

The Principle of Derivation and the Search for Distributive Justice in the Niger Delta Region of Nigeria: The Journey So Far

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Abstract

The Niger Delta has since the 1960's, been associated with restiveness and agitations. The agitations in the region assumed violent dimensions from the 1990's when different militant groups in the region launched sustained attacks on oil and gas installations and facilities within the region thereby crippling the Nigerian economy which is woven round oil and gas. At the centre of the agitations is the clamour for justice by the oppressed and marginalized ethnic minorities of the Niger Delta who argue that although the Nigerian State is sustained by the revenue derived from oil and gas exploited in the region, they remain amongst the rank of the poorest ethnic groups in the federation of Nigeria. The Niger Delta has not benefitted from the stupendous oil wealth generated from the region. The principle of derivation has evolved as part of the efforts by the federal government of Nigeria to address the inequities and injustice inherent in the revenue allocation system whereby oil revenue collected by the federal government is re-distributed to the constituent units. Although the derivation principle was not designed originally for the Niger Delta, its association with the region derives from the total dependence of the Nigerian economy on oil and gas since the 1970's. It is argued that the domination of the Nigerian federation by the three majority ethnic groups of Hausa/Fulani, Yoruba and Igbo respectively and the superior-subordinate relationship between the majority and minority ethnic groups in Nigeria have resulted in the complete distortion of the derivation principle to the detriment of the oil-producing ethnic minorities of the Niger delta. The conspiracy amongst the three majority ethnic groups has ensured that the derivation payable to the oil-producing states of the Niger Delta region does not exceed thirteen percent (13%) in spite of the fact that the Constitution of the Federal Republic of Nigeria, 1999 (as amended) permits an upward review of the 13% payable. When the current rate of 13% is compared with the 100% and much later 50% paid to solid mineral-producing regions of the federation before the commercial discovery of oil in the Niger delta, the injustice being inflicted on the Niger Delta ethnic minorities becomes very apparent. This paper, therefore, argues that the derivation principle as currently practised has failed to serve as a tool of distributive justice. Thus, the paper proposes an upward review of the derivative principle from 13% to 30% with a further progression to 50% by 2020.

INTRODUCTION

Issues of justice, fairness and equity have remained the defining factors not only in our private lives but also in the social, political and economic spheres whether at national, regional or international levels. These issues have defined, redefined, shaped, strengthened or weakened entities according to how they were perceived by relevant actors. Therefore, the centrality of justice to the development of a socially cohesive, politically stable and economically vibrant polity cannot be over-emphasized.

The principle of derivation has remained a contentious feature in Nigerian distributive federalism since oil derived from the Niger Delta region became the mainstay of Nigeria's economy. The deadlock experienced at the 2014 National Conference following the inability of the delegates to reach a unanimous agreement on the principle of derivation and the curious recommendation by the conference that the federal government should set up a technical committee to address this issue along with other unresolved issues demonstrate in vivid terms the contentious character of the principle of derivation as a fiscal tool.

The purpose of this article is to analyse the principle of derivation as a fiscal tool in Nigerian federalism and to answer the question whether the principle has served as an effective tool of distributive justice in Nigeria's troubled Niger Delta region. The article argues that the ethnic politics in Nigeria coupled with the irrepressible capacities of the three majority ethnic groups in the federation, namely Hausa/Fulani, Yoruba and Igbo to manipulate the application of the derivation principle to meet their own economic and political interests have robbed it of its effectiveness as a tool for addressing the unspeakable injustice being visited on the ethnic minorities of the Niger Delta region. Thus, when the application of the derivation principle served the economic interests of the majority ethnic groups in the federation of Nigeria, it was emphasized as the primary criteria for redistributing federally collected revenue to the federating units. However, with the emergence of oil and gas as Nigeria's main revenue source, the application of the derivation principle was deliberately de-emphasized by the Nigerian State as a major criteria for revenue allocation by the centre to the subnational units because the immediate beneficiaries of its application are the oil-producing States in the Niger Delta region.

This article is divided into five sections. The introductory section provides the background to the study. Section two examines the geographical and political descriptions of Nigeria's Niger Delta Region and the

ethnography of its peoples. Section three discusses an over-view of the principle of distributive justice within the wider context of justice. In section four, the paper addresses the development and application of the principle of derivation in Nigerian federation and its effectiveness or otherwise as a tool of distributive justice in Nigeria's federalism. The concluding remarks are contained in section five.

DESCRIPTION OF NIGERIA'S NIGER DELTA

The fan-shaped 'Niger delta' which derives its name from the River Niger is located in the southernmost part of Nigeria that borders the Atlantic Ocean. It lies between latitudes (4 and 6)⁰ north of the equator and longitudes (5 and 9)⁰ east of the Greenwich Meridian.¹ Its geographical perimeter stretches from the 'Benin River in the West to the Imo River in the East and from the southernmost tip at Palm Point near Akassa to Aboh in the North where the Niger River bifurcates into its two main tributaries.'² Nigeria's Niger delta region encompasses a triangular area of about 70,000km² out of which about 20,000km² is wetland along the Atlantic coast. It is comprised of four ecological zones, namely coastal barrier islands, mangroves, freshwater swamp forests, and lowland rainforests. It is the largest wetland in Africa and the third largest in the world after the Mississippi and Pantanal.³

The first official delineation of Nigeria's Niger delta by the British colonial government was contained in the Proclamation issued by the Governor-General of Nigeria in 1959 which declared that the area of the 'Niger Delta' for the purpose of the Niger Delta Development Board shall be — '(a) in respect of the Western Region, the Western Ijaw Division of Delta Province; and (b) in respect of the Eastern Region, Yenagoa Province, Degema Province and the Ogoni Division of Port Harcourt Province.'⁴ Based on this proclamation it can be argued that the Niger delta region in its geographical sense comprises six South-South States of the federation, namely Akwa-Ibom, Bayelsa, Cross-River, Delta, Edo, and Rivers respectively which were carved out of the administrative provinces and divisions mentioned in the proclamation.

However, the above colonial delineation of the Niger Delta region has generated controversy over the years. According to Ogbogbo, the debate over the exact delineation of the Niger Delta region reflects 'the interests involved at different times and circumstances.'⁵ Arguably, the discovery of crude oil in the region in 1956 had politicized the delineation of the Niger delta as the diverse ethnic groups within and outside the region jostled for share of the benefits from the new oil industry. This politicization has created two Nigeria's Niger Deltas—the 'geographical Niger Delta' and the 'political Niger Delta.'⁶

At the centre of the controversy over the exact delineation of the Niger delta is the Niger Delta Development Commission (Establishment) Act, 2000 which establishes the Niger Delta Development Commission (NDDC) and charges it with the responsibility of developing the region.⁷ Sections 1(2), 2(1)(b) and 4 of the Act recognise nine federating States as member-states of the commission, that is to say Abia State, Akwa-Ibom State, Bayelsa State, Cross River State, Delta State, Edo State, Imo State, Ondo State, and Rivers State respectively. Having regard to the fact that these nine member-states are recognised as oil-producing states under s.2 (1) of the Act and that the commission's statutory mandate is limited to the Niger delta under s. 7 thereof, the general tenor of the Act would seem to imply that the Niger delta region now comprises the said nine oil-producing States which are situated in the South-South, South-East and South-West geo-political zones of the federation.

It is submitted that the deliberate emphasis placed by the NDDC Act on 'oil-producing states' supports the interpretation that the Act is concerned primarily with the development of these States some of which are in the Niger delta, rather than defining the Niger delta. This interpretation is supported by s.30 of the Act which defines 'member States' to include the nine States already mentioned 'and any other oil-producing State.' Thus,

¹ T. T. Tamuno, 'The Geographical Niger Delta (GND)' Proceedings of the International Conference on the Nigerian State, Oil Industry and the Niger Delta, March 11-13 2008 (Harey Publications Port Harcourt, 2008)917, 918.

² Michael Watts, 'Resource curse? Governmentality, oil and power in the Niger Delta, Nigeria' (2004) 9 *Geopolitics* 50, 58; Tamuno (n1) 918.

³ World Bank, 'Defining an Environmental Development Strategy for the Niger Delta, Vol. 1' (Industry and Energy Operations Division, West Central Africa Department, World Bank, May 25, 1995) 2; Chris B. N. Ogbogbo, 'Identity Politics and Resource Control Conflict in the Niger Delta' in Bahru Zewde (ed), *Society, State and Identity in African History* (Forum for Social Studies Addis Ababa, 2008) 257.

⁴ Proclamation of the Area of the Niger Delta, S. C. L. N. 43 of 1959 dated 26 August 1959; Nigeria (Constitution) (Amendment No. 2) Order-in- Council 1959, S. I. No. 1049 of 1959.

⁵ Ogbogbo (n3) 257

⁶ Kaniye S. A. Ebeku, 'Oil, Niger Delta and the new development initiative: Some reflections from socio-legal perspective' (2007)19 *Sri Lanka JIL* 1, 4; Tamuno (n1) 918; Augustine A. Ikein, 'Introduction to Nigeria and the Politics of Niger Delta Development' in Augustine A. Ikein et al., (eds), *Oil, democracy and the promise of true federalism in Nigeria* (University Press of America, Maryland 2008) 1, 15-6.

