to award compensation was supported primarily through English case law. He had to use English precedent to make his case, as so few cases in the Nigerian courts use legislation in environmental disputes, with a strong preference for tort litigation. Nigerian Supreme Court Justice Ayoola, provided expert testimony on behalf of Shell, and supported the view that the OPA should supersede common law remedies in cases of oil pollution.[927] From Shell's perspective, OPA is a useful tool as it has clear provisions for avoiding liability in the event of third party interference. Justice Akenhead's reasoning is founded on the fact that the OPA is comprehensive in addressing compensation for spills and that it is "much more generous overall for the victims than common law in many respects."[928] He also finds that the statutory provisions provide a much wider scope for liability than common law remedies. Despite Justice Akenhead and Shell's confidence in the "generosity" of the OPA's compensation regime, Frynas finds that compensation rates are deemed much too low; this research finds that the quantum of compensation in tort litigation is improving, as shown in Chapter 7.[929]

Following Justice Akenhead's preliminary hearing, SPDC and the Bodo litigants settled out of court. In January 2015, *The Guardian* reported a GBP 55 million settlement between SPDC and 15,600 Bodo community farmers and fishermen.[930] Individuals received more than GBP 2,000 each and millions more was given to local health services facilities. The settlement was described as "several years' earnings" by Martyn Day, whose firm represented the Bodo community in the legal proceedings against Shell.[931] He said that "I don't think I have ever seen a happier bunch of people. The minimum wage in Nigeria is NGN 18,000 a month and 70% of the Bodo population live below the poverty line."[932] *The Guardian* reported that

[927] Ibid., pt.34.
[928] **The Bodo Community and Ors. v. SPDC** [2014] EWHC 1973 (TCC), pt.64.
[929] Frynas, *Oil in Nigeria*, 96.
[930] John Vidal, "Shell Announces £55m Payout for Nigeria Oil Spills."
[931] John Vidal, "Shell Announces £55m Payout for Nigeria Oil Spills."
[932] Ibid.

the initial offer to the community was GBP 4,000 in 2011, followed by GBP 18 million in 2013.[933]

One Nigerian oil and gas lawyer who I interviewed argues that the settlement is a partial victory for the Bodo Community. His opinion is that the settlement shows ETL can be "a civilised mode of getting justice" rather than previous alternative extra-legal avenues for recourse, which often took the form of barricading oil and gas installations and seizing equipment.[934] In this instance, "getting justice" relates to receiving a level of compensation that is deemed to be fair by the parties involved. While he is optimistic for the future of ETL, he also finds that oil companies are proving that they will rely on adapting their domestic defence tactics to frustrate new legal developments. He shared, as an example, a case he was working on in 2014, where he approached a French law firm to support an ETL case in France against the French oil company Total. When the Nigerian lawyer informed Total that he was filing suit in France, the oil company retaliated by filing an application in Nigerian courts for an injunction, preventing the community from suing abroad. The lawyer acknowledges that the suit is frivolous, but it will still delay proceedings abroad.[935]

6.6.4.3 The Ogale-Bille Claims

Under similar circumstances to the above case, two sets of suits were filed separately and then joined together in the Technology and Construction Court in London in 2015. The first set of cases involved a group of 20 named claimants filing suit against RDS and SPDC in London on behalf of the Ogale community.[936] The claim seeks damages for "serious and ongoing pollution and environmental damage caused by oil spills emanating from the Defendants' oil pipelines and associated

[933] As of January 2017, the oil spill still had not been cleaned up, though compensation was paid to the community. The dynamics behind clean-up have proven complicated and indeed have raised questions about the community's interest in having the spill cleaned up properly. See Emily Gosden,
"Why Shell's Bodo oil spill still hasn't been cleaned up," *The Telegraph*, January 8, 2017, http://www.telegraph.co.uk/business/2017/01/08/yet-clean-nigerian-oil-spills-two-years-compensation-deal/ (accessed August 1, 2017).
[934] Interview A1L2 – PH, January 12, 2015.
[935] Ibid.
[936] **Okpabi and Ors. v. Royal Dutch Shell and SPDC** 2017 EWHC 89 (TCC).

infrastructure in and around the Ogale community in Nigeria."[937] The second claim is by a group of claimants representing the Bille Kingdom in Nigeria. Their claim concerns "damages arising as a result of serious and ongoing pollution and environmental damage caused by oil spills emanating from the Defendants' oil pipelines and associated infrastructure in and around Bille Kingdom in Nigeria."[938] Once their suits were combined, they involved 42,500 people living in the Niger Delta.[939]

Unlike the Bodo case, where SPDC volunteered to be bound by UK jurisdiction, in the Ogale-Bille case, SPDC contested jurisdiction in the UK. Justice Fraser notes that "SPDC 'had no wish to repeat' the experience of that litigation, and that was why the defendants in the two instant sets of proceedings had decided to insist on their strict legal rights so far as jurisdiction is concerned."[940] This meant that RDS' validity as an anchor defendant had to be proved in order to proceed with the claim in the UK courts. On this point, the claimants were ultimately unsuccessful; their legal counsel (also Leigh Day, as in the Bodo case) could not prove that Royal Dutch Shell, the UK domiciled overarching holding company, was a legitimate anchor in the case. A range of tests were applied to the holding company in the UK to determine if they could be held responsible for duty of care in Nigeria. One of the primary facts used by Justice Fraser in determining RDS' role as a parent to SPDC was identifying the actual activities of the corporation that took place in the UK; in this case none. The company's headquarters were in the Netherlands, and they had never held one board meeting in the UK.[941] In addition, SPDC was not a direct subsidiary of RDS at all; it was a subsidiary of Shell Petroleum NV, in turn a subsidiary of RDS, which served to further estrange the relationship between RDS and SPDC.

The above reasoning meant that the Ogale-Bille case would not proceed in British courts, but the judgement also provided useful insight into the British courts'

[937] Ibid., 2.
[938] Ibid., 3.
[939] Ibid., 4.
[940] Ibid., 41.
[941] **Okpabi and Ors. v. Royal Dutch Shell and SPDC** 2017 EWHC 89 (TCC), 83.

perception of A2EJ in Nigeria. As in the Bodo case, the judge's limited understanding of the Nigerian context served to weaken the justice's authority in the matter rather than further bolstering it. Justice Fraser made it clear that the Nigeria cases were distinct from a Zambian environmental extra territorial claim where jurisdiction was accepted by the British court.[942]

One of the ways in which Justice Fraser differentiated the cases was due to his perception of A2EJ in the respective jurisdictions. Justice Fraser noted that in Zambia, conditional fee agreements, a type of financial arrangement that provides claimants with access to legal counsel on a no-win no-fee basis, are illegal. He contrasted this to Nigeria where such arrangements are legal. Justice Fraser asserted that the ability to access legal counsel is sufficient for ensuring access to justice – a notion that is not supported by this research project.[943] He notes in Paragraph thirty-three of his judgement that "As long as legal representatives…can be found to act on these CFA arrangements, access to justice is available to claimants with deserving cases but who have no financial means."[944]

Justice Fraser also found the Nigerian law sufficient for providing redress to victims of oil pollution based on limited evidence and which is heavily dependent on the potentially flawed logic of his fellow justice, Justice Akenhead.[945] He notes in Paragraph 115 that "Nigeria has imposed a statutory framework upon the oil business in that country, with obligations upon companies that engage in such business to compensate for damage."[946] By using this logic to argue that sufficient legal remedy is available in the home jurisdiction, Justice Fraser argued that Nigerian law has "substantial similarity" to English common law, an assertion that Nigerian justices have distanced themselves from in oil pollution litigation more broadly.[947]

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[942] He was referring specifically to a Zambian mining case also concerned with environmental harms caused by industry activity, see **Lungowe & others v. Vedanta Resources plc and Konkola Copper Mines plc** [2016] EWHC 292 (TCC), pt. 44.
[943] See Chapter 7, Section 7.3 on barriers to filing claims.
[944] **Okpabi and Ors. v. Royal Dutch Shell and SPDC** 2017 EWHC 89 (TCC), 33.
[945] **Okpabi and Ors. v. Royal Dutch Shell and SPDC** 2017 EWHC 89 (TCC), 43.
[946] Ibid.,115.
[947] Ibid., 55. See **Centre for Oil Pollution Watch v. NNPC**. In that case, Justice Nwokorie says "The truth of the matter is that there is a remarkable divergence in the jurisprudence of *locus*

Ultimately, Fraser asserted that "the evidence before the court is that access to justice in Nigeria would not be denied to the claimants if these proceedings were not to continue in London"[948] This line of argument is both disadvantageous to those seeking redress for environmental harms caused by subsidiaries of large multi-national corporations as well as a persuasive example of why *lex loci* fails to be effective in foreign courts for the purposes of A2EJ.

6.6.4.4 Summary

The UK cases served as unique opportunities to have specialist judges outside of the Nigerian jurisdiction review the facts of cases between an oil company and communities. While the **Bodo** case ultimately settled out of court for a sum of GBP 55 million, the preliminary judgement has shown that applying Nigerian law outside of the context of Nigeria is simply ineffective. Justice Akenhead's assertion that the Oil Pipelines Act should be an adequate mechanism for awarding compensation for oil pollution cases is a clear departure from the practice in contemporary Nigeria and contrary to the findings of this research.

Justice Fraser's doctrinal approach to legal analysis produced a poorly informed view of A2EJ in the Nigerian context. This was illustrated by his interpretation of "access to justice" in the Bille and Ogale cases, where having access to financial means to pay for legal counsel is considered a substitute for a non-discriminatory legal framework. Ultimately, these cases do not show promise for the entertaining ETL in British courts specifically for Nigerian oil pollution claims, as other foreign environmental cases, such as the Zambian mining case, have proven more effective at showing an absence of A2EJ in the home jurisdiction.

standi in jurisdictions like England; India; Australia, etc., and the Nigerian approach to same, which has not evolved up to the stage, where litigants like the Appellant can ventilate the sort of grievance couched in its Amended Statement of Claim."

[948] **Okpabi and Ors. v. Royal Dutch Shell and SPDC** 2017 EWHC 89 (TCC), 120.

6.6.5 Summary

Results from my 2014 survey show that more than 40% of practitioners felt that ETL was the best mechanism for redress for oil related disputes. However, as my analysis has indicated, these approaches are not without their challenges and constraints, many of which are connected to the deficiencies of the Nigerian legal framework. Piercing the corporate veil remains a challenge in all of the courts analysed, where courts have heard cases regarding oil pollution in Nigeria, but have not successfully held parent companies to account.

6.7 Conclusion

This Chapter reviewed the viability of gateways to environmental justice through the courts, both in Nigeria and abroad. Findings were drawn from available evidence, namely a dataset of forty-eight Nigerian court cases and a selection of key extra territorial litigation cases.

I argued that the decision to change jurisdiction from SHC to FHC in the 1990s has had a negative effect on A2EJ for communities and individuals in the Niger Delta. This is due to the fact that the jurisdictional change limited the number of courts that were accessible to communities, while also introducing a new jurisdictional rule without clear transitional provisions. This caused confusion, which was further compounded by some higher court decisions that directly support the application of retrospective law, calling into question some of the basic tenets of the rule of law. While this has been a setback for A2EJ in the Nigerian context, challenges of jurisdiction will likely soon decline in prevalence once remaining appeals from the early and late 90s are dealt with by consolidating precedent. There have also been some gains in jurisprudence for those looking to use the courts for redress. For example, the cases considered in this Chapter show that it is possible to prove negligence and strict liability.

I additionally found no evidence that suggests that Nigerian courts are prepared to entertain PIEL for cases related to the oil sector. While there have been developments in standing for communities, this has not been extended to civil

society and pressure groups working to hold government and its commercial partners to account for misconduct in the sector. Further, interpretation of the Constitution's Chapter II on Fundamental Objectives and Directive Principles remains constrained, despite significant developments in jurisprudence in India, a jurisdiction with a similar constitutional distinction between rights and principles as those of Nigeria.

The final finding of this Chapter concerned the fact that there is dissonance between perceived utility of extra territorial litigation and its material benefits for access to environmental justice. My review of court cases from ECOWAS, the African Union, the Netherlands, and the United Kingdom finds few indications of material success through extra territorial courts for victims of oil pollution or for holding parent companies to account for the actions of their subsidiaries. In the use of *lex loci* in the Netherlands and the UK, the barriers to justice that persist for ETL courts shadow the same constraints that prevent Nigerian courts from making decisions that would facilitate A2EJ.

7 Litigation Practice

7.1 Introduction

The preceding Chapter took a judgement-focused approach to analysing litigation by interrogating reported case law. My analysis identified some substantive challenges to access to environmental justice in the Nigerian context. I argued that there is little prospect for public interest environmental litigation for oil sector cases. I also found that extra-territorial litigation is not as effective a mechanism for A2EJ as survey findings would suggest. The Chapter also showed that a few key defences used by oil companies, particularly jurisdiction, continue to prevent a large number of litigants' suits against oil companies from succeeding.

Building on these findings, the present Chapter provides the context for the case law in Chapter 6. I here draw on the insights of Nigerian legal practitioners provided by my 2014 survey, which are triangulated and illustrated by perspectives gleaned from interviews that I conducted with key informants.

