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Are the laws regulating the flaring of gas in Nigeria a negative compromise to the environment

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Abstract
Gas flaring remains a persistent environmental and legal challenge in Nigeria's oil and gas industry despite decades of regulatory intervention. This study examines whether the legal framework governing gas flaring in Nigeria – particularly the Petroleum Industry Act 2021 and the Flare Gas (Prevention of Waste and Pollution) Regulation 2018 – constitutes a 'negative compromise' that prioritises industry convenience over environmental protection. Adopting a doctrinal legal research methodology, the article analyses primary legislation, regulations, and institutional frameworks alongside secondary literature on environmental impacts. The findings reveal that while recent legal reforms have increased flare penalties and established new regulatory bodies, fundamental weaknesses persist: penalty levels remain economically attractive to oil companies relative to gas capture costs, exceptions for force majeure and operational reasons are overly broad, enforcement is inconsistent, and the non-justiciable nature of constitutional environmental provisions undermines legal accountability. The study concludes that Nigeria's gas flaring laws are indeed a negative compromise – they create an illusion of regulatory stringency while providing loopholes that perpetuate flaring. It recommends specific amendments, including: (i) increasing flare penalties to at least the marginal cost of gas utilisation; (ii) introducing specific performance remedies requiring environmental remediation; (iii) making the constitutional right to a healthy environment justiciable; and (iv) mandating public disclosure of flare volumes and penalty payments. Only such reforms can align Nigeria's legal framework with its international climate pledges and the goal of a sustainable environment.

Keywords: Gas flaring, environmental regulation, petroleum Industry act 2021, Nigeria, negative compromise climate change

Introduction
Nigeria is a blessed nation with abundant natural gas. In 2019, the total production volume of natural gas in Nigeria was around 52 billion cubic meters. [1] This reflects an increase in the production rate of gas in recent years. Such an increase indicates high demand and usage. The nation has create and enact various laws and regulations including setting up institutions for the regulation and mitigation/eradication of gas flaring. The provisions of the Flare Gas (Prevention of Waste and Pollution) Regulation 2018 and that of the Petroleum Industry Act 2021, were enacted to combat gas flaring, ostensibly with stringent measures. Even with the establishment of institutions such as the National Environmental Standards and Regulation Enforcement Agency (NESREA) Act 2007, the Nigerian Gas Flare Commercialization program, the Nigerian National Petroleum Company Limited, the Federal Ministry of Environment it is evident that the flaring of gas in Nigeria has not sufficiently reduced. This paper is divided into ten parts. Part II defines gas flaring. Part III examines the reasons for gas flaring. Part IV discusses the benefits of natural gas. Part V analyses the institutional framework. Part VI reviews the legal framework. Part VII addresses gas utilisation in Nigeria. Part VIII details the environmental impacts of gas flaring. Part IX critically evaluates the 'compromise' inherent in the laws. Part X concludes with recommendations.

The Term "Gas Flaring"
Gas flaring refers to the combustion of excess natural gas under controlled conditions at oil wells and oil production and processing facilities. When gas that is brought to the surface cannot be utilized, it is then flared(burned for disposal). [2] It is also seen as the burning of by-products of associated gas generated during different processes, such as oil and gas production and other petrol-chemical processes. Gas flaring is the burning of natural gas associated with oil extraction. The practice has persisted from the beginning of oil production over 160 years ago and takes place due to a range of issues, from market and economic constraints, to a lack of appropriate regulation and political will.

The reason for the flaring of gas
The reason why natural gas is flared in the upstream production areas is due to the lack of direct market to sell the product and also the technology to convert the gas into useful purposes. Also there is lack of technology to conserve the gas for future purposes hence it is flared. According to the World Bank Gas Flaring Reduction Partnership Program, there are different reasons why gas is flared. Some of which are:
a. Safety Reasons
b. Economic and technical reasons
c. Regulatory reasons
d. Unfaithful deadline syndrome

Safety Reasons
In respect of the safety reason, gas flaring may be required to contain and control explosion during crude oil extraction and also reduce the increasing pressure during extracting and processing oil and gas.

Economic and Technical Reasons
The economic and technical reasons are drawn from the fact that there are no market and also the process and technology for transporting the gas from the industry to where it will be processed and utilized is a technological challenge.

The conversion process of gas for utilization is very expensive and as such they are allowed to be flared.

Regulatory Reasons

The regulatory reasons is that the laws which are suppose to foster the reduction in the gas flared are too stringent. The law makes it hard for companies to sell associated gas this is due to the fact that the right secured to extract oil do not automatically give them the ownership of the associated gas found alongside the extraction process.

