The use and impact of criminal sanctions for environmental law transgressions in industrial facilities in South Africa: Determining the boundaries of overcriminalization

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Declaration

I, the undersigned, hereby declare that the work contained in this thesis is my own original work and that I have not previously in its entirety or in part submitted it at any University for a degree.

Signature: 

Date: 6 September 2022

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Thanks to my supervisor, family, husband, friends, colleagues, and participants without whom this research and thesis would not be possible.

Abstract

South Africa has many environmental laws that apply to industrial operations, which laws contain numerous criminal offence and penalty provisions. On conviction, criminal liability may be substantial and far-reaching, including maximum prescribed penalties of up to R5 million or R10 million or imprisonment of up to five or ten years, depending on the offence's nature. The National Environmental Management Act 107 of 1998 also contains instances where additional criminal liability may be imposed.

Writers have described these environmental laws as being 'littered with new criminal offences'. Criminal law theorists express strong views against overcriminalization, describing it as 'one of the most serious problems facing criminal law' because although the criminal sanction should be the state's 'ultimate weapon against assaults threatening societal coexistence', it 'has become a blunt instrument through its indiscriminate use by legislatures as a tool to ensure obedience'.

South African environmental law scholars have considered the criminal sanction in environmental law, but not how the landscape of criminal sanctions has changed over the years, how the criminal sanction is used against industrial facilities that contravene such laws, and what impact this has had on the operation of these facilities or effective enforcement. This research frames these considerations in terms of theories of criminalization and overcriminalization, by establishing a normative framework that can be used to assess what behaviour should be criminalized or what may indicate overcriminalization.

This study analyzes changes to four selected South African environmental laws and specific offence categories and considers concluded prosecutions relating to such offences. It reflects the perspectives of 32 participants involved with environmental compliance and enforcement in South Africa, gauging their opinions on themes including criminal law as a last resort, certainty and practicality of the law and its frequent changes, the deterrent effect of criminal sanctions, and challenges in criminal enforcement. These aspects are analyzed within the normative framework to answer the overarching research question- whether the use of criminal sanctions for environmental transgressions in industrial facilities in South Africa has led to overcriminalization and when the use of the criminal sanction is appropriate and effective. The study's recommendations aim to contribute to the more effective use of criminal sanctions through improved legislative design.

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1. INTRODUCTION

I have been interested in the criminal enforcement of environmental laws for more than a decade, through my career as an attorney specialising in public law and regulation. I have dealt with many environmental law issues in my practice, including legal compliance assessments or due diligence processes to determine whether clients' facilities or target businesses[1] hold the required environmental approvals and whether they comply with approval conditions or legal requirements. I have assisted clients in responding to environmental authorities' compliance and enforcement action that may progress to criminal enforcement action. My involvement with criminal prosecutions of industrial operations, in particular, ignited an interest in how the criminal sanction is used for environmental law contraventions and if its use (or the sanctions themselves) may amount to overcriminalization. This research is founded on these experiences[2] and further informed by the outcomes of the non-empirical and empirical research contained in this thesis.

This study focuses on activities within the industrial sector,[3] in other words, facilities[4] established for the production or manufacturing of products or commodities or treatment, management and/or disposal of waste, which activities are often undertaken in areas zoned for industrial use. This research predominantly focuses on the manufacturing or secondary sector of the economy.[5] Participants interviewed as part of the empirical component of this research were predominantly from manufacturing (metals, chemicals and other commodities) and businesses involving waste management or treatment. However, as explained in this thesis, some of the cases considered extend to the agricultural and mining sectors. The use of the word

[1] In this context, a target business or entity is typically the subject of a sale of business or shares. The purchaser will conduct a legal due diligence to assess the target's legal compliance to determine any business risks should it proceed with its acquisition.

[2] The research methodology takes into account any bias originating from my practical experience.

[3] In this regard, 'industrial sector' could be defined as the 'goods-producing segment of an economy, including agriculture, construction, fisheries, forestry, and manufacturing'.

[4] 'Industrial facilities' are defined by the Merriam Webster online dictionary as 'of or relating to industry'. In turn, 'industry' is defined as referring to 'systematic labor especially for some useful purpose or the creation of something of value; or a distinct group of productive or profit-making enterprises; or manufacturing activity as a whole'. 'Facility' is used in the context of 'a building, plant, or structure, built, established, or installed for the performance of one or more specific activities or functions'. See *https://www.merriam-webster.com/dictionary/ and http://www.businessdictionary.com/definition/facility.html.*

[5] See *http://www.businessdictionary.com/definition/industrial-sector.html* The industrial sector or secondary sector is one of the three sectors that make up a country's economy. The other two are the primary sector (including agriculture, fishing, and mining) and services sector (including hospitality, consultancy, and nursing). A few common industrial sector divisions include the automobile, chemical, consumer electronics, industrial equipment; steel production, electricity, natural gas, petroleum and metalworking industries. See *http://www.economywatch.com/world-industries/industrial-sector.*

'industry' or 'industrial' in this research is delimited by these focus areas and the available case law. I have selected industrial activities as the focus because of my experience in criminal prosecutions in this sector and considering the actual and potential impact of industrial activities on the environment. As a result of the potentially significant environmental impact, industrial activities are highly regulated and can contribute to environmental pollution and degradation through atmospheric emissions, effluent discharges, impacts on water resources, and hazardous (and other) waste generation, disposal, and treatment.

Considering their potential environmental impacts, industrial facilities are generally required to comply with a range of environmental laws. To operate lawfully, they may be required to hold numerous environmental authorisations, permits, licences, and/or registrations (collectively referred to as 'approvals').[6] This study focusses on the following four laws based on their overarching relevance to the delineated industrial facilities: The National Environmental Management Act 107 of 1998 ('NEMA'), the National Water Act 36 of 1998 ('the National Water Act'), the National Environmental Management: Air Quality Act 39 of 2004 ('the Air Quality Act') and the National Environmental Management Waste Act 59 of 2008 ('the Waste Act') (as at the date of the study unless otherwise stated). Several other laws may apply to industrial facilities,[7] but these four are the principal laws relevant to considering the research questions outlined later in this Chapter.

There are many requirements that such facilities could transgress under these four overarching laws, including 'duty of care' requirements,[8] failure to obtain the necessary approvals, compliance with approval conditions, and registration requirements. Regardless of the transgression's seriousness, each of these requirements could result in significant criminal liability. The reference in this research to possible criminal liability includes a facility's liability (where it has a juristic personality) and the potential liability of individuals including employees or directors of business entities.

[6] This may include a NEMA environmental authorisation, a Waste Act waste management licence, an Air Quality Act atmospheric emissions licence, a National Water Act water use licence or registrations.
[7] Including the National Heritage Resources Act 25 of 1999, the National Environmental Management: Biodiversity Act 10 of 2004, the National Environmental Management: Integrated Coastal Management Act 24 of 2008, the National Environmental Management: Protected Areas Act 57 of 2003, the National Forests Act 84 of 1998, the National Veld and Forest Fire Act 101 of 1998, the Water Services Act 108 of 1997, Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947, Hazardous Substances Act 15 of 1973, Conservation of Agricultural Resources Act 43 of 1983, provincial laws and municipal by-laws.
[8] NEMA s 28 and National Water Act s 19.

2. CONTEXTUAL AND LEGAL FRAMEWORK

Since the mid-1990s, the democratic government of South Africa enacted a suite of environmental laws[9] to give effect to the constitutional obligation to protect the environment through reasonable legislative measures.[10] Each of these laws contains many offence provisions, and on conviction, a person may be liable to significant penalties, including imprisonment or fines (monetary penalties), or both.[11]

NEMA, the framework law for environmental management in South Africa, incorporates different compliance and enforcement measures, including civil, administrative and criminal measures.[12] Civil measures include common-law remedies used in civil courts, including seeking appropriate relief regarding any breach or threatened breach of environmental laws,[13] applications to interdict unlawfulness, actions based on nuisance, or to claim damages.[14] Administrative measures are statutory in nature and include directives,[15] compliance notices,[16] or administrative penalties (albeit limited).[17] Statutes prescribe criminal measures for prohibited conduct and failure to adhere to statutory requirements.[18] Criminal measures require the involvement of the National Prosecuting Authority ('NPA'), which must initiate the prosecution of offenders in criminal courts (or private prosecutors - as contemplated in NEMA s 33). Prosecutions may, in turn, result in convictions, a criminal record, and be punishable by either imprisonment or a fine/monetary penalty. This research focuses on criminal sanctions.

The main actors responsible for investigating environmental law offences are inspectors within the Environmental Management Inspectorate ('EMIs') appointed and designated for specific functions as prescribed in NEMA, either at a national, provincial, or local level.[19] EMIs are appointed within the Department of Forestry, Fisheries and Environment ('DFFE'), the

[9] Including NEMA, the Waste Act; the Air Quality Act; and the National Water Act.
[10] Section 24 of the Constitution of the Republic of South Arica 1996 ('the Constitution'), and the NEMA s 2 principles, including in s 2(1)(o) and (p).
[11] For example, NEMA ss 49A and 49B, Waste Act ss 67 and 68, Air Quality Act ss 51 and 52, and National Water Act s 151.
[12] For example, NEMA ss 24G, 28(4), 31L, 49A and 49B.
[13] As contemplated in NEMA ss 28(7) or 32.
[14] Alexander Paterson & Louis Kotze 'Introduction' in Alexander Paterson & Louis Kotze (eds) *Environmental Compliance and Enforcement in South Africa Legal Perspectives* (2009) 7-8, and 378.
[15] Issued in terms of NEMA s 28 or National Water Act s 19.
[16] Issued in terms of NEMA s 31L.
[17] As contemplated in NEMA s 24G. See Terry Winstanley 'Administrative Measures' in Alexander Paterson & Louis Kotze (eds) *Environmental Compliance and Enforcement in South Africa Legal Perspectives* (2009) 225.
[18] Michael Kidd 'Criminal Measures' in Paterson & Kotze (eds) *Environmental Compliance and Enforcement in South Africa Legal Perspectives* (2009) 240.
[19] In terms of NEMA ss 31B, 31BA and 31BB; and in the case of provincial and local authorities - NEMA s 31C.

Department of Water and Sanitation ('DWS'), the Department of Mineral Resources and Energy ('DMRE'), and provincial and local government structures. EMIs are appointed to monitor compliance with the provisions of NEMA and Specific Environmental Management Acts ('SEMAs') and to enforce compliance with their provisions.[20]

The use of criminal enforcement measures in environmental law is not new.[21] Criminal law has been used in the service of protecting the environment in numerous jurisdictions over the last few decades.[22] However, criminal measures are considered a more recent addition than other established civil enforcement mechanisms.[23] In South Africa, environmental criminal measures have been used since at least the mid-1900s. For example, water pollution or the contravention of permit conditions were amongst the offences established by the Water Act 54 of 1956.[24]

On conviction of an environmental offence, the criminal liability of industrial facilities may be substantial and far-reaching. Currently, South African environmental laws' offence and penalty provisions include maximum prescribed penalties of up to R5 million or up to R10 million or imprisonment of up to five or ten years,[25] depending on the offence's nature. Adding to the potential far-reaching criminal consequences, NEMA s 34 extends the form and quantum of liability should a person be convicted of the offences listed in NEMA Schedule 3. Such additional liability (or additional burdens on the accused) may include that a court orders

[20] NEMA s 31A(1). SEMAs are defined in NEMA s 1 and includes (a) the Environment Conservation Act, 1989; (b) the National Water Act; (c) the National Environmental Management: Protected Areas Act, 2003; (d) the National Environmental Management: Biodiversity Act, 2004; (e) the Air Quality Act; (f) the National Environmental Management: Integrated Coastal Management Act, 2008; (g) the Waste Act; or (h) the World Heritage Convention Act, 1999, and includes any regulation or other subordinate legislation made in terms of any of those Acts.

[21] It has been considered by Michael Kidd *The protection of the environment through the use of criminal sanctions: A comparative analysis with specific reference to South Africa* (unpublished PhD thesis, University of Natal, 2002), Michael Kidd 'Environmental crime - Time for a rethink South Africa?' (1998) 5 *SAJELP* 181, Michael Kidd *Environmental Law* 2 ed (2011) 269 and foreign writers including Kathleen F Brickley Environmental Crime: Law, Policy, Prosecution (2008).

[22] Kathleen F Brickley *Environmental Crime: Law, Policy, Prosecution* (2008) at xxiii, which states 'The term "environmental crime" is a relatively recent addition to the criminal law lexicon. Until the mid-1980s, environmental enforcement was synonymous with civil enforcement. But the advent of modern environmental legislation in the 1970s and 1980s ushered in an era of increased public and congressional support for sending polluters to jail…'. See also, Craigie, Snijman & Fourie 'Dissecting Environmental Compliance and Enforcement' in Paterson & Kotze (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) at 53.

[23] Ibid Brickey

[24] Water Act 54 of 1956 ss 5(4), 9A(5), 9B(2), 9C(6)(c), 12(8), 12A(5), 12C(8), 20(11), 21(5), 22(4), 23, 23A, 24(5), 25(3), 26H, 33I and 170. The 1956 Water Act repealed a number of preceding laws, I have not referred to any possible criminal sanctions in those laws. This reference is to illustrate that the concept of criminal transgressions in environmental law is not a new concept.

[25] For example, NEMA s 49B(1); Waste Act s 68 or Air Quality Act s 52.

a person to pay damages where that person's actions cause loss or damage;[26] liability for the reasonable costs of prosecution; liability of the employer for the acts or omissions of its employees or functionaries; and personal liability of managers, agents, employees, or directors.[27]

Prescribing criminal sanctions for each possible contravention is described as an 'indiscriminate use by legislatures as a tool to ensure obedience'.[28] Criminalizing behaviour that should not be subject to criminal law results in overcriminalization - described as 'one of the most serious problems facing criminal law'.[29]

This thesis considers selected primary offences created under these laws and generally pursued in prosecutions (as set out in Chapter Four) in considering criminalization and overcriminalization. The selected offences (as explained in Chapter Four) include the failure to obtain approvals,[30] causing pollution and degradation or breaching 'duty of care' obligations (or general pollution offences),[31] the failure to adhere to approval conditions,[32] or the failure to adhere to authority instructions.[33] There appears to be a tendency to prescribe the same maximum penalty in the NEMA and the other three framing laws for serious and less serious transgressions.[34] Serious environmental law transgression may include activities that result in significant pollution or degradation.[35] Whereas less serious transgressions may not result in environmental pollution or degradation and could include non-compliance with administrative,

[26] Provided this is a contravention of the provisions in schedule 3, see NEMA s 34(1) - (3). The provisions of s 34(1) to (8) presuppose a criminal conviction and are thus referred to as potential further consequences or additional liability for a convicted person. This does not include a consideration of other subsections added to s 34, i.e., 34C, Cancellation of permits or 34G, Admission of guilt fines which could be used outside of the criminal law.
[27] NEMA s 34 (4) to (8).
[28] A St Q Skeen, updated by S Hoctor, 'Criminal Law' in J A Faris (ed) *The Law of South Arica* 3 ed (2017) volume 11 para 9.
[29] Ibid Skeen.
[30] NEMA s 49A(1)(a), Waste Act s 67(1)(a), Air Quality Act s 51(1)(a), and National Water Act s 151(1)(a).
[31] NEMA ss 28, 48A(1)(e) and (f) and National Water Act ss 19, 151(1)(i) and (j).
[32] NEMA s 49A(1)(c), Waste Act s 67(1)(h), Air Quality Act s 51(1)(e), and National Water Act s 151(1)(c).
[33] NEMA ss 49A(1)(g) and (k) and National Water Act s 151(1)(d).
[34] Examples of serious and less serious offences which potentially carry the same penalties include that under the Air Quality Act a person could be liable to five years imprisonment or a fine of R5 million if they fail to obtain a licence (s 51(1)(a)). Whereas the failure to register or report information as contemplated in the National Atmospheric Emission Reporting Regulations, 2015 (GNR283 *GG* 38633 of 2 April 2015) which does not have an environmental impact, could result in the same penalty, i.e., R5million on a first offence. The latter could be considered less serious than those offences which relate directly to pollution or detrimental impacts on the environment.
[35] For example, NEMA ss 49A(1)(e) read with s 49B(1).

technical, or bureaucratic[36] approval conditions, the failure to meet registration requirements, or non-compliance with a non-material requirement in an environmental management plan.[37] The failure to register with a particular authority[38] is easily reparable because it is not discretionary and does not directly impact the environment. Nevertheless, it could result in a fine not exceeding R5 million or imprisonment for a period not exceeding five years. The tendency not to grade or distinguish between more and less serious environmental offences, and the criteria by which one determines whether an offence is more or less serious, are important themes in this thesis.