In general, Nigeria's judiciary has been criticised as corrupt, inefficient, and ill-equipped to respond to the needs of Nigerian citizens.[949] A recent report ranked the judiciary as the second worst institution in Nigeria for eliciting bribes.[950] According to this study, more than 30% of the Nigerian adult population has been asked to pay a bribe to judges and magistrates.[951] In addition to corruption, a 2006 United Nations Office on Drugs and Crime (UNODC) report on the integrity of the judiciary in three Nigerian states found that laws and regulations were not consistently interpreted, adjournments remain a persistent challenge to justice seekers, and the quality of services provided by the courts is generally poor.[952]

[949] Jibrin Ibrahim, "Nigeria: Our Critical Institutions Are the Most Corrupt," *Daily Trust (Abuja)*, August 18, 2017. http://allafrica.com/stories/201708180021.html (accessed August 22, 2017).
[950] "Corruption in Nigeria, Bribery: Public experience and response," *United Nations Office on Drugs and Crime*, July 2017, http://nigerianstat.gov.ng/elibrary (accessed September 1, 2017), 38.
[951] Ibid.
[952] "Assessment of the Integrity and capacity of the justice system in three Nigerian States: Technical Assessment Report," *United Nations Office on Drugs and Crime*. https://www.unodc.org/documents/corruption/publications_nigeria_assessment.pdf, 18-23. (accessed August 20, 2017).

Nigeria's current Vice President, Yemi Osinbajo, has made a range of comments about the need to improve the Nigerian judiciary, from reducing corruption to improving the efficiency and quality of decisions in order to appeal to investors.[953]

Given the context of general frustration with the judiciary, the purpose of this Chapter is to understand to what effect and under what conditions the courts act as a gateway for those seeking justice specifically in environmental disputes related to oil sector activity. This is an approach consistent with socio-legal methodology. Simply interrogating the case law as it exists on paper can only provide an indication about who wins cases and what the judges' reasoning was. In considering the experience of litigation, the social context of the courts contributes to a shared understanding of the drivers of those outcomes.

My analysis is organised around three key moments in the litigation chain. I make use of an adaptation of Anderson's schema of the litigation cycle, which draws heavily on the work of Felstiner et al, which classifies three stages of dispute formation: "Naming, Blaming and Claiming."[954] The premise of this framework is that first a litigant must know that they have been wronged and be able to identify the person or institution that has committed that wrong. This is referred to as "Naming" and "Blaming" in both Anderson and Felstiner et al's schema. Following this process, a potential litigant would then decide how, if at all, to seek redress and articulate the claim in a way that it might be addressed. This stage is referred to as "Claiming" and can involve litigation or other non-judicial mechanisms, such as direct negotiation or advocacy.[955] Relevant to this research, Anderson focuses

[953] "Osinbajo: Nigeria's 'crawling' judicial process 'nightmare for investors'," *The Cable,* June 20, 2017, https://www.thecable.ng/osinbajo-nigerias-crawling-judicial-process-nightmare-investors (accessed August 22, 2017) and "Justice System In Nigeria Is Under Siege, Osinbajo Laments," *Greenbarge Reporters,* June 12, 2017, http://www.greenbreporters.com/home/national/justice-system-nigeria-siege-osinbajo-laments.html (accessed August 22, 2017).

[954] The present use omits the Grievance and Naming stages of the cycle in order to make the frame of analysis more manageable. Felstiner et al and Anderson characterise the grievance stage as identifying that a wrong has been committed, which can be entangled in range of socio-economic expectations and perceptions about wrongs. Naming moves from identifying a wrong to formulating that wrong in a way that can be a cause for action, another significant barrier, particularly in instances of environmental harms. See Michael R. Anderson, "Access to justice and legal process: making legal institutions responsive to poor people in LDCs."

[955]William Felstiner, Richard L. Abel, and Austin Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . ." *Law & Society Review* 15, no. 3/4 (1980): 631–54.

specifically on litigation as a mechanism for dispute resolution. In his adaptation of Felstiner et al's dispute schema, Anderson includes "Winning" and "Enforcing," suggesting that specific barriers to justice persist at different stages of the litigation cycle.[956]

In order to apply this framework to my analysis of the Nigerian context, this Chapter uses survey findings from a sample of twenty-seven legal practitioners with professional experience in oil sector environmental disputes. This data is an important contribution to the study of A2EJ in Nigeria's oil sector in that it is the first time a repeated survey has been conducted using Frynas' work as a baseline.[957] I have made some changes to his survey design and administration to accommodate progress in available technology and in order to frame the survey as more explicitly concerned with A2EJ. Despite these alterations, the repeated survey instrument proves a powerful tool for analysis.[958] I also augment these survey findings with additional insights from other experienced practitioners who participated in interviews in order to triangulate findings and explore topics in further depth than the survey allows.[959]

First, in Section 7.2, I discuss court delays – a challenge that cuts across the litigation cycle.[960] In Section 7.3, I then interrogate the challenge of accessing the courts (translating Blaming to Claiming) with particular focus on the barriers to filing a claim. Section 7.4 will focus on lawyers' perceptions of judicial decision-making and the challenges that may occur at trial for oil-related disputes (Winning). According to Anderson, the Winning stage in the litigation cycle is where concepts such as "judicial independence" and "procedural fairness" are to be assessed.[961] Section 7.5 will discuss the final stage of the litigation cycle –

[956] Anderson, "Access to justice and legal process," 17. The approach is also informed by the work of Marc Galanter who set out a framework for analysing litigation by considering "the different kinds of parties and the effect these differences might have on the way the system works". See also Marc Galanter, "Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change," *Law & Society Review* 9, no. 1 (1974): 95–160; 97.
[957] See Chapter 3, Section 3.4.1.
[958] Ibid.
[959] See Chapter 3, Section 3.4.2.
[960] See Chapter 6, Section 6.3.2.2 for more on delays.
[961] These are both factors that Anderson highlights as potential barriers to justice. See Anderson, "Access to justice and legal process."

enforcement. This section assesses how, even if a litigant is successful in a claim against an oil company, they might still face challenges accessing justice. From Blaming and Claiming to Enforcing, each section will highlight relevant literature and provide survey findings alongside relevant data from interviews. Given the findings throughout this Chapter, I will conclude in Section 7.6 by asking whether the courts in Nigeria are a viable gateway for environmental justice.

7.2 Delay

Across the Blaming to Claiming, Winning, and Enforcing cycle, delay is highlighted as a persistent barrier to justice. This is a particular challenge in Nigeria, as was first shown in Chapter 6.[962] On the World Just Project's Rule of Law Index in 2016, Nigeria scored significantly lower than the average for Sub-Saharan Africa on "no unreasonable delay" in civil justice matters.[963] In a UNODC assessment of the integrity and capacity of the Nigerian judiciary in 2004, researchers found that Delta State, one of the oil-producing states in the Niger Delta region, performed worse on "timeliness" than the national average.[964] A range of studies on the Nigerian judiciary suggest delays most often are driven by adjournments and interlocutory appeals.[965]

My survey findings (further elucidated in Section 7.3) show that the expectation of delay is so severe that it acts as a deterrent for claimants to file suits in the first place, thus impacting the transition from Blaming to Claiming. The UNODC study

[962] See Chapter 6, Section 6.3.2.
[963] "Rule of Law Index," *World Justice Project*, http://data.worldjusticeproject.org/#/groups/NGA (accessed August 1, 2017).
[964] "Assessment of the Integrity and capacity of the justice system in three Nigerian States: Technical Assessment Report," *United Nations Office on Drugs and Crime*. https://www.unodc.org/documents/corruption/publications_nigeria_assessment.pdf (accessed August 20, 2017) 18-23.
[965] See "Assessment of the Integrity and capacity of the justice system in three Nigerian States"; John Agbonika and Alewo Musa, "Delay in the Administration of Criminal Justice in Nigeria: Issues from a Nigerian Viewpoint," *Journal of Law, Policy and Globalization* 26, no. 0 (2014): 130–38; "Dealing with delayed justice syndrome," *The Daily Post*, http://dailypost.ng/2014/01/30/dealing-delayed-justice-syndrome/ (accessed August 22, 2017); "Human Rights Report," *Nigerian State*, https://www.state.gov/documents/organization/265500.pdf (accessed August 22, 2017); Iruoma, "Eradicating delay in the administration of justice in African Courts: A comparative analysis of South African and Nigerian Courts," 41.

confirms that experiencing court delays can have a direct negative impact on citizens' public trust.[966] This is also consistent with Tyler's assertion, discussed further below, that a previous experience in court can negatively affect the way in which citizens view the legal system as a whole.[967]

Then, at the trial stage, delay actively impacts a litigant's experience in the courts with seemingly endless adjournments and delays through interlocutory appeals. Agbonika and Musa note that adjournments can be instigated by a range of actors involved in litigation.[968] They suggest lawyers have financial incentives to receive adjournments for two reasons. Firstly, lawyers may get paid for each appearance in court, which incentivises more court appearances. Secondly, lawyers often work in small or sole proprietor firms, and thus have conflicting obligations that require them to request different court dates.[969]

Agbonika and Musa suggest that judges are also responsible for unnecessary adjournments for a range of reasons, from perceived work ethic (i.e. not wanting to work hard), to personal reasons (i.e. picking up a child from school) and due to lack of professional qualification (i.e. adjourning court to do further research on an issue of elementary law raised in the course of a trial).[970] Court staff can also be the source of adjournments in the event that they misplace files or do not provide the information needed by the judge to continue proceedings.[971] The UNODC and Iruoma studies suggest that such frivolity might be related to corruption and external influence rather than incompetence.[972] This relationship is supported in findings in Section 7.4 where survey respondents suggest that judges and other

[966] "Assessment of the Integrity and capacity of the justice system in three Nigerian States: Technical Assessment Report," *United Nations Office on Drugs and Crime*. https://www.unodc.org/documents/corruption/publications_nigeria_assessment.pdf, 18-23. (accessed August 20, 2017).
[967] Tom Tyler. "Procedural Justice and the Courts." *Court Review: The Journal of the American Judges Association* 44, no. 1 and 2 (2007), 26-31.
[968] Agbonika and Musa. "Delay in the Administration of Criminal Justice in Nigeria," 130–38.
[969] "Assessment of the Integrity and capacity of the justice system in three Nigerian States: Technical Assessment Report," 18-23.
[970] Agbonika and Musa. "Delay in the Administration of Criminal Justice in Nigeria," 132 – 133.
[971] Ibid., 133.
[972] Iruoma, "Eradicating delay in the administration of justice in African Courts," 137. UNODC found a correlation between low judicial independence and slow and inefficient courts proceedings. They also found a correlation between corruption and delay. See "Assessment of the Integrity and capacity of the justice system in three Nigerian States."

judicial officers are subject to external pressure. At trial, delay can run up legal fees, while also delaying compensation and the potential remediation of environmental harms. The UNODC report finds that delays at this stage also disproportionately negatively impact the poor.[973]

Finally, at the enforcing stage, delay prevents claimants from receiving timely compensation – often for loss of livelihood or damage to property. A USAID report on corruption in Nigeria's judiciary found that delay at the enforcement stage is common. The report notes that there are clear incentives for a losing party to delay proceedings because "delay may provide an opportunity to conceal or transfer assets; the rate of interest on an unpaid judgment may be below the market rate."[974] Oil company motivation may also be delayed to introduce a sense of litigation fatigue in the opposing party in order to force an out-of-court settlement, which would be much lower than the amount which might be awarded in court. Delay at the enforcement stage can have a materially negative effect on the quality of a litigant's life, especially for those who have been out of work due to environmental harm done to their property.

Now that delay has been established as a recurring theme throughout the litigation cycle, the remainder of this Chapter will discuss in further detail the other barriers to justice that present themselves as a litigant moves from Blaming to Enforcing.

7.3 Accessing the Courts – Blaming and Claiming

Anderson argues that moving between the Blaming and Claiming stage – the stage in which claimants access the courts to pursue a legal claim – "presents the most formidable challenges because it entails involvement with the legal system."[975] The challenge is so complex and intimidating that many with valid claims never make it to this stage. A seminal study on access to courts for civil claims in the United

[973] Ibid.
[974] "Reducing Corruption in the Judiciary," *USAID*, http://pdf.usaid.gov/pdf_docs/Pnadq106.pdf (accessed August 22, 2017).
[975] Anderson, "Access to Justice and Legal Process," 17.

States found, for example, that "many more potential legal disputes existed than researchers had anticipated, and the vast majority never reached a lawyer or courthouse, let alone a judge."[976]

The Civil Litigation Research Project (CLRP) has shown that there are many factors that affect a person's decision whether or not to use the courts.[977] Indeed, the CLRP noted that "Not only resources (e.g., time, money, and lawyers), but also social meaning affected whether a potentially legal problem came to be perceived as such or reached a legal institution for resolution."[978] In order to better understand this complexity, this section explores to what extent those with valid claims in Nigeria are translating grievances into legal claims against another party, thus moving from the Blaming to Claiming stage through to the litigation stage**.** I then analyse some of the factors that might prevent litigants from filing claims, considering, in particular, to what extent these factors differ in cases involving the oil sector.

7.3.1 Findings

As I have discussed above, people choose, for a variety of reasons, to not use the courts, even when they have a valid legal claim. In Nigeria, it may be that those with valid legal claims are not fully using the courts because they feel dissuaded from doing so (as distinct from claimants having an intrinsic sense that there are better avenues for redress). More than 78% of Frynas' survey respondents had experiences where potential litigants were discouraged from taking legal recourse

[976] This finding was significant in the context of assertions that there was a litigation boom in the United States at the time the research was conducted. Indeed, the Civil Litigation Research Project suggested that perhaps the courts were only addressing a small number of the possible claims that could be pursued in courts. See Catherine R. Albiston and Rebecca L. Sandefur, "Expanding the Empirical Study of Access to Justice," *Wisconsin Law Review* 101 (2013): 103 – 120; 103.

[977] Anderson, "Access to Justice and Legal Process," 17.