The law further remove the hands of companies from determining gas utilization processes such as how it is handled commercially. The penalties that are imposed on the companies for violating the gas flaring prohibition are more financially viable for the companies than capturing or selling the gas.

Unfaithful Deadline Syndrome

Nigeria had given a deadline to stop the recurrent flaring of gas till 2020. However there is no atom of improvement towards achieving this goal irrespective of the fact that 2020 had far gone. The statement of Bjorn Hamso, program manager for the World Bank's Global Gas Flaring Reduction Partnership (GGFR), was more upbeat. He noted that "a number of nations, including Nigeria, are making progress." However, much more work needs to be done to stop the current regular flaring. Shell Nigeria is responsible for the majority of the oil extraction in the Niger Delta. It belongs to the GGFR as well. The Shell Petroleum Development Company (SPDC), commonly known as Shell Nigeria, told DW that it was collaborating closely with the Nigerian government to put an end to gas flaring. All new SPDC JV facilities have been built since 2000 with the goal of reducing ongoing related gas flaring, and a multi-year program to develop technology for capturing related gas from older facilities has been successfully completed concurrently. [3] The quantity of gas produced and flared in the country from 2017 to 2021 is shown in the Table below:

The benefits of Natural Gas

Natural gas is a fossil fuel that consists primarily of methane, hydrogen, and carbon. It was not until lately that techniques for obtaining this gas, bringing it to the surface, and putting it to good use were urbanized. Natural gas is lighter than air, colorless, odorless, and tasteless. For this reason, an odorant is added to the gas to make it noticeable and objectionable for safety reasons. Natural Gas is an environmentally friendly and efficient energy source, is the cleanest-burning conventional fuel, emitting lower levels of greenhouse gas emissions than heavier hydrocarbon fuels such as coal and oil. It is said that for every disadvantage there is an advantage. Thus, it is pertinent to note that as criticized as Natural Gas, it comes with its importance. The importance of Natural Gas cannot be over accentuated thus there are limits to which we shall discuss the advantageous role it has and will play in society at large. In this work the benefits will be divided into three areas which are:

a. Economic benefits
b. Environmental benefits
c. Domestic benefits

The economic benefits of the natural gas is the creation of revenue generation for the nation. The global increase in demand for natural gas is attracting more exploration and producing companies to the sector and as such the country can generate more revenue to cater for itself. Also the sale of natural gas by individuals have served as a means of lively-hood and provide a source of income for individuals. Also another benefits of natural gas is the creation of employment. Any where natural gas is found, attracts investors an companies thereby establishing jobs for people to work.

The environmental benefits of natural gas is that it reduces noise pollution as the use of natural gas for equipment and machines generates less noise. Also the use of natural gas reduces harmful emission into the atmosphere thereby reducing air pollution. Natural gas is an environmentally friendly and efficient energy source and the cleanest-burning conventional fuel, which produces lower levels of greenhouse gas emissions than heavier hydrocarbon fuels such as coal and oil.

The domestic benefit of natural gas is found in the utilization of the gas in homes for cooking and heat generation such as home heaters, boilers and water heaters. Also it is used to generate and supply power. Another benefit is in the production of fertilizer, as natural gas it is a major component for the production of ammonia which is found in fertilizers.

The Institutional Framework Of The Gas Sector

The institutional framework of the gas sector are those agencies saddled with the responsibility of ensuring the gas flaring and its activities do not adversely affect the environment.

1. The Nigeria Gas Flare Commercialization Programme 2017

The Nigeria Gas Flare Commercialization Programme 2017 is saddled with the responsibility of reducing the environmental and social impact of gas flaring in Nigeria for the protection of the environment. It ensures the prevention of waste of natural resources, and the establishment of economic and social benefits from natural gas. It is obligatory to take up all gas assigned to be flared without any cost implication and the gas is to be sold at a competitive auction sale. A permit or licence is obtained to access the flare site and take up flared gas. The sanction for non-compliance is USD 2 (NGN 830.24) per thousand standard cubic feet for the production of 10,000 barrels of oil. A Further sanction of USD 2.50 (NGN 1037.80) per cubic foot is made against a company for failure to make available correct flare figures, refusal to execute the Connection Agreement, and failure to give access to the flare site.