⁷ No. 6 of 2000, Cap.N86 L. F. N. 2004; the Act repealed the Oil Minerals Producing Areas Development Commission (Establishment etc.) Decree No. 23 of 1992.

every oil-producing State qualifies as a member-state of the commission irrespective of its geographical location. Therefore, if a State in Northern Nigeria becomes oil-producing such State will qualify as a member-state of the NDDC although it will be palpably ridiculous to refer to such State as a Niger delta State in the geographical sense of the term. In other word, the fact that a State of the federation is a member-state of the NDDC does not *ipso facto* make that State a Niger delta State. States of the Niger delta region are therefore, not coterminous with member-states of the NDDC.

Perhaps, it was in order to avoid this confusion that the repealed Oil Minerals Producing Areas Development Commission (Establishment etc.) Decree 1992 had merely described the area of the jurisdiction of the commission, the precursor of the NDDC, as the 'oil-producing areas' rather than the Niger delta.

The conclusion to be drawn from the NDDC Act is that its short title is misleading to the extent that it suggests that every member-state of the commission is a Niger delta State. It is respectfully submitted that given that the only condition for membership of the commission is that a State must be oil-producing, the description of every oil-producing member-state of the commission as a Niger delta State reflects the political delineation of the Niger delta. This political delineation which is for development and administrative purposes would appear to reflect the current description of the Niger delta as encompassing two Igbo-speaking States of Abia and Imo and the predominately Yoruba-speaking State of Ondo respectively.

Given the two meanings attached to Nigeria's Niger Delta — the geographical Niger delta and the political or administrative Niger delta — this paper has opted for the geographical delineation of the Niger delta because it is only in this sense that the region has become coterminous with Nigeria's southern ethnic minorities. Within the context of this research therefore, Nigeria's Niger Delta region covers the six federating States of Akwa-Ibom, Bayelsa, Cross River, Delta, Edo, and Rivers respectively.

The Niger Delta encompasses 60% of Nigeria's coastline and about 2.77% of her total land mass.¹ Prior to the discovery of oil, the economy of the region depended on fishing and farming. As Ikporukpo has rightly pointed out, the 'network of creeks and rivers of the delta and the coastal seas provide the basis for a peasant fishing industry.'² While the mangrove swamp area of the outer delta depended on fishing, subsistence and commercial farming flourished in the rain forests of the inner delta area which was famous for large scale rubber and palm plantations. As a matter of fact, before the discovery of oil the Niger delta was the chief source of palm oil on the West African coast which formed one of Nigeria's leading export commodities.³ It was on this peasant economy that Nigeria's oil and gas industry came to be superimposed.

In terms of ethnography, the Niger delta boasts a profusion of ethno-linguistic diversities. It is the traditional homeland to more than forty ethnic groups which include Ijaw, Ibibio, Efik, Ogoni, Urhobo, Itsekiri, Isoko, Ishan, Andoni (Obolo), Ibani, Kalabari, Okrika, Ikwerre, Edo, and Anioma. These ethnic groups fall into different linguistic groups. Kay Williamson identified five major linguistic groups in the delta: Ijoid, Yoruboid-Akokoid, Edoid, Igboid, and Delta-Cross, each group encompassing a vast number of ethno-linguistic communities.⁴

The population of the States in the Niger delta region of the federation is put at 21,044,081 people out of Nigeria's current population of 140,431,790.⁵ This represents about 14.98% of the national population. It cannot be disputed that in a federation dominated by three majority ethnic groups— Hausa/Fulani (North), Yoruba (West) and Igbo (East) which account for about two-thirds of the national population, the Niger delta peoples belong to the group of ethnic minorities.⁶

In strict demographic terms, Nigeria's 'ethnic minorities' may be classified as ethnic groups that do not belong to the three majority ethnic groups already mentioned. This implies that in the Nigerian federation comprising about 250 ethnic groups, 247 of the groups including all the Niger delta ethnic groups constitute ethnic minorities.

However, this is not the only sense in which the term 'ethnic minorities' is used. The term also has a functional meaning. Within the context of Nigeria's multi-ethnic federation, a functional classification of ethnic

¹ World Bank (n3) 9; Nick Ashton-Jones, *The human ecosystems of the Niger Delta: An ERA handbook* (Environmental Rights Action, Benin City 1998) 1.

² C. O. Ikporukpo, 'Petroleum exploitation and the socio-economic environment in Nigeria' (1983) 21 *International Journal of Environmental Studies* 193.

³ K. O. Dike, *Trade and Politics in the Niger Delta 1830-1885* (OUP, London 1956) 50.

⁴ Kay Williamson, 'Linguistic Evidence for the Prehistory of the Niger Delta' in E. J. Alagoa et al. (eds), *The Early History of the Niger Delta* (Helmut Buske Verlag Hamburg 1988) 65, 69.

⁵ Federal Republic of Nigeria, Extraordinary Gazette No. 2, Vol. 96 of February 2, 2009 containing the Legal Notification on Publication of 2006 Census Final Results.

⁶ Central Intelligence Agency, *The World Factbook* (13 August 2013) <<http://www.cia.gov/librarythe-world-/publications/factbook/geo/ni.html>> accessed 21 August 2013; Secretary of State for the Colonies, 'Report of the Commission Appointed to Enquire into The Fears of Minorities and the Means of Allaying Them' (Cmnd 505, London 1958) para 4.

minorities must take into consideration not only distinct cultural identity and comparative demographic size but also socio-political and economic standing of the groups measured in terms of their level of participation in the political and economic affairs of the federation. From this perspective ethnic minorities are historically, linguistically, culturally, and territorially distinct ethnic groups which have by reason of their comparatively small demographic size been subjected 'to subordinate political, social and economic positions in the federation and its constituent units.'¹

The Niger delta ethnic groups are clearly minorities in this functional sense. As numerically inferior groups, they are considered minor-stakeholders in the federation and subjected to domination and marginalization by the majority groups in the political, economic and social spheres. To be sure, one sphere of public life where the domination has manifested is in the application of the principle of derivation as a fiscal tool for revenue allocation by the central government to the federating units.

THE PRINCIPLE OF DISTRIBUTIVE JUSTICE

The concept of distributive justice is best examined within the wider concept of justice. The concept of justice has dominated the greater part of human history. It is an ideal that every man lays claim to. It is the permanent passion of public life. Every policy maker claims it. It is the *terminus ad quem* of private life as well. Every litigant claims it. It is the focal point of humanity.² Courts of law also claim the dispensation of justice as their primary goal or essence. Sir William Scott re-echoed the point in *Evans v. Evans*, when he observed that, "Humanity is the second virtue of courts but undoubtedly, the first is justice."³ The Holy Bible itself talks about justice and the means of achieving it in several passages. For instance, in the Book of Deuteronomy, the following imperishable passage is found:

*Thou shall appoint judges and magistrates in all thy towns which the Lord thy God shall give thee, in all thy tribes: that they may judge the people with just judgment, you shall not pervert justice you shall not show partiality and you shall not take a bribe for a bribe blinds the eye of the wise and subverts the course of righteousness. Justice and justice, you shall follow, that you may live and inherit the land which the Lord your God gives you."*⁴

In one of the earliest discovered written secular Code, King Hammurabi (about 1628 – 1686 BC.) of Babylon claimed that his purpose for giving the Code to his people was to make justice appear in the land, to destroy the evil and the wicked in order that the strong might not oppress the weak.⁵ The centrality of justice to humanity and to our national polity is reaffirmed by the provisions of section 14(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) which provides that: "The Federal Republic of Nigeria shall be a State based on the principles of democracy and social justice." Similar lofty declarations are contained in the Preambles to the United Nations Charter and the Constitution of the United States of America, 1787.

Our courts have repeatedly affirmed the right of every citizen to justice. For instance, the Court of Appeal has held that "it is the inalienable right of every citizen to get justice dispensed to him freely in all cases in which he is involved."⁶ In *Amaechi v. Independent National Electoral Commission (INEC)*, it was held by the Supreme Court of Nigeria that all courts in Nigeria "have a duty which flows from a power granted by the Constitution of Nigeria to ensure that citizens of Nigeria, high and low get the justice which their case deserves."⁷

From the foregoing, it is submitted, that the centrality of justice in society cannot be over-emphasized. Justice is indeed the mirror of civilization of any society. St. Augustine was therefore right when he declared that, "Remove justice and what are kingdoms but gangs of criminals on a large scale."⁸ However, in spite of man's unrelenting quest for justice, justice has remained in short supply in virtually every society and its attainment is even becoming increasingly idealistic.

The foregoing leads me to the question; what is justice? Etymologically, the word "justice" is of Latin

¹ Eghosa E. Osaghae, 'Managing Multiple Minority Problems in a Divided Society: The Nigerian Experience' (1998)36 *Journal of Modern African Studies* 1, 3-4; P. Agbese, 'Federalism and the Minority Question in Nigeria' in Aaron T. Gana and Samuel G. Egwu (eds), *Federalism in Africa: The imperative of democratic development, Vol. 1* (Africa World Press Inc., Eritrea 2003) 237, 239.

² See Hon. Justice Chukwudifu Oputa, "Justice for All Nigerian Womanhood and the Human Side of Justice" (Being Paper delivered at the 2nd Annual Chief (Dr) Nabo B. Graham-Douglas (SAN) Memorial Lecture, Rivers State University of Science and Technology, Nkpolu-Port Harcourt, 1990) 11.

³ (1790) Hagg Con. Rep 36.

⁴ Deut. 16: 18-20.

⁵ Cited in T. A. Aguda, "The Crisis of Justice" (Eresu Hills Publishers, 1986) 5.