[978] Albiston and Sandefur, "Expanding the Empirical Study of Access to Justice," 104. Another study finds that a potential litigant's past experience with the legal system will affect their willingness to file suit. In Greene's study, she found poor people who had negative experiences with the criminal justice system were less likely to file civil claims, even if they had a valid claim. See also Sara Sternberg Greene, "Race, Class, and Access to Civil Justice," *Iowa Law Review* 1010 (2016): 1234-1322.

in instances where they had a valid legal claim.[979] Sixteen years later, 74% of my survey respondents reported instances in which potential litigants had been discouraged from legal action although they had a valid claim to compensation, an injunction, or another form of legal recourse.[980] The margin between the two survey findings is small, given differences in survey administration and sampling that were discussed in Chapter 3.

Figure 11: Q31, 2014 Survey: Have you experienced instances in which potential litigants have been discouraged from legal action although they had a valid claim to compensation, an injunction, or another form of legal recourse?

The finding is significant. It means that the shift to a democratic regime in 1999 with the establishment of the Fourth Republic has not improved basic perceptions about access to courts. The findings of both Frynas and my own survey and confirm the view of the Civil Litigation Research Project that there are more claims that could be filed in courts than what dockets reflect.

Barriers to Filing a Claim

There are in other words more people and groups in Nigeria with valid claims than those that are using the courts. In this section, I seek to understand the particular

[979] The above is in regards to general disputes, not oil and gas disputes specifically. However, the number of potential litigants for oil-related disputes is particularly an unknowable number due to the scale and prevalence of oil spills, the nature of communal land use arrangements, and relatively poor documentation of both.

[980] Given that there is less than a 4% difference between Frynas' findings and the 2014 survey, and that this is a repeated survey rather than longitudinal, it is important to colour any sort of analysis of the decrease with some trepidation. A repeated survey uses different individuals in the same population whereas longitudinal studies follow the exact same individuals over time.

barriers to filing, while keeping in mind CLRP's findings that these barriers can be complex and heavily dependent on social context.

Identifying barriers to filling a claim is an important part of access to justice research, and a subject that has been approached by scholars in a range of contexts.[981] Case studies from India, Indonesia, China, Pakistan, Malaysia, Thailand from the A2EJ/SOAS Project all highlight that the reasons people do not file suits are varied and contextually bound. [982] For example, Perry- Kessaris finds that in Bangalore, deterrents to filing suits include cost and awareness of legal rights, but also "psychological limitations," including the pressure of personal attacks and damage to professional credibility for lawyers involved.[983] Lau similarly found intimidation by outsiders as a deterrent to filing claims.[984] In Indonesia, Bedner suggests that trust in the judiciary is a barrier preventing people from using the courts for environmental litigation.[985] In China, argues Palmer, social norms and cultural practices are seen as barriers to the use of courts.[986]

In order to understand what kinds of barriers litigants face in accessing courts in the Nigerian context, both surveys asked respondents, "How important are the

[981] Anderson, "Access to Justice and Legal Process;" Amanda Perry-Kessaris, "Access to Environmental Justice in India's Garden City (Bangalore)," in *Access to Environmental Justice : A Comparative Study*, ed. Andrew Harding (Boston: BRILL); Adrian Bedner, "Access to Environmental Justice in Indonesia," in *Access to Environmental Justice : A Comparative Study*; Andrew Harding and Azmi Sharom, "Access to Environmental Justice in Malaysia (Kuala Lumpur),")," in *Access to Environmental Justice : A Comparative Study*; Martin Lau, "Access to Environmental Justice: Karachi's Urban Poor and the Law," in *Access to Environmental Justice : A Comparative Study*; Michael Palmer, "Towards a Greener China? Accessing Environmental Justice in the People's Republic of China," in *Access to Environmental Justice : A Comparative Study*; Thawilwadee Bureekul, "Access to Environmental Justice and Public Participation in Thailand," in *Access to Environmental Justice : A Comparative Study* and "Coalition for Access to Justice for the Environment," *Friends Of the Earth*, https://www.foe.co.uk/sites/default/files/downloads/caje_general_briefing.pdf (accessed August 12, 2017).

[982] Harding, Andrew, ed., *Access to Environmental Justice: A Comparative Study*. (Boston: BRILL).

[983] See Perry-Kessaris, "Access to Environmental Justice in India's Garden City (Bangalore)," 60-87.

[984] Lau, "Access to Environmental Justice, Karachi's Urban Poor and the Law," 178-204.

[985] Bedner, "Access to Environmental Justice in Indonesia," 121.

[986] Palmer, "Toward a Greener China? Assessing Environmental Justice in the People's Republic of China," 218-223.

following reasons in explaining why potential litigants might not seek legal recourse?" The surveys then gave the following options for respondents to score:

- Ignorance of legal rights
- Lack of funds
- Lack of general education
- Geographical distance to courts
- Intimidation by tortfeasors
- Intimidation by public bodies
- Organisational structure of villages
- Uncertainty about the potential success of the suit
- Delay in the disposal of cases by courts
- Ethnic origin
- Living in rural areas
- Being a woman
- Being a young age.[987]

These dimensions broadly map onto the barriers identified in the literature. Keeping categories consistent with the Frynas questionnaire allowed for the best opportunity to analyse findings in their historical context.[988]

Table 5: Responses to Q33 of 2014 survey. How important are the following reasons in explaining why potential litigants might not seek legal recourse?

	% of 1998 Respondents 'Very important' and 'Important'	**% of 2014 Respondents 'Very important' and 'Important'**
Lack of funds	88.90%	100.00%
Delay	81.70%	96.30%
Ignorance of legal rights	89%	85.19%
Lack of general education	81.80%	81.48%
Uncertainty	76.60%	77.78%

[987] These options were based on the original survey administered by Frynas in 1998 in order to maintain the opportunity for a baseline comparison. Frynas does not provide insight into how he drafted his survey and why he chose to include certain variables. To compensate for this lack of evidence in the initial survey design, this analysis uses additional literature to provide a basis for triangulating findings with the broader literature on access to justice.

[988] UNDP has identified a range of barriers that try to encapsulate the complexity that the literature illustrates. See Appendix III for the full list.

Frynas found that lack of funds and ignorance of legal rights, followed by a deficiency in general education and expectations of delay were the top deterrents for those with valid claims to access the courts.[989] In my survey, lack of funds was top deterrent, followed by concerns about delays. These were then followed to a lesser extent by a lack of general education, ignorance of legal rights, and uncertainty about the potential success of the suit. These findings, along with the findings of the section below, contrast with Perry-Kessaris' and Lau's case studies, as they show that intimidation by outside actors is not a major deterrent to litigants accessing the legal system. This is an interesting finding when taken into consideration with the trial experience, discussed in Section 7.4, where judges and other judicial officers face significant pressure from external actors in the course of doing their work.

Barriers to Filing Oil-Related Disputes

The section above provides insight into the general deterrents to filing suits in the Nigerian context. This section uses those findings as a baseline in order to interrogate if there are particular deterrents that are more pronounced in the case of oil-related disputes. Any differences may be attributed to the particular qualities of oil in the Nigerian context, as outlined in the petro-state literature in Chapter 3.

Frynas' survey found that 48% of respondents believe barriers are more pronounced in oil-related litigation and 40% believe they are the same.[990] This finding is important because it shows that litigants filing suits related to the oil sector may not face particular challenges due to the nature of the suit.[991] However, it should be noted that Frynas did not ask his respondents to respond to each barrier to accessing courts in oil-related litigation, making it impossible to use his data to gain a granular understanding of how barriers might differ between oil and general cases.

[989] Frynas, *Oil in Nigeria*, 107.
[990] Frynas did not disaggregate his follow up question and instead asked if these issues were more or less severe in oil-related litigation as a blanket statement. This means findings cannot be directly compared.
[991] Frynas, *Oil in Nigerian*, 108.

Given the particular properties of oil, I wanted to test which specific barriers were more or less of a barrier in oil-related cases. Doing so allowed me to test the hypothesis that litigation involving the oil sector faces challenges that are more pronounced than the general deterrents a potential litigant might encounter. In taking this approach, I found that 'lack of funds' was perceived by approximately 40% of respondents to be a more severe barrier to the courts than in other types of litigation. This is consistent, though not overwhelmingly, with Frynas' assertion that the sheer scale of finances available to an oil company means that an individual suing would likely have to have access to more funds to respond to a higher investment in defending against claims than may otherwise be the case.[992] One key informant who works closely with communities noted that "the perception among communities is that the oil companies are better able to get the best lawyers [compared to what litigants] are able to, so there is already, if you like, structural inequality in access to legal services."[993]

Table 6: Q34: Are these problems more or less severe in oil litigation? (Excluding 'Less Severe' and 'I don't know')

	More severe	**Same**
Lack of funds	40.74%	48.15%
Uncertainty	40.74%	25.93%
Living in rural areas	25.93%	40.74%
Delay	37.04%	44.44%
Ignorance of legal rights	33.33%	59.26%
Intimidation by tortfeasor	33.33%	40.74%
Intimidation by public body	29.63%	40.74%
Lack of general education	18.52%	66.67%

'Uncertainty' was the only other barrier where at least 40% of respondents believed that conditions in oil sector litigation were more severe than in other types of litigation. This could be due to a range of factors, but this is likely related to

[992] Frynas, *Oil in Nigerian*, 108.
[993] Interview A1D1, August 18, 2014.

concerns about judicial independence, as well as a universal right to appeal and inconsistent application of precedent.[994]

7.3.2 Summary

This section considered to what extent Nigerians with valid legal claims follow these through into legal action. Felstiner et al and the CLRP study emphasise that there are a range of complex sociological reasons that may prevent people from translating grievances into formal disputes. Anderson explicitly notes that for the poor in least developed countries barriers to filing a legal claim are particularly onerous.[995]

The section showed that a large majority of respondents in both 1998 and 2014 reported that they knew of potential litigants with valid claims that were deterred from filing suits in Nigerian courts. The barriers to entry were similar across time. While lack of funds is a deterrent, the survey findings suggest concerns about delays in the courts, ignorance of legal rights, lack of general education, and uncertainty of the success of the suit are also significant barriers for those who might otherwise access the formal legal system. Further, survey findings show that there may be some barriers that are more severe for those seeking to access the Nigerian legal system for oil-related disputes, but not overwhelmingly so. In particular, lack of funds and uncertainty of the success of a suit, may be more pronounced barriers for oil-related litigation than in normal suits. These findings support the hypothesis that "democratising" the legal system with the establishment of the Fourth Republic has yet to have an impact on access to courts in Nigeria.

[994] This is particularly true on the issue of jurisdiction, where certainty has not yet been well-established. See Chapter 6, Section 6.5.2.1.
[995] Anderson, "Access to Justice and Legal Process," 17.

7.4 The Trial – Winning

Once in the courtroom, litigants are confronted with a new set of barriers.[996] At this stage, litigants turn to judges to ensure fairness of the proceedings.[997] For a judge to execute this task, they must rely heavily on their ability to make decisions that are not overly restrictive and which are free from external pressure or intimidation.

Anderson argues that, "independence of the judiciary and the fairness of legal procedures can…be fatal at [the trial] stage, even if the case is well founded."[998] However, Anderson does not define what is meant by fairness of legal procedures nor of judicial independence. In order to define these terms, this section draws on the work of Tyler and Rottman. Rottman summarises procedural fairness as having four components. He argues that litigation would be considered procedurally fair if litigants felt that they experienced:

> Respect: Treated with dignity and one's rights respected.
> Neutrality: Honest and impartial decision-makers who base decisions on facts.
> Participation: An opportunity to express one's viewpoint to the decision-maker.
> Trustworthiness: Decision-makers who are benevolent, caring, motivated to treat you fairly, and sincerely concerned about people[999]

Perceived fairness at the trial stage matters because it is an important component of people accepting decisions made by courts. If a litigant has an experience they deem to be unfair, this can negatively affect their overall view of the courts and undermine their respect for the rule of law.[1000] Thus, understanding the different

[996] Anderson, "Access to Justice and Legal Process," 17.
[997] Ibid.
[998] See Anderson, "Access to Justice and Legal Process" for a historical analysis of judicial interpretation. See also Obinna B. Okere, "Judicial Activism or Passivity in Interpreting the Nigerian Constitution."
[999] David Rottman, "Adhere to Procedural Fairness in the Justice System," *Criminology & Public Policy* 6, no. 4 (2007): 835–42; 835.
[1000] Tom Tyler, "Procedural Justice and the Courts." *Court Review: The Journal of the American Judges Association*, 44, no. 1 & 2 (2007), 26-31. See also Tom Tyler, "What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures," *Law & Society Review* 22, no. 1 (1988): 103–35.

dimensions of fairness at trial in the Nigerian context is critical to understanding the legitimacy of courts in Nigeria as a gateway for environmental justice in oil pollution litigation.

The remainder of this section discusses survey findings that interrogate a litigant's ability to use court proceedings to access justice, focusing specifically on oil-related disputes in Nigeria. For the purposes of this research, Rottman's "respect" and "participation" components are covered by survey questions relating to fair treatment and fair compensation awards. "Neutrality" and "trustworthiness" are covered by survey questions relating to court bias and external pressure.

7.4.1 Findings

This section discusses a group of findings drawn from my survey that relate to fairness of outcome and process, as well as perceptions of judicial independence at trial. First, I analyse findings on perception of unfair treatment of litigants filing suit against oil companies and perceived fairness of compensation awards. Then, I discuss findings related to other dimensions of fairness, specifically, fairness of decision-making (restrictive or liberal interpretation), fairness of outcome (court awards), and neutrality of judges (external pressure on judiciary).

Fair Treatment

Findings from 2014 suggest that oil companies are perceived to be treated more fairly than the communities and individuals that file suit against them. A majority (67%) of respondents agreed to some extent that oil companies are treated fairly in oil pollution disputes, while a minority (37%) felt the same to be true of individuals' and communities' treatment by the courts.[1001] This finding is significant because it establishes the premise that the trial experience is not perceived as universally fair for all litigants in oil pollution cases. Given that 63% of respondents in my survey have acted as counsel for an oil company, I assume that responses are not prejudiced by those who have only worked in opposition to oil company interests.