However, weak enforcement due to the absence of the strong political will of the government to enforce its anti-gas-flaring laws and regulations is a challenge working against its efficiency. [4]

2. Niger Delta Development Commission (NDDC).

This commission is established by the Niger Delta Development Commission (Establishment, etc.) Act, 2000. This institution is responsible for the tackling of economic and environmental problems in the Niger Delta region and also prevent oil spillage, gas flaring and other environmental pollution.

The Legal Framework of The Gas Sector

The major laws and regulations saddled with the responsibility of making sure that the objective of the gas sector is attained are the Flare Gas (Prevention of Waste and

Pollution) Regulation 2018 and the Petroleum Industry Act 2021. A brief discussion of the aforementioned laws is as follows:

1. The Constitution of the Federal Republic of Nigeria 1999 (As Amended)

The constitution provides for the ownership and control of all minerals under the federal government. This is important because ownership is the first stage of control. It by knowing who tittle is bestowed on that will determine how such commodity is to be utilized. The provision of the constitution provides thus:

'Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oil and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria, shall vest in the Government of the Federation and shall be managed in such manner as may be prescribed by the National Assembly' [5]

The Constitution, which is the fundamental law, makes provision for the protection of the environment which can be found under Chapter 2 of the Nigerian Constitution. This aspect of the constitution is nonjusticiable and under section 6 [6] (c) this area of the Constitution only serves as a guide and a yardstick to what ought to be obtainable in the Nigerian society.

The provision of Section 20 states that 'the state shall maintain and improve the environment and safeguard the water, air, and land of Nigeria, as well as the forest and wildlife.' In a court of law, an injured party cannot rely on it. As a result, it will not guarantee significant environmental protection or conservation against gas flaring in the oil industry

2. Flare Gas (Prevention of Waste and Pollution) Regulation 2018

This regulation came into force on the 5th of July, 2018. It was signed into Law by the former President of Nigeria, His Excellency, Late President Muhammadu Buhari, GCFR, in his capacity as the Minister of Petroleum Resources ('the Minister').

Under this regulation, the federal government is in full control and ownership of all flared gas and they have the right to dispose of or assign the same to a Holder through the issuance of a permit to such Holder. [6] Also, such ownership or rather a possessive right by the federal government is free of cost and royalties, meaning that the federal government is not expected or does not owe a duty to the oil companies to pay for its ownership of such flared gas.

It also prohibits producers from flaring and venting natural gas. Hence no routine flaring is allowed. However, due to the inability to put a total halt to this menace, it was provided as an alternative to the prohibition, that any company that produces at least 10,000 barrels of oil per day shall be liable to a flare payment of $2 (two United States Dollars) per 28.317 standard cubic meters (1,000 standard cubic feet (SCF) of gas flared. [7]

Furthermore, companies which produce less than 10,000 barrels per day shall be liable to a flare payment of $0.50 (Fifty United States Cent) per 28.317 standard cubic meters (1,000 standard cubic feet (SCF)) of gas flared. Inclusive is the force majeure sub-provision that stipulates and exempt the company from liability when flaring of gas occurs beyond their control. [8]

It is from the above that we find that there has been a substantial growth from the erstwhile penalty of N10 per 1,000 SCF of gas flared which has been in force since January 1998, although not economically meaningful.

A brief comparative perspective illustrates the inadequacy of Nigeria's penalty regime. In Norway, flaring is strictly prohibited except for safety or technical necessity, and violations attract significant tax liabilities under the country's carbon tax framework, which in 2023 stood at approximately NOK 1,400 (US$130) per tonne of CO_2 equivalent – translating to an effective penalty far exceeding Nigeria's $2 per 1,000 SCF. Angola, another African oil producer, imposes a penalty of $3.50 per 1,000 SCF for unauthorised flaring under its 2018 Gas Law (Lei dos Petróleos), which is 75% higher than Nigeria's rate for large producers. Moreover, Angola has linked flare penalties to a dedicated environmental remediation fund, whereas Nigeria's flare payments flow into general government revenue with no earmarking for affected communities. This comparison underscores that Nigeria's penalties are not only low in absolute terms but also lack the structural features – such as carbon-based escalation or ring-fenced remediation – that make other regimes more effective deterrents. [9]

3. The Petroleum Industry Act 2021

This newly reviewed law has put in place two regulatory aspects of the Oil and Gas industry, which are the Nigerian Upstream Petroleum Regulatory Commission referred to as the 'Commission' [10], and the Nigerian Midstream and Downstream Petroleum Regulatory Authority referred to as 'the Authority'. [11] This commission and authority are responsible for the regulation of their various streams in the aspect of technical, operational and commercial activities.