3. LITERATURE INFORMING THE STUDY

This part introduces the conceptions of criminal sanctions in South African environmental law, referring to several South African (and some foreign) academic texts, to contextualise the theory of the use of criminal sanctions in environmental law. This part also presents criminal law and overcriminalization theories, which have received more attention in foreign jurisdictions. These theories are explored alongside the challenges observed from my experience with criminal sanctions as a method to enforce environmental laws.

3.1. The use of the criminal sanction in environmental law - South African perspectives

Several South African environmental law academics have considered the criminal enforcement of environmental laws.[39] Their work, particularly that of Kidd,[40] inform this study. However,

[36] This would depend on the facts of a particular case. An example of a bureaucratic approval condition includes, where conditions are imposed as a result of a 'copy and paste' inclusion and where that condition is not suitable or appropriate for the particular activity or facility being authorised. Nevertheless, it will remain as an 'impractical' condition with which the approval holder would not be able to comply with and which would result in non-compliance. Approval holders should apply to the relevant authority to have these amended, but often amendments are delayed. The authorities tasked with approval administration and amendments are often different from those who enforce compliance. The latter do not always know what the former are doing. An approval holder, even where an amendment has been applied for, often experiences non-compliance findings even if the approval is under amendment.

[37] NEMA s 49A(1)(b) read with s 49B(1).

[38] For example, as mentioned above, the National Atmospheric Emission Reporting Regulations, 2015. This may include a failure to register with the National Atmospheric Emission Inventory System or ('NAEIS') or change registration details (regulations 5 and 6).

[39] Including Y Burns & M Kidd 'Administrative law and implementation of environmental law' in ND King & HA Strydom (eds) *Fuggle & Rabie's Environmental Management in South Africa* 2ed (2009); Frances Craigie, Phil Snijman & Melissa Fourie 'Environmental Compliance and Enforcement Institutions', Louis J Kotze 'Environmental Governance' and Kidd op cit note 18 in Paterson & Kotze (eds) *Environmental Compliance and Enforcement in South Africa Legal Perspectives* (2009). See also Michael Kidd *Environmental Law* 2 ed (2011) Chapter 8 'Implementation and Administration of Environmental law'.

[40] Michael Kidd *The protection of the environment through the use of criminal sanctions: A comparative analysis with specific reference to South Africa* (unpublished PhD thesis, University of Natal, 2002), Kidd *Environmental Law* (2011) supra and Kidd (2009) op cit note 18.

many amendments to the environmental laws occurred over the last decade,[41] and enforcement action has increased over time. Since 2008, the DFFE has annually published a National Environmental Compliance and Enforcement Report ('NECER'), which 'provide[s] a national overview of environmental compliance and enforcement activities undertaken by relevant institutions across the country'.[42] The DFFE has published twelve of these reports,[43] providing information regarding enforcement measures taken, including criminal enforcement and compliance monitoring statistics within the 'blue, green and brown sub-sectors'. These identifiers refer to the biodiversity and protected areas or species subsector as the 'green' sector. Integrated coastal management or freshwater resources fall within the 'blue' subsector, and pollution, waste and environmental impacts fall within the 'brown' sub-sector.[44] Industrial activities considered in this study thus fall within the 'brown' sector.

The current literature on criminal enforcement of South African environmental law considers several aspects, including the magnitude of criminal sanctions in various environmental laws,[45] the functionaries tasked with enforcement, the weaknesses of criminal prosecutions, the liability of corporations, directors and employers,[46] alternatives to criminal measures,[47] and the need to 'rethink' aspects of environmental crime in South Africa.[48]

[41] For example, the National Environmental Management Amendment Act 8 of 2004; National Environmental Management Amendment Act 46 of 2003; National Environmental Management Amendment Act 62 of 2008; National Environment Laws Amendment Act 44 of 2008; National Environment Laws Amendment Act 14 of 2009; National Environmental Management Laws Second Amendment Act 30 of 2013; National Environmental Management Laws Amendment Act 25 of 2014; and by Mineral and Petroleum Resources Development Act 28 of 2002.

[42] Department of Environmental Affairs (now DFFE) *National Environmental Compliance & Enforcement Report* ('NECER') (2008- 9) 2.

[43] As at the time of writing. Based on the information recorded in the 2008-9 NECER, it appears that similar reports were prepared for 2006/7, 2007/8 and 2008/9 but these do not appear to be electronically accessible on DFFE's website where the subsequent NECERs are made available, see *https://www.environment.gov.za/branches/regulatorycompliance_sectormonitoring.*

[44] See for example, the DFFE *NECER* (2015/16) 1.

[45] Michael Kidd *The protection of the environment through the use of criminal sanctions: A comparative analysis with specific reference to South Africa* (unpublished PhD thesis, University of Natal, 2002).

[46] Michael Kidd *Environmental Law* 2 ed (2011), Paterson & Kotze *Environmental Compliance and Enforcement in South Africa Legal Perspectives* (2009), Michael Kidd 'Administrative law and implementation of environmental law' in King et al *Fuggle & Rabie's Environmental Management in South Africa* 3ed (2018) 244.

[47] Michael Kidd 'Alternatives to the criminal sanction in the enforcement of environmental law' (2002) 9 *SAJELP* 21, and Melissa Fourie 'How civil and administrative penalties can change the face of environmental compliance in South Africa' (2009) 16 *SAJELP* 93.

[48] Michael Kidd 'Environmental crime - Time for a rethink South Africa?' (1998) 5 *SAJELP* 181.

Additional themes considered include sentencing environmental crimes,[49] the effectiveness of plea and sentence agreements,[50] forms of liability[51] and aspects of self-incrimination.[52]

However, there has been no recent critical analysis of the criminal sanctions in South African environmental law, the use of these measures in actual prosecutions, and no empirical study on key stakeholders' views of criminal enforcement measures. The current literature does not include empirical research analysing the practical use, trends or themes, and impact of criminal prosecutions in the context of industrial facilities (as delimited in this research, based on the potential environmental impacts of such activities). Moreover, the extant literature has not considered the South African criminal enforcement measure in environmental law through the lens of overcriminalization.

In addressing these research gaps, this study focuses on how the main body of criminal sanctions applicable to industrial facilities has changed since their promulgation in the late 1990s and early 2000s; it focuses on selected criminal sanctions and their use in concluded prosecutions (between 2005 and 2020). The empirical research also gauges expert opinion on how such sanctions have been implemented in industrial facilities and practical difficulties in using the criminal sanction, such as frequent changes to laws. The practical use, trends, and impact of criminal prosecutions of industrial-type activities are considered within a framework of overcriminalization.

That the criminal sanction should be reserved for the most severe environmental offences[53] or the 'most culpable' set of offences and 'not used solely for their ability to deter' is not a new proposition.[54] The criminal sanction is described as 'the ultimate weapon against assaults

[49] Michael Kidd 'Sentencing environmental crimes' (2004) 11 *SAJELP* 53.
[50] Tumai Murombo & Isaac Munyuki 'The effectiveness of plea and sentence agreements in environmental enforcement in South Africa' (2019) 22 *Potchefstroom Electronic Law Journal* 1.
[51] Michael Kidd 'The use of strict liability in the prosecution of environmental crimes' (2002) 15 *SAJELP* 181, Michael Kidd 'Vicarious liability for environmental offences' (2003) 24 *Obiter* 186, Michael Kidd 'Liability for corporate officers for environmental offences' (2003) 18 *SA Public Law* 277.
[52] Michael Kidd 'Environmental audits and self-incrimination' (2004) 37 *Comparative and International Law Journal of Southern Africa* 84.
[53] Michael Kidd *Environmental Law* 2 ed (2011) 276 with reference to Herbert L Packer *The Limits of the Criminal Sanction* (1968) 250.
[54] Kidd ibid at 276 with reference to Richard L Lazarus 'Assimilating environmental protection into legal rules and the problem with environmental crime' (1994) 27 *Loyola LA LR* 867 at 883 and Zada Lipman 'Old wine in new bottles: Difficulties in the application of general principles of criminal law to environmental law' in Neil Gunningham, Jennifer Norberry & Sandra McKillop (eds) *Environmental Crime* (1995) 42; C Reasons 'Crimes against the environment: Some theoretical and practical concerns' (1991) 34 *Crim LQ* 86 at 104, who, according to Kidd, suggest that 'there is a role to be played by the use of criminal sanctions, but only for the most serious harms and persistent offenders'.

threatening societal coexistence' and should be used as a last resort.[55] One of the central claims emerging from criminal law theory in the context of environmental offences, including from writers like Kidd, is that the criminal sanction should be reserved for serious offences.[56] Overutilisation of criminal sanctions in environmental legislation may encumber its enforcement.[57]

Proving a criminal act requires the prosecution to prove the elements of that crime beyond a reasonable doubt.[58] In addition to factual and legal causation, the act must be wrongful and, where it is not a strict liability offence, intention or negligence must be evident.[59] In the context of industrial facilities, notwithstanding the potential for significant environmental impacts, offences more likely involve negligence than intent. In contrast, nature conservation offences are typically committed with intent.[60] Examples of alleged industrial negligence include momentary failure of equipment resulting in emissions, involuntary exceedance of a particular standard (such as air emissions or effluent discharge), or oversight and resultant contravention of legal requirements.[61] Proving negligence may be a challenge in the context of criminal prosecution of industrial operators because the prosecution would have to show that the offender did not undertake reasonable measures to prevent the offence. Often industrial facilities have several procedures or measures in place to manage their operations. A prosecutor with limited knowledge of the technology or processes at such a facility (and often limited specialist knowledge of environmental laws) must prove that such measures are not sufficiently reasonable. It may also be challenging to prove intentional contraventions of environmental law, particularly if intention cannot be proved or where knowledge of unlawfulness is absent.

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[55] Skeen, A St Q updated by Hoctor, S 'Criminal Law' in J A Faris (ed) *The Law of South Africa* 3 ed (2017) volume 11 para 9.

[56] Kidd (2011) op cit note 53 at 276. See also Zada Lipman 'Compliance and Enforcement of International Environmental Conventions in Australia' in Paddock, Qun, Kotze (eds) *Compliance and Enforcement in Environmental Law: Toward More Effective Implementation* (2011) at 54 where she states that 'a criminal prosecution may be more appropriate in a case… where there has been an intentional breach of environmental legislation and warnings have been ignored.'

[57] Skeen op cit note 55 para 9(d), 11. In other words, creating similar penalties for serious and less serious offences may weaken the effect of the criminal sanction.

[58] Skeen op cit note 55 para 12.

[59] Skeen ibid para 359, and Kidd (2011) op cit note 53 at 271.

[60] Kidd (2011) op cit note 53 at 274 and 275, particularly where he states that 'Nature conservation offences are very often more akin to "traditional" crimes, in that their commission is not usually the unintended side-effect of otherwise socially useful behaviour. People do not usually shoot elephants by accident.'

[61] Kidd ibid at 274 to 275 where he states that 'What must also be borne in mind is that the regulated persons in such circumstances are most often productive members of society whose offences consist of carrying on an activity which is not illegal per se, but only illegal where a certain standard is exceeded. In many cases, as well, the reason for the infringement is not wilful disregard for the law but, at worst, negligence.'

Kidd outlines inherent and contingent weaknesses of criminal sanctions and proposes that these sanctions should only be used in cases of intentional wrongdoing, persistent wrongdoing, or where an offender has caused severe environmental harm or harm to people.[62] He states that '[e]ffective prosecution depends on an acceptable prospect of conviction and an appropriate penalty'.[63] He adds that the law may not be inadequate, but regulators or other role players could be implementing it incorrectly.[64] Overall the number of those implementing environmental laws (i.e. EMIs) has increased over time, based on the NECERs. Even so, additional themes arising from this research include the practical challenges faced by enforcement (and other) officials, including capacity constraints of role players in using (or being able to use) criminal sanctions effectively.

The magnitude of criminal sanctions that environmental laws are 'littered with'[65] raise questions about how environmental laws are constructed, considering theories of criminal law and if it leads/could lead to overcriminalization.

3.2. Overcriminalization and theories of criminal law

Theories of criminal law,[66] criminalization,[67] and overcriminalization[68] are fundamental to a critique of the use of environmental law criminal sanctions in South Africa.