⁶ *Ekerete v. U. B. A. PLC* [2005] 9 N. W. L. R. (Pt. 930) 401, 420.

⁷ [2008] 5 N. W. L. R. (Part 1080) 227, 324.

⁸ Cited in Hon. Justice C. A. Oputa, "The Law and the Twin Pillars of Justice" (Government Printers Owerri, 1981) 3.

origin. It is derived from the Latin word “Justitia.” Comprised in the concept of “Justitia” are “Justus” which means lawful, rightful, just etc. and “Jus” which means law, right etc.¹ Therefore, in its ordinary signification the term ‘justice’ encompasses inter-alia, the followings:

- (i) The quality of being righteous,
- (ii) Honesty, impartiality and fairness,
- (iii) Sound reason, validity, rightfulness,
- (iv) The use of authority and power to uphold what is right just and lawful,
- (v) The administration of law in the process of adjudications; the procedure of the courts,
- (vi) The reward of virtue and punishment of vice. Justice is rooted in sincere feeling for man. Justice accepts the dignity and worth of the human person. Properly defined therefore, justice is that virtue which accepts every human being as a person and then renders to such person his or her due. Rendering to every man his or her due is thus the imperishable classical formulation of the concept of justice.²

As a concept which involves “at its centre the notion of an allotment of something to persons— duties, goods, offices, opportunities, penalties, punishments, privileges, roles, status, and so on”,³ justice emphasizes fairness or equity. In relation to the dispensation of justice by courts of law, justice enjoins that the parties to litigation are fairly treated and receive a fair deal from the courts without any element of bias.⁴ Perhaps, one of the best formulations of the concept of justice was offered by John Rawls who defined justice in terms of twin principles of equality and fairness as follows:

The first statement of the two principles reads as follows:

First, each person is to have an equal right to extensive basic liberty compatible with a similar liberty for others.

Second, social and economic inequalities are to be arranged so that they are both;

- (a) reasonably expected to be to every one’s advantage; and
- (b) attached to positions and offices open to all.

The second principle applies, in the first approximation, to the distribution of income and wealth and to the design of organizations that make use of differences in authority and responsibility, or chains of command. While the distribution of wealth and income needs not be equal, it must be to every one’s advantage, and at the same time, positions of authority and offices of command must be accessible to all.⁵

Thus, while it is conceded that equality and fairness represent the basic indicia of justice as postulated by John Rawls, the point must be made that the views of John Rawls are not free from controversies. This is so because justice is basically a moral value and its formulation varies from person to person.⁶ It is for this reason that justice has also been simply defined as what the right minded members of the community— those who have the right spirit within them believe to be fair.⁷

The concept of distributive justice like the broader concept of justice is not susceptible to any precise formulation. However, what is certain as pointed out by Aristotle is that the concept operates in the public sphere by demanding the state as the allocator of rights, benefits, rewards and burdens to act fairly and equitably thus contrasting with corrective justice which prescribes corrective principle in private transactions.⁸

Distributive justice is concerned with the ‘just distribution of benefits and burdens among a group of people.’⁹ The rationale for the concept derives from the fact that since resources and other divisible assets of the community are scarce, every social system must devise a mechanism for allocating these resources among the competing constituent groups. The theories of distributive justice, therefore, prescribe guidelines on how a community treats its members with respect to assignment of benefits and burdens according to some standards of

¹ See generally Oputa (n 15) 12-13.

² Hon. Justice C. A. Oputa, *In the Eyes of the Law* (Friends Law Publishers Limited, 1992) 15-20;

³ W. K. Frankena, “The Concept of Social Justice” in R. B. Brandt (ed), *Social Justice* (Prentice-Hall, Engle Wood Cliff, N.J. 1962) 1, 9.

⁴ See generally, *Caribbean Trading & Fidelity Corporation v. N. N. P. C.* [1992] 7 N. W. L. R. (Pt. 252) 161, 182; *First Bank of Nigeria PLC v. May Medical Clinics & Diagnostic Centre Ltd.*, [2006] 4 N. W. L. R. (Pt. 971) 442, 478-479; *Omabuwa v. Owhofatsho* [2006] 5 N. W. L. R. (972) 40, 62.

⁵ John Rawls, “Justice as Fairness” (April 1958) 67 *Philosophical Review* 164; John Rawls, “Distributive Justice: Some Agenda” (1968) *Natural Law Forum Paper* 138 < http://scholarship.law.nd.edu/nd_naturallaw_forum/138 > accessed 07 August, 2015.

⁶ Dennis Lloyd, *The Idea of Law* (Penguin Books, 1964) 117.

⁷ Hon. Justice Kayode Eso, *Thoughts on Law and Jurisprudence* (MIJ Professional Publishers Limited, 1990) 138; *Emesim v. Nwachukwu* [1999] 6 NWLR (Pt. 605) 154, 168; *Edun v. Odan Community* (1980) 9-11 S. C. 103; *Willoughby v. International Merchant Bank (Nig) Ltd.*, [1987] 1 N. W. L. R. (Pt. 48) 105, 121.

⁸ Martin Ostwald (tr), *Nicomachean Ethics of Aristotle, Book V* (Bobbs-Merrill Company Inc., 1962) paras. 3: 1131a-4:1132b.

⁹ Norman E. Bowie, *Towards a New Theory of Distributive Justice* (The University of Massachusetts Press, Amherst 1971) 4.

fairness.¹ In other words, the theories of distributive justice ‘specify the conditions under which particular distributions (and, more recently, distributional procedures) are perceived to be “just” or “fair.”²

Central to the theories of distributive justice, therefore, is the notion of fair allocation of benefits and burdens by the state. This involves some form of evaluative judgment to determine the correlation between each ‘individual’s ratio of rewards to investments, or share of rewards to share of investments, or the difference between rewards and investments, or some similar method.’³ The correspondence of rewards to investments may be perceived as just or unfair depending on the method adopted in the evaluation.

The search for the most acceptable criteria for determining the standard of ‘fair allocation’ in any distributive scheme had led several political scientists, economists, philosophers, and psychologists over the past three centuries to develop different theories of distributive justice including egalitarianism, utilitarianism and socialism amongst others. Since a discussion of all the theories of distributive justice seems out of place in the present work, only a brief discussion of the egalitarian and utilitarian theories is undertaken herein. The choice of these two formulas of distributive justice is informed by the fact that apart from being the most dominant in the literature, most other theories of distributive justice are indeed, either a modification or an adaptation of them.⁴ For instance, Rawls’ ‘difference principle’ which demands: (i) equality in the distribution of political and civil liberties; and (ii) equality in the distribution of social and economic goods and services subject to the qualification that inequalities in the distribution of social and economic goods and services could be justified if they work to the benefit of the least advantaged, is an adaptation of the equality principle on which the egalitarian theory is founded.⁵

The utilitarian theory of distributive justice postulates that in any given distributional situation involving public goods and services or the good things of life (utility), that distribution which provides the greatest happiness for the greatest number is the one which is just. In other words, every distribution should be founded on the rule of the greatest good of the greatest number.⁶ Applying this rule to Nigeria’s distributive federalism, that distribution of the benefits from natural resources which provides the greatest happiness to the greatest number of the constituent groups within the federation is the one that is just.

It is clear that to the extent that the utilitarian theory of distributive justice places emphasis on the ‘greatest good for the greatest number’ in any distributional situation, other competing values such as the peculiar circumstances of the different groups, their level of contribution to the production process, the disproportionate pains they experience and their peculiar needs are bound to be sacrificed on the altar of the ‘greatest good for the greatest number.’ It is submitted that a distribution that ignores these weighty values is bound to inflict maximum pains on minority groups and is therefore unjust and inequitable. These limitations of utilitarianism render it inadequate as a theoretical framework for reworking Nigeria’s distributive federalism.

This leads me to a brief examination of the egalitarian theory of distributive justice. Egalitarianism is founded on the principle of equality. According to this principle, the distribution of public goods and services which can be considered just is that which distributes them equally amongst the recipients. ‘According to the rule of arithmetical equality’ writes Ryan, ‘all persons who contribute to the product should receive the same amount of remuneration.’⁷ Ryan was however, quick to point out that this rule may seem ‘unjust because it would treat unequals equally.’ This is because:

Although men are equal as moral entities, as human persons, they are unequal in desires, capacities, and powers. An income that would fully satisfy the needs of one man would meet only 75 per cent., or 50 per cent., of the capacities of another. To allot them equal amounts of income would be to treat them unequally with regard to the requisites of life and self-development. To treat them unequally in these matters would be to treat them unequally as regards the real and only purpose of property

¹ Gene R. Laczniak and Patrick E. Murphy, “Distributive Justice: Pressing Questions and Emerging Directions and the Promise of Rawlsian Analysis” (2008) 28 *Journal of Macro marketing* 1.

² Karen S. Cook and Karen A. Hegtvædt, ‘Distributive Justice, Equity, and Equality’ (1983) 9 *Ann. Rev. Sociol.* 217, 218.

³ Ronald L. Cohen, ‘Distributive Justice: Theory and Research’ (1987) 1 *Social Justice Research* 19, 20-1, 24.

⁴Wulf Gaertner, ‘Distributive justice: Theoretical foundations and empirical findings’ (1994) 38 *European Economic Review* 711, 712; John Scott et al., ‘Just Deserts: An Experimental Study of Distributive Justice Norms’ (2001) 45 *American Journal of Political Science* 749, 751.

