

The Paradox of the Concept of Sustainable Development Under Nigeria's Environmental Law

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ABSTRACT

Sustainable development, understood since the Brundtland Report as development that meets the needs of the present without compromising the ability of future generations to meet their own needs, has been embraced by Nigeria as an organising principle. This paper examines the paradox between that commitment and the limited enforceability of Nigerian environmental law. The study uses a doctrinal, library-based method. It reads the 1999 Constitution, the NESREA Act 2007, the Environmental Impact Assessment Act 1992, the Petroleum Industry Act 2021 and related statutes alongside Nigerian and comparative case law. Section 20 of the Constitution directs the State to protect the environment, but section 6(6)(c) places that duty outside direct judicial enforcement. Statutes proclaim sustainability without a single enforcement architecture. Courts have absorbed environmental harm into the rights to life and dignity, notably in *Gbemre v Shell*, but the trajectory is uneven, as *Opara v Shell* shows. The paper treats the paradox as structural rather than merely definitional, linking the Positivist and Negativist readings of sustainable development to constitutional non-justiciability, statutory fragmentation and contested judicial absorption. Clarifying guidance from the Supreme Court, a harmonising environmental framework statute, specialised court capacity, and supervisory remedies drawn from Indian and South African practice would move the commitment from aspiration toward remedy.

Keywords: *sustainable development, environmental law, Nigeria, justiciability, constitutional law, doctrinal research*

1. Introduction

Sustainable development, defined by the World Commission on Environment and Development as development that meets the needs of the present without compromising the ability of future generations to meet their own needs, has become an organising principle across domestic legal systems (World Commission on Environment and Development, 1987). Nigeria has embraced this formulation at the level of policy, seeking to mesh development with environmental protection (Ogbodo, 2010). The concept's breadth has produced two schools. A Positivist or Optimist reading treats it as a licence for continued development that benefits present and future generations. A Negativist or Pessimist reading treats it as a warrant for restricting development in the name of ecological preservation (Ogbodo, 2010).

The question is not whether Nigeria has environmental statutes. It is whether those statutes, read with a non-justiciable constitutional objective, amount to a right that a person can enforce when a flare continues, a spill is not remediated, or an impact assessment is waived. Recent commentary has named this mismatch a legal paradox: constitutionally expressed environmental commitment without correlative judicial enforceability (Elgujja, 2025). The paradox is sharpened by the two readings of sustainable development itself. If the Optimist reading prevails, section 20 can be satisfied by development that is said to benefit future generations. If the Pessimist reading prevails, the same section requires restraint that the courts cannot directly order. Nigerian law currently offers no rule for choosing between them.

1.1 Problem, objectives and questions

The architecture proclaims sustainable development, yet the mechanisms that would give it legal effect remain weak. Section 6(6)(c) deprives citizens of a direct constitutional remedy for failure to protect the environment, and the statutes built to fill that gap suffer from jurisdictional fragmentation (Elgujja, 2025). Since *Gbemre v Shell Petroleum Development Company*

Nigeria Ltd (2005), courts have been willing to read environmental harm into sections 33 and 34, but *Opara v Shell Petroleum Development Company Nigeria Ltd* (2015) took a narrower view. The question is whether Nigeria's treatment amounts to a coherent commitment or reproduces a paradox between aspiration and remedy.

The objectives are to clarify the competing readings of sustainable development, to examine section 20 and section 6(6)(c), to assess whether the principal statutes operationalise an enforceable standard, to trace judicial absorption, and to draw lessons from India, South Africa and the ECOWAS Court. The research questions ask how the concept is interpreted in Nigerian discourse, what legal effect follows from Chapter II, how far the statutes supply an enforceable framework, how consistently courts have applied constitutional absorption, and which comparative reforms could mitigate the paradox. The study is intended for legislators, the judiciary, NESREA, the Nigerian Upstream Petroleum Regulatory Commission, practitioners and scholars of environmental and constitutional law.

2. Methodology

Doctrinal method is used here in its narrow sense. The paper does not survey community perceptions of pollution, and it does not estimate the welfare cost of gas flaring. It asks what the texts and the cases do. Primary materials were read for operative words, for ouster and exception clauses, and for the remedy actually granted. Cases were arranged chronologically so that *Gbemre*, *Centre for Oil Pollution Watch*, *Mobil v Ajanaku* and *Opara* could be compared on the same question: does environmental harm, without more, engage sections 33 and 34? Comparative materials were used only where they decide an analogous justiciability problem, not as a general survey of foreign environmental law.