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[62] Kidd ibid at 277.
[63] Paterson & Kotze op cit note 18 at 247.
[64] Kidd op cit note 53 at 266 and Paterson & Kotze op cit note 39 at 265 where it is stated that 'It is clear that any shortcomings in respect of criminal enforcement of environmental law in South Africa is not due to legislation, but rather due to its use by the environmental agencies, prosecutors and the judiciary.'
[65] Craigie, Snijman & Fourie 'Dissecting Environmental Compliance and Enforcement' in Paterson & Kotze (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) at 53.
[66] Such as those considered by Henry Hart 'The Aims of the Criminal Law' (1958) 23 *Law & Contemporary Problems* 401, or related theories of punishment considered by CR Snyman *Criminal Law* 6 ed (2014), Skeen, A St Q updated by Hoctor, S 'Criminal Law' in J A Faris (ed) *The Law of South Africa* 3 ed (2017) volume 11, related principles as considered by Jonathan Burchell *Principles of Criminal Law* 5ed (2016), or criminal justice challenges as considered by Edwin Cameron 'The Crisis of the Criminal Justice System' (2020) *SALJ* 32.
[67] Including, as considered by- Herbert L Packer *The Limits of the Criminal Sanction* (1968), William Stuntz 'The Pathological Politics of Criminal Law' (2001) 100 *Michigan Law Review* 506, William J. Stuntz 'Correspondence: Reply: Criminal Law's Pathology' (2002) 101 *Michigan Law Review* 828, D Husak 'The Criminal Law as Last Resort' (2004) 25 *OJLS* 207, R.A. Duff et al *The Boundaries of the Criminal Law* 1 ed (2010), Lauterwein, Carl Constantin *The Limits of Criminal Law: A comparative analysis of approaches to legal theorizing* (2016) and Luna, Erik (ed) *Reforming Criminal justice: Introduction and criminalization* (2017).
[68] Including, as considered by- Sanford Kadish 'The Crisis of Overcriminalization' (1967) 157 *Annals of the American Academy of Political and Social Science* 374, Norval Morris & Julius Kreeger 'The Overreach of the Criminal Law' (1975) *Acta Juridica* 40, SP Green 'Why is it a crime to tear a tag off a mattress: Overcriminalization and the moral content of regulatory offences' (1997) 46 *Emory Law Journal* 1533, Erik Luna 'Overextending the Criminal Law' 25 *CATO POL'Y RPT.* 1 (2003), Erik Luna 'The Overcriminalization Phenomenon' (2005) 54 *American University Law Review* 703, Douglas Husak *Overcriminalization, The Limits of the Criminal Law* (2008), Douglas Husak 'Reservations about Overcriminalization' (2011) 14 *New Crim. L.*

The aim of criminal law has been said to '[t]raditionally include (i) prevention; (ii) deterrence, which may be on an individual or general basis; (iii) reformation or rehabilitation and (iv) retribution.'[69] Punishment theories, including retribution or prevention theories, also inform criminal law and criminalization theory, in turn, overcriminalization may occur when these aims are not met or overextended.[70] South African criminal law writers have said that:

> One of the most serious problems facing criminal law today is the fact that legislatures have abused the criminal sanction to such an extent that overcriminalization has taken place. The criminal sanction… has become a blunt instrument through its having been used indiscriminately by legislatures as a device to censure any kind of deviant conduct or as a convenient disciplinary tool to secure obedience to any kind of legislative prescription. This has brought about a number of detrimental consequences.[71]

According to Skeen, these detrimental consequences include that (a) '[t]he establishment of too many criminal prohibitions, leading to the creation of too many criminals…threaten[s] the whole criminal justice system with collapse'; (b) the consequences of (a) is that 'the deterrent effect of the threat of punishment and of punishment has been severely affected'; (c) overcriminalization particularly of conduct that 'does not excite any moral disapproval and condemnation, has impaired the criminal law's image and has led to an erosion of respect for criminal law'; (d) overuse of the criminal sanctions constrains enforcement resources which are already 'spread too thinly'; and (e) using criminal sanctions as enforcement devices for 'every legal provision may have the effect of deluding society into falsely believing' that legislation adequately protects its interests. Skeen adds that alternative sanctions may be more effective and less costly compared to criminal sanctions.[72]

The overuse of the criminal law sanction is not a new issue. In 1977, Rabie wrote about the legislatures' habit of regularly prescribing criminal sanctions to control any human behaviour, which he said led to a 'crisis of overcriminalization'.[73] He posits that the overuse of criminal

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Rev. 97 and Paul J. Larkin, Jr. 'Regulation, prohibition, and overcriminalization: the proper and improper uses of the criminal law' (2014) 42, 3 *Hofstra Law Review* 745.

[69] Skeen op cit note 55 para 9 with reference to AJ Middleton 'Road Traffic and Abuse of the criminal sanction' (1974) *THRHR* 159 at 160, JD van der Vyver 'Lead-in paper' (leading into the paper by Morris & Kreeger) (1975) *Acta Juridica* 53, and Norval Morris & Julius Kreeger 'The Overreach of the Criminal Law' (1975) *Acta Juridica* 40.

[70] Skeen ibid para 6, Erik Luna 'Punishment Theory, Holism, and the Procedural Conception of Restorative Justice' (2003) 205 *UTAH L. REV* 250.

[71] Skeen ibid para 9.

[72] Skeen ibid para 9.

[73] Jonathan Burchell & John Milton *Principles of Criminal Law* 2ed (1997) 34, Skeen op cit note 55 para 10, Andre Rabie 'The need for decriminalization' (1977) *CILSA* 200.

sanctions is unjustified and an 'injudicious use of energy' because it amounts to using 'a canon to shoot a sparrow'.[74] According to Rabie, overcriminalization impairs the criminal law's image, generally erodes respect for the law, and impairs criminal laws' effectiveness because it overstrains 'the process of criminal law enforcement'.[75] He adds that even determined efforts to enforce criminal sanctions are ineffective in dealing with a large variety of human conduct as 'it often results in sporadic and selective enforcement'. Like Skeen, Rabie asserts that 'overcriminalization can delude society into believing its interests to be adequately protected' but 'outlawing the problem often means avoiding the solution'.[76]

These authors suggest that decriminalization, i.e., removing offences that should not be crimes, may address the crisis of overcriminalization. They explain that forms of decriminalization could include 'procedural devices to relieve the machinery of justice'. For example, admission of guilt fines for petty offences without court appearance in terms of the provisions of the Criminal Procedure Act that allow for compounding of petty offences (in other words that do not result in a criminal record), or prosecutors declining to prosecute and police refraining from taking action where the contravention is trivial.[77] This thesis considers overcriminalization in environmental law and does not involve studying decriminalization *per se*, although it may be a viable solution to a problem of overcriminalization and an aspect requiring further research.

In the mid-1970s, Morris and Kreeger wrote on criminal law theory and its overreach, stating that 'the criminal law of the future may be predominantly administrative law, reserving punishment for a *persistent* flouting of regulatory controls' (emphasis added).[78] According to Van der Vyver, 'certain acts can be regulated by administrative law, backed by criminal sanctions.'[79] However, all statutory or administrative law requirements may not need to be backed by criminal sanctions in the first instance. Middleton argues that 'although sanctions are probably the most effective means of governing human conduct, all sanctions need not

[74] Rabie op cit note 73 at 201.
[75] Rabie ibid with reference to Forer, Lois G *The death of the law* (1975) 319 at 334 and Van Bemmelen, JM 'Strafbaarstelling en afschaffing van strafbaarheid van feiten' in *En hommage a Jean Constant* (1971) 351.
[76] Rabie ibid with reference to Kadish, S 'The crisis of overcriminalization', in *Annals of the American Academy of Political and Social Science* Vol 374 (1967) 157, Remington, FJ 'The limits and possibilities of the criminal law' in *The challenge of crime in a free society: Perspectives on the Report of the President's Commission on Law Enforcement and the Administration of Justice* (1971) 56-57, and Jones, Harry W *The efficacy of law* (1968) 33-34.
[77] Rabie op cit note 73 at 201 - 202 with reference to Kadish op cit at 157.
[78] Norval Morris & Julius Kreeger 'The Overreach of the Criminal Law' (1975) *Acta Juridica* 40 at 43
[79] JD Van der Vyver 'Lead-in paper' (leading into the paper by Morris & Kreeger above) *Acta Juridica* (1975) 40 at 54 with reference to Morris & Kreeger op cit note 78.

necessarily be criminal sanctions'.[80] Administrative sanctions could substitute criminal sanctions in certain instances to avoid overcriminalization. Moreover, an administrative penalty system could unburden the justice system and still punish offenders.[81]

The theory of overcriminalization has received more in-depth and recent consideration in other jurisdictions, such as the United States. Here, writers have questioned whether the criminalization of certain forms of behaviour is legitimate.[82] This research does not involve a comparative study, but the concepts and theories of overcriminalization have been more widely written about and are more developed in jurisdictions like the USA and are thus used as a basis for this research.

Larkin explains that overcriminalization is a 'neologism' considered by the Judiciary Committee of the US House of Representatives in 2013, referring to 'the overuse and misuse of the criminal law to punish conduct traditionally deemed morally blameless'.[83] He refers to the criminal law as 'society's most powerful weapon' that should apply to an individual only when he or she has acted with 'wicked intent'. However, Larkin complains that 'regulatory laws do not see it that way … [which] creates serious notice and compliance problems for small businesses'.[84] Here I should note that environmental crimes are prescribed by statute or subordinate regulations and can be referred to as 'regulatory crimes'.

Larkin explains that using criminal law to enforce a regulatory regime gives rise to 'notice problems'. The public does not necessarily know, have access to, or understand complex legal requirements within regulatory regimes.[85] This theme arises in Chapter Five, where research participants shared concerns about frequent changes to South African environmental laws. Larkin also contends that the number of regulatory crimes is unknown and likely to be relatively high.[86] Another challenge is that it can be difficult for the average person to find and understand such regulations.[87] A similar theme arises in a South African context, as discussed in Chapter Five. The US Congress often adopts broad, aspirational regulatory laws, making

[80] AJ Middleton 'Road Traffic and Abuse of the criminal sanction' (1974) *THRHR* 159.
[81] Melissa Fourie 'How civil and administrative penalties can change the face of environmental compliance in South Africa' (2009) 16 *SAJELP* 93.
[82] Lauterwein, Carl Constantin *The Limits of Criminal Law: A comparative analysis of approaches to legal theorizing* (2016) 17.
[83] Paul J. Larkin, Jr. 'Regulation, prohibition, and overcriminalization: the proper and improper uses of the criminal law' (2014) 42, 3 *Hofstra Law Review* 745 at 745 and 746.
[84] Larkin op cit note 83 at 756.
[85] Larkin ibid at 744.
[86] Larkin ibid at 750.
[87] Larkin ibid.

compliance difficult for the average person.[88] Larkin contends that environmental laws are particularly aspirational and pose 'exceptionally difficult notice problems for the average person'.[89] It can be unreasonable to expect the average person to readily know how broadly phrased or highly technical rules apply without legal advice, which places undue burdens, particularly on small businesses.[90] Thornburg reiterates that 'the criminal sanction should be reserved for only the most serious transgressions and to do otherwise, in fact, can cause disrespect for the law'.[91]

Apart from the literature on overcriminalization, there have also been attempts to establish a normative theory of criminalization to determine '[t]he boundaries of the criminal law'.[92] Some describe it as 'a theory of criminal law minimalism'.[93] Husak argues that the US courts have used the 'canon of overcriminalization' as a norm of legislative construction when considering a criminal sanction's use and appropriateness.[94] According to Pierce, 'the overcriminalization canon applies when a defendant is charged under multiple criminal statutes, yet each appears to serve the same function as applied to the defendant's conduct; in this case, there seems to be no need to accuse the defendant of multiple serious crimes'.[95]

This study draws on the extant literature on criminalization and overcriminalization to develop a normative framework for criminalization and determine if there is overcriminalization in South African environmental law. It goes further in seeking to determine if the application and use of South African environmental criminal sanctions in industrial facilities (as delimited) lead to overcriminalization and whether this contributes to the ineffectiveness of criminal sanctions. This study considers the suggestions in the existing literature (particularly regarding overcriminalization) on approaching legislative design, i.e., the design of statutory offences and related enforcement policy and practices.

[88] Larkin ibid at 751.
[89] Larkin ibid.
[90] Larkin ibid at 752 with reference to Richard L Lazarus 'Assimilating environmental protection into legal rules and the problem with environmental crime' (1994) 27 *Loyola LA LR* 867 at 881 – 884.
[91] Dick Thornburg 'The Challenge of Over-criminalization' (2011) *The Pennsylvania Lawyer* at 36 to 41.
[92] R.A. Duff, Lindsay Farmer, S.E. Marshall, Massimo Renzo, & Victor Tadros (eds) *The Boundaries of Criminal Law* (2011).
[93] Douglas Husak *Overcriminalization: The Limits of the Criminal Law* (2008) at vi.
[94] Michael Pierce 'The Court and Overcriminalization' (2015) *Stanford Law Review* 68 at 58.
[95] Pierce ibid.

3.3. A situated perspective

In practising in the field of environmental law, I have encountered cases where enforcement action for environmental law contraventions did not lead to prosecution, where the prosecution was withdrawn or reached a dead-end, or where efficient enforcement was constrained by:

1) Continuous changes to the applicable legislation, including the addition of many criminal sanctions. Too frequent changes to the law puts legal certainty at risk and inhibits effective compliance and enforcement;[96]
2) Legal provisions which are not drafted clearly, are continuously amended, or are open to differing interpretations and application, but which are subject to significant criminal sanctions when contravened;
3) Incorrect application of legislation to the facts or activities, including the incorrect retrospective application of laws to activities that did not require approvals at a particular point in time, nevertheless resulting in criminal enforcement activities;
4) Lack of understanding by external parties of complex industrial processes and the application of complex legal requirements to such facilities;
5) Imposition of unrelated, irrelevant or unfeasible approval conditions, yet holding the approval holder criminally liable notwithstanding pending amendments to approval conditions; and
6) Failure to understand the broader context of legal rules and principles, including the principles that guide statutory interpretation, administrative, constitutional and criminal law.

The above are examples of instances where the use of criminal sanctions may have been unwarranted or resulted in an ill-fated prosecution. In some of these instances, the use of criminal sanctions may amount to overcriminalization.

Within the range of compliance and enforcement measures entrenched in environmental laws, other mechanisms offer alternatives to criminal sanctions, such as administrative measures. However, there is no requirement in South African environmental law to exhaust

[96] Lon L Fuller *The Morality of Law* (1969) 39, he includes in his description of eight ways how a legal system can miscarry, the following: '…rules that require conduct beyond the powers of the affected party; introducing such frequent changes in the rules that the subject cannot orient his action by them; and a failure of congruence between the rules as announced and their actual administration.'

such mechanisms before proceeding to criminal prosecution. The use of administrative compliance and enforcement mechanisms and the criminal sanction often occur concurrently.[97] This concurrency raises the question of whether other remedies should first be exhausted or used as a more appropriate alternative and if the failure to do so amounts to overcriminalization.

4. PROBLEM STATEMENT

South African law makes provision for various criminal sanctions for environmental offences by industrial facilities, considering the potentially significant environmental impacts arising from such activities. While South African law theorists have considered the criminal sanction in environmental law, there is a research gap in terms of understanding how the landscape of criminal sanctions has changed over the years, how the criminal sanction is used against industrial facilities that contravene environmental laws, and what impact this has had on the operation of these facilities as well as effective enforcement. There is an opportunity to frame this research gap in terms of a theory of criminalization and overcriminalization. No one has considered the suite of environmental penalties in South African laws from the perspective of overcriminalization. Nor have the criminal sanctions been considered with reference to the body of concluded cases considered in Chapter Four of this research.

As explained in Part 3.2 above, overcriminalization and overuse of criminal sanctions are considered to (1) constrain enforcement resources that are already 'spread too thinly' and divert attention from 'real' crime; (2) create too many crimes resulting in inconsistent enforcement; (3) threaten an already constrained criminal justice system with collapse; (4) remove the deterrent value of the threat of punishment or punishment itself; (5) impair the criminal laws' image and led to erosion the respect for the law, particularly, the criminalization of conduct that 'does not excite any moral disapproval and condemnation'; (6) result in an unjustified and injudicious use of energy; (7) give us a false sense of security that the interests in need of protection are adequately protected; (8) not be an effective mechanism to handle a large variety of human conduct; (9) not be the only solution to a particular problem.[98]

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[97] Strydom M, *Environmental Enforcement Trends in South Africa: Insights from our experience*, *http://www.bowmanslaw.com/insights/environmental-enforcement-trends-south-africa-insights-experience/* published 13 July 2017, accessed electronically, 13 August 2017, at 3. 'In some instances, criminal charges are brought simultaneously with administrative enforcement measures, as these are not mutually exclusive enforcement measures or measures implemented on escalation based on the severity of the transgression.'

