The Rentier State: Oil-related Legislation And Conflict In The Niger Delta, Nigeria

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To cite this article: Kenneth Omeje (2006) The Rentier State: Oil-related Legislation And Conflict In The Niger Delta, Nigeria, Conflict, Security & Development, 6:2, 211-230, DOI: 10.1080/14678800600739259

To link to this article: http://dx.doi.org/10.1080/14678800600739259

Published online: 19 Jan 2007.

Article views: 613

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Oil presents a horrendous paradox in Nigeria. It provides enormous wealth and means of patronage to the rentier state and its joint venture partners, the transnational oil companies. However, to large sections of the local oil-bearing communities, the commodity is mainly a source of anxiety and misery. Dating from colonial history, the state has made systematic and sustained efforts to disfactor the local oil-bearing Niger Delta communities from asserting or holding any consequential stakes in the oil resources underneath their soil. In this ironic political game, the state employs the unmitigated paraphernalia of law and public policy to privilege itself and its business partners primarily within the oil industry. This leaves the local oil-bearing communities with limited breathing space, hence, their massive resort to violent protests. This study critically examines the emergence of the contemporary rentier state and how the latter mobilizes and exploits the instrumentality of rule making to entrench and advance its rent-seeking interests in the Nigerian oil economy. The rent-seeking interests and devices of the federal state not only underlie but also complicate the oil conflict.
Introduction

Oil-related legislation and policies are the most politicized subjects in Nigeria’s recent legal history. The reason for this is probably common knowledge. Nigeria has a mono-economy in which oil rent plays a dominant part. Rents are generally defined as ‘exports earned or income derived from a gift of nature’. Based on the nature of its political economy, Nigeria is described as a ‘rentier state’, largely dependent on oil mining rents, taxes and royalties paid by transnational oil-producing companies (TNOCs), and on profits from its equity stakes in the TNOCs’ investments. Many scholars focusing on the Arabian Gulf oil-rich and oil-poor states have expanded the concept of rent to include diverse forms of foreign aid and external development assistance otherwise conceptualized as ‘strategic rent’.

A self-serving hegemonic elite, whose interests in rent seeking and ‘prebendal accumulation’ determine a range of state policies, statutes and institutional practices, dominates most rentier states such as Nigeria. Prebendalism is a political tradition in which state offices are regarded as prebends that can be appropriated by office holders, who use them to generate material benefits for themselves and their constituents and kin groups. Prebendalism is a practice institutionally rooted in the patrimonial or patron-clientelist culture of most pre-colonial societies. In the post-colonial setting, the entrenched politics of neo-patrimonialism is a reinvention of the traditional patrimonial form of governance in which the differentiation of public and private spheres is institutionally obscured by the primordial considerations, interests and loyalties of public office holders. By and large, the conduct of politics and public administration in a neo-patrimonial state follows such primordial clientelistic patterns as family networks, clannism, cronyism and ethnic solidarity, without the necessary rational-legal institutional restraints against corrupt enrichment and abuse of office.

With an average production rate of about 2.3 million barrels per day (some 95% of overall national exports), Nigeria is by far Africa’s largest oil-producing country and the sixth largest oil exporter in the world. With oil as the mainstay of the economy, oil interests, including, of course, control of the accruable revenues, have become a major defining influence upon the Nigerian state. The state is itself dominated by an unstable coalition of some ethnic majority elites whose geographical homelands have little or no oil reserves. The dominance of these elites is manifestly to the disadvantage of the ethnic minorities of the Niger Delta area from whose land the bulk of Nigeria’s oil resources are produced. Terisa Turner has used the concept of a ‘commercial triangle’ to depict these
dominant elite forces, which she conceptualizes as a nexus between the TNOCs, their local Nigerian associates consisting of private middlemen otherwise labelled ‘compradors’ and state officials. Both the compradors and the state officials heavily rely on the state’s oil revenues to ultimately fund and reproduce their societal dominance through highly unproductive contrivances (spurious and inflated contracts and imports, barefaced looting, etc.) that impede both economic growth and political stability. Without delving into the ultimate configuration of interests and contradictions within the dominant social forces in Nigeria (which would overstep the bounds of this study) this article tries to demonstrate that the rent seeking interest of the dominant elite forces in Nigeria, which partly coincide with the corporate interests of the TNOCs, inform much of the oil-related legislation and policies of government.