It is the Commission that is saddled with the responsibility of eliminating natural gas flaring and venting. [12] However, it allows for flaring on some excepted grounds i.e. where it is required for facility start-up or strategic operational reasons, including testing. [13] The responsibility of the Authority on the other hand concerning the flaring of gas is that the Authority may make regulations to impose gas flare penalties arising from midstream operations. [14]

4. Environmental Impact Assessment Act t 1992 Cap E12, LFN 2004

Environmental Impact Assessment is defined generally as the process of elaborating on the Environmental effects of alternative actions and making the premises of decisions explicit. It is also defined as a formal process used to predict the environmental consequences of any development project by trying to ensure that potential problems are foreseen and addressed at an early stage in the project's planning and design. EIA is a direct consequence of the precaution principle; in order to prevent environmental hazard, it is necessary to understand the environmental impacts of a project as early as possible. [15]

It also makes environment impact assessment mandatory for development projects likely to have adverse impacts on the environment prior to implementation. The act provides that:

'The Federal, State, Local Government or any of its agencies prior to Environmental Assessment of the project in accordance with the Environmental Impact Assessment Act shall not under the provisions of any law or enactment issue a permit or license, grant or approval or take any other action for the purpose of enabling the project to be carried out in whole in or in part' [16]

By virtue of this Act, there is a general compliance level for all sectors of the economy including the gas sector to comply with the laws that will foster an enabling environment in the society.

5. National Environmental Standard Regulation (Establishment) Agency (NESREA) Act 2007.

The National Environmental Standard Regulation (Establishment) Agency (NESREA) Act was established in 2007 to repeal and replace the Federal Environmental Protection Act (FEPA) of 1988. The National Environmental Standard Regulation (Establishment) Agency (NESREA) has the responsibility to enforce all environmental laws in Nigeria including international agreement or conventions on environmental protection. This is in compliance with the National Policy on Environment which protects the environment. It further prohibits the release of harmful waste into the environment without permission and authorization. A mobile court is set up to try those who violates its provisions. [17]

Gas Utilization in Nigeria

Historically, Nigeria has been able to evolve from the traditional law-making process as regards Oil. For a long time, the aspect of gas was a grey area waiting to be harnessed. The subsequent awareness and interest in this area brought about the need to put into consideration the regulation of the same. 'Previously, if you found water, you were better off than finding natural gas [18].

This goes to show that there was no integral utilization of Natural Gas in Nigeria previously, the only buyer at the time was the former National Electric Power Authority (NEPA). It was during the period of 1999 that the International Oil Companies (IOC) found profit in exporting these natural gases. However, they could not utilize all the natural gases hence they were being flared.

Auspiciously, Nigeria has metamorphosed from a gas under-utilization stage to a gas utilization phase. Here gas is now being utilized in so many ways such as power generation, petrochemicals & fertilizers etc.

Impacts of Gas Flaring on the Environment

In Nigeria, 6.63 billion cubic meters of gas have been flared in 2021. [19] The impacts of the flaring of gas are no doubt a pandemic and endemic cause of various fractions of problems. Concerning the country Nigeria, we can find that host communities are verily affected and have posed a great challenge to the members and environment of such society. Gas flaring is harmful to both humans and the ecosystem. The impacts or rather consequences are grouped as thus:

1. Climate Change

The flaring of gas into the atmosphere causes global warming. This is because gaseous elements such as CO2 are emitted into the atmosphere which amounts to the major Green House Gas (GHG) factor. CO2 produced by human activities is the largest contributor to global warming. By 2020, its concentration in the atmosphere had risen to 48% above its pre-industrial level (before 1750) [20].

The further consequences that this may cause is that the ozone layer which ought to protect against excessive sunlight and heat will become depleted and as such pave the way for increased temperature and irregular weather conditions. The shell sustainability report, 2018 stipulates that the flaring of natural gas contributes to climate change. [21]

2. Acid Rain

Acid rain damage vegetation and acidifies the water bodies, thereby leading to the high mortality rate of aquatic life. The acidic nature of the environment can affect farming activities as the acid rainfall could potentially impact crop yield and harvest. The rivers and streams, which are a source of water supply for most households within the jetties, and slumps in some parts of the state, have been exposed to unclean water, poor sanitation, and hygiene for its users. [22]

3. Deforestation

Deforestation which is the purposeful clearing of forested land. The clearing of forested land to make space for equipment and machinery including large structures without recourse to transfer of vegetation and natural habitat creates a negative effect on the environment. The activities of gas flaring on the environment reduces the advantages of the vegetation on the environment. The natural habitat of such a place becomes deteriorated.