[98] Skeen op cit note 55 para 9, and Rabie op cit note 73 at 200-201

In a South African environmental law context, one of the aspects this study considers is which criminal sanctions (of the many prescribed in the select laws) result in successful prosecutions or may warrant prosecution. It also considers the increase in the prescribed maximum penalties and those penalties that do not distinguish between serious or non-serious offences. Such considerations may reveal that many sanctions imposed in environmental law either overcriminalize behaviour that should not be criminalized or that the criminal sanction is overused. Overcriminalization or the overuse of the criminal sanction in environmental law may have similar detrimental consequences to those discussed above. Thus, the criminal sanction is not always or necessarily the only or best mechanism to protect environmental interests. Concerns of overcriminalization may not arise because people are being prosecuted to unacceptable degrees, but because the threat of the use of criminal law within the constraints mentioned above (frequently changing and unclear laws, incorrect application and lack of understanding) puts undue pressure on an already constrained criminal justice system.

More judicious use of criminal sanctions in environmental law may (1) clarify what is considered serious environmental crimes that should be addressed by criminal action; (2) identify the type of transgressions that may be more appropriately dealt with through mechanisms outside the criminal law; (3) advance legal certainty so that legal subjects can orient themselves better regarding what the law requires; (4) alleviate constrained enforcement capacity of enforcers, prosecutors and courts if only those crimes that justify criminal sanctions are prescribed and prosecuted; (5) result in more consistent enforcement; and (6) result in greater respect for the law.

Studying these aspects may contribute to knowledge in environmental criminal enforcement that may benefit lawmakers, enforcers, the judiciary, businesses and citizens; it may elevate the importance of practical concerns and theoretical considerations in drafting, passing, amending, and enforcing environmental laws. The outcomes may benefit enforcement, contribute to more robust laws, and, in turn, create more respect for the laws and enhance the environmental protection laws have to offer.

5. RESEARCH QUESTION

The overarching research questions for this PhD study are: Has the use of criminal sanctions for environmental transgressions in industrial facilities in South Africa led to overcriminalization? When is the use of the criminal sanction appropriate and effective?

In studying the first question, theories of criminalization and overcriminalization are considered to determine what behaviour is criminalized, why behaviour is criminalized, and when overcriminalization occurs. These theories may also identify the indicators of overcriminalization. Particular criminal sanctions, their design, changes to the sanction over time, and cases prosecuted are studied to establish if the selected South African environmental laws give rise to overcriminalization. In other words, when may provisions of the selected laws result in overcriminalization. Research participant perspectives on the design, use and impact of environmental criminal sanctions are considered to ascertain any indications of the overuse of the criminal sanction or overcriminalization.

Available concluded prosecutions are considered to identify characteristics of successfully/unsuccessfully using criminal law sanctions for environmental law transgressions. The design of some criminal sanctions is considered to illustrate when the criminal sanction may not be an appropriate mechanism to use. Research participant views may also offer insight into the appropriate and effective use of criminal sanctions.

6. PURPOSE OF THE STUDY

In responding to the research questions above, this study seeks to:

1) elucidate key claims of criminalization and overcriminalization theory in order to establish a normative framework for criminalization and overcriminalization in the context of environmental law; i.e., to establish the parameters that bound overcriminalization;

2) analyse specific offences and changes to NEMA, the Air Quality Act, the Waste Act, and the National Water Act within selected offence categories, being the failure to obtain approvals, to comply with approval conditions, to comply with authority directives or notices, causing pollution or environmental degradation, and considering similar penalties for serious and less serious offences;

3) consider the use of criminal enforcement measures in prosecutions by examining cases in which offences in the select laws were prosecuted. The analysis identifies possible trends apparent from the withdrawal, settlement or adjudication of these matters;

4) reflect the perspectives of 32 different role-players involved with the practical implementation of South Africa environmental laws to gauge their opinions on

environmental compliance and enforcement challenges, specifically focusing on the use and effect of criminal sanctions.

This work aims to contribute towards a more grounded understanding of the appropriateness and effectiveness of environmental law criminal sanctions, contributing to the knowledge within this area. It aims to illustrate the impact of frequent legislative changes on enforcement and how environmental laws are practically enforced. In doing so, it aims to inform and impact how legislatures approach the drafting and continuous changes to the environmental laws and establish a normative framework for considering when the criminal sanction is the appropriate mechanism to ensure effective enforcement and not used as a 'blunt instrument'[99] creating disrespect for the law.[100] In other words, it seeks to add value to policy considerations and legislative reform.

This study is limited to the criminal enforcement (i.e., prosecutions) of the four mentioned environmental laws focusing on industrial facilities. It does not intend to address other administrative compliance mechanisms, such as directives or compliance notices, other than to the extent they may be relevant in the context of criminal prosecutions. Alternative measures do not form part of the study, although criminalization concepts may inform the appropriate use of such alternative measures within the spectrum of enforcement mechanisms.

7. METHODOLOGY

This study has been conducted through a combination of doctrinal and non-doctrinal, qualitative empirical and non-empirical research.[101] The non-empirical and doctrinal research consists of a literature review and legal analysis of laws and cases (i.e., Chapters Two, Three and Four). The non-doctrinal and qualitative empirical research[102] involved canvassing stakeholder perceptions and opinions (Chapter Five). The research culminates in a critical analysis (Chapter Six) of the information gathered and discussed (in Chapters Three to Five), evaluating it against the normative principles established in Chapter Two. My research

[99] Skeen op cit note 55 para 9.
[100] Dick Thornburg 'The Challenge of Over-criminalization' (2011) *The Pennsylvania Lawyer* at 36 to 41.
[101] As accepted research methods described by Mike McConville & Wing Hong Chai (eds) *Research Methods for Law* (2007) 17, Dawn Watkins & Mandy Burton (eds) *Research Methods in Law* (2013) ch 1, Earl Babbie *The Basics of Social Research* 3 ed (2005) 23-25, Paul D. Leedy & Jeanne E. Ormond *Practical Research Planning and Design* 9 ed (2010) 94.
[102] Being methods described and explained by Leedy & Ormond op cit note 101 at 141, and Babbie op cit note 101 at 189.

approach could be described as predominantly pragmatic[103] because it is founded on my experience in law practice and considers problems faced in using criminal sanctions and stakeholders' challenges in implementing the law. It is aimed to be applied within the realms of policy and law reform.[104]

7.1. Non-empirical research

The non-empirical study involved a literature review and analysis of the theories of criminal law, criminalization and overcriminalization (Chapter Two) as theoretical legal or doctrinal research and conceptual analysis. Overcriminalization has been written about more in other jurisdictions, and these theories have been drawn from. Existing regulatory and environmental crime theories are considered to establish a normative framework for criminalization in environmental law, establishing a philosophy of criminalization or overcriminalization in South African environmental law.

The assessment of specific environmental offence provisions and changes in the four overarching laws (Chapter Three) is non-empirical and doctrinal. The analysis of these themes involved considering the laws, regulations, and various notices and amendments published in the *Government Gazette* accessed through electronic databases such as Sabinet. Chapter Three references criminal sanctions in repealed environmental laws only to show changes over time, including increased prescribed criminal penalties. Chapter Three focuses on specific selected offence categories because it would not have been possible to assess all offences within the time and word limit of the study. The selected categories typically arise in the transgressions pursued by authorities (as evident from the NECERs) and prosecuted.

For Chapter Four, I gathered information on concluded criminal prosecutions (i.e., criminal prosecutions that have been finalized, culminating in either a conviction or acquittal) relevant to this research, which were concluded between 2005 and 2020. The first locatable concluded prosecution appeared to be from October 2005.[105] Although there are prior prosecutions[106] their outcomes are not easily accessible. The sources considered included case outcomes publicly available, reported judgments on legal databases such as SAFLII and Juta Law Online

[103] As described by Dr G R Angadi 'Philosophical Method of Educational Research' (2019) 9 *International Journal of Research in Engineering, IT and Social Sciences* 37 at 40.
[104] As contemplated by Babbie op cit note 101 at 25, and McConville & Chai op cit note 101 at 19-20.
[105] *S v Acker* Hermanus Regional Court (unreported) case number ECH 100/05.
[106] For example, the *Sappi Ngodwana* case in Mpumalanga (unreported) SH 158/190 referred to by Kidd 'Sentencing environmental crimes' (2004) 11 *SAJELP* 53.

Publications, and the concluded criminal cases mentioned in the DFFE's annually published NECERs. These were used to identify completed prosecutions in the 'brown' sector,[107] including prosecutions of industrial operations and offences under the four selected laws, which may not seem directly relevant. For example, mining or farming-related activities resulting in impacts relevant under NEMA, the National Water Act, Waste Act, or Air Quality Act. These cases were considered as the number of concluded prosecutions of industrial operations seemed relatively limited and was thus used to bolster or supplement the data used for determining trends with greater accuracy.

The NECERs contain case summaries and mention matters criminally investigated and prosecuted but do not necessarily identify all concluded prosecutions. The case summaries do not always contain all the details necessary for proper analysis, e.g., all the criminal charges or the relevant legal aspects considered and adjudicated. In some instances, the NECER refers to matters generically without providing details of the accused or charges. I requested case information from several sources to obtain more comprehensive information regarding concluded criminal prosecutions.[108] Concluded cases are considered public information unless otherwise directed by a Court.[109] It was not possible to visit or contact each Magistrates Court in the country to request information. Thus, reliance was placed on the information received from government officials (including EMIs, prosecutors, magistrates or, in some instances, research participants from industry). After the research interviews and collating all the relevant case information obtained, it became apparent that there were many more relevant prosecutions than initially thought.

7.2. Empirical research

The empirical research involved selecting participants through nonprobability sampling, involving samples of specific people who are not necessarily representative of each element of the population. The method was purposive sampling;[110] participants were selected from specific groups for a specific purpose, i.e., to comment on criminal law sanctions in South African environmental law relevant to the research questions. The criteria used to select participants[111] included their knowledge and experience in South African environmental law

[107] Defined in NECER as the 'pollution, waste and EIA (brown) sub-sector'.
[108] Particularly various EMIs, relevant departments or functionaries.
[109] Magistrates Court Act 32 of 1944 s 7.
[110] As described by Leedy & Ormond op cit note 101 at 212 and Babbie op cit note 101 at 189.
[111] Babbie ibid.

(focusing on industrial facilities) and knowledge of the enforcement of such laws, including criminal measures. Aspects of participant perceptions, perspectives and understanding could be described as phenomenological study[112] because it relays participants' direct experiences with environmental law enforcement.

The empirical research was qualitative because it involved collecting non-numerical data, questioning participants and understanding their experiences,[113] observing 'phenomena that occur in natural settings' and studying such phenomena.[114] The research consisted of face-to-face interviews (as a method of empirical research[115]) with a specific set of individuals ('research participants') identified based on their knowledge, expertise or involvement in environmental law enforcement. Their knowledge of environmental law enabled the researcher to understand criminal enforcement trends in environmental law from participants' perspectives.[116] Chapter Five reports information from interviews with 32 research participants who fall within the following categories: enforcement officials, prosecutors, magistrates, industry, and defence counsel.

Thus, the research involved human participants and required ethics clearance from the Wits University's Human Research Ethics Committee (Non-Medical), which was granted on 16 November 2018.[117]

Public sector/government employees who participated in the research included eight EMIs involved with compliance and enforcement action; two officials involved with support or oversight of EMIs; five prosecutors involved with environmental criminal prosecutions; and two magistrates who have adjudicated such prosecutions. Private-sector research participants took part as individuals involved with industrial operations (i.e., industry participants or 'IPs'). The IPs interviewed are all (in some form) tasked with ensuring environmental compliance within their organizations and have compliance and enforcement action experience. Twelve

[112] As described by Leedy & Ormond op cit note 101 at 141 and Angadi op cit note 103 at 40.
[113] Margaret Myers 'Qualitative Research and the Generalizability Question: Standing Firm with Proteus' (2000) 4 *The Qualitative Report* Article 9, 1.
[114] Leedy & Ormond op cit note 101 at 135 and Babbie op cit note 101 at 23-24.
[115] Earl Babbie, Johann Mouton, et al. *Practice of Social Research* (2001) 53, 249-256 and Johann Mouton *How to Succeed in Your Master's and Doctoral Studies* (2001) 105.
[116] James H. McMillan & Sally Schumacher *Research in Education Evidence-based inquiry* 6ed (2006) 351 'In the interview guide approach [includes semi-structured interviews], topics are selected in advance, but the researcher decides the sequence and wording of the questions during the interview'.
[117] Human Research Ethics Committee (Non-Medical) Clearance Certificate with protocol Number: H18/11/31 issued to M Strydom issued on 16 November 2018 with expiry date 28 November 2021.

IPs were interviewed. Three defence counsel, who assist industries in defending enforcement action and criminal prosecutions, were also interviewed.

7.2.1. Determining the terms of participation and categorization of participant groups

The sensitive nature of criminal investigations or prosecutions was a critical consideration in defining the terms of participation. Sensitivity was the main reason for maintaining participants' anonymity and, in the case of IPs, the anonymity of their employers. For example, IPs could be exposed to possible risks, such as potential enforcement action, should sensitive information shared during the interviews be made public. The research methodology had to safeguard for situations where information otherwise not available to authorities might be shared. Maintaining the anonymity of industry research participants and their organizations was essential to protect participants. In this study, I, therefore, identify private sector participants as being from 'industry' or 'IPs'. The disclosure of research participant names or industry organizations is not necessary for this research; what is relevant is the participant's experience pertinent to the research questions. Therefore, the results reported in Chapter Five maintain anonymity and omit any sensitive, detailed information that may be prejudicial to participants. Conducting interviews with multiple participants from within the industry further reduces the possible risk of identifying particular individuals or companies.

A factor that further mitigated IPs' possible risks in participating in this research is that much information on compliance and enforcement action is available in the public domain. The annual NECER published by the DFFE mentions organizations subject to compliance and enforcement action, including criminal investigations and prosecutions. Such organizations employ some of the research participants.

The researcher identified government participants as either enforcement or 'other' officials, the latter being those tasked with administrative (not criminal) enforcement or in supervisory roles. Prosecutors and magistrates also formed part of the government participant category. The employers of these participants are limited, and therefore, it is not always possible to maintain the employer's anonymity (for example, all prosecutors are employed by the NPA). In such instances, the researcher withheld identifying the location of the research participants. Participants from government organizations could share examples of weaknesses in specific cases, policy or prosecution strategies that could prejudice prosecutions if made publicly available. Thus, the information obtained during each interview required scrutiny to ensure that

sensitive or confidential information was not shared but simultaneously discerning the research participants' views on the subject matter. Where a participant shared information with a qualification that it is 'off-the-record' or 'confidential', the researcher did not quote the participant. Where indicated, Chapter Five relays information edited or redacted to ensure that no sensitive or potentially prejudicial information is shared.