The disposition and inclination of the state towards neo-patrimonial rent seeking or rent maximization plays into the hands of TNOCs and other oil companies in different ways. For instance, the phenomenon leaves little room for investment in strengthening the institutional capacity of the state to regulate the activities of oil corporations with regard to such crucial issues as environmental practices and degradation, corporate social responsibility, and payment of compensation in respect of land alienation and environmental damage. In fact, as opposed to aiming to strengthen the regulatory capacity of the state in oil activities, the state allows the oil companies to operate at their whim, and in addition, backs them with manipulable legislation that they occasionally exploit to evade legal responsibility when their activities infringe on the livelihood and interests of local communities. For instance, it is noteworthy that one of the most important pieces of oil-related environmental legislation in post-colonial Nigeria, the Oil in Navigable Waters Act of 1968, permits the discharge of hazardous substances or petroleum under certain circumstances; such as if the escape of oil from a vessel was due to leakage and the leakage was not due to any want of reasonable care and all reasonable steps were taken to stop or reduce the discharge. Many oil companies have relied on the technical loophole intrinsic to this statute to evade legal liability in litigation following incidents of oil spillage. The state is not keen on repealing this statute or revising it to bring it in conformity with legal developments in most oil mining and oil processing parts of the world, with the implication that local oil-bearing communities are usually forced to a standoff with oil companies in order to settle compensation claims arising from oil spillage.
Similarly, the state’s inclination to maximization of oil rent has a marked anti-development slant. Even though it appropriates the greater percentage of the oil revenues, the state largely abdicates its developmental obligations in the oil region to TNOCs, and only undertakes limited developmental functions through a federal government parastatal known as the Niger Delta Development Commission (NDDC). The NDDC has been widely criticized for its top-down, non-participatory and unsustainable approach to development. Besides the NDDC, the sub-national governments of the Niger Delta region have compounded the grassroots developmental deficits through unaccountable rule and large-scale corruption. Consequently, the state does not exercise any regulatory oversight on the development provisioning programmes of TNOCs, with the result that their efforts are mostly chaotic, appeasement-oriented and business-driven. Given the poor institutional capacity, nonchalant mentality and parlous insensitivity of the state to the requirements of regulating the activities and excesses of oil corporations, it is simply inadequate if not completely futile to rely on state action to tame the powerful oil industry. The interest of the state in maximizing oil revenue receipts primarily for the benefits of its rentier elites tends to blindfold it to the realities of its responsibilities as a fair regulatory umpire. This practically compounds the plight and infringement of the local oil-bearing communities.

In both direct and indirect ways, the narrowly constructed interests of the hegemonic rentier elites in Nigeria are antithetical and detrimental to the interests, well-being and aspirations of the oil-bearing communities of the Niger Delta, and, thereby, the poverty-stricken majority of the Nigerian populace.

Oil-related legislation in Nigeria: an historical overview

Crude oil discovery and extraction activities in Nigeria date back to May 1956 when the then Shell-BP Petroleum Development Corporation of Nigeria Limited (a joint venture of Shell and British Petroleum but operated by Shell) made the first commercial discovery of oil at Oloibiri in the Niger Delta. The discovery was preceded by series of explorations for oil and gas that date back to 1903 by Shell D’Arcy (Shell’s operating name at the early colonial time), the Mineral Survey Company and the German-owned Nigerian Bitumen Corporation. Oil production and export have been carried out since 1958 by Shell and other TNOCs.
It is significant that in both colonial and post-colonial Nigeria, oil activities have been extraordinarily facilitated by the state's invocation of the 'power of eminent domain.' This principle is a major legal norm associated with the evolution of the modern state system, which, among other things, empowers the government to seize some private properties, such as land and allied investments, for public good under extraordinary circumstances. In the Nigerian situation, the power of eminent domain bears its origin in diverse colonial land ordinances not related to mineral oils, notably the Public Land Acquisition Act of 1917.12

Oil discovery was greatly facilitated by a number of pieces of colonial legislation, which were originally designed to provide decisive advantage to British firms, especially Shell D'Arcy. The first significant colonial legislation promulgated immediately after the 1914 amalgamation of the Northern and Southern Protectorates of Nigeria was the Minerals Oil Ordinance No. 17 of 1914 (amended in 1925, 1950 and 1958).13 This statute principally gave oil exploration monopoly in Nigeria to British firms. Shell D'Arcy was the sole beneficiary from the Mineral Oil Ordinance. The company was in 1938, nearly two decades before oil was discovered in Nigeria, granted an exclusive oil exploration licence covering the entire territory of Nigeria by the British colonial government. Hence, the Nigerian oil exploration market was foreclosed to other foreign competitors, notably American multinationals that were obviously interested in oil exploration in Nigeria. The colonial government backed Shell with the necessary security provisions they needed to carry out oil exploration in Nigerian territory.