⁵ John Rawls, *A Theory of Justice* (Harvard University Press, Cambridge MA 1971); Nozick’s ‘entitlement theory’ which builds on the three principles of justice in acquisition, justice in transfer; and rectification of injustice challenges the concept of distribution in its entirety and argues that justice does not consist of distributing the goods of society at all. For him, there is no such concept as the goods of society but only the goods of individuals and society has no legitimate right to redistribute such goods between individuals except in rectification of injustice, see Robert Nozick, ‘Distributive Justice’ (1973) 3 *Philosophy and Public Affairs* 45, 46-9.

⁶ Bowie (n30)12-13.

⁷ John A. Ryan, *Distributive Justice* (3rd edn Macmillan, New York 1942) 180-1.

rights. That purpose is welfare. Hence the equal moral claims of men which admittedly arise out of their moral equality must be construed as claims to equal degrees of welfare, not to equal amounts of external goods.¹

The generic character of the concept of 'equality' which provides the moral plank for the egalitarian theory informed the subsequent efforts geared toward reformulating the theory to reflect the varying circumstances of the recipients without completely jettisoning the requirement of equality. A number of allocation principles or rules have emerged from these efforts. The 'equity rule' (also called the 'contribution or merit rule') demands equality of outcome/input ratios or equality relative to individual contributions.² Under this allocation principle, individual's contribution (ability and performance) forms a cardinal yardstick for distributing goods. And given that contribution is usually unequal, Scott et al., have argued that 'merit is most often a justification for inequality.'³ The 'needs rule' emphasizes equality of outcomes taking into account the need and/or desert of the recipients. It seeks to eliminate inequalities by prescribing equal needs as the basis for equal distribution.⁴

The principle of rank order equality formulated by Homans is also relevant for our present purposes. The principle of rank order equality is formulated thus: 'If the costs of the members of one group are higher than those of another, distributive justice requires that their rewards should be higher too.'⁵ Clearly, Homans' principle of rank order equality recognises inequalities in distributional situations based on the comparative costs of each group. This recognition drives his argument that distributive justice is one of the crucial conditions of group equilibrium because it involves a situation of 'felt justice.'⁶

Although the existing research in the area of distributive justice has focused on the distribution of social and economic goods and services including income, education, medical care, and housing, it is very arguable that some of the existing allocation principles, particularly the principle of rank order equality can be applied to the distribution of benefits or revenue derived from natural resources between levels of government. In this sense, the principle can serve as a mechanism for redressing perceived injustice against the oil-producing ethnic minorities in the Niger Delta region of Nigerian federation. The application of these principles would involve a consideration of the contributions made by the oil-producing ethnic minorities of the federation to the 'baking of the national cake,' the costs of such contributions, the prevailing ratios of rewards to costs and the attendant inequities.

It is submitted that the application of the principles of distributive justice to the restructuring of Nigeria's current system of fiscal federalism can be justified on a number of grounds. First, s. 14(1) of the 1999 Constitution declares that 'The Federal Republic of Nigeria shall be a State based on the principles of democracy and social justice.' Section 17(1) of the Constitution further reaffirms that the State 'social order is founded on ideals of freedom, equality and justice.' In furtherance of these ideals, s.15 (4) of the Constitution declares that 'The State shall foster a feeling of belonging and of involvement among the various peoples of the Federation, to the end that loyalty to the nation shall override sectional loyalties.' Given that distributive justice actually embraces 'the whole economic dimension of social justice',⁷ it stands to reason that in principle, distributive justice forms one of the corner stones of Nigerian federalism.

Secondly, the quest for justice is central to the agitations by different ethnic nationalities, particularly ethnic minorities of the Niger Delta for the restructuring of Nigeria's federation to provide for greater space for self-rule by the constituent units. The domination and marginalisation of ethnic minorities by the majority groups and the entrenched fear that the former would not have their just deserts in the federal union are the major pathologies of Nigeria's federalism. Only an equity theory could provide an enduring answer to these problems which have continued to retard the development of a strong and stable Nigerian federation.

Finally, it is generally accepted that the 'legitimacy of the state and its leaders depends in large measure on their perceived justice, and legislation and public policy are judged in terms of their procedural and distributive justice.'⁸ Therefore, the perception of the justice or injustice of Nigeria's federal system in terms of the current fiscal arrangement is a crucial factor in any efforts geared toward building a stable Nigerian

¹ Ryan (n37) 180-1.

² T. Schwinger, 'Just allocation of goods: decisions among three principles' in G. Mikula (ed), *Justice and Social Interaction* (Springer-Verlag, New York 1980) 95- 125.

³ John T. Scott et al., 'Just Deserts: An Experimental Study of Distributive Justice Norms.' (2001) 45 *American Journal of Political Science* 749, 751.

⁴ Karen S. Cook and Karen A. Hegtvedt, 'Distributive Justice, Equity, and Equality' (1983) 9 *Ann. Rev. Sociol.* 217, 220; Scott (n40) 751.

⁵ George C. Homans, 'Social Behaviour as Exchange' (1958) 63 *Am. J. Sociol.* 597, 604.

⁶ Homans (n42) 604.

⁷ Nicholas Rescher, *Distributive Justice: A Constructive Critique of the Utilitarian Theory of Distribution* (The Bobbs-Merrill Company, Inc., Indianapolis 1966) 5.

⁸ Scott (n40) 749.

federation and engendering a sense of national loyalty among the diverse ethnic groups.

It is against the foregoing background that the next section of this paper will briefly examine the adverse ecological, environmental and social impacts of oil and gas exploration and production in the Niger Delta since the 1950's, the horrendous deprivations being suffered by its peoples and the extent to which the application of the principle of derivation has addressed the disproportionate contributions of the region to the sustenance of the Nigerian State.

THE ADVERSE ECOLOGICAL AND ECONOMIC IMPACTS OF OIL AND GAS EXPLORATION AND PRODUCTION IN THE NIGER DELTA REGION

The ethnic groups of the Niger Delta region have had serious grievances against the Nigerian state which are traceable to the discovery and exploitation of hydrocarbons in their territory since 1956. According to Osaghae, foremost amongst these grievances is that 'although the bulk of crude oil, the country's main source of revenue is derived from their lands, they belong to the ranks of the most backward and politically marginalized groups in the country.'¹ The Niger delta ethnic groups traced this horrendous injustice to the fact that they are ethnic minorities in a federation dominated by the Hausa/Fulani, Yoruba and Igbo ethnic groups. The result is that the oil wealth generated from the region is used to develop other regions of the country inhabited by the majority ethnic groups while the Niger delta is left to grapple with the perennial lack of basic infrastructure and amenities which are taken for granted in other parts of the federation.²

Second is that oil exploitation spanning over five decades has left in its trail severe environmental degradation, despoliation of the ecosystem and destruction of the peasant economy of the region built on fishing and farming thereby exposing the people to severe health hazards, economic hardship and social dislocation.³

To be sure, the above grievances are not misplaced. The Minorities' Commission set up by the erstwhile British colonial government had as far back as 1958 found that the 'needs of those who lived in the creeks and swamps of the Niger delta' were 'very different from those of the interior' and that the Niger delta was 'poor, backward and neglected.'⁴ Although the Commission recommended the creation of a 'special area' in the Niger delta and the establishment of a Federal Board to direct the development of the region into channels which would meet its peculiar problems, the region has remained poor, underdeveloped and neglected to an extent that suggests that the Commission's description of the Niger delta as 'poor, backward and neglected' is as true today as it was in 1958.

While it is generally acknowledged that the Niger delta terrain which causes seasonal flooding of over 80 per cent of the region 'including all of the swamp forest, except the riverbank levees'⁵ poses peculiar environmental problems, it would be naïve to treat the underdevelopment of the region as a natural consequence of its deltaic terrain. The truth of the matter is that the underdevelopment of the region is the result of decades of wilful neglect by a distant central government dominated by the majority ethnic groups. The result is that the region though rich in natural resources is paradoxically one of the poorest regions of the world.

A Report by the United Nations Development Programme (UNDP) painted a shocking but true picture of the Niger delta: 'In reality, the Niger Delta is a region suffering from administrative neglect, crumbling social infrastructure and services, high unemployment, social deprivation, abject poverty, filth and squalor, and endemic conflict.'⁶ The Report chronicled the lack of basic infrastructure and amenities in the region such as electricity, roads, schools, hospitals, potable water, and housing and concluded that although oil wealth enriches Nigeria as a country, 'it has not alleviated the grinding poverty, neglect and deprivation in the region that produces it.'⁷

The findings in the UNDP's Report are amply supported by a number of other reports and studies including those commissioned by the federal government.⁸ Attention may be drawn here to just two of such

¹ Eghosa E. Osaghae, "The Ogoni uprising: Oil Politics, Minority Agitation and the future of the Nigerian State" (1995)94 African Affairs 325.

² Michael Watts, "Resource curse? Governmentality, oil and power in the Niger Delta, Nigeria" (2004) 9 Geopolitics 50, 51; Ijaw National Congress (INC), *The Ijaws, the Niger Delta and the Nigerian State* (University of Port Harcourt Press, 2006)13.

³ Ijaw National Congress (n47) 18-22; Chris O. Ikporukpo, "Petroleum, Fiscal Federalism and Environmental Justice in Nigeria" (2004) 8 Space and Polity 321, 325-330.

⁴ Secretary of State for the Colonies, "Report of the Commission Appointed to Enquire into The Fears of Minorities and the Means of Allaying Them" (Cmd 505, London 1958) ch.7, para 15; ch.14, para 27.

