Abstract—Literature on the resource curse has attempted to explain all manner of failure in the political and economic institutions of resource rich countries. Much of the literature, however, ignores the failings of legal institutions. While some developments occur out of government interest in natural resource sectors such as investor protection frameworks, others, like redress mechanisms for pollution, suffer from arrested development. This paper uses the Nigerian case to illustrate the serious effect this type of institutional crisis can have on the ability to mitigate the negative externalities of resource development. It considers how failure in one institutional context directly affects other jurisdictions by examining the increased use of extra-territorial jurisdiction to try multinational extractive companies for pollution committed abroad.

Introduction

Governments who want to benefit from new discoveries of oil, gas, and minerals often need to put in place new institutions to manage the resource rents as well as secure and sustain investment. Some institutions, however, such as those meant to mitigate the negative environmental and social externalities of resource exploitation, remain in a suspended state of arrested development.

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Literature on the resource curse has attempted to explain all manner of failure in the political and economic institutions of resource rich countries. Much of the literature, however, ignores the failings of legal institutions. A functioning and trusted legal system is an important foundation for crystalizing the best industry practices. As one of the first ports of call for citizens adversely affected by industry activity, legal institutions also provide pivotal conflict mitigation and redress mechanisms. I argue that there is a crisis of legal institutions, particularly the state’s ability to secure gateways to environmental justice in resource rich states.

An Institutional Paradox

Countries of the global South are making the choice to exploit their natural resources and capitalize on windfall rents. From East Africa alone, the global energy market may soon expect contributions from Tanzania, Kenya, Uganda, and Ethiopia. The potential contribution to socio-economic development for these countries could be exceptional.

But as past decades of research have shown, despite the economic opportunities presented by resource wealth, exploitation isn’t always a good decision. Resource dependence is frequently found alongside less welcome phenomena, such as corruption and violent conflict. Dependence also affects how political leaders make decisions given the potential to entrench oppressive regimes while de-stabilizing more democratic ones.

The executive and legislative branches of government are often the focus of studies on how decision-making can be skewed by resource dependence within the rentier state. What is less obvious, yet fundamental, is how resource dependence affects the judiciary and legal systems more broadly. Legal institutions include constitutional structure, legislation, legal education, adjudication, and legal assistance. History plays a large role in how these institutions have formed, and resource dependence affects how these institutions will develop to address the natural resource sector in the future.

The rentier mentality – the phenomenon by which large sums of unearned income from one sector change how governments make decisions – can have a severe effect on a society’s social fabric. At worst, when de-linked from citizen expectations and demands, perverse decision-making can dismantle trust between state and people and foment violent conflict. Economic institution building is important for reducing uncertainty for investors and securing the necessary inflows of foreign direct investment to start...
unlocking resource rents. In the best-case scenario, these institutions will develop and address the worrying macroeconomic stresses of resource dependence in order to glean the largest financial benefit from the subsoil asset.

There is a complementary need, however, to develop sound institutions in order to combat the negative externalities of what resource exploitation does to the environment and people. These institutions do not have the same direct or immediate impact on a rentier state’s financial inflows. At best, such institutions are forgotten, underfunded, or ignored. At worst, they are contrary to their ultimate purpose of creating working mechanisms to mitigate the dangers of resource exploitation for the physical environment and its inhabitants.

Institutions of Environmental Justice

Resource dependent economies need comprehensive and enforced environmental regulation and redress mechanisms moreso than in normal circumstances because of how the industry interacts with the environment. While important, environmental regulation and the surrounding legal framework can be seen as costly to a government’s share in resource sector profits. The very nature of their dependence perverts the ability for positive developments to take place.

Oil, gas, and minerals are found in some of the most beautiful, remote, and ecologically fragile places in the world. It is an inherent challenge for both old producers and new to exploit deposits in these areas without compromising the environmental or potential human development costs of oil pollution.

Oil, gas, and minerals are found in some of the most beautiful, remote, and ecologically fragile places in the world. It is an inherent challenge for both old producers and new to exploit deposits in these areas without compromising the environmental or potential human development costs of oil pollution. Nigeria, in West Africa, for example, has long struggled with this challenge as it contains Africa’s largest wetland resting upon extensive oil reserves. New producers in East Africa will face similar challenges. A haven of bio-diversity, Uganda’s Albertine Graben sits above that country’s oil reserves. In Kenya, the semi-arid grazing lands found around Lake Turkana conceal potentially transformative hydrocarbon reserves and precious fresh water stores, and are vital for local pastoralist livelihoods. For these places, getting the balance right between resource exploitation and environmental regulation and enforcement will be more than just an agenda set by conservationists. Legal institutions concerned with environmental justice are a practical and necessary priority for governments with an interest in securing promising prospects for long-term investment.