To further protect and strengthen the monopolistic interest of Shell D'Arcy, the colonial government promulgated the Minerals Ordinance of 1945, which stipulated that:14

*The entire property and control of all minerals and mineral oil, in, under, or upon any land in Nigeria, and of all rivers, streams, and watercourses throughout Nigeria, is and shall be vested in the CROWN.*

The 1945 Minerals Ordinance was significant because it settled once and for all the potential conflict between ownership of oil mineral and oil mining space (land, rivers, streams and other water bodies). While vesting the ownership of all mineral resources in the British Crown, the Minerals Ordinance further stipulated that the owner of the land where oil was found would be paid some compensation for the loss of economic crops, not for the land or for the minerals.15 In effect, this Ordinance meant that the colonial state, acting on behalf, or in the interest of, Shell D'Arcy and any other oil company, was at
liberty to expropriate any lands endowed with oil minerals from different colonial subjects and local communities at little or no cost.

From the build-up to decolonization in mid-1950s through the first decade of political independence (1960–1970), Shell’s monopoly of oil exploration concessions was systematically broken. The interest of nationalist politicians (who significantly shared political power with the colonialists in the guided transition democracy of the 1950s) in opening up the Nigerian investment market to other foreign competitors largely accounted for this process. Other TNOCs like Mobil, Texaco, Gulf (later Chevron), Agip, Esso and Safrap (now Elf) were thus granted oil exploration licences in the country during this period. Notwithstanding the admissions of substantial foreign players to the oil sector, Shell remains the largest oil company in Nigeria, currently accounting for roughly half of the country’s total oil production.16 Thanks to its pioneer leverage under the colonial era, onshore ‘upstream sector’, (i.e. oil exploration and production) is dominated by Shell, while two American TNOCs, ExxonMobil and ChevronTexaco, dominated upstream activities in the offshore area.

During the first decade of commercial extraction (1958–1968), the foreign oil companies held the dominant stakes in the Nigerian oil industry. They controlled the entire equity, production, export and marketing of Nigerian oil and merely paid royalties and taxes to the government. Therefore, the state played second fiddle in the oil sector, which at this early stage accounted for less than 20% of national export revenue.17

Rentierism, assertive nationalism and disempowerment of the subnational space

The 1970s witnessed the emergence of an oil-centred rentier state through the assertive nationalism of the hegemonic postcolonial elites, based on two strategies adopted by the federal state. The first was to acquire a dominant federal share and control of the oil economy hitherto dominated by the TNOCs. The second was to ensure a decisive centralization of power and resources in the federal state through systematic disempowerment of the sub-national space. This strategic game plan of the federal state has more or less remained a salient feature of rentier politics in Nigeria since the early 1970s.

Prior to this phase of rentierism, national revenue was largely dependent on the production and export of three major cash crops produced by the different regions of the
country—palm produce in the Eastern region, cocoa in the Western region and groundnut in the Northern region. Other agricultural products such as rubber, cotton and timber were also produced and exported. Hence, the economic structure was of a significantly different rentier pattern. It was based on a more or less productive, diversified, agricultural economy inherited from the colonial rentier state. More significantly, a robust pattern of economic competition prevailed between the three major provincial regions, albeit the federal government led by the Northern People’s Congress (NPC) had in its bid to redress the perceived developmental disadvantage of the Northern region relative to the South, begun to take a disproportionate share of federal revenue by the early 1960s even when the bulk of these revenues were generated from Western and Eastern regions. This controversial revenue allocation contrivance was to not only upset the original formula of sharing export revenue earnings on a 50:50 basis between the federal government and each producing region instituted in the late colonial period, but also contributed to the crisis in the coalition government of the first republic; further feeding into the chain of events that culminated in the first military coup of 1966 and civil war in 1967. A federal victory, following a war prosecuted in the main by soldiers loyal to the political agenda of the NPC, further accelerated the centralization of revenue, more so as crude oil replaced cocoa, groundnuts and palm oil as major source of national revenue.

It is noteworthy that the emergence in the early 1970s of the oil rent dispensation and the new rentier elites that thrive on it helped to consolidate a radical departure from the colonial regionalist revenue distribution formula. There are three apparent reasons for the political turnaround that occurred in the early 1970s.

The first was the Biafran civil war of 1967–1970, in which the oil-rich Eastern region attempted to secede from the federation. The devastating war ultimately won by the federal government sensitized the latter to the danger of substantial economic empowerment of the constitutive regions, and the continued low profile participation of the federal government in the oil sector. Had Biafra won the war, Nigeria would have lost more than 75% of its oil resources, a reality that dawned on the federal military government in the wake of the separatist campaign. Towards the end of the civil war, the federal government, among other measures, promulgated the Nigerian Petroleum Decree No. 51 (1969), which vested the entire ownership and control of all petroleum in Nigeria with the state and/or its agency. In addition, the federal government dissolved the substantially autonomous large regional governments at the wake of the 1967 war, replaced them with a 12 States structure, and had since then prosecuted a calculated
disempowerment of the sub-national space. From the three regions of the immediate post-
independence era, Nigeria presently has 36 de-autonomized States plus the federal capital
territory of Abuja, itself a quasi sub-national State. Consequently, from the 50:50
derivation formula implemented under the regional structure of the late colonial era, the
sub-national States share of the national revenue was systematically whittled down to 3%
in the mid-1990s and only more recently upped to 13% to placate the restive oil producing
States of the Niger Delta that have waged a violent resistance campaign against the federal
government and TNOCs since the 1990s.22