⁵ World Bank "Defining an Environmental Development Strategy for the Niger Delta, Vol. 1" (Industry and Energy Operations Division, West Central Africa Department, World Bank, May 25, 1995) 2.

⁶ UNDP, "Niger Delta Human Development Report" (UNDP, Abuja Nigeria 2006) 9<<http://hdr.undp.org/en/reports/nationalreports/africa/nigeria/name,3368,en.html/>>accessed 03 February 2012.

⁷ UNDP (n51) 37.

⁸ Some of these Reports include; Report of the Ministerial Fact-Finding Team to Oil Producing Communities in Nigeria, 1994; Report of the Presidential Committee on the Development Options for the Niger Delta, 1996.

reports. The Report of the Technical Committee on the Niger Delta discussed the infrastructural poverty of the Niger Delta communities and concluded that:

They still lack basic facilities and amenities that are taken for granted in other parts of the country. In particular, the creeks and riverine areas still look worse than the fourth world by whatever development indicators that may be applied. Some of the riverine communities cannot be accessed by road, have no school, clinic or any form of electricity. Public officials do not get to these communities for years and do not have any reasonable sensitivity to their conditions of living. No doubt, this has contributed to the violent agitations and provided safe havens for the militants . . . The absence of such infrastructure in a region that produces so much wealth and opportunities for the nation has continued to prick the conscience of many and contaminate opportunities for building national harmony and a sense of citizenship.¹

The Report by Amnesty International is no less damning in its vivid description of the striking contrast between the enormous resource wealth of the Niger delta and its shocking underdevelopment and neglect:

Oil has generated an estimated \$600 billion since the 1960s. Despite this, the majority of the Niger delta's population lives in poverty. . . The majority of the people of the Niger delta do not have adequate access to clean water or health care. Their poverty, and its contrast with the wealth generated by oil, has become one of the world's starkest and most disturbing examples of the 'resource curse.'²

Similarly, a recent report released by the National Bureau of Statistics confirmed that the Niger delta (south-south geo-political zone) remains one of the poorest geo-political zones in the federation with a poverty rate of 63.8 per cent; and in terms of dollar per day measure of poverty, all the States in the region except Edo are below the national average.³ Although the report also showed that poverty is more extreme in the North with North-West and North-East geo-political zones recording poverty rates of 77.7 per cent and 76.3 per cent respectively, the truth of the matter according to the Human Rights Watch, is that the divisions 'between the rich and poor are more obvious in the areas where gas flares light up the night sky.'⁴

The region also lags behind on the Human Development Index (HDI) score which represents a composite index measuring average achievement in three basic dimensions of human development —long and healthy life as measured by life expectancy at birth; knowledge as measured by adult literacy rate; and a decent standard of living as measured by Gross Domestic Product per capita.⁵ According to the UNDP the region's HDI's score remains at a low value of 0.564 which puts it far below countries or regions with similar oil and gas resources.⁶

Although Ross has attempted to rationalise the poverty in the oil-rich Niger delta by reference to a cluster of economic and political ailments plaguing resource-rich countries such as retarded economic growth, prevalence of corruption, higher risks of political instability, and widespread poverty,⁷ it is respectfully submitted that the case of the Niger delta is clearly one of ethnic marginalization and domination. If the vast wealth generated from oil in the region could be deployed to develop several multi-billion naira projects in different regions of the country including the new federal capital city of Abuja in spite of the 'resource curse', it seems difficult to justify the backwardness of the region by reference to any theoretical prescription other than the conspiracy of the three majority ethnic groups.

To be sure, apart from infrastructural and human poverty, the region also suffers from severe environmental degradation arising from decades of petroleum exploration and exploitation. There is a widely received view that the process of petroleum exploration and production generally impacts adversely on the environment although the degree of environmental impact is 'determined by operator responsibility, government

¹ Report of the Technical Committee on the Niger Delta, Vol. 1 (Abuja, November 2008) 50-1.

² Amnesty International, 'Nigeria: Petroleum, Pollution and Poverty in the Niger Delta' (Amnesty International Publications, London 2009) 9<<http://www.amnesty.org/en/library/asset/. . . /017/. . . /afr440172009.pdf>> accessed 08 August, 2015; see also Amnesty International, 'Annual Report 2013'(London, 2013) 196<<http://www.amnesty.org/en/annual-report/2013>> accessed 08 August 2015.

³ National Bureau of Statistics, 'Nigeria Poverty Profile 2010' (Abuja Nigeria, January 2012)1, 16, 25.

⁴ Human Rights Watch, 'The Price of Oil, Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities' (Human Rights Watch, New York January 1999)8<<http://www.hrw.org/legacy/reports/1999/nigeria/>>accessed 02 August, 2015; Human Rights Watch, 'World Report 2013—Nigeria' (New York, 2013)140, 144<http://www.hrw.org/sites/default/files/wr2013_web.pdf>accessed 09 August 2015.

⁵ UNDP, 'Human Development Report 1990' (UNDP, New York 1990)1, 11-2<http://hdr.undp.org/en/media/hdr_1990_en_chap1.pdf> accessed 03 August, 2015.

⁶ UNDP (n 51) 2.

⁷ Michael L. Ross, 'Nigeria's Oil Sector and the Poor' (Paper Prepared for the UK Department for International Development "Nigeria: Drivers of Change Programme" May 23 2003) 1, 3-4< <http://www.polisci.ucla.edu/faculty/ross.>>accessed 03 July, 2015.

oversight and conditions in particular ecosystems.¹ It is common ground that while a number of public agencies are charged with regulating, supervising and monitoring Nigeria's oil and gas industry and the environment at large, 'these agencies are, for the most part, ill-equipped, poorly financed, corrupt, and lack requisite regulatory capacity and expertise.'² Apart from the lack of an effective environmental regulatory mechanism, there is also concern over the lack of political will by the central government to enforce extant regulations, particularly when the international oil companies are involved. The result is that the Niger delta has been rendered far more vulnerable to the adverse impacts of petroleum exploration and exploitation.

Quite expectedly, a study carried out by an independent team of experts drawn from Nigeria, the UK and the USA has found that the Niger delta is 'one of the 5 most severely petroleum damaged ecosystems in the world' and that the devastation of the region 'may even be worse than other notoriously impacted regions such as Azerbaijan, Kazakhstan, Siberia, and Ecuador.'³ The Report described the environmental damage to the Niger delta as 'chronic and cumulative' and that it has acted 'synergistically with other sources of environmental stress to result in a severely impaired coastal ecosystem and compromised the livelihoods and health of the region's impoverished residents.'⁴ The report also found that the environmental devastation of the Niger delta occurs at every stage of the extractive activities, particularly during exploration, production, transportation, and refining:

Oil and gas activities have caused damage in several forms to the Delta. In *exploration*, seismic lines have cleared significant forest areas, and seismic crews have generated thousands of tons of waste, all disposed untreated directly into the ecosystem. In *production*, there is a considerable amount of dredging and filling of the water ways, siltation, sulfidic dredge spoils leading to acidification of water bodies, erosion, spills (well blowouts and facility failures), pollution from gas and associated oil flaring, discharge of huge amounts of production water containing significant quantities of hydrocarbons, and drilling mud discharges. In *transportation*, laying of several thousand miles of oil and gas pipelines across Delta habitats has resulted in significant habitat damage and loss, pipeline and tanker spills, and storage tank spills. And in *refining*, toxic sludge discharges and process spills pollute waterways, flaring and stack emissions pollute the atmosphere, and refined products (particularly petrochemicals) further enter the ecosystem.⁵

Dealing specifically with oil spills which form the major source of pollution, the Report concluded that 'an estimated 9 million -13 million barrels (1.5 million tons) of oil had spilled in the Niger delta ecosystem over the past 50 years representing about 50 times the estimated volume spilled in the Exxon Valdez Oil Spill in Alaska in 1989.'⁶

While it is conceded that there is a dearth of comprehensive data on the cumulative spills recorded each year in the Niger delta, available statistics suggest that the above conclusion is well founded. One study has shown that a total of 4,835 spills occurred in the region over the period 1976-1996 resulting in a cumulative spill volume of 2,446,322 spills. Of this amount, only about 15.91 per cent was recovered; implying that about 84.09 per cent of the spill was lost to the environment.⁷ The UNDP on its part estimated that a total of 6,817 oil spills occurred in the region between 1976 and 2001 resulting in the loss of approximately 3 million barrels of crude oil more than 70 per cent of which was not recovered. Approximately 6 per cent spilled on land, 25 per cent in swamps and the remaining 69 per cent in offshore environment.⁸ The SPDC reported an average of 221 spills yearly between 1989 and 1994 involving some 7,350 barrels of crude oil lost to the environment annually. From 2005 to 2009, SPDC recorded an average of 175 spill incidents involving its facilities yearly. A marginal increase in spill incidents involving SPDC facilities was recorded in 2012 with a total of 198 spills. About 32% of the spilled volume from SPDC facilities in 2012 was lost to the environment.⁹

¹David Waskow and Carol Welch, 'The Environmental, Social and Human Rights Impacts of Oil Development' in Svetlana Tsalik and Anya Schiffrin (eds), *Covering Oil: A Reporter's Guide to Energy and Development* (Open Society Institute, New York 2005) 101, 104; Christopher O. Orubu et al., 'The Nigerian Oil Industry: Environmental Diseconomies, Management Strategies and the Need for Community Involvement' (2004) 16 J. Hum. Ecol.204.