3. Conceptual foundations

The Brundtland formulation was reinforced by Principle 3 of the Rio Declaration, which affirms that the right to development must be fulfilled so as to meet the developmental and environmental needs of present and future generations equitably (United Nations, 1992). Apparent clarity has not prevented contestation, because development and environmental protection can pull in opposite directions (Ogbodo, 2010). The Positivist school treats properly managed development as serving both generations. The Negativist school prioritises ecological preservation even at the cost of foregone economic activity. Nigeria's constitutional and policy architecture does not resolve that tension. It proclaims both objectives without a hierarchy or an enforceable mechanism for reconciling them.

4. The constitutional paradox

Section 20 provides that the State shall protect and improve the environment and safeguard the water, air, land, forest and wildlife of Nigeria. The provision is a textual commitment to the environmental dimension of sustainable development. It sits in Chapter II, the Fundamental Objectives and Directive Principles of State Policy, and section 6(6)(c) provides that the judicial power shall not extend to any issue or question as to whether any act or omission conforms with Chapter II. The result is a constitutionally expressed commitment without direct judicial enforceability (Elguja, 2025).

Item 60(a) is the legislative hinge. It empowers the National Assembly to make laws for the promotion and enforcement of the Fundamental Objectives. Where such a law exists, a Chapter II duty can be enforced as a statutory duty rather than as a free-standing constitutional right. That route explains why the Environmental Impact Assessment Act and the NESREA Act matter constitutionally, and why their weak application matters. A statute that is not applied does not convert section 20 into a remedy. Absorption into sections 33 and 34 is a second route, and it does not require a fresh Act. It requires a court willing to hold that life and dignity include the conditions of air, water and land. The two routes can be combined, as Gbemre combined a statutory impact-assessment breach with a constitutional holding, but neither route is secure while appellate authority points in both directions.

5. The statutory paradox

Statute compensates for section 20, but across a dispersed set of instruments. The NESREA Act 2007 confers broad federal regulatory powers and repealed the Federal Environmental Protection Agency Act, yet friction with sectoral regulators persists (Ogbodo, 2010; Elgujja, 2025). The Environmental Impact Assessment Act 1992 makes assessment a precondition for listed projects, with a review panel determining significant effect, yet late approvals have undermined its preventative logic (Elgujja, 2025).

The Associated Gas Re-Injection Act is the clearest statutory illustration of the Optimist reading. It permitted continued flaring on terms set by the minister, treating gas disposal as a cost of production rather than as an injury to a host community. Gbemre held the permitting provisions inconsistent with sections 33 and 34. The Petroleum Industry Act 2021 later tightened flare penalties and host-community obligations, which is a legislative movement toward the Pessimist reading, but it did not repeal the constitutional ouster and it did not create a private right of action framed as a right to a healthy environment. A licensee can comply with a plan under section 102 and still leave a community without a direct constitutional claim if a court follows Opara rather than Gbemre.

6. The judicial paradox

The turning point is *Gbemre v Shell Petroleum Development Company Nigeria Ltd* (2005). The Federal High Court in Benin held that continued gas flaring in Iwherekan, Delta State, violated the applicants' rights to life and dignity, that failure to conduct an environmental impact assessment breached the 1992 Act and those rights, and that provisions of the Associated Gas Re-Injection Act permitting continued flaring were inconsistent with the Constitution and void. The court ordered the Attorney-General to pursue amendment of that Act. The judgment was the first explicit domestic recognition that environmental degradation can be a fundamental-rights breach (Elgujja, 2025).

Later decisions echo that reasoning. *Centre for Oil Pollution Watch v Nigerian National Petroleum Corporation* (2019) 5 NWLR (Pt 1666) 518 confirmed that environmental degradation implicates the right to life and liberalised standing, recognising that harm is often diffuse. *Mobil Producing (Nig.) Unlimited v Ajanaku* (2021) LPELR-52566 (CA) reiterated that corporate pollution and failed remediation can be a constitutional violation. Read together, these cases suggest an emerging trajectory rather than an isolated instance (Elgujja, 2025).