[1001] See Figure 15.

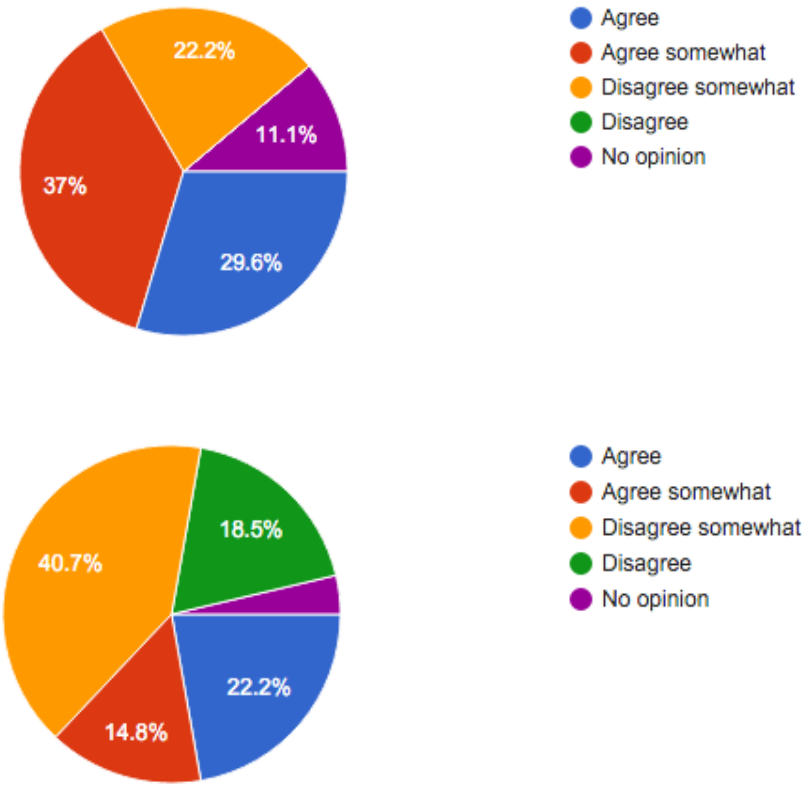


Figure 12 Top: "Oil companies are treated fairly in court cases involving communities/individuals affected by oil pollution." Do you agree or disagree with this statement?" Bottom: "Litigants (communities/individuals affected by oil pollution) are treated fairly in court cases involving oil companies." Do you agree or disagree with this statement?

Fair Decision-making

Understanding legal practitioners' views of judicial decision-making is important for contextualising how those lawyers choose to engage with the litigation process. It follows logically that if a lawyer believes judges only make decisions on technical procedural points, the lawyer would have little incentive to pursue substantive arguments that require a more liberal interpretation of the law. To probe perceptions of the courts' decision-making, survey respondents were asked to agree or disagree with the statement, "The Nigerian legal system is more concerned with process than outcome." Respondents were then asked the converse. I used the term "process-driven" to test arbitrary "technicality-driven" decision-making without negatively biasing the question.

Seventy four percent of respondents agree to some extent with the statement that "The Nigerian legal system is more concerned with process than outcome." When asked the converse, only 41% responded that the legal system was more concerned with *outcome* rather than process. In order to gain an understanding of how being procedurally-oriented, rather than outcome-oriented decisions, might have an impact on how judges make judgements, respondents were asked if they consider "oil-related court decisions" to be interpreted liberally, conservatively, or appropriately. In response, only 19% of respondents found oil-related court decisions to be appropriate. Sixty seven percent found them to be restrictive to some degree.

The notion that judges make procedure-focused, restrictive, decisions is further supported by key informants who suggest that both lawyers and the judiciary focus on technicalities, such as jurisdiction, rather than the salient facts of a given case.[1002] Case law also supports this view.[1003] For example, **NNPC v. Sele** is a case where a restrictive interpretation of statute meant that communities lost the opportunity for substantive justice. In that case, the Supreme Court dismissed the case of the Ogbe-Udu community representative for missing the jurisdiction change deadline by three weeks.[1004] Restrictive decision-making that is applied primarily against one litigant group (communities) is a dangerous signal that the courts may be fostering a culture of procedural unfairness.

Fair Outcome

Fairness is central to compensation awards' role in providing access to justice. Without fair compensation awards, communities may be dissatisfied with their experience in the court and seek alternative, extra-judicial, pathways to justice, such as violence or obstruction of oil facilities.[1005] This is particularly true in the

[1002] Interviews A1L5, August 12, 2014; O1A2-PH, July 18, 2014; A1L1, July 13, 2014; A1G4, July 18, 2014; A1L4, August 15, 2014.
[1003] See Chapter 6.
[1004] See Chapter 6.
[1005] For example, see Emman Ovuakporie, "Ikara spill: Reps order NPDC to pay community N100m," *Vanguard*, June 15, 2017,

case of oil pollution claims in Nigeria, where many claims only make it to courts once direct negotiations with oil companies have already broken down due to inadequate compensation offers.[1006]

In 1998, Frynas found that almost 80% of his sample reported that compensation paid by oil companies was unfair to litigants going up against oil companies. The finding was significant in the sense that the overwhelming response includes a majority of oil company lawyers themselves, who in other instances in the survey had viewed their clients as at a disadvantage.

While Frynas notes that perceptions about compensation are negative, he also found that since the **Shell v. Farah** case in 1995, awards have increased for communities seeking compensation from oil companies.[1007] The judge in that case found that compensation claims under tort law should be calculated in a way that is specific to the circumstances of that tort rather than relying on one-size-fits-all legislated compensation schemes.[1008]

Table 7: Selected cases where oil communities won compensation in trial courts and ultimately won on appeal (Lipschutz 1999-2015 Dataset)[1009]

Case	**Trial Year**	**Award value at time of trial (USD)**
SPDC v. ANARO & ORS	1997	358,446
SPDC v. EDAMKUE & ORS.	1999	2,346,040
SPDC v. IKONTIA & ORS	2002	6,498
SPDC v. ORUAMBO & ORS	2003	791,506
NIGERIA AGIP v. OGINI & ORS	2008	1,558,750

http://www.vanguardngr.com/2017/06/ikara-spill-reps-order-npdc-pay-community-n100m/ (accessed August 22, 2017).

[1006] Frynas, *Oil in Nigeria*, 184.

[1007] Ibid., 213. See also Chapter 6.

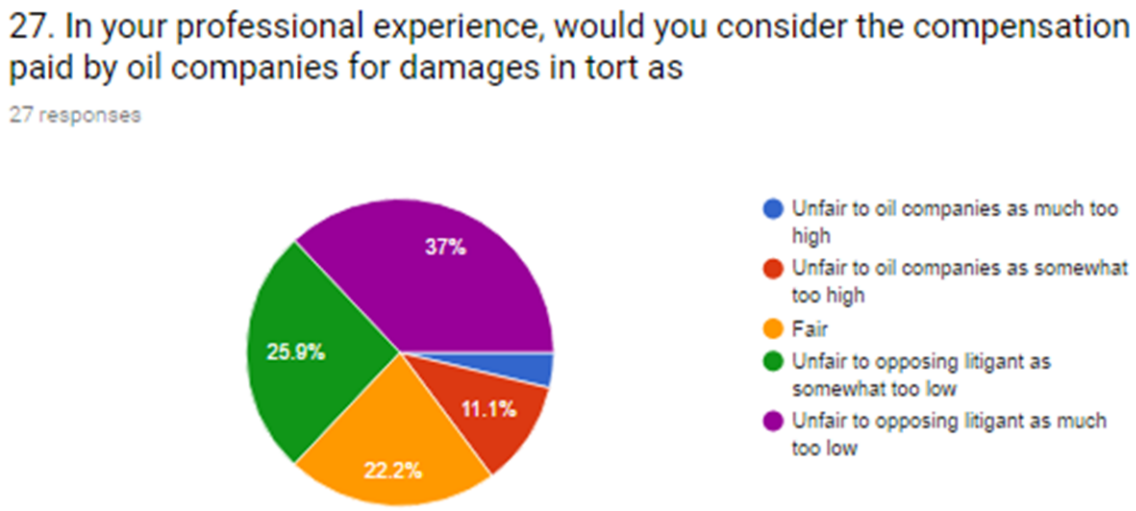
[1008] Frynas, *Oil in Nigeria*, 213.

[1009] One key informant, PH1L3, notes that it is common practice for plaintiffs who win damages in the trial court to request that the judgement award be placed in an interest yielding account while awaiting the final decision of an appeals process. Interview PH1L3, June 29, 2017.

CHEVRON Nigeria v. OMOREGHA & ORS	2011	33,091

As the above table shows, this development may have led to larger awards for communities, which in turn may be shifting perceptions of award fairness. While respondents still overwhelmingly believe that compensation for damages is too low, that number has increased by almost twenty percent since Frynas' survey.

Figure 13: Q:27



The section has established that when oil companies are ordered to pay compensation, the amount awarded is still perceived to be too low. It also showed that perceptions may be changing as judgements that award higher compensation for communities increase. Despite what appears to be progress toward fairness in compensation awards, enforcing court order remains a challenge, discussed later in this section.

Neutrality of Judges – Judicial Independence

Anderson argues that without judicial independence, or what Rottman classifies as "neutrality," court proceedings cannot provide access to justice.[1010] An

[1010] Anderson, "Access to Justice and Legal Process," 17.

independent judiciary is a critical component of procedural fairness. Larkins defines judicial independence as:

> the existence of judges who are not manipulated for political gain, who are impartial toward the parties of a dispute, and who form a judicial branch which has the power as an institution to regulate the legality of government behavior, enact "neutral" justice, and determine significant constitutional and legal values.[1011]

Larkins notes that there are a range of factors that might compromise independence, such as social beliefs and political pressure.[1012]

In Nigeria, questions of judicial independence are tied up in the evolution of the courts across regime types; a relatively new judiciary under democratic rule is struggling to find its own voice following a long tradition of executive co-option of the institution. [1013] Aka's review of judicial independence in Nigeria's Fourth Republic finds that "While one would expect improvements in judicial independence under the Fourth Republic from 1999 to the present period, this is not the case."[1014] In order to illustrate his point, Aka notes four separate reports from the Nigeria report of United States State Department Country Report on Human Rights Practices which, in the years 1999, 2003, 2012, and 2013, essentially all conclude similarly that "the Constitution provides for an independent judiciary; however in practice, the judicial branch remains

[1011] Christopher Larkins, "Judicial Independence and Democratization," *The American Journal of Comparative Law* 44, no. 4 (1996): 605-626

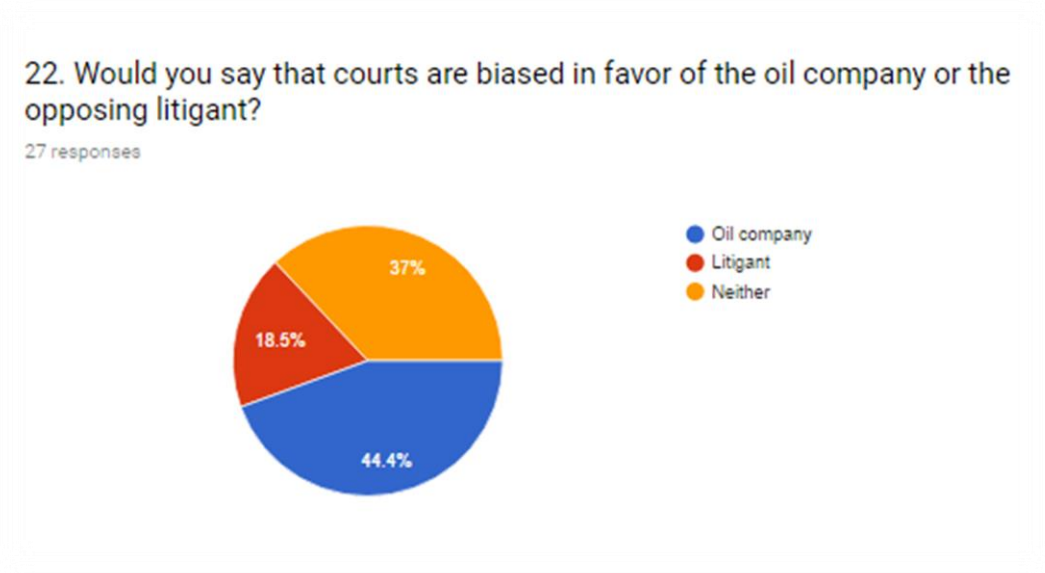
[1012] Assessing the degree to which a court is independent is difficult and requires a range of approaches. Larkins finds that while analysing "judicial workloads, case backlogs, the public's impression of the courts, and the judiciary's own perception of its role can lend themselves to interpretation, which may eventually lead to a better understanding of the courts' independence as an institution in the larger political process," it will never fully be able to provide a complete picture of judicial independence in practice. This is in large part due to the sensitive nature of judicial independence – it is not in the judiciary's interest to admit any degree of partiality, nor does it serve democratic governments to admit that they assert pressure and influence to achieve certain outcomes in the courts. See Larkins, "Judicial Independence and Democratization," 614, 618.

[1013] Larkins notes that in order to become truly independent, judiciaries need to be institutionalised into their roles as "preserv[ers] of the rule of law." See Larkins, "Judicial Independence and Democratization," 620.