² Evaristus Oshionebo, 'Transnational Corporations, Civil Society Organisations and Social Accountability in Nigeria's Oil and Gas Industry' (2007) 15 Afr. J. Int'l & Comp. L. 107, 108; see also N.E. Ojukwu-Ogba, 'Tackling Insecurity in Nigeria's Niger Delta: The Devil's Alternative' (2006)4 OGEL 1, 3.

³Federal Ministry of Environment et al, 'Niger Delta Natural Resource Damage Assessment and Restoration Project, Phase 1 -Scoping Report' (Abuja, 2006) 3.

⁴ Federal Ministry of Environment (n63) 2.

⁵ Federal Ministry of Environment (n63) 5.

⁶ Federal Ministry of Environment (n63) 1.

⁷ Environmental Resources Managers Ltd., 'Niger Delta Environmental Survey, Final Report Phase 1, Volume 1' (1997) 1, 249.

⁸ UNDP (n51) 76.

⁹SPDC, 'Briefing Notes: Environmental Performance—Oil Spills' (May, 2010)< <http://www.static.shell>.

Although the Niger delta communities have consistently disagreed with the IOCs over the causes of these spills, their adverse impacts on the residents and the entire ecosystem cannot be disputed.¹ Oil spills on land destroy crops and damage the quality and productivity of the soil. A recent study carried out by the United Nations Environment Programme (UNEP) in Ogoni land has found that when oil reaches the root zone, crops and other plants begin to experience stress and can die and the effect can last as long as 40 years despite repeated clean-up attempts.² Oil spills in water affect mangrove forests, kill aquatic and marine lives including fauna and flora and contaminate sources of drinking water. The most serious case of groundwater contamination was found in Ogoni land close to a Nigerian National Company Product pipeline where an 8cm layer of refined oil was observed floating on the groundwater which serves the community wells.³ Thus, oil pollution is linked to infections such as diarrhoea, dysentery, gastro-enteritis, and whooping cough.⁴

Oil exploration has also impacted adversely on the traditional peasant economy of the Niger delta. For instance, through the use of explosives, provision of new routes and pits and stream diversion during the process of prospecting for oil, fishing grounds and farm lands are put out of use thus depriving the local population access to ancestral farmlands and fishing grounds. Furthermore, explosives destroy marine and aquatic lives within the areas of impact. Lastly, gas flaring which still goes on in the Niger delta 'creates a microclimate around that hinders the survival of both plants and animals alike.'⁵ These activities have led to poor fishing and farming yields, dwindling fortune among the local population and a local economy that is completely destroyed. A learned writer has therefore rightly argued that the adverse impacts of the oil industry in the Niger delta could best be summed up in 'three D's: deprivation, despoliation and destitution.'⁶

What clearly emerges from the foregoing is that the ethnic minorities of the Niger delta have not only borne the costs of oil exploration and exploitation in the region disproportionately but have also been denied the benefits derived from these activities. Quite expectedly, the common perception amongst the peoples of the region is that 'all the oil wealth has leaked out, leaving people impoverished and neglected.'⁷ Thus, the Niger Delta has suffered from decades of criminal neglect and injustice. The question whether the principle of derivation has adequately addressed these injustices will be examined in the next section of this paper.

THE PRINCIPLE OF DERIVATION

The principle of derivation as one of the constitutionally prescribed criteria for distributing federally-collected revenue between the federal and state governments prescribes that a pre-determined percentage of federally-collected revenue derived from a state of the federation shall be returned to the state as a form of compensation for its contribution to federal finance.⁸ In other words, the derivation principle seeks to strike a balance between the contributions made by the respective states of the federation to federally-collected revenue and their share of revenue from the total federal receipts. As the 1994-1995 Constitutional Conference stated it:

Derivation is a factor of fiscal federalism which ensures that each unit of

com/static/nga/downloads/pdfs/briefing_notes/oil_spills.pdf> accessed 25 July, 2015; SPDC, 'Briefing Notes: Environmental Performance—Oil Spills' (April 2013)< <http://www.s00.static-shell.com/content/dam/shell-new/local/country/nga/downloads/pdf/2013bnotes/environmental-performance.pdf>> accessed 30 July 2015.

¹According to SPDC, from 2008- 2012, sabotage, oil theft and other criminal activities accounted 'for around 76% of the oil that escaped' from its facilities while under a quarter of the oil that escaped from its facilities 'was due to operational causes such as human error or equipment failure' see SPDC, 'Oil leaks in Nigeria'< <http://www.shell.com/global/environment-society/society/nigeria/spills.html>>< accessed 31 July 2015; cf. Clara Nwachukwu, 'Nigeria's horrifying oil spill response management' *Sweet Crude* (Vol. 02, No. 15, July 2010)1, 4, who attributed the spills to different causes: corrosion of pipelines and tankers (50%); oil production operations (21%); sabotage (28%); and inadequate or non-functional production equipment (1%); a recent press release issued by Amnesty International has challenged the claims of SPDC that sabotage is responsible for most of the spill incidents, see, Amnesty International, 'Press Release: Nigeria, Oil giant Shell criticised over Niger Delta pipelines "sabotage" claims' (London, 19 June 2013)<<http://www.amnesty.org/en/for-media/press-releases/nigeria-oil-giant-shell-criticised-over-niger-delta-pipelines-sabotage-claims/>> accessed 08 August 2015.

² UNEP, *Environmental Assessment of Ogoniland* (UNEP, Nairobi 2011)1, 9<<http://www.unep.org/nigeria/>> accessed 01 July, 2015.

³ UNEP (n 71)10.

⁴ C. O. Ikporukpo, 'Petroleum exploitation and the socio-economic environment in Nigeria' (1983)21 *International Journal of Environmental Studies*, 193, 198; J. Finine Fekumo, *Oil Pollution and the Problems of Compensation in Nigeria* (F & F Publishers, Port Harcourt 2011) 5.

⁵ Ikporukpo (n73)195-6.

⁶ Ibibia Lucky Worika, 'Deprivation, Despoliation and Destitution: Whither Environment and Human Rights in Nigeria's Niger Delta?' (2001-2002) 8 *ILSA J. Int'l & Comp. L.* 1, 5.

⁷C. P. Wolf, Forward to Augustine A. Ikein et al., (eds), *Oil, democracy and the promise of true federalism in Nigeria* (University Press of America, Maryland 2008) 1, 15-6.

⁸ Federal Republic of Nigeria, 'Report of the Constitutional Conference Debates 1994-1995 Vol. III' (Abuja Nigeria, 1995) 123, paras. 2781-2782.

government contributes to the national coffers and receives equitably in return through revenue allocation. Each unit is, therefore, encouraged to work hard in baking a larger national cake from which it receives in proportion to its contribution. Derivation is, therefore, basically a reward for noble efforts of revenue generation. However, that is not all; derivation can also be seen as compensation for the loss in revenue or other economic activities through the utilisation of the land of any unit of governments [or communities] for national resource generation. Still derivation can be utilised for upgrading and reclaiming land degraded in the process of mineral exploitation and exploration. Derivation can also be put in place as payment usually in rent for the use of land and/or payment for exploring mineral from the land...¹

Although the application of the derivation principle dates back to the recommendation of the Sydney Phillipson Commission of 1946, its use as a specific fiscal tool for redistributing revenue derived from natural resources to the mineral-producing regions can be traced to the recommendations made by Sir Louis Chick who was appointed Fiscal Commissioner by the London Constitutional Conference to advise the government on the financial implications of the proposed new constitutional arrangements for Nigeria. Sir Louis Chick recommended that the whole of the net proceeds of mining royalties derived from minerals (extracted from the Northern region) should be allocated to the region from which the taxed minerals were extracted in accordance with the principle of derivation, that is allocating revenue to a region in proportion to the region's contribution to central revenue.² During the Lagos Constitutional Conference, it was agreed that the derivation principle which then applied only to solid minerals exploited in Northern Nigeria, should be extended to royalties and rents derived from petroleum resources.³

It is clear, therefore, that the principle of derivation as originally conceived, was not intended for the benefit of the oil-producing states or communities of the Niger delta, but rather the Northern region of Nigeria which was the mineral-producing region. Thus, Northern Nigeria had enjoyed enhanced revenue allocation from the centre based on the principle of derivation long before oil and gas exploitation commenced in the Niger delta.

The principle of derivation as currently incorporated in the proviso to s.162(2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) prescribes that in the application of any approved revenue sharing formula for distributing the fund standing to the credit of the Federation Account among the federal and state governments and the local governments in each state, not less than thirteen per cent of the revenue accruing to the Federation Account from any natural resources shall be distributed to the states from which such natural resources were extracted. By operation of this principle, oil-producing states under the current federal system receive thirteen per cent (13%) from the Federation Account in respect of revenue derived by the federation from oil and gas produced within their respective land and off-shore boundaries.⁴

It is important to point out from the outset that the principle of derivation as incorporated in the 1999 Constitution (as amended) applies to all revenue derived by the federation of Nigeria from natural resources. The practical implication of this is that all oil/gas producing and solid mineral producing states in the federation are entitled to enjoy derivation in respect of revenue derived from resource exploitation within their boundaries. Derivation, therefore, is not the exclusive preserve of the oil-producing states in the Niger delta. However, the association of the derivation principle with the Niger Delta region stems from the fact that oil and gas constitute the main source of federal revenue and revenue derived from solid minerals from other regions of the federation including Northern Nigeria constitute a very insignificant proportion of total federal revenue.