For the reasons stated above, only the researcher knows the identity of the research participants. Maintaining anonymity is achieved by applying neutral identifiers and not identifying a gender. For example, participants are referred to as 'Prosecutor 1' and 'they/their' instead of him/her or he/she. Excluding locations or province names was also done to maintain anonymity.

7.2.2. Communicating the terms of participation

Where applicable, organization consent letters granted permission to conduct the interviews with employees of such organizations. Letters seeking organization and individual consent explained the terms of research participation and the interview process to ensure that the 'rights and interests [of the subjects/interviewees] are protected.'[118] The letters explained that each participant and organization name (as relevant) would remain anonymous. It also explained that each participant's sector is relevant, e.g., industry, enforcement officials, prosecutors, defence counsel, or magistrate and that categorization would be used as an identifier. Several actions safeguarded against any possible identification of the participants. In the first place, no names appear on interview notes, transcripts, or recordings. Secondly, any identifiable characteristics are excluded from this research report and its analysis of interview results. Thirdly, all documents are password-protected, and originals kept in a personal safe. Lastly, no other person would have access to the raw data.

The letters set out the following general terms and conditions: (1) no participant will receive any direct benefits from participating in this study, and there are no disadvantages or penalties for participating or for not participating; (2) participants may withdraw at any time or not answer any question if they do not wish to; (3) participation is anonymous, and only the researcher will know the identity of participants; (4) this study will be written up as a research report, which will be available online through the university library website. Some

[118] Babbie & Mouton op cit note 115 at 528.

organizations required confidentiality agreements to confirm the terms of participation, as stated in the letters and summarised above.

7.2.3. Consent to participate

In addition to organization consents, each participant completed a Participant Consent Form that confirmed their individual consent to participate anonymously, but their participant category would be identified. They agreed to partake on the basis explained in the letter provided and explained at the start of each interview. In the Participant Consent Form, participants confirmed that they understood what their participation would involve. They agreed that the researcher could use anonymous quotes (unless otherwise indicated) and that the interview may be audio recorded.

7.2.4. The interviews

Each interview took an hour to two hours, sometimes longer, depending on the participant's availability and the information they were willing to share and debate. Each interview commenced with introductions and an explanation of the participation terms. Audio recordings were started after introductions to ensure the exclusion of the participant's name. The researcher transcribed the audio recordings. It may be possible to identify the research participants from the transcripts; thus, they are not attached to this thesis. The transcripts are referenced by interview number and date. In order to protect sensitive information and maintain anonymity, the researcher edited quotes to exclude sensitive information.

The interviews were semi-structured;[119] the researcher prepared interview sheets containing subjects that served as discussion points during the face-to-face interviews. The intention was to draw from participants' experiences through discussing these subjects. The research was not intended to be quantitative but qualitative. Value was derived from the context of each participant's knowledge and specific views on the use and impact of criminal sanctions in environmental laws applicable to industrial facilities. As explained earlier in the research, limited case information relating to industrial operations was initially available. Thus, aspects of mining or water activities related to contraventions of the four environmental laws were also considered. Similarly, some research participants have been involved more in water or mining-related transgressions. This information is relevant to this research in so far as it relates to the

[119] An accepted interview approach described by McMillan & Schumacher op cit note 116 at 352.

contravention of the four identified laws and provides insight into the use and impact of criminal sanctions.

7.2.5. Mitigating against personal or selection bias

In this study, the interview themes and discussion points originate from the researcher's personal and professional experiences, resulting in risks of personal bias, subjectivity and selective lines of questioning. It would be remiss of the researcher not to acknowledge that 'bias is omnipresent and may well have influenced [the research] findings.'[120] Some level of preconception may have influenced the research, whether through the preparation of the research topic and proposal, interview questions based on the researcher's own experience, lines of questioning during interviews, or the ultimate conclusions reached.

Purposive sampling of select participants in select categories results in their preferences or predispositions being illustrated rather than broader population groups. In other words, other population groups may have different views on the subject matter. However, participants were selected because of their direct involvement in criminal enforcement of environmental law. Nevertheless, the probability of some level of participant predisposition cannot be ignored.[121]

The risk of subjectivity, bias or selection (sampling) bias was addressed or mitigated in various ways through the research design. First, selecting a wide range of participants from the public and private sectors provided a platform for differing views to be expressed and mitigates against personal or sampling bias.[122] The number of research participants represented an almost equal ratio of public to private sector participants (i.e., 17:15). Second, reporting interview content as communicated by the participants (excluding names or sensitive information) as relayed during the interviews and using direct quotations also offers mitigation. Third, the researcher endeavoured to maintain objectivity, evidenced by participants' varied views presented in Chapter Five. Fourth, the interviews took the form of a discussion, meaning that participants could explore and elaborate on their own views, even if questions may have been subjective. Participants were requested to offer any further or additional comments on the subject matter. Offering an opportunity for such broader comments also mitigated the risk of a subjective line of questioning. Where a participant offered a different perspective or dissenting view, that view has been captured with the necessary adaptations to maintain anonymity. Fifth,

[120] Leedy & Ormond op cit note 101 at 214-216.
[121] Leedy & Ormond ibid.
[122] Leedy & Ormond ibid.

even where the researcher and participants discussed or debated varied views, including that of the researcher, the researcher consciously ensured that the participant's view was conveyed and that the other debates did not detract from that view.

7.2.6. Ethical standards

The ethical standards regarding identity protection through anonymity and confidentiality are maintained throughout this research. Through the research design, the researcher has endeavoured to remain objective and convey the information obtained fairly, drawing conclusions based on critical analysis and practical considerations of the information as provided by participants.

7.2.7. The limitations of the research interviews

The number of interviews was limited to 32 research participants, which was deemed sufficient to ensure that all participant categories were represented. Obtaining approval to interview each participant, arrangements, travelling, conducting each interview, and transcribing the recordings were time and cost-consuming. The researcher transcribed the recordings to maintain anonymity and confidentiality; re-listening to the interviews and transcribing them, considering context and participant demeanour, ensured contextual transcription and accuracy. A higher number of interviews was not possible due to the time and costs required for arranging, undertaking, transcribing, and analysing interview content.

The research was conducted mainly in Gauteng, South Africa; limited participants were from other provinces, such as Mpumalanga, Northwest, Limpopo, and the Western Cape. Approval was not forthcoming from some provincial authorities. It was not always feasible to meet with people in distant locations, considering the challenges of travelling long distances and the time and costs involved. It is a limitation that interview participants do not represent all national authorities, provincial authorities, local municipal authorities, prosecutors, or magistrates in various locations.

I interviewed EMIs within DFFE and equivalent Provincial Departments because prior interactions and engagement with such officials made approaching these authorities more effortless and limited the study's scope. It would not have been possible, within the time and word limit, to involve participants from other departments, such as DWS, DMRE or local authorities. It would have also distorted the ratio of public and private sector participants.

DMRE and DWS officials were excluded from the research because of time, scope, and cost limitations. DMRE and DWS are known to approach compliance and enforcement inconsistent with the approach of DEFF - as supported by research participant views (Chapter Five), case law, and the researcher's own experience. Their exclusion from the interviews nevertheless remains a limitation of this study.

In addition, officials responsible for legislative drafting did not form part of the selected participants because of the topic's focus on the use of criminal sanctions. The legislative design issues that emerge from this research would nevertheless be relevant considerations for legislators or drafters of the law that also impact the effective use of criminal sanctions and avoiding overcriminalization.

The approved scope of this research does not extend to broader empirical interviews, and to conduct more interviews would have delayed the study and was not possible due to time and cost constraints. Nevertheless, this thesis may form preliminary research to develop other research programs focusing on the empirical gathering of information from EMIs within the various government structures or legislators or legislative drafters. The researcher would like to explore more extensive research programs that may contribute to environmental law reform, consistent and equal application of the law across government departments, and more effective enforcement and use of criminal sanctions.

Some research participants' limited experience with the criminal justice system may also be a limitation of the study. Although the aim was to identify participants with experience in criminal investigations and prosecutions in the context of environmental compliance, not all participants have been extensively involved in criminal prosecutions. However, all participants play a role in ensuring environmental law compliance and could engage with the interview discussion topics.

8. CHAPTER OUTLINE

This introductory chapter presents the contextual and legal framework, outlines the study's rationale, aims, research question, research design and methodology. This thesis consists of seven chapters, including this introduction.

Chapter Two situates environmental law sanctions in the context of criminalization and overcriminalization theories to establish a normative framework for the study.

Chapter Three turns to South African law and analyzes select offence categories to illustrate the complexities that have arisen due to frequent changes in laws and prescribed maximum penalties and to determine whether overcriminalization has occurred. In this chapter, the offence categories considered are the failure to obtain an approval or comply with its conditions, the duty of care / general pollution offences, compliance with authority notices, and compliance with subordinate regulations.

Chapter Four considers the environmental law criminal sanctions' use by analysing cases that have been prosecuted under the four framing laws and whether such cases resulted in a settlement or a completed trial. This chapter identifies challenges or trends apparent from the settlement or adjudication of these matters.

Chapter Five presents the results of a contained qualitative empirical inquiry into the perspectives of key stakeholder groupings on the design and use of environmental criminal sanctions in industrial facilities. The chapter presents the findings from interviews with environmental enforcement and other officials, employees of industrial operations, prosecutors who have prosecuted environmental offences by industries, magistrates who have adjudicated such matters and defence counsel who have defended industry clients. The purpose is to outline their perspectives on the use, effectiveness and effect of criminal sanctions in environmental law in South Africa.

Chapter Six contains an analysis of the criminal sanctions, adjudicated cases, and insights from research participants against the normative framework for criminalization to determine if there is overcriminalization of environmental law. The conclusions and recommendations of this thesis are contained in Chapter Seven.

CHAPTER 2: ENVIRONMENTAL LAW SANCTIONS IN THE CONTEXT OF CRIMINALIZATION AND OVERCRIMINALIZATION THEORIES – DETERMINING A NORMATIVE FRAMEWORK

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1. INTRODUCTION

'What is criminalized and why? Is the criminal sanction "reserved for what really matters"'[1]?

This chapter considers environmental law sanctions in the context of theories of criminalization and overcriminalization. Theories of overcriminalization have developed over decades and have gained impetus in the new millennium.[2] But in engaging with 'overcriminalization', it is helpful to consider theories of criminalization. In simple terms, criminalization theory considers why a particular behaviour is criminalized and on what basis behaviour should be criminalized.

True criminalization lies in the fact that 'specific conduct is assigned punishment rather than another sanction'.[3] For society to function properly, certain rules that prohibit harmful actions against others need to be followed. Duff contextualises crimes as 'public wrongs' because they concern us all as community members, and are distinguishable from private wrongs that concern only those individuals directly involved.[4] The benefits people receive from following the rules include being protected against harm and restoring an imbalance in society's perception of what is just. If someone imbalances the scales by committing a 'public wrong', a debt becomes payable to society to restore the balance.[5]

Criminal law theorists (in South Africa) have written about criminal law generally[6] and the limits of criminal law (considered by writers outside South Africa),[7] although academic texts focus more on theories of punishment than theories of criminalization.[8] South African criminal

[1] Herbert L Packer *The Limits of the Criminal Sanction* (1968) 250.
[2] For example see Paul J. Larkin, Jr. 'Regulation, prohibition, and overcriminalization: the proper and improper uses of the criminal law' (2014) 42, 3 *Hofstra Law Review* 745, Douglas Husak 'Reservations about Overcriminalization' (2011) 14 *New Crim. L. Rev.* 97, Douglas Husak *Overcriminalization, The Limits of the Criminal Law* (2008); Erik Luna 'The Overcriminalization Phenomenon' (2005) 54 *American University Law Review* 703, Erik Luna 'Overextending the Criminal Law' 25 *CATO POL'Y RPT.* 1 (2003), SP Green 'Why is it a crime to tear a tag off a mattress: Overcriminalization and the moral content of regulatory offences' (1997) 46 *Emory Law Journal* 1533, Norval Morris & Julius Kreeger 'The Overreach of the Criminal Law' (1975) *Acta Juridica* 40, Sanford Kadish 'The Crisis of Overcriminalization' (1967) 157 *Annals of the American Academy of Political and Social Science* 374.
[3] R.A. Duff et al *The Boundaries of the Criminal Law* 1 ed (2010) 240.
[4] RA Duff *Answering for Crime: Responsibility and Liability in the Criminal Law* (2007) 140.
[5] CR Snyman *Criminal Law* 6 ed (2014) at 14-15 with reference to J Dressler *Understanding Criminal Law* 2 ed (1995) 12-13.
[6] Skeen, A St Q updated by Hoctor, S 'Criminal Law' in J A Faris (ed) *The Law of South Africa* 3 ed (2017) volume 11; CR Snyman *Strafreg* 4 ed (1999); Snyman (2014) op cit note 5; Jonathan Burchell *Principles of Criminal Law* 5ed (2016).
[7] Duff op cit note 3 and Packer op cit note 1.
[8] Kimmo Nuotio 'Theories of Criminalization and the Limits of the Criminal Law: A Legal Cultural Approach' in Duff (ed) *The Boundaries of the Criminal Law* 1 ed (2010) 238.

law is influenced by Roman-Dutch and English law[9] and distinguishes between general principles of criminal law and specific crimes.[10] Some writers have also observed that the concepts of 'crime' and 'criminal' have not received substantive attention in recent times and have had lesser consideration than the procedural aspects of criminal law.[11] In South Africa, there are limited writings on theories of criminalization[12] or overcriminalization. Existing recent criminal law works mainly consider general principles of criminal law, procedure and theories of punishment.[13] Thus, theories of criminalization and overcriminalization by writers outside of South Africa were considered.