[1014] See more on this in Chapter 6, Section 6.2; and Aka, "Judicial Independence Under Nigeria's Fourth Republic," 33.

susceptible to executive and legislative branch pressure, influence by political leaders at both the state and federal levels, and suffers from corruption and inefficiency."[1015]

Figure 14: Q:22



Survey findings from 1998 and 2014 provide further evidence to Aka's assertion that Nigeria's judiciary is not independent. In both surveys, respondents were asked "Would you say that courts are biased in favour of the oil company or the opposing litigant?" Almost half of all respondents found courts to be biased in favour of oil companies and less than 20% found courts to be in favour of opposing litigants. This suggests that regime change has had no positive impact on the credibility of the courts for providing A2EJ in democratic Nigeria.

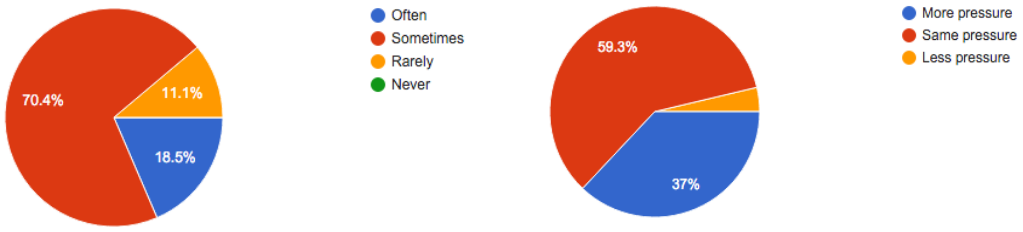
One of the drivers of bias is external pressure exerted on key actors involved in litigation. In Oko's analysis of the judiciary, he notes that "Pressures exerted on judges by the executive profoundly inhibit their ability to approach their duties with the level of objectivity and independence necessary to secure a fair trial."[1016] Pressure can come in different forms, and while in some instances justices may be exploiting a system for personal gain, Oko also notes that these judges are in the difficult position of relying on the Executive for certain allowances that directly

[1015] Ibid., 33-34.
[1016] Okechukwu Oko, "Seeking Justice in Transitional Societies," 38.

impact their personal lives, such as the provision of housing.[1017] In addition to reliance on the executive for benefits, judges also face serious intimidation by the powerful elite, both in and out of government. Oko cites a range of examples where judges either refused to take on cases or continue hearing cases due to intimidation, in many instances fearing for their personal safety.[1018]

In my survey, I asked respondents if they thought judges and other judicial officers faced external pressure in the course of carrying out their duties. Eighty-nine percent of survey respondents believed that lawyers, judges, or other judicial officers encounter outside pressures from private or public institutions in their work. A large majority, 59%, of lawyers felt this to be the same for oil-related litigation, while 37% found there to be more outside pressure in oil related litigation. Coupled with a strong sense that courts are biased in favour of oil companies, the fact that respondents also believe that judges and others experience external pressure in the course of legal proceedings suggests that courts are compromised and that there may be heightened pressure in oil-related cases.

Figure 15: Left: "In your professional opinion, would you say lawyers, judges, or other judicial officers encounter outside pressures from private or public institutions in their work?" Right: "Is this more or less the case in oil-related litigation?"



In a short answer module of my survey, almost a third of respondents elaborated on external pressure on judges and other key actors in oil pollution litigation. Some respondents suggested that pressure comes from the importance of oil to the national economy. For example, one respondent said, "the judiciary in Nigeria

[1017] Ibid., 38.
[1018] Okechukwu Oko, "Seeking Justice in Transitional Societies," 34–35.

choose to take a conservative approach to oil industry cases tending to weigh the 'common good', that is, oil industry revenue, as vital for the country over individual inconvenience."[1019] This approach would be in line with what Brenner observed in his review of nineteenth century English case law where he argued that judges chose to rule in favour of industrialisation when the imperative of economic development outweighed that of individual rights.[1020] Other respondents focused more on illicit behaviour. One respondent said:

> The oil companies at times exert some undue influence through "improper friendship" gestures with members of the bench. They also sponsor some judicial activities like workshops, etc., which ostensibly should be okay, but on closer examination have more sinister motives.[1021]

To this end, a key informant noted a common practice where lawyers are used as intermediaries to pay bribes on behalf of oil companies. In an interview, he told me that:

> One of the tricks they [oil companies] use is the one they call un-inclusive fees payable to their lawyers. And so some of these lawyers, very old lawyers, exploit old relationships and contacts with such huge fees to truncate justice.[1022]

7.4.2 Summary

This section discussed perceived fairness at trial. Using survey findings, I established that oil-related litigation in Nigeria does not meet Rottman's criteria for procedural fairness. In particular, results from my survey illustrated that oil companies are perceived to be treated more fairly than their opposing litigants, while judges continue to make restrictive judgements that focus more on

[1019] Survey Respondent 13:30:45, 2014.
[1020] Brenner, "Nuisance Law and the Industrial Revolution," 428. Of the trade-off, Brenner said, "to conclude that the decision to industrialise was economically right, and that the courts were right not to obstruct it, is not however to conclude that the process of industrialisation was equitable. Nor need one conclude that industrial defendants required the extent of protection that was given to them."
[1021] Survey Respondent 19:38:17, 2014.
[1022] Interview A1L4, August 15, 2014.

technicalities than substance. However, when comparing findings from both surveys, it becomes clear that as compensation awards for communities increase in value, so might perceptions of compensation award fairness. Finally, this section showed that many lawyers believe that the courts are biased in favour of companies over communities, which may be a by-product of the outside pressures exerted on them. Taken together, these findings suggest that it is unlikely that a victim of oil pollution would be able to access justice through a domestic trial in Nigeria.

7.5 Enforcing Court Orders

Anderson notes that there are a range of benefits to the enforcement of court orders, particularly for compensation for environmental harms. He writes:

> If the compensation is properly assessed and awarded, then the following benefits should accrue. First, the injured party is compensated directly for injury while funds can be made available for environmental remediation. Second, the tortfeasor is forced to make payment for the environmentally degrading activities, thereby incorporating negative externalities directly into the costs of conducting the polluting or degrading activity. Third, the award of damages should send out what are effectively price signals to deter or discourage similar polluting or degrading activities by other actors in the market.[1023]

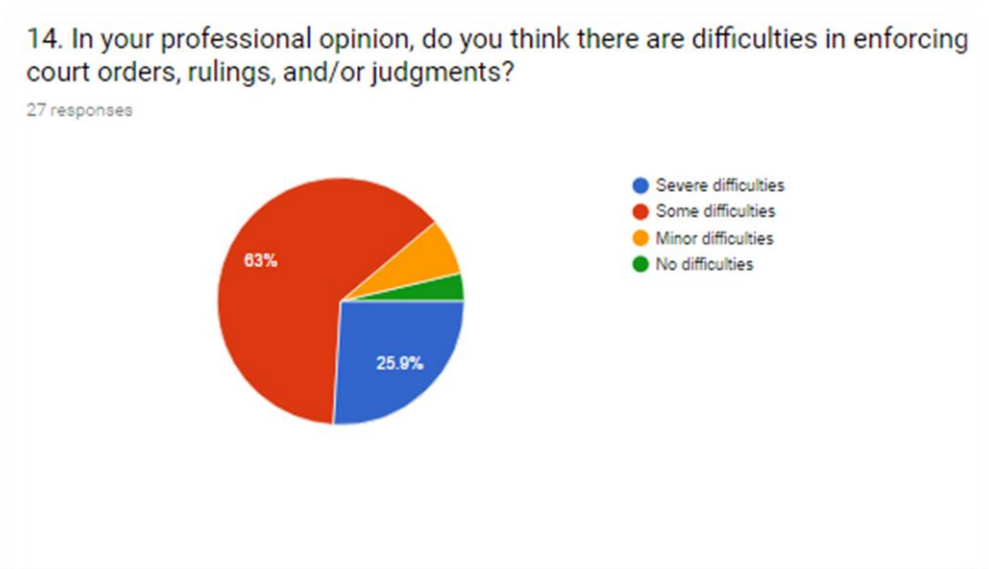
However, the importance of ensuring that compensation is successfully awarded, or other court orders are successfully carried out (such as injunctive relief), cannot be taken for granted. Harding notes that enforcement is a recurring challenge in using legal gateways for environmental justice across contexts.[1024] Without such enforcement, any judgement in court is a hollow victory.

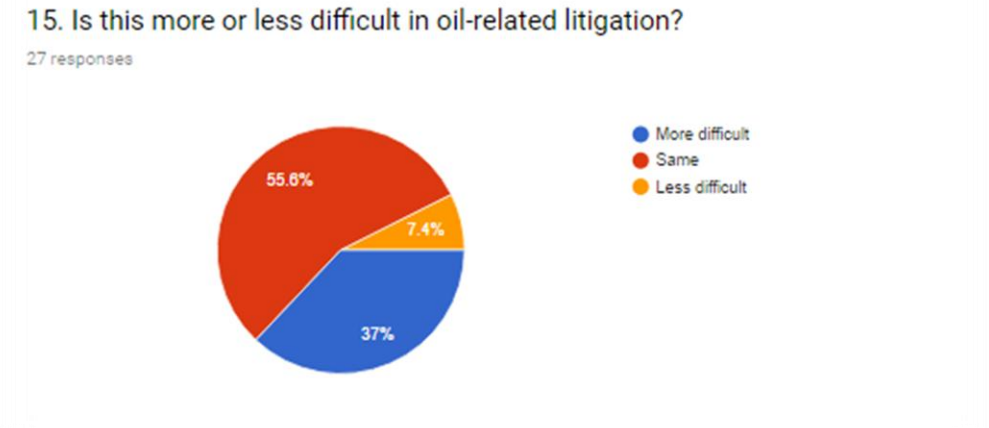
[1023] Michael Anderson, "Transnational Corporations and Environmental Damage: Is Tort Law the Answer," *Washburn Law Journal* 41 (2002 2001): 399–426; 408-409.
[1024] Andrew Harding, "A Note on Environmental Law Enforcement Duties" in *Access to Environmental Justice: A Comparative Study*, ed. Andrew Harding (Boston: BRILL, 2014), 355.

7.5.1 Findings

Poor enforcement of judgements is a severe barrier to justice in Nigeria, and one that has not improved over time or regime change. In 1998, under a military regime, 96% of Frynas' respondents identified significant challenges in enforcing court orders.[1025] In 2014, survey respondents found the situation to be similarly challenging, with 89% of respondents reporting that there are difficulties in enforcing court orders, rulings and/or judgements in independent Nigeria. This indicates that respect for court judgements under the Fourth Republic may be at similar levels to those that obtained under military dictatorship.

Figure 16: Q:14 & Q:15





[1025] More than half found those difficulties to be severe. See Frynas. *Oil in Nigeria*, 123.

Given that perceptions of enforcement of court judgements have historically been poor, it should be of little surprise that about half of respondents in 1998 and 2014 felt that enforcing court orders for oil-related litigation was the same as trying to enforce any other judgement (which is already deemed to be difficult). In both surveys, more than 35% of responses suggest that there are particular challenges related to enforcing court orders for oil-related litigation.

Short answers from some survey respondents shed light on why oil-related judgements might face different, if not more severe, obstacles in enforcement. Fourteen respondents reported that oil companies can afford, both politically and financially, to frustrate and delay enforcement of compensation awards.[1026] Some respondents stated that the oil industry's economic significance for the Federal Government meant that government may be fearful that enforcing judgements may upset the country's most important investors. This strong aversion to the payment of compensation awards may be further compounded by government institutions that share incentives to delay or prevent compensation payments. One government lawyer questioned regulators' level of motivation for enforcing court orders when ultimately the Government will have to pay a percentage of the bill. He said,

> The government owns an aggregate of about 57 % in the joint venture and so if for instance, there is an accident in the industry, it means that in compensation, government must be able to provide a fund to that effect. So it is an issue. And whether the regulatory body will have wherewithal to pursue, that is also another question that has to be answered.[1027]

In addition to government's misaligned incentives, one survey respondent told me that "The multinational oil companies make it a point of duty to frustrate judgment creditors from enforcing judgments obtained against such multinational oil companies by filing frivolous appeals."[1028] This is consistent with Galanter's analysis of "repeated players" in the courts, who have a stake not just in the

[1026] Survey Respondents 19:38:17; 12:38:15; 15:49:38; 22:27:47; 18:06:08; 9:32:27; 15:27:09; 14:33:42; 13:30:45; 12:58:03; 13:59:23; 8:52:39; 12:25:15, 2014.
[1027] Interview A1G5, July 23, 2014.
[1028] Survey Respondent 12:25:15, 2014.

present litigation outcome, but also in setting a favourable precedent for future litigation.[1029]

Key informants illustrate that companies are adept at preventing enforcement of compensation awards. One respondent recalled the case of **Zenith Bank v. Chief Arthur John & Ors**. as an example[1030] In this case, Shell lost the suit in the trial court and was ordered to pay NGN 1.8 billion to the community for damages. Before paying the compensation award, Shell appealed the decision and, as a condition of appeal, was ordered to take out a bank guarantee. This was done to prevent undue delay in payment of the award should they lose on appeal, a common practice developed in order to improve enforcement. Shell subsequently took out a bank guarantee with Zenith Bank. Once Shell lost their appeal, Shell applied to the lower court to prevent Zenith Bank from paying the bank guarantee to the community.[1031] At the same time, the community filed proceedings in the same court to compel Zenith to pay the bank guarantee. In the Supreme Court decision, Supreme Court Justice Mary Ukaego Peter-Odili admonished Shell for their clear efforts to delay payment to the injured community. She said:

> I have to state at least to decry the practice that has unfolded before this court in this application, documents and arguments seeking to persuade the Court to go along is that of a deployment of tricks of a trade to frustrate or stultify through seductive arguments the right properly inuring to a party. This practice has to stop and a party has to know where to pull the brakes and fulfil obligations it has a duty to do and to comply with Court orders such as the Garnishee Order Absolute. The administration of justice has no room for the dribbling as usually seen in football fields of play while a successful party is made to suffer when justice is on its side.[1032]

One lawyer told me that he has dealt with multiple cases in recent years that pose a similar problem:

> The banks for fear of losing the custom of the oil companies, their business, agree with them. They have even penetrated the Nigerian central bank, the regulatory authority, that the Nigerian central

[1029] Marc Galanter, "Why the Haves Come Out Ahead," 100.
[1030] Interview A1L4, August 15, 2014.
[1031] **Zenith Bank v. John & Ors.** LN-e-LR/2015/16 (SC).
[1032] Ibid.