It has been argued by Suberu that the derivation principle meets the 'special claims and needs of the oil-bearing units.'⁵ Thus, for Suberu, the application of the derivation principle serves as an effective tool of distributive justice in the Niger Delta region of the federation by providing additional fund to the oil-producing States from the Federation Account to address the adverse ecological, economic and social impacts of oil exploration and exploitation.

It is submitted that the above view is clearly over-stated. First, being a purely fiscal tool the derivation principle does not grant the oil-producing states any right of participation in the control, development and management of natural resources located within their boundaries. The derivation principle, therefore, is not

¹ Federal Republic of Nigeria (n77) 123, paras 2781-2782; Adedotun Phillips, 'Nigeria's Federal Financial Experience' (1971) 9 *Journal of Modern African Studies* 389, 390.

² Secretary of State for the Colonies, 'Nigeria: Report of the Fiscal Commissioner on the Financial Effects of the Proposed New Constitutional Arrangements' (Cmd.9026, London 1953) paras.51, 95 (16).

³ Secretary of State for the Colonies, 'Report by the Resumed Conference on the Nigerian Constitution held in Lagos in January and February, 1954' (Cmd. 9059, London 1954) para. 12 (ix).

⁴ The principle also applies to off-shore resources within 200 metre water depth isobath contiguous to a state of the federation, see *Allocation of Revenue (Abolition of the Dichotomy in the Application of the Principle of Derivation) Act 2004*, s.1 ; *A-G Adamawa State v. A-G Federation* [2005]18 N. W. L. R (Pt. 958)581, 673-4.

⁵Rotimi Suberu, 'Federalism in Africa: The Nigerian Experience in Comparative Perspective' (2009) 8 *Ethnopolitics* 67, 81.

coterminous with resource ownership or governance by the oil-producing states.¹

Secondly, deriving from its character as a mere fiscal tool, it is indisputable that the principle of derivation does not address the core of the Niger delta agitation which is the participation of the constituent units in the control, development and management of natural resources within their boundaries. To be sure, the derivation principle leaves the oil-producing states at the mercy of the federal government in terms of the redistribution of revenue derived from natural resources. To this extent, it is arguable that the principle of derivation neither advances the preservation of the underlying principles of Nigerian federalism nor the principle of self-determination which is central to the resource movement in the region.

Thirdly, the application of the principle of derivation has remained highly susceptible to political manipulations by the majority ethnic groups in the federation of Nigeria. From 1954-1969 when mineral resources (tin and columbite) and agricultural produce (cocoa, groundnut and palm oil) which were derived outside of the Niger delta, that is to say from the Northern (Hausa/Fulani), Western (Yoruba) and Eastern (Igbo) regions constituted the main foreign exchange earners for the federation, the application of the derivation principle was favoured and insisted upon by these three majority ethnic groups as the primary basis for allocating centrally-collected revenue between levels of government because it boosted the fiscal capacities of their regional governments. Indeed, from 1954-1969 the derivation paid to regional governments with respect to revenue derived from minerals, mineral oils and other tax sources varied from hundred per cent to fifty per cent.²

Interestingly, the irreversible decline in the contribution made by solid minerals and agricultural produce derived from the Northern, Western and Eastern regions to the economy and the ascendancy of oil derived from the Niger delta as the main foreign exchange earner from the 1970s heralded the distortion in the application of the principle of derivation. This systematic distortion is obvious from the preference now accorded to other allocation criteria such as equality of states, population, land mass, terrain, and population density with the principle of derivation being treated as an appendage to these main allocation criteria. The emphasis placed by s.162 (2) of the 1999 Constitution (as amended) on the main allocation criteria, that is to say population, population density and land mass implies that the larger the population and land mass of a state the more oil revenue is allocated to the state. The result is that non-oil-producing states in Northern and Western Nigeria with large population and land mass receive more allocations from oil revenue than the oil-producing states that are generally smaller both in terms of population and areal extent.³

The scant emphasis placed on the derivation principle came to a head when the Okigbo Revenue Allocation Commission set up by the federal government explicitly rejected it on the ground that it was divisive.⁴ It is very curious that such misconceived claim was not made when the majority ethnic groups benefited immensely from the application of the principle before the discovery of oil in the Niger delta. Expectedly, therefore, from 1970 when oil became the main source of government revenue, the derivation principle had suffered systematic obliteration resulting in its drastic reduction from forty-five per cent in 1970 to zero per cent in 1979, one per cent in 1992 and later thirteen per cent in 1999.⁵

Fourth, the distortion in the application of the principle of derivation also extends to offshore natural resources. Whereas under s. 134(6) of the 1960 Constitution and s. 140(6) of the 1963 Constitution respectively, the continental shelf of each region was deemed to be part of that region for purpose of computing the derivation principle, the 1999 Constitution does not contain any identical provision. It is very arguable that this deliberate omission in the 1999 Constitution (as amended) reflects the long standing objection of the Northern Region of Nigeria to the application of the principle of derivation to revenue derived from off-shore petroleum exploitation which it perceived favoured the oil-producing littoral states in the Niger delta. The Northern delegation to the Ad hoc Conference on Constitutional Proposals for Nigeria had stated the northern objection in its memorandum thus:

In a country following a Federal set up it is the practice of nations upheld by decisions of judicial tribunals and opinions of jurists that the minerals in territorial waters and continental shelf belong to the whole Federation . . . From the foregoing it is clear that the provision in our Constitution treating minerals obtained from the continental shelf as if it were extracted from land situate in a Region is a concession

¹A-G, *Adamawa State* (n81)639-640.

²Nigeria (Constitution) Order in Council 1954, s.161; Nigeria (Constitution) (Amendment) Order-in-Council 1959, s.161 (1); Constitution of the Federation of Nigeria 1960, s.134; Constitution of the Federation of Nigeria 1963, s. 140.

³Akpan H. Ekpo, 'Fiscal Federalism: Nigeria's Post-Independence Experience, 1960-90' (1994) 22 *World Development* 1129, 1131-4; Chris O.Ikporukpo, 'Petroleum, Fiscal Federalism and Environmental Justice in Nigeria' (2004)8 *Space and Polity* 321, 332-3.

⁴Report of the Presidential Commission on Revenue Allocation, Volume I (Federal Government Printers, Lagos 1980) para.360.

⁵ Emmanuel O. Ojo, 'The Politics of Revenue Allocation and Resource Control in Nigeria: Implications for Federal Stability' (2010) 7 *Federal Governance* 14, 31.

which is wrong in principle and out of step with international law and practice.¹

The above objection was restated by the Northern delegates to the just concluded 2014 National Conference when they called not only for the reduction of the current thirteen (13) per cent derivation but also demanded for the re-introduction of the onshore/off-shore dichotomy in the application of the derivation principle. As the delegates put it:

The North recommends the rejection of claim to oil resources by oil producing areas that led to the cancellation of the onshore/offshore oil dichotomy which action gave away a national resource to littoral states, seriously eroding revenue available for the distribution to all part of the country. The North demands a reversal to *status quo ante* . . . The derivation which is now at 13 per cent should be reduced to five percent and must be limited only to the onshore.²

Although the enactment of the Allocation of Revenue (Abolition of Dichotomy in the Application of the Principle of Derivation) Act 2004 was a bold attempt by the federal government to remedy the injustice sanctioned by the 1999 Constitution (as amended), it is submitted that the legislative intervention has not gone as far as restoring the exact position laid down under the 1960 and 1963 Constitutions. Unlike the 1960 and 1963 Constitutions which extended the application of the principle of derivation to natural resources extracted in the continental shelf contiguous to the region, s. 1(1) of the Allocation of Revenue (Abolition of Dichotomy in the Application of the Principle of Derivation) Act 2004 limits the extension of the seaward boundary of a littoral state of the federation to the two hundred metre water depth Isobath contiguous to that state for the purpose of the application of the principle of derivation.

Having regard to the fact that the expression ‘two hundred metre water depth Isobath’ in s.1 (1) of the Act refers to a ‘line joining all points off the coast of Nigeria where the waters are two hundred metres deep,’³ it would appear that the application of the principle of derivation in relation to offshore resources is limited to offshore production occurring between the low-water mark off the coast of Nigeria and the two hundred metre water depth thus excluding natural resources extracted from substantial parts of the continental shelf from the application of the principle.

Indeed most of Nigeria’s current offshore operations occur outside the two hundred metre water depth off its coast. For instance, Nigeria’s largest deep-water oil field —Bonga field lies in ‘water 1,000 plus metres deep across an area of 60 square km.’⁴ Although this oil field lies within Nigeria’s continental shelf —120 km offshore Nigeria in the Gulf of Guinea —it is clear that no oil-producing littoral state can claim any derivation with respect to production from this field which stands at 200,000 bpd and 150 million standard cubic feet of gas per day representing 10 per cent of Nigeria’s oil exports.⁵

The effect of the Allocation of Revenue (Abolition of Dichotomy in the Application of the Principle of Derivation) Act 2004, therefore, is that the bulk of offshore natural resources extracted within the continental shelf of Nigeria are excluded from the application of the derivation principle in spite of the fact that production activities within the continental shelf had in the past resulted in oil spills such as the December 2011 spill from Bonga field which led to 40, 000 barrels of oil spilling into the Atlantic ocean with serious adverse environmental impacts on Akwa Ibom State, an oil-producing state in the Niger delta.⁶

Fifthly, there is also evidence of inconsistency in the application of the derivation principle which is

¹ Memoranda submitted by the delegations to the Ad hoc Conference on Constitutional Proposals for Nigeria (The Nigerian National Press Limited, Apapa 1967) 122-123; In *A-G, Adamawa State* (n81) the 19 northern states challenged the constitutionality of the Allocation of Revenue (Abolition of Dichotomy in the Application of the Principle of Derivation) Act 2004 on the ground that the Act granted ownership of offshore resources within the delimited zone to the littoral states. The Supreme Court upheld the constitutionality of the Act as providing for the implementation of the derivation principle rather than dealing with transfer of ownership of off-shore natural resources to the littoral states.