In an ideal system — uncompromised by the political and economic reality of staying in power and securing more money to do so — governments would embed fair principles
in distribution of benefit and burden from resource exploitation across new institutions. It would be protected in a constitution, executed through evidence-based legislation, enforced appropriately by sufficiently empowered and funded agencies, and adjudicated by an independent and uncompromised judiciary that has the capacity and requisite technical knowledge to decide justly. Just as there is, however, no such rational economic man that is often talked about in economics, there is also no such perfect and just legal system that exists in the world today.

By looking at the nature of development of legal institutions to address environmental externalities of the oil sector, government leaders and practitioners can begin considering how to engage with legal institutional development, particularly in light of large-scale reform processes.

The Nigerian Case

Nigeria, the world’s twelfth largest producer of oil, is one of the most well-studied countries in terms of how oil has affected its economy, development trajectory, and politics. There have been limited studies, however, examining how legal institutions fit into resource curse discourse. By Sub-Saharan African standards, Nigeria is an older oil producer that provides insight into how institutions developed to manage oil exploitation. Many claim that Nigeria is an exception because of the severity of its problems with oil-related violence and environmental pollution, but these claims are overstated. There are many phenomena that occur or have occurred which have already taken shape in newer producers.

Nigeria is a federal republic comprised of thirty-six states with a total population of 170 million people represented by 250 ethnic groups. While states have their own court systems and are able to collect some taxes, they are largely dependent on money transferred to them by the federal government due to the overwhelming contribution of oil revenue to total government revenue. As much as 80 percent of the country’s total revenue comes from the oil sector.

The past two decades have shed light on the severity of the environmental pollution caused by oil sector activities in the Niger Delta. The 2011 UNEP study commissioned by the Nigerian federal government on the state of environment in Ogoniland in Rivers State observed that “[t]he oil industry has been a key sector of the Nigerian economy for over 50 years. But many Nigerians have paid a high price.” The two-year evaluation found that it would take 25 to 30 years to clean up the legacy of pollution from the last 40 years of oil spills, caused by oil theft, pipeline leakage, and equipment failure. While the government commissioned the report, they have thus far not acted on any of the authors’ recommendations. The following sections will consider three ways in which economic dependence on the oil sector has affected how legal institutions address oil pollution.

The Constitution’s Crisis of Legitimacy

The ushering in of the Fourth Republic in 1999 was a pivotal moment in Nigeria’s democratic history. Terry Lynn Karl’s research in Venezuela demonstrated how
important regime transition is for petroleum resource management. “Regime change is a critical juncture—a moment for dismantling or reinforcing cages. New regimes do not inherit a clean slate; they are grafted onto preexisting state institutions, either by altering their characteristics or by reinforcing existing political and economic practices and thus entrenching them more deeply.” Based on an analysis of Nigeria’s legal institutions, the transition from military regime to democracy has had mixed results in altering the trajectory of state decision-making in the oil sector.

The first sign that transition had not prompted an ideological shift in the new federal government’s stance toward oil management was found in the country’s constitution. The current constitution, like similar versions before it, was drafted by a military regime as a decree and later translated into a constitution for the newly formed federal republic. Institutional development in the democratic era has been built on the foundation of preferences of what was a closed, undemocratic policy-making process of a preceding regime. A few illustrative examples provide some of the challenges for institutional development that originate in the constitution.

Firstly, the brand of federalism espoused in the constitution restricts oil-producing states from having any control over the largest sector actively operating within their borders. This means that states cannot collect taxes on those assets or legislate on any aspect of sector operations, including environmental legislation. There are few incentives for state-level government to take up the cause of environmental monitoring without affording them any power or resources.

Secondly, the way in which the federal government closely guards the oil sector manifests itself in constitutional provisions for adjudication relating to the oil, gas, and mineral sectors. The constitution requires that all oil- and gas-related cases go to a federal court in the first instance. Federal courts, as compared to state courts, are less accessible, more expensive to file in, and more intimidating. They make it more difficult for those adversely affected by oil sector activity to seek redress.

Furthermore, the constitution does not prioritize its provisions into any form of hierarchy. There is a clear contradiction between the states’ right to adjudicate cases related to the Constitution’s Chapter IV “Fundamental Rights” and the states’ inability to hear cases relating to the oil sector. The lack of hierarchy leaves oil-rich states in limbo and at the mercy of the Federal appeals process.