> bank will be hiring lawyers to resist the payment on a guarantee by a bank in a case that does not concern them.[1033]

Poor enforcement of court awards and judgements may be leading to desperation on the part of communities for some semblance of redress by any means necessary. One interview subject said he had experienced cases where communities would prevent clean ups until compensation was paid.[1034] According to him, "[t]here have been cases, and the oil companies will tell you this clearly, where communities themselves have actually stopped remediation efforts until their compensation is stated."[1035]

7.5.2 Enforcement Summary

This section finds that there has been no substantive improvement in the enforcement of judgements since the Fourth Republic. While there was not an overwhelming sentiment that the situation was worse in oil-related litigation, respondents did provide views on the particular challenges in enforcing oil-related judgements by stating that the vast financial resources available to oil companies made it easier to avoid payment. They also stated that government is in a conflicted position, as enforcing court judgements may not be in the government's immediate financial interest.

7.6 Conclusion

This Chapter built on the findings of Chapter 6 by focusing on the experience, rather than simply the outcomes, of litigation. I employed the insights of Nigerian legal practitioners from a survey and key informant interviews to understand the extent to which Nigerian courts serve as an effective gateway for environmental justice in the Nigerian oil sector. In taking this approach, I made a unique

[1033] Interview A1L4, August 15, 2014. There is at least one documented case in my dataset which suggests a bank did go through with making such a payment. In **SPDC v. Edamkue & Ors**., the Supreme Court justice notes that Shell's Bank did pay the judgement debt of NGN 225.8 million to community respondents after the Court of Appeals decision.
[1034] A1D1 Interview, August 18, 2014.
[1035] Ibid.

contribution to the literature on access to environmental justice in the oil sector in Nigeria.

This Chapter afforded a further opportunity to answer the central question of this research project: is A2EJ possible for victims of oil pollution in Nigeria's Fourth Republic? The findings of this Chapter provide nuance and detailed evidence to support one of my overarching arguments, that the Nigerian court system excludes certain avenues for redress for oil-related pollution. My findings suggest that the overall climate for access to justice in Nigeria is poor and those seeking redress for oil-related grievances may experience an exacerbation of already present challenges rather than entirely new difficulties. This Chapter also supports my overarching claim that regime change has had little impact on the effectiveness of courts in providing access to environmental justice.

My first set of findings cut across the stages of Blaming to Claiming, Winning and Enforcing, and relate to the issue of delays. Chapter 6 found that delays in the case law dataset were significant, with most litigants waiting on average ten years until a final judgement was made. This Chapter provided context to those delays, largely based on secondary literature and survey questions, in order to understand how delay affects the key stages of the litigation cycle. I showed that even the expectation of delays was viewed as a significant deterrent to potential litigants filing a suit in the first place, which in turn may undermine their perception of the legal system as a whole. At trial, delays were driven by a range of key actors with different incentives to slow or halt proceedings; a majority of these delays came in the form of adjournments and interlocutory appeals. Finally, I illustrated that, at the enforcement stage, delays were driven by the losing party's unwillingness to pay, as they may experience positive benefits in delaying enforcement.

The next set of findings related to the challenges of moving from the Blaming to the Claiming stage for a valid dispute. A vast majority of respondents in my survey were aware of potential litigants with valid grievances that chose not to file claims in Nigerian courts, a finding that is consistent with Frynas' own. Survey responses also suggested that people do not translate valid grievances into legal claims for a

range of reasons. While cost is a key consideration, parties also do not file claims in Nigeria for reasons such as concern about extensive delays, ignorance of legal rights, lack of education, and uncertainty of the outcome of their case. For oil-related litigation specifically, lack of funds and uncertainty of outcome were the top deterrents in 2014. This indicates that there are some differences between oil-related and other cases, but not to an overwhelming extent. Contrary to expectations, intimidation did not feature as one of the main reasons that litigants avoided filing claims.

The findings related to the Winning stage of the litigation cycle were centred on the notion of perceived fairness at trial. A majority of respondents reported that oil companies were treated more fairly in disputes than the opposing party. Though respondents believed oil companies were treated more fairly, only 20% found judgements to be appropriate, with a large majority reporting that judgements were too restrictive and procedurally focused. These findings suggest that what is considered in the survey as "fair treatment" of oil companies is actually oil company bias. This was confirmed by respondents who reported that they believed courts were biased in favour of oil companies. This bias was further explained by the finding that judges may be subject to external pressure. And finally, while awards might be improving in terms of quantum of compensation, a majority of respondents still believed compensation levels for victims of oil pollution are too low.

The final set of findings concerned the enforcement of judgements. Perceptions of enforcement have not improved significantly since the establishment of the Fourth Republic. Given that the overall perception of enforcement is poor, many respondents found that oil-related judgements were not any more difficult to enforce than what is usually the case. Some key informants and survey respondents suggested that the difficulties in enforcing oil-related judgements were due to the vast financial resources at the disposal of companies to delay court proceedings, as well as a lack of government incentive to compel companies to pay compensation to claimants. One respondent identified an emergent tactic for delaying payment, illustrating that oil companies may be inventing new means to

ensure delay in payment alongside attempts that have been made to improve enforcement.

Taken together, these findings suggest that the courts are not effective institutions for providing access to justice, both in general, and for oil-related litigation, despite some of the modest gains identified in the case law in Chapter 6. The 'Winning,' or trial, stage of litigation appears to be the point in the litigation cycle that is most affected by the particular dynamics of oil.

In light of these findings, it is of extreme importance that the courts be questioned as the appropriate forum for oil sector environmental litigation. I asked this question in my survey, and survey respondents answered predominantly in the negative. Only 26% of survey respondents in 2014 felt that litigation is the most effective institution for resolution of oil pollution conflict. A relatively large minority, 19%, supported mediation, and 7% supported out of court settlement as the most effective means for conflict resolution in the oil sector.

In contrast, and as discussed in Chapter 6, a large group of respondents believed that courts in other jurisdictions (through ETL) may be more effective at resolving disputes related to the oil sector. This, in and of itself, emphasises lawyers' lack of confidence in their own legal system to fairly adjudicate disputes. This finding is made all the more stark when considering findings from Chapter 6 that show an extremely limited number of cases that have attempted ETL, let alone successfully.

This Chapter has interrogated the degree to which litigation is an effective legal gateway for environmental justice in Nigeria. Coupled with findings from Chapter 6 that focused on litigation through the lens of case law, it is evident that improvements to the effectiveness of the courts under a democratic regime are negligible. Noting Tyler's assertion that a litigant's experience in court can impact their overall perception of the justice system, such a poorly performing court system may have serious implications for the legitimacy of the rule of law in the Nigerian context.[1036]

[1036] Tom Tyler, "Procedural Justice and the Courts," 26.

8 Conclusion

The objective of this dissertation was to identify and assess legal gateways to environmental justice for victims of environmental pollution from the oil sector in Nigeria. The importance of this issue cannot be overstated given the 30 million people living in the Niger Delta that are affected by oil sector operations in the area. In terms of the rest of Nigeria, almost 190 million people suffer from the instability that poor governance of the oil sector has fomented. This concern has sustained this dissertation, which has sought to engage with legal gateways to environmental justice in order to advance an academic line of argument, while also contributing to an evidence-base that can support those working to reform A2EJ in Nigeria.

This thesis used a substantial case law dataset, survey data, key informant interviews, as well as laws and regulations that were collected during fieldwork. In doing so, the thesis identified two prevailing constraints to access to environmental justice. The first constraint pertained to the historical legacy of previous regimes' focus on commercial interests, as expressed through legislation, institutional setup and mandate, and precedent in the case law. Through analysis of the legal and regulatory framework, interviews, case law, and results of the repeated survey, I found that instead of using regime change as an opportunity to drastically re-imagine Nigeria's approach to A2EJ, each new ruling regime chose instead to adopt the previous regime's flawed laws and practices.

The second constraint to A2EJ was the scale of funds derived from the oil sector. This was both the case in terms of the impact that oil has had on government decision-making (e.g. legislation that favours the interests of commercial actors and grants vast discretion to the political elite) and the scale of oil company financial resources, which distort the power dynamic with regulators (e.g. the process for assessing the scale and cause of oil spills), courts (e.g. the ability of oil companies to delay cases for decades and exploit a judicial tradition of restrictive interpretation), and victims of oil pollution (e.g. victims' reluctance to file suits against oil companies due to limited financial resources).

This second constraint confirms that there is a need to further develop a theoretical framework specifically for addressing A2EJ in Rentier State contexts, and it is here where my dissertation's intervention lies.

8.1 Chapter Findings

The findings of this dissertation provide a nuanced picture of the environmental justice landscape in Nigeria's oil sector. While previous research has confirmed that legal gateways are inadequate, there is a dearth of evidence to elucidate the drivers of that inadequacy.

The framing of my research in Chapter 2 and 3 identified gaps in the A2EJ literature and in the research on Nigeria's oil industry since 1999. As I argued in Chapter 2, while the A2EJ literature has identified politics as a constraint to providing access to justice, there has not yet been an adoption of a theoretical framework that could address this lacuna. This research has thus contributed to filling this gap in the A2EJ literature by introducing a specific sub-set of A2EJ research that focuses on A2EJ in a Rentier State context – an approach that has not been taken before. As set out in Chapter 2 and addressed in Chapter 3, my research also made an intervention in the recent Nigerian environmental law literature by bringing new methods to bear on an oft-studied problem, while at the same time applying a socio-legal lens to my analysis.

Chapter 2 set the theoretical framework for a socio-legal study of A2EJ in Nigeria's oil sector that was informed by the Rentier State literature. Chapter 4 applied this framing to a key dimension of sector governance – oil spill detection and response. This Chapter focused on oil sector governance, in part by comparing Nigeria's governance regime to that of Norway, and also by focusing on Nigeria's "Joint Investigation Visit" mechanism for determining the cause of oil spills.

I also analysed governance of the oil sector in the context of Nigeria's Rentier State qualities. I did this in Chapter 4 in particular, which illustrated the flow of

revenues to the different institutions that are required to carry out governance functions, and then compared the scale of those funds to that of the oil sector actors they are meant to regulate. The Chapter found that the flow and scale of oil revenue has an impact on A2EJ by creating an environment of dependence. I argued that government actors cannot afford to fulfil their mandates, such as responding to oil spills, without financial support from oil companies. I argued that this creates an asymmetric power structure that negatively impacts regulation.

Chapter 4 also makes clear the influence of history on present-day institutions. I illustrated how the regulator, due to the Department of Petroleum Resources' historically close relationship with the Nigerian National Petroleum Company and the oil companies themselves, has gained a reputation as being technically competent, but compromised. I showed how the National Oil Spills Detection and Response Agency, a newer body set up to comply with an international agreement, is perceived as a well-intentioned newcomer, but is ultimately seen as an outsider without industry expertise. The reputations of these regulatory institutions affect their ability to fulfil their environmental protection mandates.

Chapter 5 analysed the legal and regulatory framework underpinning these institutions and Nigeria's wider governance regime. Here I used survey responses and interviews with private sector actors and stakeholders from key government institutions to assess the effectiveness of the eleven pieces of legislation that govern environmental protection and access to environmental justice in the oil sector.

As was the case in Chapter 4, I argued in Chapter 5, that history plays an important role in understanding why these laws remain ineffective as far as access to environmental justice is concerned. In assessing the historical development of legislation governing the oil sector, I found that the legal framework governing the commercial dimension of the oil sector was considered to be somewhat effective and functioning as intended. This is because there is an economic imperative for legislation, such as the Petroleum Act, to be enforced. Conversely, I found that legislation not primarily concerned with commercial aspects of the sector had been

developed as political responses to either domestic or international pressure with little incentive for enforcement. Arguably, even the Constitution of 1999 could be placed in this latter category. Upon reviewing the developments that led to the adoption of 1999 Constitution, I demonstrated that the Nigerian Constitution does not, in fact, function as a mechanism for social justice, especially not for victims of environmental harms. Rather, the Constitution serves to more deeply entrench and legitimise vested economic interests in the oil sector without public consultation.

Additionally, Chapter 5 found that the way in which statutes have developed over time has had a disproportionately negative effect on those harmed by oil sector activity. The degree of these imbalances is so severe that these legislative instruments, such as the Oil Pipelines Act, often go unused as tools for redress. As I demonstrated, it is the ineffectiveness of Nigeria's environmental laws that compels victims to rely more heavily on tort law in order to obtain compensation for loss caused by oil pollution.

Chapter 6 turned to an assessment of the effectiveness of tort litigation as a legal gateway to environmental justice and a means to compensate victims of oil pollution, both in the Nigerian context and also for extra territorial cases. The findings of Chapter 6 are based on a substantial dataset of Nigerian oil pollution cases created specifically for this research.

The overarching finding after analysing forty-eight Nigerian cases between oil companies and communities is that a majority of cases fail to deliver justice to victims of oil sector activity. There are a few key reasons why cases fail to deliver justice. Firstly, the cases I analysed show that the culture of unconditional appeal is more likely to negatively affect those filing suit against an oil company. Despite the fact that most trial courts decide in favour of oil pollution victims, only 27% of cases that make it to the Supreme Court are decided in favour of Niger Delta residents.