² Cited in Henry Umoru, Joseph Erunke and Levinus Nwabughio, ‘Resource control: Northern delegates want derivation reduced to 5 %’ *Vanguard* (Lagos, 30 April 2014) <<http://www.vanguardngr.com/2014/04/resource-control-northern-delegates-want-derivation-reduced-to-5%/>> accessed 05 October 2014; during the abortive National Political Reforms Conference 2005/2006, delegates from the oil-producing states had insisted on twenty five per cent derivation with a progression to fifty per cent but were countered by delegates from the north who were only willing to concede not more than eighteen per cent. The ethnic bitterness generated by this disagreement led to a walk out on the conference by the south-south delegates. See UNDP, ‘Niger Delta Human Development Report (UNDP, Abuja 2006) 15-6.

³ I. E. Sagay, ‘Nigerian Constitutions, Operation of Federalism and the South- South Zone’ Being Keynote Address Delivered at the All Niger Peoples Conference, Dallas, Texas, U. S. A. (24-27 August, 2006) 13-14 <<http://www.dawodu.com/sagay2.htm/> accessed 20 December 2012.

⁴ SPDC, ‘Briefing Notes: Deepwater Nigeria—Bonga Development’ (April 2013) <<http://www.s05.static-shell.com/content/dam/shell-new/local/country/nga/downloads/pdf/2013bnotes/deepwater.pdf/>> accessed 05 August, 2015.

⁵ SPDC (n91).

⁶ BBC News Africa, ‘Shell urged to pay Nigeria \$5bn over Bonga oil spill’ (17 July, 2012) <<http://www.bbc.co.uk/world-africa-18875731>> accessed 08 August, 2015.

reflected in the different rates of derivation payable by the federal government for oil and gas production from the Niger delta on the one hand, and solid minerals extracted from outside the Niger delta on the other. Whereas the oil-producing states receive only thirteen per cent derivation for oil and gas, fifty-five per cent is paid as derivation to Oyo state, South-West Nigeria (Yoruba) in respect of the Igbeti marble resources.¹ Ekpo has also pointed out that Value Added Tax (VAT), the bulk of which is generated in Lagos (South-West Nigeria) attracts twenty per cent derivation as against thirteen per cent for oil and gas.²

The juxtaposition of the above discriminatory policies of the federal government has continued to fuel the general perception in the Niger delta that the distortion of the derivation principle forms part of the systematic marginalisation and domination of the oil-producing minorities by the majority ethnic groups.³ A former Governor of Rivers State, Milford Okilo, captured the sense of alienation that the politics of derivation principle has generated among the delta minorities vividly:

Derivation as a revenue allocation criterion is not new in this country. It featured prominently when cocoa, groundnuts, etc., were the main sources of revenue for Nigeria. But it has continued to be deliberately suppressed since crude oil became the mainstay of the country's wealth . . . simply because the main contributors of the oil wealth are the minorities.⁴

This perception has been further heightened by the refusal of the federal government to take any steps toward implementing past reports on the Niger delta which had recommended upward review of the derivation principle.⁵ It is arguable that the manipulation of the principle of derivation by the dominant ethnic groups in response to their changing economic interests and the lack of political will on the part of the federal government to negotiate any upward review of the thirteen per cent derivation negate any hope that the principle could serve as a viable fiscal mechanism for addressing the marginalization of the oil-producing Niger delta region.

Sixthly, by a practice already struck down by the Supreme Court as unconstitutional, the federal government unilaterally makes deductions from the distributable fund in the federation account to service its external debts and settle other financial obligations including the operations of the National Oil Corporation before distributing the balance among the three tiers of government.⁶ Through this unconstitutional act the distributable fund in the federation account which is available to the states including the oil-producing states under the derivation principle is substantially depleted thereby further weakening the application of the derivation principle. The result is that the oil-producing states have not fared any better under derivation principle vis-à-vis none oil-producing states of the federation.

Finally, the derivation principle represents a constitutional legitimization of centralized state ownership of natural resources. It seeks to justify federal appropriation of the natural resources in the Niger delta in consideration for a form of compensation which creates the misleading impression that the oil-producing states are benefitting from resource-extraction within their territory.⁷ However, the truth of the matter is that the thirteen per cent derivation payable to oil-producing states pales into insignificance given the horrendous negative ecological, environmental, economic, and social externalities associated with oil production. The derivation is grossly insufficient to tackle these externalities, let alone address infrastructural development. Besides, as Ejobowah has rightly argued, it 'does not open up economic space for the subnational governments to fend for themselves, and it encourages wastage (corruption) . . .'⁸ As expected, the derivation principle has been 'rejected in several parts of the Federation in preference for a return to fiscal federalism under which the

¹ F. O. Egwaikhede and O. Aregbeyen, 'Oil production externalities in the Niger Delta: Is fiscal solution feasible?' in F. O. Egwaikhede and O. Aregbeyen (eds), *Fiscal Federalism and Nigeria's Economic Development* (The Nigerian Economic Society, Ibadan 1999) 101-115.

² Akpan H. Ekpo, 'Intergovernmental Fiscal Relations: The Nigerian Experience' Being paper presented at the 10th Year Anniversary of the Financial and Fiscal Commission of South Africa, Cape town International Convention Centre, Cape town, South Africa (10-12 August 2004)32.

³ Lawrence A. Rupley, 'Revenue Sharing in the Nigerian Federation' (1981)19 *Journal of Modern African Studies* 257, 261; Adedotun O. Phillips, 'Managing Fiscal Federalism: Revenue Allocation Issues' (1991)21 *Publius: The Journal of Federalism* 103, 104; I. Oguine, 'Nigeria's Oil Revenues and the Oil Producing Areas' (1999)17 *J. Energy & Nat. Resources L.* 111, 114-5.

⁴ M. Okilo, 'The Derivation Principle and National Unity' *Daily Times* (Lagos, 19 July 1980) 3.

⁵ Report of the Technical Committee on the Niger Delta Vol.1 (November, 2008) 60; Report of the Special Security Committee On Oil Producing Areas (September, 2001) 26.

⁶ *A-G Federation v. A-G Abia State (No. 2)* [2000]6 N. W. L. R. (Pt. 764) 542, 760-1, 802.

⁷ George Anderson, 'Nigerian Fiscal Federalism Seen from a Comparative Perspective' Notes for Address to Governors' Forum' (Abuja, Nigeria 28 October, 2007)14<[http:// www. forumfed.org/en/ pubs/GA_ Governors](http://www.forumfed.org/en/pubs/GA_Governors)' Forum_NigeriaOct07.pdf/>accessed 02 August, 2015.

⁸ John Boye Ejobowah, 'Rewriting Nigerian Federal Constitution: A Prescriptive Argument for Self-Sustaining Arrangement' (2009) 43 *Canadian Journal of African Studies* 507, 528.

federating States . . . owned, controlled and developed the natural resources which were located on their land.’¹

CONCLUDING REMARKS

The Niger Delta region of Nigeria has been the epicentre of conflicts and restiveness in the federation since the 1960’s. The history of conflicts and restiveness in the region are traceable to perceived injustices being suffered by its oil-producing ethnic minorities. The agitations in the Niger Delta for resource control or/and the practice of fiscal federalism are part and parcel of the collective quest for social justice in the region.

The principle of derivation has been touted as a fair and just response by the Nigerian State to the criminal neglect of the oil-producing Niger Delta. Indeed the general perception in none oil-producing regions of the federation is that the application of the derivation principle offers the oil-producing states of the Niger delta undeserved access to federally-collected oil revenue to the detriment of none oil-producing states of the federation. However, this paper has demonstrated that the application of the principle of derivation has not improved the fortunes of oil-producing states in the light of the horrendous ecological, environmental, social and economic externalities associated with natural resource exploration and extraction. Thus, the rewards offered oil-producing states of the Niger delta region under the derivation principle pales into insignificance when compared with the contributions of the region to the baking of the national cake and the deprivations being suffered by its peoples.

The position of this paper therefore is that the application of the principle of derivation is ineffective as a tool of distributive justice in the Niger Delta region of the Federation of Nigeria. This clearly renders the clamour from Northern Nigeria for a reduction of the derivation principle from the current 13% to 5% highly insensitive if not out rightly provocative. What is urgently needed is an upward review of the derivation principle from the current 13% to 30% with a further progression to 50% by 2020. The proposed increase is permissible under the 1999 Constitution (as amended) which merely specifies the lowest limit of the derivation principle in the proviso to s. 162 (2) thereof. The proposed increase will make more funds available to the oil-producing states to enable them address the infrastructural deficit in the region and the other social externalities associated with natural resource extraction.

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¹ Federal Republic of Nigeria, ‘Report of the Presidential Committee on the Review of the 1999 Constitution Vol. 1: Main Report’ (Federal Ministry of Information and National Orientation, Abuja 2001)43, para. 7.3.

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