The facts in Gbemre matter to the ratio. The applicants lived with continuous flaring. They did not ask the court to redesign energy policy. They asked for a declaration that the flare violated life and dignity, for an order restraining the flare, and for a direction that the Attorney-General initiate amendment of the statute that authorised it. The court granted that package. Centre for Oil Pollution Watch later removed a standing barrier that would otherwise have confined such claims to named victims with proved individual injury. *Mobil v Ajanaku* extended the logic to failure of remediation, so that the wrong is not only the release of a pollutant but the refusal to restore the conditions of life. Opara pulls the other way by treating fundamental-rights procedure as unsuitable for what it regarded as an ordinary oil-pollution claim. Until that conflict is resolved, litigants must choose a court and a procedure in the hope that absorption will be applied.

7. A third route: the African Charter and comparative practice

Domestication of the African Charter on Human and Peoples' Rights supplies a route that section 20 does not. The African Charter (Ratification and Enforcement) Act, Cap A9, Laws of the Federation of Nigeria 2004, gives the Charter the force of a Nigerian statute. Article 24 guarantees peoples the right to a general satisfactory environment favourable to their development. Because the Act is a statute, section 6(6)(c) does not oust it. A claimant can plead Article 24 together with sections 33 and 34, which is what the ECOWAS Court effectively required Nigeria to live up to in *SERAP v Federal Republic of Nigeria* (2012). The domestic difficulty is procedural. Fundamental-rights rules are summary. Pollution claims need evidence of cause, remedy and sometimes expert proof. Courts that follow Opara send those claims to ordinary procedure, where delay and standing rules return. Courts that follow Gbemre keep them on the rights track. The Charter narrows the constitutional gap. It does not close the procedural one.

India's Directive Principles resemble Chapter II, yet *Subhash Kumar v State of Bihar* (1991) 1 SCC 598 held that access to pollution-free water and air is inherent in the right to life. Continuing mandamus then keeps the agency before the court until compliance is shown (Elgужja, 2025). A Nigerian declaration that flaring violates dignity does not, by itself, keep a flare unlit. South Africa removed the need for absorption. Section 24 of the 1996 Constitution guarantees an environment not harmful to health or well-being, and *Fuel Retailers Association v Director-General* required sustainable development and cumulative impact to be considered in administrative review. The ECOWAS judgment binds Nigeria as a State, but it does not amend section 6(6)(c), and a community still needs a domestic order. Text, supervisory remedy and regional duty answer different parts of the same gap. Nigeria has used absorption, and only in some courts.

Table 1. Where Nigeria's sustainable-development commitment can and cannot be enforced

Instrument	What it promises	Enforceable?
Constitution, s. 20	State duty to protect and improve the environment	No, while it remains in Chapter II
Constitution, s. 6(6)(c)	Ouster of judicial power over Chapter II	Yes, as a bar, subject to other constitutional provision
Constitution, ss. 33 and 34	Rights to life and dignity	Yes, if a court absorbs environmental harm

African Charter Act, Art. 24	Right to a satisfactory environment	Yes, as a domesticated statute
NESREA Act 2007	Federal standards and enforcement powers	Yes, but split with sector regulators
EIA Act 1992	Assessment before approval of listed projects	Yes, if the review is not waived or delayed
Petroleum Industry Act 2021	Management plans, host communities, flare sanctions	Yes, as licence conditions, not as a free-standing right
Associated Gas Re-Injection Act	Ministerial permission to flare	Qualified, after Gbemre held permitting provisions void

Note. Enforceability is stated as a matter of current doctrinal position, not of administrative practice.

Table 1 is the paradox in summary. The clearest environmental sentence in the Constitution is the one a court cannot enforce directly. The enforceable sentences are either rights that do not mention the environment, a regional treaty made domestic, or sectoral statutes that do not speak to one another. Sustainable development is then asked to do the work of a missing right. It cannot, because the Optimist and Pessimist readings license opposite outcomes from the same phrase.

8. Discussion

Three levels operate at once. Conceptually, Positivist and Negativist readings give no determinate balance when development and protection conflict (Ogbodo, 2010). Constitutionally, section 20 carries no direct remedy, which recent scholarship has named as a paradox (Elgujja, 2025). Judicially, absorption since Gbemre is real, liberalised by Centre for Oil Pollution Watch, and limited by Opara. Statutory fragmentation becomes constitutionally significant only when a court is willing to read a breached statute through sections 33 and 34 or through Article 24. A community that loses on procedure has not lost because the science of harm was weak. It has lost because the architecture offers several doors and locks the main one.