Furthermore, cases decided in favour of victims of oil pollution in the appellate courts face delays of an average of ten years, with some judgements being delayed for decades. These delays were predominantly caused by a suite of oil company tactics, such as adjournments, interlocutory appeals, combined with companies simply not appearing in court on a specified date. While, in some instances, communities were ultimately successful, it was often at a great personal cost to individuals with limited financial resources. Finally, analysis of the case law provides evidence to suggest that in some instances, judges will apply precedent inconsistently in order to achieve a pre-determined desired outcome, such as in **NNPC v. Mallam Idi Zaria & Anor**, where a judge went against well-established precedent that Federal High Courts have exclusive jurisdiction over oil-related cases in order to rule in favour of the state-owned oil company.

Many of the obstructions to the effectiveness of tort litigation discussed above have also been identified by other A2EJ research, as outlined by Harding and discussed in Chapter 2. However, Chapter 6 identified one barrier to access to environmental justice that was unique to Nigeria – that is, the issue of jurisdiction. I found that changes in jurisdiction in the 1990s that removed State High Courts' ability to hear oil-related cases has had a negative effect specifically on oil pollution cases. The harm done by this single barrier outweighs the gains made by other developments in oil pollution litigation, such as increases to the quantum of compensation paid to the few litigants that do manage to gain a favourable judgement.

In addition to analysing a range of variables related to the tort cases, Chapter 6 also assessed the viability of public interest environmental litigation and extra-territorial litigation. Both mechanisms are frequently celebrated for providing redress to victims of environmental pollution in contexts and countries where accessing environmental justice through the legal system has been otherwise fraught. I argued that, unlike the significant developments and success of environmental PIEL in India, a jurisdiction with a similar constitutional framework of fundamental rights, Nigerian courts have remained unwilling to expand their interpretation of the Constitution to equate the fundamental "right to life" to a "right to a clean and healthy environment." This reluctance persists

despite some developments that have made it easier for Nigerian courts to otherwise entertain public interest litigation related to enforcing the Constitution's Chapter IV on Fundamental Rights.

Another finding of Chapter 6 concerned the fact that extra-territorial litigation, which has been heralded by many Nigerian lawyers as an alternative to impotent domestic litigation for oil pollution disputes, has not proven to be an effective and accessible legal gateway to environmental justice. This is due to factors unique to African regional courts and courts in Europe. In African regional courts, there is a lack of state participation in judicial proceedings and no stringent enforcement capability following judgements. In the case of ETL in courts of European countries, specifically the UK and the Netherlands, ETL is ineffective because judges apply Nigerian law to cases, which means that litigation abroad will mirror the same deficiencies of jurisprudence and legislation that is experienced in Nigeria.

ETL in European courts is further constrained by the challenge of lifting the corporate veil between parent company and subsidiary. I found this to be particularly egregious in the **Okpabi & Ors v. Royal Dutch Shell and SPDC** case before the Technology and Construction Court in London, where the Court accepted the submission that Shell UK could not be joined to the suit because it is only a holding company.

Chapter 7, the penultimate Chapter in this dissertation, used the results of a survey of twenty-seven Nigerian oil and gas lawyers to gain a deeper understanding of the factors that made litigation an ineffective gateway to environmental justice for oil pollution victims.

While the overall poor perception of civil litigation is similar in oil and non-oil cases, Chapter 7 found that the reasons for poor performance may differ, or are exacerbated, in the case of oil-related litigation. A recurring theme throughout the survey results was the impact of the sheer scale of oil sector financial resources. In particular, I showed that lack of funds can act as a deterrent to victims filing a suit

in the first place. Further, financial resources of companies and the oil sector's contribution to the economy were seen by many survey participants as reasons why judges and other judicial officers might be biased in their decision-making or face pressure to rule in favour of oil companies in the course of hearing oil-related disputes. Finally, financial resources were seen as a reason why enforcement of judgements was so poor; oil companies could simply afford to engage in frivolous and indefinite delaying tactics in order to avoid a judgement or its enforcement. This finding, that the scale of financial resources of commercial actors in the oil sector adversely impacts legal gateways to environmental justice, bolsters the case I have made for studying A2EJ in Rentier States within a defined theoretical framework.

8.2 Areas for Future Research

This thesis' findings have opened up several areas for future research in the field of A2EJ. Below, I outline one possible additional study that may be conducted in Nigeria, and one study that could be conducted in another jurisdiction in the wake of the research undertaken here.

My research makes the claim that some of the challenges related to A2EJ in the oil-sector are unique due to the State's economic dependence on oil revenues. In light of this, it would be worthwhile for future researchers to conduct similar studies on other polluting, less economically-influential industries in Nigeria, such as the manufacturing sector, as a means of testing whether other environmentally-impactful industries pose similar challenges for A2EJ.

Secondly, while this research argues that resource dependence can affect the viability of legal gateways to environmental justice, there is nothing to suggest that this is an issue unique to Nigeria, or the Global South. The findings presented by my Nigerian case study may be a useful framework for investigating similarly fraught contexts, such as oil sector activities within the United States. This is particularly relevant today as the current administration in Washington has been

antagonistic toward environmental protection.[1037] Salient here is that there is a growing body of investigative journalism covering oil sector practices in both North Dakota and Louisiana, which suggests there may be substantial parallels between environmental justice challenges faced in these parts of the US and in Nigeria.[1038] Applying the theoretical framework I employed here would be a valuable way of testing these parallels, and, in doing so, build a broader theory of A2EJ in oil dependent contexts.

8.3 Policy and Practical Implications: The Road Ahead

My research also has significant policy and practical implications. This section highlights several possible ways to improve access to justice and environmental protection in Nigeria in the short-to-medium term.

Firstly, the findings of this research suggest that it would be unwise for those in, or advising, government to recommend new legislation or institutions as a means of solving the entrenched oil sector governance challenges that persist in contemporary Nigeria. Incremental changes to existing regulations and laws will be more effective than wholesale reform. This is due to the highly politicised nature of oil sector reform, which is controlled closely by a small group of stakeholders with entrenched interests in maintaining the *status quo*. Making smaller changes that are less obviously perceptible over time provides an opportunity to nudge reform forward without alienating too many stakeholders at once. Should amendments be pursued, such amendments should amount to more than simply

[1037] Coral Davenport and Eric Lipton, "Scott Pruitt Is Carrying Out His E.P.A. Agenda in Secret, Critics Say," *The New York Times*, August 11, 2017, https://www.nytimes.com/2017/08/11/us/politics/scott-pruitt-epa.html?_r=0 (accessed September 10, 2017); Hiroko Tabuchi, "What's at Stake in Trump's Proposed E.P.A Cuts," *The New York Times*, April 10, 2017, https://www.nytimes.com/2017/04/10/climate/trump-epa-budget-cuts.html (accessed September 10, 2017); and Justin Worland, "President Trump Says He Wants 'Energy Dominance.' What Does He Mean?," *Time,* June 29, 2017, http://time.com/4839884/energy-dominance-energy-independence-donald-trump/ (accessed September 10, 2017).

[1038] Deborah Sontag and Robert Gebeloff, "The Downside of the Boom," *The New York Time,* November 22, 2014, https://www.nytimes.com/interactive/2014/11/23/us/north-dakota-oil-boom-downside.html (accessed September 10, 2017) and Nathaniel Rich, "The Most Ambitious Environmental Lawsuit Ever," *The New York Times*, October 14, 2014, https://www.nytimes.com/interactive/2014/10/02/magazine/mag-oil-lawsuit.html?_r=0 (accessed September 10, 2017).

imposing new financial penalties or creating new institutions, because these are ineffective mechanisms for reform (as illustrated with the Associated Gas Re-Injection Act and the Niger Delta Development Commission Act). Rather, amendments and marginal changes to oil sector governance should be made in ways that incentivise reluctant actors, such as NNPC and international oil companies, to modify their behaviour. The most promising example of this approach to date is the work done in recent years on gas flaring, which has focused on developing a policy framework for encouraging gas flaring companies to sell associated gas to a domestic power market.[1039]

Secondly, for those lawyers and activists representing individuals and communities that have been affected by oil pollution, this research suggests that there are some practices that can be adopted to improve litigation outcomes, and some practices that should be avoided altogether. For example, it would be prudent for legal practitioners to ensure that their clients understand that extra-territorial litigation is still an experimental legal gateway and has shown only limited success for victims of oil pollution. In particular, ETL in the UK will not be conducive to successful Nigerian oil pollution litigation. This means that oil pollution victims should only enter into such extra-territorial disputes with the expectation of bringing international attention to their cause, and perhaps forcing a settlement, rather than achieving a precedent-setting successful case.

The future of ETL for Nigerian cases over the next few decades is uncertain, and not altogether promising. Nigeria's rising economic and political prominence globally may make it increasingly diplomatically untenable for other jurisdictions to take on Nigerian claims. For example, the UK cases explored in Chapter 6 - where jurisdiction was denied on account of perceived sufficient A2J in Nigeria – show how a country's global standing and prominence in the global economy may influence extra-territorial justices' perceptions of Nigeria's court system, despite limited credible evidence.

[1039] "Nigeria's Flaring Reduction Target: 2020," *World Bank*, March 10, 2017, http://www.worldbank.org/en/news/feature/2017/03/10/nigerias-flaring-reduction-target-2020 (accessed September 10, 2017).

There are opportunities and drawbacks to closing avenues for redress internationally. The drawbacks are clear: some litigants will no longer be able to pursue claims in courts perceived as less partial. However, that avenue for redress has never feasibly been a long term solution; courts can only hear so many cases from other jurisdictions and any favourable decisions would not then be enshrined in Nigerian case law, limiting its ability to contribute to the evolution of Nigerian jurisprudence. The opportunity lies in what this could mean for the Nigerian legal system longer term; if no other avenues are available, a case could be made that the pressure within the domestic legal system will grow to a point where it can no longer be ignored by the judiciary and lawmakers.

At present, the political economy of oil litigation does not seem to suggest that the legal system is prepared to make the necessary changes to restore trust and certainty in Nigerian courts. However, time is running out on Nigeria's oil reserves and so the dynamic may shift in the next three decades when there is less economically at stake for enforcing individual and community rights against oil companies. Nigeria's global climate change commitments to reduce gas flaring and increase energy efficiency may be an indication that this dynamic is already starting to shift.

In addition to the implications of a potentially waning oil sector, the argument presented in this dissertation concerning the oil sector in Nigeria may have important parallels for other sectors as Nigeria diversifies its economy. My findings strongly suggest that the donor community and those advising government should be extremely cautious about future recommendations for the diversification and growth of the Nigerian economy – especially if these recommendations predominantly rely on other extractive sectors for development.[1040] Such findings are particularly urgent in light of the recent exploration for oil, as well as discussions about developing the mining sector, that

[1040] "Nigeria: World Bank Approves $150 Million to Enhance Mining Sector Contribution and Support Economic Diversification," *World Bank*, http://www.worldbank.org/en/news/press-release/2017/04/14/nigeria-world-bank-approves-150-million-to-enhance-mining-sector-contribution-and-support-economic-diversification (accessed August 22, 2017).

have taken place in northern Nigeria.[1041] As the situation in the Niger Delta has shown, economic growth based on extractive practices in the Nigerian context leads to severe environmental damage, violent conflict, and lagging development. It would be a great tragedy to repeat the same mistakes in the north – where Boko Haram actively operates, and where water scarcity, draught and famine are everyday battles. It is likely that mineral deposits and petroleum reserves will continue to be exploited as long as there is a demand for them, but the current context of low commodity prices presents an opportunity to develop better practices when the stakes are not as high.

8.4 Concluding Remarks

This project has contributed substantive findings to the field of A2EJ in Nigeria, and developed a framework for A2EJ in oil dependent contexts.

While I do not intend to suggest that my findings are generally applicable, I do wish to emphasise the value in using shared theoretical and methodological frameworks to interrogate similar questions in different contexts. Further, this research has proffered a great deal of worrying findings for the state of A2EJ in Nigeria's oil sector, but this does not mean that my research has been informed by cynicism. Rather, my hope is that the findings presented here, which are grounded in empirics, can move research and policy discussions away from what *should* be done (indeed, many of the "shoulds" have been tested and failed) in order to focus on what *can* be done given the unique political economy of the oil dependence.

While many things have remained constant in Nigeria's political economy since independence, the world around the country has changed rapidly. Recent financial shocks precipitated by a dramatic drop in oil prices have at least offered a glimpse into what a Nigerian national budget may look like post oil. In the present case, policymakers have proven that when required, they can make difficult decisions and impose some discipline over governance regimes.

[1041] Agence France-Presse, "Boko Haram Attack on Nigeria Oil Team 'Killed More than 50,'" *The Telegraph*, July 28, 2017. http://www.telegraph.co.uk/news/2017/07/28/boko-haram-attack-nigeria-oil-team-killed-50/ (accessed August 22, 2017).

In addition to financial pressure, Nigeria's prominence as the largest economy in Sub-Saharan Africa and a significant contributor to greenhouse gas emissions means that the country is coming under increasing global scrutiny about the policy choices it makes. While Nigeria's Paris Agreement commitments do not require the country to address the alarming rate of oil spills explicitly, the country's participation in the climate agreement may create new pressure, forcing government and the sector may to respond.