The second factor for the emergence of the rentier dispensation of the early 1970s
onwards is Nigeria’s joining of the Organization of Petroleum Exporting Countries
(OPEC) in July 1971, while the third is the dramatic boom in the international oil
market that followed soon after the country’s OPEC membership. OPEC had, in its
Resolution No. XVI.90, called for member countries to acquire 51% of foreign equity
interests and to participate more actively in all aspects of oil operations.23 As part of the
measures to step up its participation in the oil economy, the federal government
established the Nigerian National Oil Corporation (NNOC) in May 1971, which was
later reconfigured and renamed the Nigerian National Petroleum Company (NNPC) in
April 1977.

In 1972, the federal government introduced the Indigenization of Foreign Enterprises
Decree on the basis of which it was in 1973 to force all the expatriate oil companies to start
operating joint ventures with NNOC, and in 1977 increased government equity
participation. The NNPC presently operates two types of partnerships with TNOCs. These
are called ‘joint ventures’ and ‘production-sharing contracts’. In a ‘joint venture’, the
operator (TNOCs) and the joint venture partner (NNPC and in rare cases with other
foreign investors) share the operating costs, while in a ‘production-sharing contract’, the
contractor (TNOCs) advances all funds towards running costs.24 By 1979, NNPC had
acquired about 57% participation interest in most of the oil producing ventures, with an
80% interest in the former Shell-BP venture (with Shell retaining 20%), following the
nationalization of BP in 1979.25 Profits from the joint ventures are shared in the same
equity ratios between the NNPC and its principal partners. Beyond equity participation on
behalf of the government, the NNPC plays a significant role in the ‘downstream sector’ (i.e.
processing of crude oil into various petroleum products), discovering and allocating of
oil/gas fields to producing companies, and in the local marketing of refined oil products
and export of Nigeria’s crude oil.
It is significant to observe that the Indigenization of Foreign Enterprises Decree of 1972 also included ‘personnel indigenization’. The Decree required that, in line with the new equity structure, TNOCs developed and implemented a time plan for recruitment, training and use of local manpower to replace expatriates, a process otherwise known as personnel ‘nigerianization’. Against the backdrop of their substantially reduced equity holdings, TNOCs had no difficulties with personnel nigerianization because of its inherent advantages, not least the cheapness of local manpower relative to expatriates. Presently, more than 90% of TNOCs’ managerial and technical manpower are Nigerians.\(^{26}\)

In diverse ways, the Indigenization policy helped to foster within the oil industry the neo-patrimonial interests of the dominant elite forces in the state. Among other things, it was apparently exploited by sections of the dominant ethnic groups to dominate the personnel structure of the oil industry. However, the dominance of the ethnic majorities in the Nigerian oil industry remains a controversial subject. Many scholars argue that the phenomenon is more apparent than real, not least because strategic decisions and high-value technical aspects of the oil industry remain firmly controlled from the TNOCs’ metropolitan headquarters in the UK, Netherlands and the US, often superseding and sidelining the interests of Nigerian ethnic majorities and minorities alike. The local representatives of the TNOCs and the Nigerian state have not shown strong inclination to reverse this strategic extraversion of the oil sector, apparently because of the power relations between the global north and south. Together with the fact that regardless of any disadvantages the extraversion might present the Indigenization policy, has none the less greatly expanded the government’s revenue base and *ipso facto* the state’s rent and capacity for patronage. Moreover, through overseas personnel capacity development, technical meetings and cross-posting, importation of oil equipment and technology transfer, a medley of rentier benefits still accrue to some strategic local players and rentier elites from the continued process of strategic extraversion.

Similarly, the Indigenization policy has encouraged the issuance of oil exploration and production licences to a considerable number of members of the hegemonic elite forces, albeit most licensees act as fronts for or operate as associates of small-scale foreign investors.\(^{27}\) Given their ethnic minority status in Nigeria, the oil-bearing communities of the Niger Delta have been largely excluded from these rentier benefits, a phenomenon the people commonly describe as ‘marginalization’.\(^{219}\)
The rentier state and oil mining space

Ownership and control of oil mining space (land and diverse water bodies) have remained highly contentious subjects in postcolonial Nigeria, especially since the emergence of the oil-centred economy and its derivative rentier state in the early 1970s. The rent-seeking interest of the rentier state has largely determined the state’s response to the question of ownership and control of oil mining space in postcolonial history. The federal state has repeatedly exploited its monopoly of the power to make authoritative, superseding and binding rules and legislation for the federation to privilege itself at the expense of the subnational governments and local oil-bearing communities. To illustrate this point further, it will be pertinent to analyse how the rentier state has over the years crafted and manipulated legislation to decide ownership and authoritative control of onshore and offshore oil mining spaces.