Theories of punishment are separate and ancillary to criminalization theory and are not discussed in detail in this chapter but mentioned because the purpose of punishment is pertinent to considerations of overcriminalization - principles that apply to punishment theories and theories of criminalization overlap in certain instances. *Absolute theories* of punishment include *retributive or punishment theory* - that 'punishment is an end in itself'; an offender deserves to be punished and has to pay his debt to society for committing the offence. According to the retributive theory, punishment is retrospective and looks at the transgression undertaken in the past.[14] Snyman explains that retribution does not focus on vengeance but rather on restoring the legal balance, i.e., 'the scales of justice', and has also been described as 'just desert' or 'restorative justice'.[15] Consequently, the degree of punishment must be proportional to the degree of the harm, the violation and moral blameworthiness of the offender. In other words, the less the harm, the violation and moral blameworthiness, the less the punishment should be.[16]

Relative theories of punishment include *prevention* theory, *deterrenc*e theory, and *reform/rehabilitation* theory.[17] These theories view punishment as a means to an end, are forward-looking and aimed at achieving particular policy objectives, e.g. prevention or

[9] CHJ Badenhorst 'Die oorsprong en betekenis van inhoudgewing aan die algemene begrip misdaad in die Suid-Afrikaanse strafreg*'* (translated 'The origin and importance attached to the general concept of *crime* in South African criminal law') (1982) 209 *J. S. Afr. L.* 215.
[10] Badenhorst ibid at 215.
[11] Badenhorst ibid at 216.
[12] Snyman briefly refers to theories of punishment; Burchell addresses principles of criminal liability and specific offences. In this regard see CHJ Badenhorst '*Die oorsprong en betekenis van inhoudgewing aan die algemene begrip misdaad in die Suid-Afrikaanse strafreg'* (1982) J. S. Afr. L. 209.
[13] See for example Burchell op cit note 6, Snyman (1999) op cit note 6, and Snyman (2014) op cit note 5.
[14] Snyman (2014) op cit note 5 at 10-11 para 2 and 3.
[15] Snyman (2014) ibid at 13 para 4(c), p19 para 9; and Snyman (1999) op cit note 6 at 22 with reference in fn 26 to Albert Kruger *Hiemstra's Criminal Procedure* (2018).
[16] Snyman (2014) ibid at 13 para 4(d).
[17] Snyman (2014) ibid at 11 para 3.

reformation.[18] The purpose of 'preventive theory' is to prevent further crime; 'deterrence theory' aims to deter a person or the broader community from committing a crime, i.e., individual or general deterrence.[19] *Reformative/rehabilitation theory* aims to reform or rehabilitate the offender. Snyman offers several critiques against this theory[20] and states that experience has taught that rehabilitation is, more often than not, an ideal rather than a reality, and the high percentage of recidivism (repeat offenders) proves this.[21] He explains that this theory has lost its allure in the USA and England. However, South African courts still believe in reform or rehabilitation as a criminal law policy goal in appropriate circumstances.[22]

South African courts use a 'combination theory' of punishment, which means achieving a balance between considerations of retribution, reform, prevention and deterrence, and 'a court should not emphasize any one of them at the expense of the others'.[23] However, Hiemstra states that the 'South African courts regard deterrence as the predominant and most widely acknowledged purpose of punishment, the other purposes are additional, and retribution, in particular, has diminished in importance'.[24] Snyman contends that punishment should enjoy a higher priority, and the individual offender's personal circumstances should be a lesser factor.[25] The aim of punishment is a relevant factor when considering criminalization and overcriminalization. These concepts (criminalization, overcriminalization and punishment) are distinct but intertwined.

Criminalization is the broader theory, which considers why actions are/should be criminalized and punished. Not all criminal acts are punishable (in law) or punished (in fact) because the definition of a crime is those actions that attract (and warrant) a sanction. Arguably, overcriminalization can occur where there is too much criminal law or too much punishment, and where the aims of punishment (including, retribution and prevention) are not met or exceeded. This chapter (and thesis) considers this argument in deliberating the research questions of whether there is overcriminalization in South African environmental law and when the criminal sanction is appropriate and effective.

[18] Snyman (2014) ibid at 10-11 paras 2 and 3.
[19] Snyman (2014) ibid at 15-16 para 6.
[20] Snyman (2014) ibid at 18 para 8.
[21] Snyman (2014) ibid.
[22] Snyman (2014) ibid at 18.
[23] Snyman (2014) ibid at 19.
[24] Albert Kruger *Hiemstra's Criminal Procedure* (2018) at 28-4.
[25] Snyman (2014) op cit note 5 at 23.

According to Nuotio, the abundant creation of statutory offences, including environmental law offences, requires re-examining the boundaries of criminal law.[26] He remarks that-

> Criminal codes are increasingly amended by new provisions covering economic and environmental offences… . Only very few areas that are regulated seem *not* to attract some criminal prohibitions. This flood of legislation certainly explains the need to rethink the boundaries of criminal law and to assess the risks and merits of this trend critically.[27]

As Chapter Three illustrates, South African environmental law creates numerous criminal sanctions. According to Kidd, the criminal sanction is 'by far the most widely prescribed sanction for contraventions of legal and administrative provisions'.[28] Nuotio's statement therefore seems to ring true in a South African environmental law and criminalization context. The adverse consequences of too much criminalization include that it may erode the rule of law,[29] which is a foundational value of the Constitution of the Republic of South Africa 1996 ('the Constitution') and any functioning legal system.

While South African law theorists have considered environmental crimes, there is a research gap in understanding such crimes in the context of criminalization and overcriminalization theory. The criminal law's internal and external constraints can be used to formulate normative principles for determining what acts should be classified as being 'criminal' and why.

Several constraints, limitations, or weaknesses[30] are inherent to the use of criminal law. These constraints, limitations or weaknesses are exacerbated in environmental law because of the complexities inherent in implementing and enforcing such laws. Normative boundaries may provide for the more effective use of the criminal sanction for environmental law transgressions. In other words, if environmental crimes are enacted within the bounds of these normative principles, it should provide more precise and appropriate criminal sanctions, which are easier to enforce and which render the intended results. In addition to developing a normative framework for criminalization, the intention is to apply the normative framework to

[26] Duff op cit note 3 at 240-241.
[27] Duff op cit note 3 at 239-241.
[28] Michael Kidd *Environmental Law* 2 ed (2011) at 269 with reference to MA Rabie et al 'Implementation of environmental law' in RF Fuggle & MA Rabie *Environmental Management in South Africa* (1992) at 128 and (2018) at 235, and Michael Kidd 'The protection of the environment through the use of criminal sanctions: A comparative analysis with specific reference to South Africa' (unpublished PhD thesis, University of Natal, 2002).
[29] Husak op cit note 2 at 28.
[30] Kidd op cit note 28 at 269-274.

the empirical data collected as part of this research to determine if overcriminalization occurs in South African environmental law.

Thus, Part 2 of this chapter explores criminalization and overcriminalization concepts, the problem of overcriminalization, the creation of unrestrained discretion, and the erosion of the rule of law. Part 3 considers several principles in establishing a normative theory of criminalization to determine the boundaries beyond which overcriminalization could occur.

Part 4 explores the development and unique features of environmental law and crime and how this influences a normative framework for criminalization or how to avoid overcriminalization. The distinctive qualities and technical nature of environmental law result in additional weaknesses and difficulties in its enforcement. Environmental enforcement regimes could vest authorities and prosecutors with too much and too broad discretion, necessitating policies to prevent unequal enforcement or overcriminalization. Alternative measures or enforcement methodologies could also limit overcriminalization in the environmental law context. The deeper dive into the intricacies of environmental law crimes helps answer the research questions: Has the use of criminal sanctions for environmental transgressions in industrial facilities led to overcriminalization? When is the use of the criminal sanction appropriate and effective?

This chapter concludes with a summary of normative principles for criminalization and reiterates why it is essential to limit overcriminalization.

2. OVERCRIMINALIZATION AND CRIMINALIZATION THEORY

> 'The criminal sanction is the most powerful weapon in the state arsenal; the government can do nothing worse to its citizens than to punish them… criminal sanctions are the most severe and therefore the most in need of justification.'[31]

In reflecting on this statement, this part considers the consequences of overcriminalization and why it is problematic. This part explains that too many statutory crimes create more criminals and increase authorities' or prosecutors' discretion, as they must decide which cases to investigate or prosecute. Increased discretion leads to inconsistent enforcement, raising doubts about justice being achieved, thus eroding trust in the law and its enforcement. Reassessing when criminal mechanisms should be prescribed and used is thus warranted. Considerations of

[31] Husak op cit note 2 at 95.

criminalization theory assist in understanding overcriminalization and in developing normative rules to guide decisions on when to criminalize behaviour.

2.1 The problem of overcriminalization generally

It is not a new opinion that the criminal sanction should be 'reserved for the most serious environmental offences'[32] or for the 'most culpable' set of offences and 'not used solely for their ability to deter'.[33] Many authors express strong views against overcriminalization. Skeen describes it as 'one of the most serious problems facing criminal law'.[34] He argues that the criminal sanction should be the 'ultimate weapon against assaults threatening societal coexistence', yet it 'has become a blunt instrument through its indiscriminate use by legislatures as a tool to ensure obedience'.[35] Husak describes legislatures as 'offence factories that churn out new statutes each week'.[36] He claims that the absence of a viable account of criminalization constitutes the single most glaring criminal theory failure.[37] He frames the problem as arising from the lack of a normative framework that can guide decisions regarding criminalization.[38]

Overcriminalization 'threatens the whole justice system with collapse due to the establishment of too many criminal prohibitions'.[39] It is said to impair 'the deterring effect of the threat of punishment, as the threat becomes more remote with the increase in prohibitions'.[40] Deterrence theory (one of the punishment theories) only becomes effective if (1) there is certainty that the police will catch the offender; (2) that prosecution will be successful; and (3) that the offender will serve his sentence and will not escape or get early parole.[41] Prospective offenders could reason that if the risk of being caught, properly prosecuted and sentenced does not outweigh the benefit of committing the offence they will

[32] Kidd op cit note 28 at 76 with reference to Packer op cit note 1 at 250.
[33] Kidd ibid at 276 with reference to Richard J. Lazarus 'Assimilating environmental protection into legal rules and the problem with environmental crime' (1994) 27 *Loyola LA LR* 867 at 883 and also Zada Lipman 'Old wine in new bottles: Difficulties in the application of general principles of criminal law to environmental law' in Gunningham (eds) 31 at 42; C Reasons 'Crimes against the environment: Some theoretical and practical concerns' (1991) 34 *Crim LQ* 86 at 104, who, according to Kidd, suggest that 'there is a role to be played by the use of criminal sanctions, but only for the most serious harms and persistent offenders'.
[34] Skeen op cit note 6 para 9 with reference to Middleton 1974 *THRH*R 159; Morris 1975 *Acta Juridica* 40; and Van der Vyver 1975 *Acta Juridica* 53.
[35] Skeen ibid para 9.
[36] Husak op cit note 2 at 34.
[37] Husak ibid at 58.
[38] Husak ibid at vii.
[39] Skeen op cit note 6 para 9.
[40] Skeen op cit note 6 para 9.
[41] Snyman (2014) op cit note 5 at 16 at 18-19.

proceed to commit the offence. Thus, if the benefit of the offence outweighs the risk of being caught and punished, it renders this theory ineffective.[42] Snyman says that in South Africa, the premise of individual deterrence theory is undermined by the 'shockingly high percentage of repeat offenders'.[43] According to some, South Africa's rate of recidivism is between 60 and 90 per cent.[44] Others have gauged it as being between 55 to 97 per cent.[45] Snyman critiques deterrence theory by saying that the notion of 'making an example of someone' so that the community at large can be deterred is immoral as one person is 'sacrificed' to change society instead of being judged proportionally to the crime committed. There is no empirical proof in favour of such a theory.[46]

Husak contends that there are several reasons to doubt whether criminal statutes produce any marginal gains in deterrence.[47] He says that social scientists have recognised that 'uncertainties and lengthy delays in imposing punishments erode whatever deterrent effect penal sanctions might have had'.[48] Husak argues that '[m]ere allegations of deterrence are insufficient to justify a criminal offense.'[49] Luna agrees that enacting more offences does not result in deterrence.[50] Creating numerous criminal sanctions may 'have the effect of deluding society into falsely believing that…its interests are adequately protected…'.[51] In other words, creating more prohibitions creates more offenders, which makes successful enforcement action more improbable because it becomes less likely that successful enforcement against all

[42] Snyman (1999) op cit note 6 at 19 and Snyman (2014) ibid at 16 para 7.
[43] Syman (2014) ibid at 15-16 para 6.
[44] Edwin Cameron 'The Crisis of the Criminal Justice System' (2020) *SALJ* 32 at 49 with reference to several sources including Regan Jules-Macquet 'The state of South African prisons' NICRO Public Education Series (2014) 1, available at *http://press.nicro.org.za/images/PDF/Public-Education-Paper-The-State-of-South-African-Prisons-2014.pdf*. at 19 mentions a recidivism rate of between 80 and 90 per cent; Patrick Murhula, Shanta Singh & Rema Nunlall 'A critical analysis on offenders rehabilitation approach in South Africa: A review of the literature' (2019) 12 *African Journal of Criminology and Justice Studies* 21; Oliver Ngabonziza & Shanta Singh 'Offender reintegration programme and its role in reducing recidivism: Exploring perceptions of the effectiveness of tough enough programmes' (2012) 25 *Acta Criminologica* (Special Edition) 87 at 89 mentions recidivism rates ranging from 94 per cent, and 60 to 70 per cent according to the Department of Correctional Services Draft White Paper on Corrections in South Africa (December 2003) 6, available at *https://www.gov.za/sites/default/files/gcis_document/201409/correct1.pdf*.
[45] Marelize Schoeman 'Recidivism: a conceptual and operational conundrum' (2009) *Acta Criminologica* CRIMSA 2009 Conference Special Edition No.1/2010 80.
[46] Snyman (2014) op cit note 5 at 17 para 7.
[47] Husak op cit note 2 at 50 with reference to Paul H. Robinson & John M. Darley 'The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best' (2003) 91 *Georgetown Law Journal* at 949.
[48] Husak op cit note 2 at 146.
[49] Husak ibid.
[50] Erik Luna 'The Overcriminalization Phenomenon' (2005) 54 *American University Law Review* 703 at 720 with reference to Luna 'Punishment Theory, Holism, and the Procedural Conception of Restorative Justice' (2003) 205 *UTAH L. REV*. at 250-258.
[51] Skeen op cit note 6 para 9.

offenders would occur. Consequently, the deterrent effect of statutory crimes diminishes. Thus, too many statutory crimes undermine the deterrent effect of punishment. Thus, overcriminalization (in the creation of too many crimes) may result in diminished deterrence. Diminished deterrence, despite many statutory crimes, may thus be an indication of overcriminalization.

Overcriminalization also results in the state being given more powers over its subjects (individuals/natural or juristic entities) than it should have, overextending the state's 'penal apparatus'.[52] The decision to criminalize is a serious one and requires more scrutiny than it currently receives.[53] Husak says overcriminalization 'is objectionable mainly because it produces too much punishment'.[54] There are more criminal laws and punishment than what seems sensible.[55] Not many criminologists appear to have been persuaded that increased punishment significantly decreases crime.[56] Stuntz echoes this sentiment. He claims that too many crimes bring us 'closer to a world in which the law on the books makes everyone a felon'.[57]

Other writers believe that overcriminalization is problematic because of its potential to 'deprive citizens of their liberty'.[58] The deprivation of liberty argument recognises that overcriminalization can arise through criminal offence design, enforcement or adjudication, which supports the empirical research design and approach taken in this thesis (i.e., the range of stakeholders interviewed). Criminal penalties may include a sentence of direct imprisonment or the imposition of a fine, or both.[59] Alternative sanctions could also be imposed, for example, correctional supervision, or sentences can be postponed on the condition of community service being performed.[60] Regardless of the type of sanction imposed (whether direct imprisonment, payment of a fine or alternative sanctions), a conviction results in a criminal record, which also impacts offenders' liberties, particularly where the offender is an individual/natural person. A criminal record results in limitations on employment opportunities or obtaining visas for travel.[61] The most significant consequence for a business, but which may occur outside the

[52] Duff op cit note 3 at 59.
[53] Duff ibid.
[54] Husak op cit note 2 at 3.
[55] Husak ibid at 3.
[56] Husak ibid at 6.
[57] William Stuntz 'The Pathological Politics of Criminal Law' (2001) 100 *Michigan Law Review* 506 at 511.
[58] Andrew Ashworth & Lucia Zedner 'Preventive Orders: A Problem of Undercriminalization?' in Duff op cit note 3 at 59.
[59] Criminal Procedure Act 51 of 1977 ('CPA') s 276.
[60] CPA s 297.
[61] *S v Tong* 2013 (1) SACR 346 (WCC) at 4, 5 and 18.

criminal law and does not necessarily result from a successful prosecution, is the revocation of the approvals required to operate.[62] This mechanism is discussed in Chapter Six and considered a more severe consequence than a criminal record.