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Appendix I: Gas Flaring: A brief introduction

Where there are oil deposits, there is also gas, referred to as "associated gas." The gas must be disposed of in some way – i.e. used for energy, re-injected to build pressure in the oil well, or burned off through large towers that emit flames and debris at high temperatures. The latter practice is referred to as gas flaring.[1042] In some instances, gas flaring is the most cost-effective method for disposing of gas, especially on older installations that do not have the technology required for re-appropriating gas.[1043]

Photo Credit: Creative Commons User Chebyshev1983
Figure 17: Gas flaring in the Niger Delta

The detrimental effects of flaring are well-documented. These include air, noise, and land pollution, causing acid rain, respiratory diseases, and making some areas

[1042]Zoheir Ebrahim and Jörg Friedrichs, "Gas Flaring: the burning issue," *Resilience,* September 2, 2013, http://www.resilience.org/stories/2013-09-03/gas-flaring-the-burning-issue/ (accessed August 1, 2017).
[1043] Ebrahim and Friedrichs, "Gas Flaring: the burning issue", http://www.resilience.org/stories/2013-09-03/gas-flaring-the-burning-issue/

uninhabitable due to severe noise.[1044] The practice is also a serious contributor to greenhouse gas emissions. As of 2014, Nigeria was the second largest gas flarer in the world, behind Russia.[1045] As of November 11th 2015, Nigeria had flared 270,579,860.16 Mscf[1046] of associated gas, foregoing 23,378.1028 GWh[1047] of power generation potential, while emitting 14,266,201.0112 tonnes of CO2 emissions and also forgoing more than USD 675 million in revenue from selling the flared gas.[1048] This is equivalent to all of the current power production in Nigeria.

[1044] "About Gas Flaring," *Gas Flare Tracker*, http://gasflaretracker.ng/about.html (accessed November 11, 2015).
[1045] Ebrahim and Friedrichs, "Gas Flaring: the burning issue."
[1046] Ibid.
[1047] Ibid.
[1048] Ibid.

Appendix II: Survey Questionnaire

The Nigerian legal system and oil pollution

This questionnaire is part of PhD research being conducted at the SOAS Law Department, University of London. The researcher assures that there will be complete anonymity for respondents and is happy to share results of the research with respondents, should they like to be informed when the research is complete. **NOTE: All questions require a response. The form will not be submitted without a fully completed form**

This research is analyzing legal and regulatory frameworks relating to oil pollution in Nigeria. The timeframe of the research project is from 1999 to the present and includes related legislation and litigation between communities and companies. The questionnaire is in part based on a survey conducted by an academic in the 1990s.

Thank you for your time. Your response is a valued part of this research project.

* Required

Background

1. **1. Gender** *
   Mark only one oval.
   - ◯ Male
   - ◯ Female

2. **2. When were you called to the bar?** *
   Please fill in the year. If you are not a lawyer, put "N/A."

3. **3. If you are not a lawyer filling out this questionnaire, please state your profession.**

4. **4. Where did you complete your degrees?** *
   Please note all universities attended. If you did not attend university, please put "N/A."

5. **5. Did you take any modules on Environmental law?** *
   Mark only one oval.
   - ◯ Yes
   - ◯ No

6. **6. Did you take any modules on Oil and Gas Law?** *
   Mark only one oval.
   - ◯ Yes
   - ◯ No

7. **7. Did you take any modules on Human Rights Law?** *
   Mark only one oval.
   - ◯ Yes
   - ◯ No

8. **8. Did you take any modules on Investment and/or Commercial law?** *
Mark only one oval.

- ◯ Yes
- ◯ No

9. **9. What is the size of your firm/organization, including support staff?** *
Mark only one oval.

- ◯ 1-20 staff
- ◯ 20-40 staff
- ◯ 40-80 staff
- ◯ 80-100 staff
- ◯ 100+ staff

10. **10. How would you describe your firm/organization?** *
Mark only one oval.

- ◯ Law firm
- ◯ Academic institution
- ◯ NGO
- ◯ Donor organization
- ◯ Federal government
- ◯ State government
- ◯ Other: _____

11. **11. What do you specialize in?** *
Choose as many as apply.
Check all that apply.

- ☐ Criminal
- ☐ Civil
- ☐ Environmental
- ☐ Constitutional
- ☐ Commercial
- ☐ Other: _____

Litigation

12. **12. Have you acted as counsel for an oil company, subsidiary or contractor?** *
Mark only one oval.

- ◯ Yes
- ◯ No

13. **13. Have you acted as counsel in a case against an oil company, subsidiary or contractor?** *
Mark only one oval.

- ◯ Yes
- ◯ No

14. **14. In your professional opinion, do you think there are difficulties in enforcing court orders, rulings, and/or judgments?** *
Mark only one oval.

- ◯ Severe difficulties
- ◯ Some difficulties
- ◯ Minor difficulties
- ◯ No difficulties

15. **15. Is this more or less difficult in oil-related litigation?** *
Mark only one oval.

- ◯ More difficult
- ◯ Same
- ◯ Less difficult

16. **16. If you responded "More" or "Less" please elaborate.**

_____

_____

_____

_____

_____

17. **17. In your professional opinion, would you say lawyers, judges, or other judicial officers encounter outside pressures from private or public institutions in their work?** *
Mark only one oval.

- ◯ Often
- ◯ Sometimes
- ◯ Rarely
- ◯ Never

18. **18. Is this more or less the case in oil-related litigation?** *
Mark only one oval.

- ◯ More pressure
- ◯ Same pressure
- ◯ Less pressure

19. **19. If you responded "More" or "Less" please elaborate.**

_____

_____

_____

_____

_____

20. **20. "Oil companies are treated fairly in court cases involving communities/individuals affected by oil pollution." Do you agree or disagree with this statement?** *
Mark only one oval.

- ◯ Agree
- ◯ Agree somewhat
- ◯ Disagree somewhat
- ◯ Disagree
- ◯ No opinion

21. **21. "Litigants (communities/individuals affected by oil pollution) are treated fairly in court cases involving oil companies." Do you agree or disagree with this statement?** *
Mark only one oval.

- ◯ Agree
- ◯ Agree somewhat
- ◯ Disagree somewhat
- ◯ Disagree
- ◯ No opinion

22. **22. Would you say that courts are biased in favor of the oil company or the opposing litigant?** *
Mark only one oval.

- ◯ Oil company
- ◯ Litigant
- ◯ Neither

23. **23. "The Nigerian legal system is more concerned with process than outcome." Do you agree or disagree with this statement?** *
Mark only one oval.

- ◯ Agree
- ◯ Agree somewhat
- ◯ Disagree somewhat
- ◯ Disagree
- ◯ No opinion

24. **24. "The Nigerian legal system is more concerned with outcome than process." Do you agree or disagree with this statement?** *
Mark only one oval.

- ◯ Agree
- ◯ Agree somewhat
- ◯ Disagree somewhat
- ◯ Disagree
- ◯ No opinion

25. **25. How important are the following reasons for explaining why courts (federal or state) might encounter difficulties in judging oil related cases fairly?** *

Mark only one oval per row.

	Very important	Important	Less important	Not important
Lack of knowledge on oil technology				
Lack of funds				
Lack of time				
Outside pressures				
Vast resources and skill of oil company's counsel				
Lack of witnesses				
Incompetence of witnesses				
Lack of evidence				
Restrictive interpretation of standing				

26. **26. Do you find oil-related court decisions to be:** *

Mark only one oval.

- Far too restrictive
- Somewhat restrictive
- Appropriate
- Somewhat liberally interpreted
- Far too liberally interpreted

27. **27. In your professional experience, would you consider the compensation paid by oil companies for damages in tort as** *

Mark only one oval.

- Unfair to oil companies as much too high
- Unfair to oil companies as somewhat too high
- Fair
- Unfair to opposing litigant as somewhat too low
- Unfair to opposing litigant as much too low

28. **28. "Court judgments state the facts of the case and the decision clearly." Do you agree or disagree with this statement?** *

Mark only one oval.

- Agree
- Agree somewhat
- Disagree somewhat
- Disagree

29. **29. Do you think the quality of judicial services vary in different Nigerian courts (e.g. state or federal, magistrate or high court)?** *

Mark only one oval.

- Yes
- No

30. **30. If you responded "Yes" to the question above, please specify which court you view as of the highest quality and of the lowest.**

Accessing the courts

31. **31. Have you experienced instances in which potential litigants have been discouraged from legal action although they had a valid claim to compensation, an injunction, or another form of legal recourse?** *
Mark only one oval.

- Yes
- No

32. **32. If you responded "Yes" to the question above, please elaborate.**

33. **33. How important are the following reasons in explaining why potential litigants might not seek legal recourse?** *
Mark only one oval per row.

	Very important	Important	Less important	Not important
Ignorance of legal rights				
Lack of funds				
Lack of general education				
Geographical distance to courts				
Intimidation by tort feasors				
Intimidation by public bodies				
Organizational structure of villages				
Uncertainty about the potential success of a suit				
Delay in the disposal of cases by courts				
Ethnic origin				
Living in rural areas				
Being a woman				
Young age				

34. **34. Are these problems more or less severe in oil litigation?** *

Mark only one oval per row.

	More severe	Same	Less severe	I don't know
Ignorance of legal rights				
Lack of funds				
Lack of general education				
Geographical distance to courts				
Intimidation by tort feasors				
Intimidation by public bodies				
Organizational structure of villages				
Uncertainty about the potential success of a suit				
Delay in the disposal of cases by courts				
Ethnic origin				
Living in rural areas				
Being a woman				
Young age				

Legislation, redress and reform

35. **35. In your professional experience, which areas of law have undergone substantial reform since you were called to the bar?** *

Choose as many as you think are appropriate. If you are not a lawyer, please answer in line with when you began working in your relevant field.

Check all that apply.

- [ ] Criminal law
- [ ] Civil law
- [ ] Environmental law
- [ ] Commercial law
- [ ] Constitutional law
- [ ] Human Rights law
- [ ] Other: _____

36. **36. Which areas of law do you think currently need substantial reform?** *

Choose as many as you think are appropriate.

Check all that apply.

- [ ] Criminal law
- [ ] Civil law
- [ ] Environmental law
- [ ] Commercial law
- [ ] Constitutional law
- [ ] Human rights law
- [ ] Other: _____

37. **37. Do you think that the following pieces of legislation achieve their stated aims?** *

Mark only one oval per row.

	Achieve	Somewhat achieve	Minimally achieve	Not at all achieve	I don't know
Petroleum Act					
Land Use Act					
Gas Re-Injection Act					
Chapter IV, Constitution of Nigeria 1999					
NOSDRA Act					
NESREA Act					
Environmental Impact Assessment Act					
Harmful Waste (Special Criminal Provisions) Act					
Hydrocarbon Oil Refineries Act					
Oil Pipelines Act					
Niger-Delta Development Commission (NDDC) Act.					
Oil in Navigable Waters Act					

38. **38. Do you think they provide sufficient mechanisms for redress?** *

Mark only one oval per row.

	Sufficient	Somewhat sufficient	Minimally sufficient	Insufficient	I don't know
Petroleum Act					
Land Use Act					
Gas Re-Injection Act					
Chapter IV, Constitution of Nigeria 1999					
NOSDRA Act					
NESREA Act					
Environmental Impact Assessment Act					
Harmful Waste (Special Criminal Provisions) Act					
Hydrocarbon Oil Refineries Act					
Oil Pipelines Act					
Niger-Delta Development Commission (NDDC) Act.					
Oil in Navigable Waters Act					

39. **39. Research conducted in the 1990s published the following findings. Do you agree or disagree with the findings?** *

Mark only one oval per row.

	Agree	Somewhat agree	Somewhat disagree	Disagree	No opinion
The judiciary is too dependent on the executive arm of the Government					
The appointment of judges is too arbitrary					
The legal system is underfunded					
Congestion in the courts is too high					

40. **40. What do you think is the most effective institution for resolution of oil pollution conflict?** *
Mark only one oval.

- ◯ Out of court settlement
- ◯ Mediation
- ◯ Litigation
- ◯ Extra territorial litigation
- ◯ Doing nothing
- ◯ Other: _____

41. **41. In other instances of pollution?** *
Mark only one oval.

- ◯ Out of court settlement
- ◯ Mediation
- ◯ Litigation
- ◯ Extra territorial litigation
- ◯ Doing nothing
- ◯ Other: _____

42. **42. Do you think you would benefit from receiving further training?** *
Mark only one oval.

- ◯ Yes
- ◯ No

43. **43. If you responded "yes," please specify in what areas (e.g. sector specific training, advocacy skills, legal research).**

_____
_____
_____
_____
_____

Conclusion

44. **Further comments?**
Please use this space to elaborate on any of the answers you've provided above.

_____
_____
_____
_____
_____

45. **Have more to say on this topic? Please provide e-mail address if you would be willing to have a more in-depth interview with the researcher.**

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Appendix III: UNDP Barriers to Justice in the Legal System

The following excerpt is taken from UNDP's "Access to Justice Practice Note" and provides UNDP's classification of barriers to justice in a legal system:

1. Long delays; prohibitive costs of using the system; lack of available and affordable legal representation, that is reliable and has integrity; abuse of authority and powers, resulting in unlawful searches, seizures, detention and imprisonment; and weak enforcement of laws and implementation of orders and decrees.
2. Severe limitations in existing remedies provided either by law or in practice. Most legal systems fail to provide remedies that are preventive, timely, non-discriminatory, adequate, just and deterrent.
3. Gender bias and other barriers in the law and legal systems: inadequacies in existing laws effectively fail to protect women, children, poor and other disadvantaged people, including those with disabilities and low levels of literacy.
4. Lack of de facto protection, especially for women, children, and men in prisons or centres of detention.
5. Lack of adequate information about what is supposed to exist under the law, what prevails in practice, and limited popular knowledge of rights.
6. Lack of adequate legal aid systems.
7. Limited public participation in reform programmes.
8. Excessive number of laws.
9. Formalistic and expensive legal procedures (in criminal and civil litigation and in administrative board procedures).
10. Avoidance of the legal system due to economic reasons, fear, or a sense of futility of purpose.

Source: "Access to Justice Practice Note," *UNDP*, 2004: http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-justice-practice-note/Justice_PN_En.pdf, 4.