The federal military government promulgated two important statutes to address the issue of ownership and control of onshore and offshore oil mining spaces. The first was the Petroleum Decree of 1969 (later renamed Petroleum Act) and the second was the Land Use Decree of 1978 (later re-enacted as Land Use Act of 1979). The Petroleum Act stipulates that ‘the entire ownership and control of all oil and gas in place within any land in Nigeria, under its territorial waters and continental shelf is vested in the federal government of Nigeria. The Petroleum Act essentially updated and replaced the colonial Minerals Oil Ordinance of 1945 that vested ownership of all minerals and mineral oil in the British Crown. The issue of federal government ownership of mineral oil resources was subsequently enshrined in Section 40(3) and Section 44(3) of the 1979 and 1999 Nigerian Constitutions respectively. The Petroleum Act (1969) further empowered the government to compulsorily acquire land for oil companies under the power of eminent domain as long as compensation was paid to the landowners.

The Land Use Act, however, helped to consolidate the power of the state to expropriate land from local communities and private citizens for oil, industrial and large-scale agricultural purposes. The Act makes all land comprised in the federation of Nigeria a property of the state and vests its allocation and administration in the State Military Governor, who, under military regime, is an appointee of the federal government. In view of the fact that oil is a property of the federal and not the State government, and the latter depends on the federal government for fiscal revenue, the State governor (whether in military or civilian regime) is beholden to the federal government in all matters of land
allocation. Under the Act, the State governor is empowered to grant any land in the State to any individual or corporate agent, to legally confirm such allocation by the issuance of a ‘certificate of occupancy’ to the allottee, and, where necessary, to also institute payment of rent for the land. The governor is further empowered to revoke any subject’s right of occupancy for reasons of ‘overriding public interest’, a phrase defined in Section 28 of the Act to include ‘the requirement of the land for mining purposes or oil pipelines or for any purposes connected therewith’.

The Land Use Act is in both theory and (to a lesser extent) practice a licence for the rentier state to expropriate land from local communities and individuals on behalf of oil companies and other major capitalist investors, at little or no cost. However, in order to mitigate the incidents of grassroots violent protest, most TNOCs in practice would usually negotiate land acquisition with local ‘landowners’ and pay some transaction fee without necessarily involving or going through the state. The real empirical problem is that because the Act legalizes arbitrary expropriation through the state, oil companies now acquire land from an enhanced position of strength and would not hesitate to seek the authoritative intervention of the state should the local ‘landowners’ prove difficult or recalcitrant. Consequently, a large number of land transfer deals by the oil industry, especially deals involving communal land, are often concluded with some self-seeking or dubious representatives of the locals, with the result that any monies paid out for land acquisition is never made available to the ‘landowners’ but embezzled. This aggravates the incidence of violent protest.

The Land Use Act makes a theoretical distinction between payment for land (a property of the state) and compensation for investments (e.g. destroyed buildings, economic trees, crops, etc.) made by previous owners on land. In practice, this distinction is mostly applicable to land acquisition that involve state direct expropriation, a phenomenon that many TNOCs tend to avoid because of its catastrophic repercussions, from both a business and public relations perspective. However, investors in industrial manufacturing and agricultural sectors, especially indigenous tycoons, have tended to be more audacious in exploiting the Land Use Act to accumulate land previously held by peasant cultivators, and this has sparked off a catalogue of violent peasant revolts in different parts of the country. With regard to the state-aided land accumulation, compensation and rents for the land are paid to the State governor under the Land Use Act regime, while compensation for any destroyed economic investments on the land—usually a one-off payment determined by the State government’s valuers—are paid to the indigenous ‘landowners’. Where the land concerned is community land, the compensation, generally said to be inadequate, is paid
to the community chief or to an endowment fund created by the governor. Either way, the money is supposed to be used for the benefit of the community. Finally, in matters of compensation relating to the provisions of the Act, Section 27 of the Act stipulates that, 'no court shall have jurisdiction to inquire into any question concerning or pertaining to the amount or adequacy of any compensation paid or to be paid under this Act.'