Overcriminalization may occur by enacting too many offences, in how authorities apply the law, and how courts adjudicate crimes. According to Holmes, the law consists of 'prophecies of what the courts will do in fact, and nothing more pretentious'.[63] An example may be when a court imposes unjust and disproportional sentences for crimes that most people may not consider criminal, but which are declared so by legislation. Creating too many statutory crimes inevitably leads to unequal enforcement as no justice system has the capacity or resources to prosecute every single transgression successfully. Whether to prosecute each statutory crime is a decision often left to the discretion of enforcers or prosecutors, which also leads to unequal enforcement.

Steiker contends that it is possible to have overcriminalization (too broad a range of conduct subject to potential criminal sanction) without having over punishment (i.e., unnecessary harshness in the actual imposition of punishment), and there could be over punishment even in the absence of overcriminalization.[64] Whether there is overcriminalization in South African environmental law by creating offences or through actual punishment is considered in the chapters that follow.

According to Luna, overcriminalization is a broad phenomenon encompassing a multiplicity of concerns but always involves the unjustifiable use of the criminal justice system.[65] He describes overcriminalization as consisting of: (1) untenable offences; (2) superfluous statutes; (3) doctrines that overextend culpability (fault); (4) crimes without jurisdictional authority; (5) grossly disproportionate punishments; and (6) excessive or pretextual enforcement of minor violations.[66] Husak argues that the 'combination of overcriminalization and discretion erodes the rule of law and undermines the principle of proportionality'.[67] Luna's multiplicity of concerns contributes to the normative framework for criminalization and avoiding overcriminalization.

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[62] For example, as provided for in NEMA s 31N.
[63] Husak op cit note 2 at 27 with reference to Oliver W. Holmes 'The Path of the Law' (1897) X *Harvard Law Review* 457, accessed at *https://www.academia.edu/33988425/Oliver_Wendell_Holmes_Jr._The_Path_of_the_Law_1897_*
[64] Duff op cit note 3 at 28.
[65] Luna (2005) op cit note 50 at 718.
[66] Luna ibid at 717.
[67] Husak op cit note 2 at 28.

Husak argues that law exists primarily to guide behaviour, but this objective is undermined by overcriminalization.[68] The law-making process and its enforcement must not compromise respect for the law, and overcriminalization threatens such respect.[69] By implication, respect for the law requires that laws and enforcement be rational, reasonable, clear, and practical.

2.2 Overcriminalization and the rule of law

> 'Citizens may be more cooperative if they believe the law is just.'[70]

According to Husak, the increase in criminalization 'is destructive of the rule of law' and 'the quantity of criminal law undermines the principle of legality'.[71] Where rules or regulations are 'perceived to be stupid', they 'are ignored or circumvented by law-abiding citizens'.[72] Confidence in the criminal justice system diminishes 'when individuals are punished for violating laws that a sizable percentage of the citizenry deems unfair'. [73] Luna uses a 'laugh test' for crimes to see if they fall within the ambit of overcriminalization.[74] Robinson and Darley argue that society will lose faith in the penal law if it is perceived as unjustly criminalizing conduct.[75]

When there are too many criminal offences that are far-reaching, there cannot be fair enforcement. Unequal and unfair enforcement inherently erodes the rule of law and respect for it. When enforcement becomes selective and discretionary, it places a small number of people at a disadvantage because the law is only enforced against them.[76] Husak posits that to enhance fairness, 'we should begin by combating the phenomenon of overcriminalization'; however, 'the proliferation of *mala prohibita* offences is among the main causes of our current predicament'.[77] *Mala prohibita* offences are statutory offences, including those found in environmental laws. Such offences contrast with *malum in se* offences, envisaging common law crimes, which are inherently immoral, regardless of whether they are declared illegal by

[68] Husak ibid at 11.
[69] Husak ibid at 12.
[70] Husak ibid at 32 with reference to Paul H. Robinson & John M. Darley *Justice, Liability & Blame* (1995).
[71] Husak ibid.
[72] Husak ibid.
[73] Husak ibid.
[74] Luna (2005) op cit note 50 at 717 with reference to Erik Luna 'Overextending the Criminal Law' 25 *CATO POL'Y RPT.* 1 (2003)
[75] Husak op cit note 2 at 32 with reference to Paul H. Robinson & John Darley *Justice, Liability & Blame* (1995).
[76] Husak ibid at 118.
[77] Husak ibid.

law.[78] To justify *mala prohibita* offences, 'there must be a good reason to create a prohibition of conduct', and it should serve the common good without 'unreasonably burden[ing] those who are subject to it'.[79]

According to Steiker, the current excess and increasing breadth of criminal laws threaten the efficacy of criminal law enforcement and its legitimacy in the public's eyes and produces unfettered official discretion, which threatens the rule of law.[80] Legislatures know they cannot foresee all possible applications of prohibitions that they enact. Consequently, they rely on the decisions of discretionary actors in response to specific circumstances.[81] Broad drafting of criminal prohibitions may be intentional to give discretionary actors more powerful tools to combat crime.[82]

2.3 More criminalization increases discretion

More criminalization means more policymaking space for prosecutors because criminal 'prohibitions are delegations of power to the officials who enforce them'.[83] Prosecutors hold the 'power' or discretion in deciding to bring charges in a criminal court.[84] Stuntz contends that one cannot abolish prosecutorial discretion, which would do more harm than good, but the substantive criminal law could be 'reined in'.[85] The discretion of prosecutors is illustrated in plea bargaining, which is a trend in the US, as its 'criminal justice system could not survive if every matter went to trial', and 95 per cent of adjudicated cases result in guilty pleas.[86] A similar plea agreement 'upsurge' is visible in a South African environmental law context, further discussed in Chapter Four.[87]

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[78] RD Claassen *Claassen's Dictionary of Legal Words and Phrases* (2021) accessed on LexisNexis online library of reference works.
[79] Duff op cit note 3 at 92-93 with reference to SP Green 'Why is it a crime to tear a tag off a mattress: Overcriminalization and the moral content of regulatory offences' (1997) 46 *Emory Law Journal* 1533.
[80] Duff ibid at 27.
[81] Duff ibid at 28.
[82] William J. Stuntz 'Correspondence: Reply: Criminal Law's Pathology' (2002) 101 *Michigan Law Review* 828, 833 at 830.
[83] Stuntz ibid.
[84] Husak op cit note 2 at 21 and Michael Edmund O'Neill 'When Prosecutors Don't: Trends in Federal Prosecutorial Declinations' (2003) 79 *Notre Dame Law Review* 221.
[85] Stuntz (2002) op cit note 82 at 831.
[86] Husak op cit note 2 at 22 with reference to Rachel E. Barkow 'Separation of Powers and the Criminal Law' (2006) 58 *Stanford Law Review* 989, 1047 n.310.
[87] Murombo & Munyuki 'The Effectiveness of Plea and Sentence Agreements in Environmental Enforcement in South Africa' *PER / PELJ* (2019) 22 at 5.

Writers seem to agree that prosecutors rather than legislators are 'the criminal justice system's real lawmakers'.[88] Even when prosecutorial discretion is exercised wisely, 'if unchecked and unbalanced by other branches of government, it is incompatible with the rule of law, and a deterioration in the rule of law produces injustice'.[89] Prosecutors have been described as the gatekeepers of the criminal system wielding 'enormous power to charge people criminally'.[90] In addition, Husak says that 'judicial discretion is the enemy of the rule of law' because the rule of law is incompatible with discretionary powers of police and prosecutors who choose when and whom to prosecute.[91] If authorities cannot 'defend their decisions about why given statutes are selectively enforced', such statutes should not be enacted in the first place.[92] Husak argues that a 'principled enforcement approach could help salvage the rule of law were it not threatened by overcriminalization'.[93]

The decision to prosecute could be 'reined in' (the term suggested by Steiker)[94] by prosecutorial principles or policies to ensure proportionality and equality. This may refer to both proportionality as a principle used to ensure that only deserved punishment is imposed, and as a principle to ensure that, when criminal sanctions are created, a balance is achieved between the interest in need of protection and the rights and liberties that may be constrained by sanctions. However, if statutes create offences, prosecutors (and other enforcement agencies) must enforce them. The criminal justice system's constraints make it impossible to ensure consistent and equal enforcement of each offender, particularly where offenders are unknown to the authorities or where enforcement officials' capacity is so constrained that they cannot prosecute every offender equally. Overcriminalization lies at the heart of the problem and cannot necessarily be fixed with a 'principled' approach. If a potential statutory crime does not meet the normative principles, it should not be a crime, and other alternative mechanisms

[88] Husak op cit note 2 at 26 with reference to Stuntz (2001) op cit note 57 at 506 and 578.
[89] Husak ibid at 27.
[90] Murdoch Watney 'The prosecutorial discretion to institute a criminal prosecution' (2019) *TSAR* 354 with reference to Wen & Leipold 'Mechanisms for screening prosecutorial charging decisions in the United States and Taiwan' in Ross & Thaman *Comparative Criminal Procedure* (2016) 161; De Villiers 'Is the prosecuting authority under South African law politically independent? An investigation into the South African and analogous models' (2011) *THRHR* 247 at 256; Mokoena 'Taming the prosecutorial beast: of independence, discretion and accountability' (2012) *Stell LR* 297 at 300; and De Villiers 'Notes on the investigatory powers of the prosecution' (2010) *THRHR* 123 at 124.
[91] Husak op cit note 2 at 28-29.
[92] Husak ibid at 32.
[93] Husak ibid.
[94] Stuntz (2002) op cit note 82 at 831.

may rather attain the statutory objective. Thus, a normative framework for criminalization could limit overcriminalization.[95]

2.4 The contribution of criminalization theory

Criminalization theory considers why a particular behaviour is criminalized and worthy of punishment, and overcriminalization occurs if the boundaries of criminalization principles are surpassed.

Expanding on Duff's notion of public wrongs, Nuotio explains that criminalization is generally understood to include the classification of public wrongs and then declaring that these wrongs are blameworthy.[96] He questions 'what makes wrong truly wrong?'[97] and considers several characteristics of criminalization in contemplating the question. Ultimately, criminalization 'manifests forbidden conduct' and 'scandalizes prohibited conduct'.[98] Nuotio states that we must understand the criminal law's 'true condemnatory role' to understand criminalization.[99]

Generally, and in different legal systems, offences are defined by elements, including wrongfulness and harmful and forbidden conduct.[100] In addition to proving factual and legal causation in a criminal matter, the conduct must be unlawful. Where it is not a strict (without fault) liability offence, intention or negligence (the guilty mind/mens rea) must be proven.[101] In an environmental law context, transgressions by industrial facilities are more likely to involve negligence, which differs from nature conservation offences because the latter are typically committed with intent.[102] Industrial operators may be accused of negligence when there is a momentary failure of equipment, an involuntary exceedance of a particular standard (such as air emissions or effluent discharge), or unforeseeable or unpreventable contravention of technical/administrative legal requirements. Some transgressions may potentially result in environmental harm, whereas others may be administrative non-compliance that does not directly result in or cause environmental harm. Principles should be established to ensure that

[95] Husak op cit note 2 at 32.
[96] Duff op cit note 3 at 241.
[97] Duff ibid at 241.
[98] Duff ibid at 243.
[99] Duff ibid.
[100] See in general, Snyman and Burchell in a South African context.
[101] Burchell op cit note 6 at 3.
[102] Kidd op cit note 28 at 275.

the creation and use of such criminal sanctions are legitimate or justifiable considering the harm it seeks to prevent.

Nuotio contends that an 'ethical-normative theory of criminalization' should be used, which 'seeks to elaborate on the restricting principles contributing both to the legitimacy of criminal law and its limits'.[103] He offers several 'yardsticks' for consideration.[104] First, the '*conditions for legitimacy of the criminal law'* are 'partly built into the rules and principles of the criminal law itself', meaning that criminal laws must be enacted following legal principles and for legitimate purposes. Second, *'[t]he ultima ratio principle'* requires that 'criminalization be resorted to only when there is no other way to deal with the problem', i.e., as a last resort. Third, *'[p]rinciples of legality and proportionality'* are general constitutional principles that should be applied more strictly in the context of criminal law. Fourth, '*[a]nalysis of the sphere of protection'* requires analyzing the scope that a provision covers as 'collective goods cannot warrant protection through the criminal law if they are too general and diffuse', i.e., what is the legitimate state purpose? Fifth, *'[s]eeking alternatives'* is supported by the ultima ratio principle. In essence, this yardstick requires rethinking the relationship between political thinking and a theory of criminalization, taking these considerations into account. Lastly, the '*basic conceptions of criminal law',* or the different nature of criminal law, should always form the core consideration of when to criminalize.[105]

Developing a normative framework requires distinguishing between criminal laws that are justified and those that are not, providing principles by which 'to reverse the trend toward enacting too many criminal laws.'[106] The proportionality principle could serve as an additional threshold for determining the boundaries of criminal law.[107] Criminalization may be a 'disproportionate response' to particular conduct where a 'less draconian alternative' is available.[108] In other words, disproportionality can occur where the punishment imposed is not deserved or where the creation of a criminal sanction results in an imbalance between the rights being protected and those being restricted through a criminal sanction.

[103] Duff op cit note 3 at at 260.
[104] Duff ibid at 261.
[105] Duff ibid.
[106] Husak op cit note 2 at 3.
[107] Duff op cit note 3 at 250-251 and Chapter Seven, Husak and Luna seem to agree, see Husak op cit note 2 at 14 and Luna op cit note 50 at 716.
[108] Duff ibid at 164.

Nuotio considers whether statutory enactment is substantively sufficient for criminalization or if actual enforcement plays a role in determining criminalization.[109] When considering what is, or should be, criminal, he considers both the law and how it is enforced.[110] Based on Nuotio's theory, other questions aimed at formulating a normative theory of criminalization could include: (1) what kinds of conduct should be subject to state control, what kinds of state control should be exercised, and how can state control interfere with the liberty of members of civilized society?; (2) criminalization is one method in the state's 'toolkit' to control behaviour; are there less restrictive means to achieve the desired results?; (3) what ends should state regulation serve?; and (4) which of the available techniques are likely to be most efficient in serving those ends? This thesis does not intend to consider all these questions but draws from these to formulate a normative framework for the effective use of criminal sanctions in environmental law in South Africa.