8.1 Implications for regulators, the bar and the legislature

For NESREA, the paradox appears as a jurisdictional quarrel. The Agency inherited the enforcement estate of the old Federal Environmental Protection Agency, but oil and gas operations remain substantially with the upstream regulator. A community that complains of a flare may be told that the matter is petroleum, not environment, while a petroleum regulator may treat it as an operational incident rather than a rights breach. Inter-agency protocols would not cure section 6(6)(c). They would stop the statutory layer from reproducing the constitutional gap in the form of a referral.

For the bar, procedure is part of the paradox. *Oronto Douglas v Shell Petroleum Development Company Ltd* showed how standing and public-interest framing can fail even where the underlying harm is widely known. Centre for Oil Pollution Watch later eased standing. Counsel who plead only section 20 will still be met by the ouster. Counsel who plead sections 33 and 34, Article 24 of the African Charter, and a specific statutory breach, as Gbemre did with the impact-assessment duty, give the court a route that does not depend on Chapter II. The uneven case law means that pleading strategy currently does the work that a settled doctrine should do.

For the legislature, a framework Act would need four clauses to be more than a consolidation. It should state that the environmental duty is enforceable notwithstanding section 6(6)(c), in the

manner Item 60(a) already permits. It should allocate media and sectors between NESREA and the petroleum regulator without a gap at the boundary. It should require reasons when an impact assessment is waived, and a time limit for the waiver decision. It should authorise the Federal High Court to issue a continuing order, so that a declaration against flaring or a spill is returned to court until the agency reports compliance. Without that fourth clause, Nigerian law would still lack the supervisory piece that Indian practice uses to stop declarations from expiring on the day they are made.

None of these steps requires the court to choose the Pessimist reading of sustainable development over the Optimist reading in the abstract. They require a forum in which the choice is made on evidence, against a duty that can be enforced, with a remedy that lasts longer than the judgment. That is the difference between a concept used in preambles and a concept used as law.

A further consequence is institutional. Environmental litigation in Nigeria is still heard in generalist courts, often on affidavit, with limited room for toxicology or cumulative-impact evidence. Elgужja (2025) has proposed specialised Environmental and Climate Justice divisions of the Federal High Court for that reason. Specialisation would not repeal section 6(6)(c). It would make the absorption route, and the Charter route, less dependent on whether a particular bench has previously sat on an oil-and-gas list. The same point applies to regulators. Sustainable development appears in guidelines and in the long title of recent petroleum reform, but a guideline cannot supply the remedy that section 20 withholds.

The paradox also shapes how future generations are spoken of in Nigerian law. The Brundtland formula treats them as the measure of present restraint. Chapter II mentions the environment, not future generations as rights-holders. There is no Nigerian analogue of a public-trust doctrine with a named beneficiary class that can sue. Absorption through the right to life protects people who are already born and already harmed. It is a weak vehicle for a duty owed to persons who cannot yet be plaintiffs. Comparative entrenchment, of the South African kind, is the cleaner answer to that intergenerational part of the concept. Until then, Nigerian sustainable-development claims will remain claims about present injury, pleaded as dignity, rather than claims about a future that the Constitution names only as policy.

The paper does not argue that every spill is a fundamental-rights case, or that courts should replace regulators. It argues that a legal system which invokes sustainable development in policy, in section 20, and in the Petroleum Industry Act cannot also maintain an ouster that makes the central duty unenforceable, and then leave the workaround to the temperament of individual benches. That is the structural claim. Definitional ambiguity explains why lawyers disagree. Non-justiciability explains why disagreement cannot be settled by a suit brought on section 20 itself.

9. Recommendations and conclusion

Five reforms follow. The Supreme Court should consolidate the absorption doctrine and resolve the tension with Opara, so that lower courts know when environmental harm engages sections 33 and 34. The National Assembly should consider a harmonising Environmental Framework Act covering the ground now split among NESREA, impact assessment and the Petroleum Industry Act (Elgujja, 2025). Specialised environmental divisions of the Federal High Court would concentrate expertise in toxicology, risk and environmental science. Future reform of section 20 should draw on India's supervisory remedies and South Africa's explicit entrenchment. NESREA and the Nigerian Upstream Petroleum Regulatory Commission should strengthen coordination so that statutory fragmentation is not reproduced in enforcement.

The paradox is not only a definitional quarrel between Positivist and Negativist readings. It is a structural feature of an architecture that proclaims environmental commitment extensively while insulating a significant part of that commitment from direct enforcement. Comparative practice shows that the paradox is neither unique nor inevitable. Purposive interpretation, explicit entrenchment and supervisory remedies are available paths from constitutional aspiration toward enforceable legal reality.

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