Based on its substantive content and dynamics, it is apparent that the Land Use Act was crafted and promulgated to facilitate the state's rent-seeking and prebendal accumulation opportunities in the oil, industrial manufacturing and agricultural sectors by legalizing land expropriation under the cheapest possible terms. It is little wonder, therefore, that with relative ease many retired Nigerian army generals have established large-scale agro-pastoral farms and land-intensive industries—businesses that have de-peasantized and dislocated thousands of smallholding local cultivators. In the oil sector, acquisition of land under the dispensation of the Act has tended to exacerbate the incidents of community fragmentation in connection with land transaction deals and the limited sharing of any accruing benefits or compensations. In addition, it has proliferated communal disputes and 'petro-violence' over land endowed or believed to be endowed with oil because of the pecuniary advantages involved in facilitating or masterminding expropriation.

The observation that the state designs oil-related laws and policies to privilege itself primarily is further attested by its statutory claiming of rent for oil mining land based on the dual legislation that centralizes both oil and land as state property. This leaves the local oil-bearing communities whose lands are expropriated for oil activities in a more vulnerable position because they can only lawfully press for compensation based on any economic investments they might have on such land. The compensation paid by oil companies in this regard are said to be grossly underestimated and, more often than not, the money is paid into the wrong hands. Undoubtedly, the state exploits the institutional advantages of its monopoly of the legitimate instruments of rule making and rule enforcement (coercive authority) to privilege itself primarily, and to safeguard the economic interests of the ruling and dominant local elite. Where the state’s oil interests run into conflict with the interests of the oil-bearing communities, such as in the land question, the ultimate consequences become a seemingly intractable cycle of local resentment, state repression and anti-oil violence.

The interests of the oil companies in post-colonial rule making are largely subordinated, but congruent with, those of the state. Furthermore, in the prosecution of oil conflict, the
TNOCs inadvertently tend to have remarkable leverage over oil-bearing communities via the institutional mechanisms of rule enforcement and rule adjudication. As is well-known, law enforcement is characteristically poor and weak in Nigeria, likewise in a vast number of post-colonial states. At the same time, rule adjudication is essentially weak and corrupt, and it is significant that for many years Nigeria has been ranked one of the most corrupt countries in the world in the global corruption perception index published by the Berlin-based Transparency International Company. The net import of these institutional lapses, arguably more or less symptomatic of post-coloniality, is that the rich (including corporate establishments), who generally have more resources to prosecute litigation, oftentimes literally buy their way through the law enforcement and adjudication processes. This is by no means restricted to oil issues and the oil industry.

In connection with the marked advantage enjoyed by TNOCs in rule adjudication, Frynas has carefully documented and analysed scores of legal case that have arisen between local Niger Delta communities and TNOCs over the past three to four decades of intensive oil operations in Nigeria, and the role of the judiciary as adjudicator. The court cases investigated by Frynas cut across diverse aspects of ecological infringement of village communities (i.e. land seizure, oil pollution, greenhouse gas emissions, biodiversity destruction, impact of seismic surveys, denial or size of compensation, sacrilege), and appertain to the activities of nearly all the TNOCs. More than half of the overall number of legal proceedings against the oil industry has been instituted against Shell, not only because the company is the largest oil producer and polluter in Nigeria, but also because, unlike other major oil producers, Shell’s oil operations are predominantly onshore and as such involve greater interaction with human communities. As at the end of 1998, for instance, Shell was involved in over 500 pending court cases in Nigeria, 352 of which dealt with oil spills. Essentially, for reasons related to the substantive nature of oil, land and environmental laws in Nigeria, as well as to the procedural structure of the legal system, a large number of oil cases do not ultimately turn out in favour of the local communities or simply result in the legal justice they fervently demand. This practically explains why the local people increasingly have recourse to extra-legal methods, such as the use of violence.

In the court cases analysed by Frynas the courts encountered enormous difficulties in attributing causality in diverse allegations of oil-related infringements of the rights of local communities, such as cases of nuisance attributable to seismic surveys and gas flaring, and this is essentially one of the inherent weaknesses in most circumstantial evidence. Similarly, negligence is often difficult to establish in a large number of cases involving oil
spills, and there is a legal loophole in Nigerian laws that under certain circumstances permits ‘inevitable spillage’. As already observed, the Oil in Navigable Waters Act of 1968 specifically permits the discharge of hazardous substances or petroleum under certain circumstances. Where the prosecution is unable to establish that negligence was involved in a spillage, the plaintiff is not usually awarded any compensation for damage. Lastly, litigation in Nigeria is often marked by prolonged adjournments and delays sometimes running into years. These practical issues and difficulties, as Frynas argued, tend to diminish the faith of the local communities in the Nigerian legal system, and indeed to a significant extent, undermine the chances of their obtaining legal justice.