The Legal and Regulatory Vacuum

There is an intricate web of legislation that directly and indirectly affects the way in which legal institutions have developed to address the social and environmental externalities
of resource exploitation. Directly, laws from the pre-democratic era continue to govern institutional arrangements for environmental protection, monitoring, oil pipelines, and gas flaring. Indirectly, laws created both before and immediately following the founding of the Fourth Republic encourage foreign direct investment, which restricts other arms of government and citizens from seeking redress for wrongs committed in the course of resource exploitation. In all this legislation there are explicit exception clauses for oil, gas, and mineral sectors that diminish or entirely relieve the sector from any meaningful monitoring or accountability.

The *NESREA Act, Act 57 of 2007* is regarded by some as a watershed moment for environmental legislation in Nigeria. The law created the Nigerian Environmental Standards, Regulation, and Enforcement Agency which oversees all aspects of environmental protection in the country. For the oil and gas sector, it was a major setback in securing environmental justice. Despite the far-reaching abilities of the new agency to create, monitor, and enforce an environmental legal and regulatory framework, it was not empowered to have any control over the oil sector. For almost every point in the law that creates an institution for environmental monitoring or a process for enforcement, there is also an exception clause that excuses the oil sector from such regulation, without providing an alternate party to pick up those responsibilities.

The *Oil in Navigable Waters Act, 1968* was created to implement the *International Convention of the Prevention of Pollution of the Sea by Oil*. While the act legislates against the dumping of hydrocarbon products such as crude oil, fuel, lubricating oil, and diesel into waterways, it also provides numerous defenses that make it hard to understand how any suit brought against a polluter under this law would be successful. Admissible legal defenses include accidental dumping caused by vessel damage and even *deliberate* dumping if done in the process of protecting the vessel or its cargo. Should a party breach the act, criminal proceedings against the party can only be taken forward by the Attorney General. This means that citizens themselves do not have the standing to file suit against polluters directly. Should the Attorney General decide to take the case forward and a fee is levied upon the polluter, it is only vaguely written that the fee should be remitted to parties adversely affected by the oil spill with no clear responsibility for any party to clean up the spill.

Finally, all versions of the *Associated Gas Reinjection Act* from 1978 to 2008 have counterproductively put a price tag on flaring. Flaring is a serious problem in Nigeria and has been for the past 50 years. Where there is oil, there is associated gas. The gas must be disposed of in some way and can be used for energy, re-injected to build pressure on the oil well, or burned off. While methods have since been developed to usefully appropriate associated gas for general energy needs, the easiest method for disposing of gas on older installations is flaring. The detrimental effects of flaring are well documented and include air, noise, and land pollution which cause acid rain, respiratory diseases, and uninhabitable areas due to severe noise. Instead of giving companies a reason to stop flaring, the *Reinjection Act* simply monetizes the process at a relatively cheap rate. The Minister of Petroleum Resources is granted powers to give gas-flaring licenses, legitimizing the otherwise prohibited activity. More recent amendments to the law create more punitive measures in order to curb flaring, but these changes have been of little influence.
Legislation provides an opportunity to clarify and shape how a host of legal institutions operate within the constitutional framework. The above legislation tends to favor the polluting industry without the necessary balancing backstops that would provide the means for adequate and reasonable measures of access to justice.

**Vested Interests Immobilize the Law-Making Process**

It is well publicized that Nigeria’s legal framework for addressing oil sector governance is outdated. Since the dawn of democracy, it has been on the legislators’ agenda to reform the piecemeal approach to governance with a more comprehensive structure. Despite lively debate between government, international oil companies, civil society, and increased media coverage of the legislative process to pass the Petroleum Industry Bill (PIB) in recent years, the government has failed to push legislation through to the National Assembly and replace a host of dictator-era laws. Failure to pass a comprehensive piece of legislation comes at a time when foreign investment in the sector is waning and companies are concerned about the prospect of future operations without a PIB.\

This failure to pass a PIB highlights how vested economic and political interests in the sector perversely affect the institutional development process. Some of the most contentious aspects of the proposed bill relate not to its core administrative and operational functions for managing the sector, but to significant pork barrel provisions. For example, versions of the bill have included questionable funds for oil exploration in the North and additional money for host oil communities in the Niger Delta. In a sector that has developed without citizen trust in the government’s ability to distribute resources fairly, the willingness to move forward with legislative change comes at a high cost.