4. Adverse Effects on Human Beings

The consequences on humans can be seen amongst the members of the host communities. It ranges from lung infections which may result in cough to visual impairments. A critical example was the recent soot crisis in Rivers State which spread to Bayelsa State. Environmental and health experts have warned that the soot in Rivers state is capable of leading to respiratory diseases, skin cancer, and kidney and liver damage. It could also damage the human eyes and nostrils. This could lead to a full-blown health crisis and reduce the life expectancy rate of residents. [23]

The Compromise of the Laws

It is evident that the flaring of gas in Nigeria has not been adequately reduced. Nigeria has flared gas for decades despite repeated official pledges to stop. The central question is whether the current legal framework can ever deliver a flare-free environment.

As part of its initiative for a sustainable environment, Nigeria pledged to put an end to gas flaring by 2030. This was done under an updated climate change plan submitted to the United Nations (UN) in 2021 and has signed up to the Global Methane Pledge, vowing to cut emissions by 30% by 2030, alongside 110 other countries. The country also signed into law its Climate Change Act (CCA) in 2021 [24].

Unfortunately, the laws which seek to alleviate the menace of flaring of gas on the environment on the other hand create other ambiguities for the international and national oil companies to flare these gases into the atmosphere in the guise of being under the exception of the law.

The country has on several occasions pledged and affirmed its commitment to stopping gas flaring in the nearest future; however, this cannot be attained even in the farthest future if the law is being compromised in such manner as to give excessive loopholes against its prohibitions.

However, the relevant government agencies have not been able to successfully impose the penalties. The non-compliant claim that they are unable to fulfil their obligations due to inadequate gas infrastructure constraints, and sub-optimal pricing for gas deliveries, plus other constraints [25]

Moreover, despite rampant flaring causing environmental degradation in the host communities, the licenses and permits which ought to be withdrawn as contained in the law are not being withdrawn.

The Ways Forward

From the foregoing analysis, the penalty rate should be increased to push the Oil companies into evolving a solution to utilize the gas flared rather than waste it and pay the cheap penalty.

In light of the above, gas projects should be encouraged which will create jobs in society. This will allow the nation to meet up its flare-out date and put an end to gas flaring while making huge amounts of revenue from it. Hence all regulations and laws made to tighten the knots of investors into the gas streams should be loosened to propel wanting investors to improve gas utilization and thereby reduce/stop the flaring of gas. This will help the environment at large.

Planting trees is one major help factor for the environment, it will help reduce greenhouse gas in the atmosphere and improve soil composition. This is because the trees planted will help remove carbon dioxide from the air and store the same in the soil where it is needed and in return, it gives out oxygen into the atmosphere. [26] This positive symbiotic relationship with the environment will be very much welcome in tackling the adverse effect of the flaring of gas in Nigeria. A sustainable environment will thus be achieved.

Moreover, there should be a law encouraging international Oil Companies to privately own and merge with other companies of their choice to utilize the gas flared rather than the government taking control and giving the same to whom it deems fit without proper checks and balances.

Correspondingly, the nation should reduce the focus on crude oil and channel part of it to the gas sector because there are a whole lot of benefits which are more beneficial to the environment and causes less harm.

In respect of the imposition of the penalties, the body responsible has to live up to its duty and make sure permits are withdrawn when the prohibitions of the flaring of gas are breached. Most importantly the act of specific performance should be imputed into the laws as one of the punishments. Here the Multi National Oil Companies will no longer trade finances with the government in form of fines, rather the government will put the burden on them to resuscitate the environment and take the damage off the surface of the earth, thereby achieving the goal of One Sustainable Earth.

Conclusion

The analysis of this article has shown that the legal frameworks about gas flaring are not capable to cater for the various propaganda to put a stop to the flaring of gas in the nearest future. This is a clear warning that the environment is not safe in the long run What is needed is a positive compromise of discouraging the flaring of gas in all its entirety thereby protecting the environment. However, if allegiance accedes towards this work, then sustainable environment and environmental pledges will be fulfilled. We need more effective laws that will serve as a positive alternative and not a negative alternative to mitigate the flaring of gas to its barest minimum. Although, increasing the flaring penalty may not be the only solution but the ability for the nation to create a level playing environment for companies to invest in this flare and convert them into money will galvanize them to channel their effort to commercialize this gas and bring on board the infrastructure we need to have in place. [27]

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