**Oil-mining space and onshore/offshore oil dichotomy**

The Onshore/Offshore Oil Dichotomy, as it is called in Nigeria, is the latest dimension of conflict over ownership and control of oil mining space in the country. Like in previous conflicts, the rentier state has responded to the situation in a shrewd and discomfiting manner that essentially dramatizes its rent-seeking mentality. The Dichotomy is about the sharing of rent generated from onshore and offshore oil resources between the federal and sub-national governments of the oil-rich Niger Delta. Sharing of oil (national) revenue between the federal and sub-national governments of the federation has been a highly polemical issue, which almost every political regime has tried to resolve with a different revenue distribution formula since the emergence of the oil-dependent rentier economy in the early 1970s. All previously tried formulas have given the federal government a disproportionately higher revenue share—a phenomenon that the oil producing States, pan-ethnic associations, community based organizations and militant youth groups of the Niger Delta region have increasingly contested in their collective struggle for what they call ‘resource control’. Although they differ considerably in their agenda, strategies and *modus operandi*, the coalescing objective of the various resource control groups in the Niger Delta is that a greater percentage of the oil revenue should accrue to and be retained by the oil-producing region as opposed to the federal government. The present revenue distribution formula between the governments of the federation was introduced by the regime of General Sanni Abacha in 1998 and subsequently enshrined in the 1999 constitution.

Section 162(2) of the 1999 constitution provides for allocation of 13 per cent derivation revenue to the States from where the resources are generated (in reality, to oil mineral producing States). In addition to the 13% derivation revenue, the 1998/1999 formula
allocates the national revenue as follows: federal government (48.50%), State governments (24%) and local governments (20%). The Federal government only implemented the payment of 13% derivation revenue with respect to resources generated from onshore oil mining space and has never extended the payment to offshore resources regarded by the Federal government as resources under the exclusive economic zone or continental shelf of the sovereign federal state. Nearly half of Nigeria’s crude oil resources are produced offshore; hence, the Niger Delta littoral States felt they were not recompensed for a significant proportion of crude oil resources mined from their coastal backyard, which mining leaves them with devastating ecological consequences. Disquieting agitations and wrangling ensued and the matter was the subject of a judicial decision by the Supreme Court in a case instituted by the Federal government against the eight littoral States of Akwa Ibom, Bayelsa, Cross-River, Delta, Lagos, Ogun, Ondo and Rivers States, to determine the seaward boundary of each of these States. ‘The Federal Government contends that the southern (or seaward) boundary of each of these States is the low-water mark of the land surface of such State or the seaward limit of inland waters within the State, as the case so requires. The Federal government, therefore, maintains that natural resources located within the Continental Shelf of Nigeria are not derivable from any State of the Federation’.43 The eight littoral States, however, disagree with the Federal Government’s contentions. Each of the States ‘claims that its territory extends beyond the low-water mark onto the territorial water and even onto the continental shelf and the exclusive economic zone and thus maintains that natural resources derived from both onshore and offshore are derivable from their respective territory and in respect thereof each is entitled to the ‘not less than 13%’ allocation as provided in the proviso to subsection (2) of section 162 of the 1999 Constitution’.44

In its April 2002 landmark judgement, the Supreme Court rejected the contentions of the eight littoral defendant States that their boundaries extend to the exclusive economic zone or the continental shelf of Nigeria.45 In delivering its judgement, the court ruled that ‘the seaward boundary of a littoral state within the Federal Republic of Nigeria for the purpose of calculating the amount of revenue accruing to the Federation Account directly from any natural resources derived from that State pursuant to section 162(2) of the constitution of the Federal Republic of Nigeria 1999 is the low-water mark of the land surface thereof or (if the case so requires as in the Cross River State with an archipelago of islands) the seaward limits of inland waters within the State’.46 Hence, in terms of the contested offshore oil resources, each littoral State would only be paid 13% derivation
revenue for oil resources derived from ‘the low-water mark of the land surface of the State’ or, as the case may be, ‘the seaward limits of inland waters within the State’.

Far from resolving the dispute, the Supreme Court judgement tended to aggravate it as the lawmakers, lawyers and politicians argued and contested the meanings of some of the technical jargons used in the apex Court’s verdict. In response to the Court verdict, the Nigerian National Assembly passed the Onshore/Offshore Oil Dichotomy Abolition Act, which President Olusegun Obasanjo signed into law in February 2004. Purporting to be conciliatory, the new law ‘abolishes’ the onshore/offshore oil rent dichotomy by extending the payment of the 13% oil derivation revenue to part of offshore oil resources. However, it is significant that the law could not rectify or redress the evident lack of clarity over the outer limit of the offshore zone in the Supreme Court judgement, as well as how the offshore oil resources derived from the ‘the low water mark’ area could be empirically determined. Consequently, to maximize its rentier interest, the federal government in crafting the onshore/offshore oil rent dichotomy abolition bill hearkened to the nebulous scientific concept of ‘the low water mark’ used in the Supreme Court judgement as basis for calculating the offshore area over which the littoral States are supposedly entitled to oil derivation revenue under the new law. Further, the new law has interpreted ‘the low water mark’ as the ‘200 metres water depth isobaths’ contiguous to the littoral States land surface, an interpretation that makes any possibility of actually operating the test problematic because there is hardly anywhere in the world where the tide rises by 200 metres. The federal government has shrewdly chosen the rather controversial ‘200 metres water depth isobaths’ as opposed to and against the widely recognized international maritime law concepts and practices of ‘contiguous zone’ (i.e. 24 nautical miles from the coast) and ‘continental shelf and exclusive economic zone’ (200 nautical miles from the coast) as basis for paying the 13% derivation revenue to littoral States under the onshore/offshore oil rent dichotomy abolition law.