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**Institutional crises do not occur in a jurisdictional vacuum.**

**Institutional Crisis and Globalization: A Shift in Responsibility**

Institutional crises do not occur in a jurisdictional vacuum. This is particularly true within a global market where natural resources are extracted, refined, and sold all over the world. What happens to institutions of resource governance in one country can affect and be affected by other institutions internationally. Extra-territorial jurisdiction (ETJ) cases for environmental pollution, for example, hold multi-national enterprises accountable for their activities outside of their home jurisdiction. ETJ is a process by which an entity or person is sued outside of the country or jurisdiction where the wrong was committed. There are many ways in which this type of legal institution has advanced in the past decades. In recent years, John Ruggie has led the charge as United Nations special representative for business and human rights. Courts in some of the world’s wealthiest countries have turned their attention to the activities of multi-nationals abroad, using international norms and activist judiciaries to provide a mechanism for redress to deal with the consequences of these companies’ operations globally.
Human rights lawyers in the United States have used the Alien Tort Statute, a piece of legislation from the late eighteenth century, as a tool to try cases related to multi-nationals’ activities abroad in U.S. courts. Recently, other important jurisdictions have started to expand the purview of their own legal institutions to address the complexities of multi-national behavior. With the help of international environmental NGOs like Friends of the Earth, a group of Nigerian farmers sued the Dutch parent company Shell and its subsidiaries in a Dutch court seeking damages for environmental pollution committed in Nigeria. A London-based personal injury and human rights law firm, Leigh Day, filed suit in the UK against Shell for compensation and cleanup following two oil spills in 2008 in the Bodo community of Rivers State in Nigeria. The suit was filed on behalf of 11,000 members of the Bodo community after Shell admitted liability for the spills and negotiated cleanup and compensation.

Such institutional developments push a post-Westphalian construction of sovereignty, which shifts the way in which responsibilities are assigned for monitoring and limiting the behavior of actors that operate in a globalized world. Today the legal protections of the parent-subsidiary multi-national structure are questioned more than ever before due to institutional crises within compromised domestic contexts.

**Conclusion**

This paper has laid out a way of thinking about legal institutional development in the context of resource dependence. Legal institutions developed to mitigate the negative social and environmental externalities of resource extraction are subject to arrested development due to the state’s dependence on resource rents.

The implications for such institutional crises are serious. National stability, the well-being of citizens in resource rich areas, and the effect on the investment climate for FDI can all be negatively impacted. When legal institutions are in crisis, the aggrieved and disenfranchised are more likely to seek out less favorable avenues for conflict mitigation such as protests, riots, and violent conflict. The Nigerian case study has shown that the nature of this arrested institutional development in the resource dependent context has multivariate yet interrelated causes and serious consequences.

Institutional crises do not happen in a jurisdictional vacuum. Institutional development may be stunted or perversely shaped in the domestic context, but it also forces developments of other kinds of institutions in other jurisdictions as evidenced in the proliferation of extra-territorial jurisdiction cases in the United States, the United Kingdom, and the Netherlands.

There are a variety of implications for resource rich countries and their international partners. A theory of legal institutional development in resource dependent contexts
can inform development policy and international development assistance. Bilateral donors and international financial institutions create programs in partnership with resource rich governments to improve a range of institutions thought to contribute to equitable development outcomes. But rarely do these programs converse on their activities or consider how they might affect each other. Without such consideration in a resource dependent environment, both types of interventions run the risk of being less effective in achieving their goals.34

– Denise Lim served as Lead Editor for this article.

NOTES


5 Gray, Matthew. 2011, “A Theory of ‘Late Rentierism’ in the Arab States of the Gulf,” Center for International and Regional Studies, Georgetown University, School of Foreign Service in Qatar, 1.


12 UNEP, 2011, 7.

13 Karl, 1997, 92.


19 Fundamental Rights include the right to legal counsel, right to life and personal dignity, and the right to assembly


Ibid.

The Oil Terminal Dues Act similarly focuses on the aspect of oil production where oil is transported for sale on the global market. The legislation has provisions intended to curb pollution during this oil transfer, however it contains similar deficiencies to that of the Oil in Navigable Waters Act.

See Jonah Gbemre v. SPDC and Ors (unreported FHC/3/C/53/05, November 14, 2005).


Akpan and Milieudefensie v. Royal Dutch Shell and SPDC, District Court of The Hague, January 30, 2013, LJN BY9854 (Netherlands).