Prior to the Supreme Court judgement, President Obasanjo had originally proposed to calculate the offshore oil revenue based on the ‘24 nautical miles contiguous zone’, a proposal the Niger Delta littoral States persistently rejected insisting on the use of the ‘200 nautical miles continental shelf’. Many maritime law experts are of the view that using the ‘200 metres water depth isobaths,’ the littoral States could end up receiving an offshore derivation revenue much less than they would probably have received if the ‘24 nautical miles contiguous zone’ originally proposed by the President were, for instance, to be used. This is because of the considerable variation of the depth of the continental shelf
from one place to another, the undulated nature of Nigeria’s seabed and shoreline, the lack of sufficient technical expertise, facilities and discipline to implement the new formula, and most significantly, the extensive political manoeuvres and chicanery likely to inundate the calculation of the ‘200 metres water depth isobaths’. Consequently, many analysts have argued (albeit, without significant or convincing empirical data) that only a few offshore oil fields currently produce at less than 200 metres depth isobaths. Most recent offshore commercial oil discoveries are said to be well off the range. The structuring of new onshore/offshore oil dichotomy abolition law is a typical reflection of how politics has been historically used to manipulate and shape legislation, especially legislation related to oil in Nigeria. In the long-term, the law is likely to generate as much controversy and conflict as the big Dichotomy it was promulgated to redress.

**Concluding remarks**

The ramifications, resonance and dynamics of the Niger Delta oil conflict have been extensively researched and documented in the extant literature and thus should not be reiterated or reviewed in this article. However, it is evident from the foregoing analysis that the evolution and intrinsic biases of oil-related legislation and policies in Nigeria largely provide an historical framework for oil conflict formation, prosecution and persistence in contemporary Nigeria. From the precursory colonial legislation like the Oil Minerals Ordinance of 1945 that vested the ownership of oil minerals in the British Crown, to the post-colonial Petroleum Act of 1969 and Land Use Act of 1978 that more or less re-enacted and expanded the relevant colonial statute, the Nigerian oil sector has tended to represent parallel interests *vis-à-vis* those of the indigenous host communities. In colonial time, the commercial interests of the colonial establishment, which in the formative oil sector reflected a convergence of the colonial government and the giant British oil multinational Shell-BP, reigned supreme. In the more decisive post-colonial dispensation, the rentier interests of the federal state—dominated by an unstable coalition of ethnic majority elites—are pre-eminent in the construction of oil-related legislation. Given the fact that Nigerian oil is largely produced by TNOCs with whom the state operates a joint venture, the corporate interests of TNOCs are coincidentally served, protected and promoted by the state’s rent-seeking devices. Ironically, the local oil-bearing communities have been systematically disfactored. Their views and interests are hardly reflected or considered in the construction of oil-related legislation and, more often than not, the
latter have direct consequences on their lives and environment. This practically predisposes the local people to seemingly intractable, disruptive, anti-oil protests, which the state evidently complicates by persistently employing military violence against grassroots protesters and militias. This culture of violent conflicts can hardly be solved without a transparent commitment to a more inclusive renegotiation and restructuring of the dominant rent-seeking interests in the oil sector with an aim to introducing proactive legal and political reforms that will more significantly accommodate the legitimate aspirations of the local people.

Endnotes

2. Ibid.
8. FMI, ‘Oil in Navigable Waters Act 1968, Section 4’; Frynas, Oil in Nigeria.
12. Frynas, Oil in Nigeria, 75.
14. Ibid., 2.
15. Ibid.
24. Okeke and Sobotie, NNPC School Enlightenment Lectures.
27. Frynas, Oil in Nigeria, 36–39.
28. NBL, ‘Nigeria Crude Oil and Gas Industry’.
30. FGN, ‘The Land Use Decree No. 6’, 2.
31. Ibid.
33. Ibid.
35. FGN, ‘The Land Use Decree No. 6’.
38. Frynas, Oil in Nigeria.
44. Ibid.
45. Ibid., 10.
46. Ibid., 26.
47. Cf. Uche and Uche, Oil and the Politics of Revenue Allocation in Nigeria, 31–32; Ibe and Okocha, ‘Confab’.


References