There may be other reasons for not criminalizing 'public wrongs', for example, where it might be 'too trivial to justify the attention of the criminal law', i.e., the *de minimis* principle.[111] However, there may also be public wrongs that cause or threaten serious harm, but that 'should not be criminalized because it is more important to ensure that the harm is repaired or paid for, than to call those who cause it to public, criminal account'.[112]

As mentioned above, too much criminal law undermines the principle of legality;[113] a principle that underlies criminalization. In terms of the ancillary body of norms surrounding criminal law theory, Maré summarises that the principle of legality in South African criminal law (also known as *nullem crimen sine lege*) embodies five rules, namely (1) the *ius acceptum* principle: a court may only convict an accused if the law recognizes the act as a crime; (2) the *ius praevium* principle: a court may only convict an accused if the act performed by him was recognized as a crime at the time of its commission; (3) the *ius certum* principle: crimes may not be formulated vaguely; (4) the *ius strictum* principle: a court must interpret the definition of a crime narrowly; and (5) the *mutatis mutandis* application of the abovementioned four

[109] Duff ibid at 250-251.
[110] Duff ibid.
[111] Duff ibid at 107. The *de minimis* principle, or more fully *de minimis non curat lex*, is defined in *Claassen's Dictionary of Legal Words and Phrases* as '[t]he law does not concern itself about trifles' or in the Merriam-Webster Dictionary as 'the law does not govern trifles**:** law ignores insignificant details' *https://www.merriam-webster.com/dictionary/de%20minimis%20non%20curat%20lex* accessed 4 June 2019.
[112] Duff op cit note 3 at 108.
[113] Husak op cit note 2 at 32.

principles to the imposition of sentences.[114] The principle of legality is contained in the fair trial rights in s 35(3) of the Constitution.[115] These are principles used in judging crimes already created in law and could be applied as tests when analyzing the likelihood of successful prosecutions. However, legislators could use some of these principles as tests before enacting crimes in the first place, for example, by testing the wording of laws to ensure that crimes are not formulated vaguely or considering laws as a court would, i.e., courts are likely to interpret crimes narrowly.

Clear language and certainty of the law are essential; often, the requirements of statutory provisions (including criminal offences) are difficult to understand without legal advice.[116] Justice requires certainty and consistency, and people should know in advance what conduct is considered criminal.[117] Uncertainty could lead to procedural unfairness. Procedural fairness requires that prospective defendants are 'on notice about whether their conduct is criminal'.[118] People should not be forced to 'guess at their peril' about prescripts in law, and 'a person must be afforded a fair opportunity to refrain from whatever conduct would incur penal liability'.[119] However, because of the number and complexity of criminal statutes, potential offenders may not receive adequate notice of their legal obligations,[120] bringing fairness into question.

Within the context of overcriminalization problems and criminalization theory, several norms discussed above justify and inform establishing a normative framework for evaluating overcriminalization. The reasons for such a framework include that, first, too many statutory crimes are impossible to enforce consistently and equally, thereby undermining the deterrent effect of punishment. Second, deprivation of liberty occurs when there is overcriminalization through offence design, enforcement or adjudication. Third, too many criminal sanctions threaten the efficacy of criminal law enforcement and its legitimacy in the eyes of the public. Fourth, too many statutory sanctions result in unfettered discretion, which threatens the rule of

[114] Rita Mare '*Criminal Law and the Bill of Rights'* in Bill of Rights Compendium LexisNexis Commentary (1997), accessed 7 February 2019, with reference to Snyman *Criminal Law* 3rd ed (1995) 34ff; Rabie MA, Strauss SA & Maré MC *Punishment: Introduction to Principles* 5th ed (1994) 69ff; Burchell J & Milton J *Principles of Criminal Law* 2 ed (1997) 57ff; Joubert JJ *Die legaliteitsbeginsel in die Strafprosesreg* (unpublished LLD thesis, UNISA, 1995) 108ff; Labuschagne JMT 'Die sekerheidsbasis van die strafreg' 1988 *SACJ* 52.
[115] Burchell op cit note 6 at 35.
[116] Husak op cit note 2 at 11-12. In the context of South African environmental law, possible ambiguities are illustrated in Chapter Three.
[117] Burchell op cit note 6 at 39, with reference to *Von Mollendorf* 1987 (1) SA 135 (T) 169f-g.
[118] Husak op cit note 2 at 11-12.
[119] Husak ibid at 11 with reference to *Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972).
[120] Husak ibid at 11 with reference to Susan Pilcher 'Ignorance, Discretion and the Fairness of Notice: Confronting "Apparent Innocence" in the Criminal Law' (1995) 33 *American Criminal Law Review* 32.

law. Fifth, for an act to be a crime, it must be non-trivial, condemned, blameworthy, and the transgressor should have a guilty mind. Sixth, legality, proportionality (in both its mentioned applications) and legal certainty principles must underlie the creation of crimes, and such crimes should be able to negate the harm it intends to avoid. These considerations also influence deciding which kinds of conduct should be subject to state control.

3. Normative considerations in overcriminalization

Several authors have developed theories or normative frameworks for criminalization or overcriminalization. For purposes of this research, Husak's internal and external constraints on criminalization are beneficial for formulating a normative frame within which to evaluate overcriminalization because it succinctly formulates practical constraints on criminalization, and his work is described as one of the most influential recent accounts of criminalization.[121] This part summarizes his internal and external constraints, and discusses additional norms from other resources under themes, such as criminal law as a last resort, practicality and enforceability, wrongfulness, and harm.

3.1 Husak's internal and external constraints on criminalization

Husak's theory of criminalization consists of seven principles or constraints that are 'designed to limit the authority of the state to enact penal offences'.[122] The 'internal constraints' are 'derived from the criminal law itself', whereas the 'external constraints' are 'imported from outside the criminal law'.[123] These constitute his criteria for deciding if laws are 'basically just'.[124] His theory of criminalization is directed at legislatures rather than courts.[125] According to this theory, there are questions that the legislatures must answer to safeguard the right not to be punished.[126]

To be justified, Husak argues, criminal laws must satisfy each of the '*four internal constraints'*.[127] First, the '*non-trivial harm or evil'* constraint entails that 'criminal liability may not be imposed unless statutes are designed to prohibit non-trivial harm or evil'.[128] In

[121] Duff op cit note 3 at 217.
[122] Husak op cit note 2 at 55.
[123] Husak ibid.
[124] Husak ibid at 56.
[125] Husak ibid at 131.
[126] Husak ibid.
[127] Husak ibid at 103.
[128] Husak ibid at 66.

other words, the harm being protected against by using criminal sanctions must be serious. In explaining what non-trivial harm is, Husak also refers to the 'defence of *de minimis*' explaining that if a defendant's conduct did not actually cause or threaten the harm or evil sought to be prevented or did so only to a trivial extent; it may not 'warrant the condemnation of conviction'.[129]

Secondly, the '*wrongfulness constraint*' assumes that penal statutes are unjustified unless they proscribe conduct that is wrongful[130] and may include knowledge of unlawfulness.[131] Green argues that punishment may be deserved when persons commit *malum prohibitum* crimes because the wrongfulness lies in breaking a promise or violating a duty of fair play.[132] For example, 'individuals who apply for permits or licenses typically "make an explicit promise to abide by certain applicable rules and regulations"[133] and thus it is wrongful to deviate from the terms or conditions of permits and licenses'.[134] Nevertheless, to avoid overcriminalization the underlying rationale for such promises, rules or regulations should also be questioned.

Thirdly, the '*desert constraint*' entails that punishment is justified only when and to the extent it is deserved.[135] Being labelled a 'criminal' must be justly deserved.[136] This 'just desert' ties into considerations of the condemn-worthy nature of criminal law, the level of an offender's culpability, blameworthiness and the underlying wrongfulness. It is also linked to deserving punishment,[137] which must also be proportional to the offence.

Fourthly, the '*burden of proof constraint*'[138] entails that, because punishments implicate and potentially violate important rights, the burden of proof should be placed on those who favour criminal legislation.[139] Husak argues that criminal laws should not be enacted if those who favour passing a criminal law fail to make an adequately considered case for doing so.[140] He

[129] Husak ibid at 66-67, with reference to the Model Penal Code, §2.12(2).
[130] Husak ibid at 75.
[131] Burchell op cit note 6 at 261.
[132] Husak op cit note 2 at 114, with reference to Stuart P. Green 'Why It's a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses' (1997) 46 *Emory Law Journal* 1533, 1540–1541 n.7.
[133] Green ibid at 1587.
[134] Husak op cit note 2 at 114 with reference to Green op cit note 132.
[135] Husak ibid at 55, 82.
[136] Husak ibid at 94.
[137] Husak ibid at 31, 54.
[138] Husak ibid at 55.
[139] Husak ibid at 100.
[140] Husak ibid.

favours a 'presumption against over-inclusive criminal laws'[141] because they frequently impose more punishment than is necessary to achieve their objectives. Husak references Hart's argument that legislatures must be 'able to say in good conscience … that [a] violation was blameworthy and, hence, deserving of the moral condemnation of the community.'[142] In a South African context, over-inclusive criminal sanctions could arguably be cured by statutory interpretation principles, including that statutes should be given the least restricting meaning favouring liberty.[143] However, by the time courts pronounce on such interpretation, state resources would have already been wasted to pursue criminal sanctions in instances where legislatures should not have enacted over-inclusive laws in the first place.

Husak's *three external constraints* include that, first, criminal laws must aim toward a substantial state interest. Within this first constraint, he states that legislators must identify a state interest, determine its legitimacy, and decide whether that interest is substantial. This constraint also links to the question of the harm or evil the statute prohibits.[144] Second, it should be determined if the particular criminal law directly advances that state interest with reference to empirical evidence.[145] Third, the state must show that the challenged offence is no more extensive than necessary to achieve its objective, alternative means of achieving the statutory purpose must be considered, and there should be no equally effective alternative.[146]

Husak states that the US Constitution is the only principal source of limitations on criminal statutes' scope in the absence of a normative criminalisation theory to restrain legislatures. However, the US Constitution leaves States with nearly absolute authority to enact criminal laws.[147] Husak explains that where someone challenges a law's constitutionality, courts consider the nature of the liberty in question, whether it is fundamental or non-fundamental. The constitutionality of a law that restricts a fundamental liberty is subjected to strict scrutiny

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[141] Husak ibid at 154.
[142] Husak ibid at 156 with reference to Henry Hart 'The Aims of the Criminal Law' (1958) 23 *Law & Contemporary Problems* 401, 412.
[143] LM Du Plessis 'Statute Law and Interpretation' in J A Faris (ed) *The Law of South Africa* Vol 25(1) 2 ed (2011) para 334(c).
[144] Husak op cit note 2 at 132-133.
[145] Husak ibid at 145.
[146] Husak ibid at 153-154.
[147] Husak ibid at 122 and fn 1 and 2 where Husak says that 'State constitutions may provide a source of constraints in addition to those derived from the federal Constitution, especially in the domain of privacy'. See Neil Colman McCabe 'State Constitutions and Substantive Criminal Law' (1998) 71 *Temple Law Review* 521. 'A handful of theorists have attempted to locate a more robust theory of criminalization in the Constitution'. See, for example, Markus Dirk Dubber 'Toward a Constitutional Law of Crime and Punishment' (2004) 55 *Hastings Law Journal* 509.

and evaluated by applying the 'compelling state interest' test.[148] The 'rational basis' test is applied to evaluate the constitutionality of a law that restricts a non-fundamental liberty, i.e., 'if the law is related to a legitimate government purpose'.[149] Husak proceeds to explain that 'courts show extraordinary deference to nearly all legislative decisions to criminalize conduct', and 'the state needs only a conceivable legitimate purpose to enact the vast majority of criminal statutes on their books'.[150] The threshold for the 'rational basis' test does not appear to be high, as it may be simple to show some form of legitimate government purpose in enacting a law that restricts non-fundamental rights.

Similar considerations may be relevant in a South African context. The South African Constitution is founded upon values such as constitutional supremacy and the rule of law, and all organs of state are bound by it.[151] Original legislation is subject to the rule against vagueness,[152] which is founded on the rule of law.[153] The principle of legality is implicit in South Africa's Constitution and an element of the rule of law that includes requirements such as the authority to act and acting rationally.[154] The separation of powers doctrine would also mean that courts would not readily interfere with the law-making powers and functions vested in legislatures.[155] Courts would consider limitations on liberty based on the principles in the Constitution. Any normative framework should align with such constitutional principles.

Aspects of Husak's external constraints resonate with the limitation of rights provision in s 36 of the South African Constitution. Section 36 provides that rights 'may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors'. The limitation of rights is considered through a two-stage approach,[156] described by the Constitutional Court as making two enquiries. The first enquiry is 'whether the...provision limits a right in the Bill of Rights'; if so, this right must be clearly identified'. The second enquiry is 'whether the limitation is reasonable and justifiable under

[148] Husak op cit note 2 at 123 and 127.
[149] Husak ibid at 123.
[150] Husak ibid at 124.
[151] Cora Hoexter *Administrative law in South Africa* 2 ed (2012) 30.
[152] Hoexter ibid at 356.
[153] Hoexter ibid at 357 with reference to *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) para 108.
[154] Hoexter ibid at 254, 255 and 122-123.
[155] The Constitution s 43 and see Hoexter ibid at 152 - 153 with reference to *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 48.
[156] IM Rautenbach 'Introduction to the Bill of Rights' in *Bill of Rights Compendium* (2018) para 1A43.

s 36(1) of the Constitution'. Courts will take this approach when considering the constitutionality of a statutory provision.[157]

Nuotio states that constitutional judicial review could resolve criminalization concerns because constitutional jurisprudence involves balancing constitutional rights and debates about fundamental rights.[158] He argues that constitutional law provisions can support or limit criminal law by requiring a substantial argument supporting every decision to criminalize.[159] Fundamental rights guide the legislator to conserve criminal law as a scarce resource.[160] Nuotio says that, in modern continental constitutional practice, every offence should be justified as a restriction of fundamental rights since all restrictions of basic liberties need to be justified.[161] In the context of environmental law crimes, each sanction must be assessed and judged by the constitutional considerations mentioned. As courts pay deference to the legislature, once a law is enacted, it may be more challenging to sustain an argument that the provision does not meet the Constitutional Court's two-pronged test. This deference underscores why it is essential that the legislator's powers and functions are exercised with comprehensive care and thorough scrutiny.

Writers have commented and critiqued Husak's theory.[162] Some theorists disagree with his view that there must be a theoretical justification for all criminal laws. For example, Brudner contends that 'despite widespread scepticism among academic writers, Anglo-American law clearly recognize a border between public welfare (regulatory) offences and "true crimes"; and it attaches markedly different liability conditions to each'.[163] In 2011 Husak responded to some of these critiques. While accepting that his theory could be developed, he stood by his view that to justify a criminal law, the state interest in enacting the law must be substantial, and the law must directly advance that interest.[164] In addition, he seeks to limit the criminal law rather

[157] Rautenbach ibid para 1A43 with reference to *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* 2009 7 BCLR 673 (CC), 2009 4 SA 222 (CC) par [41]; also, *Johncom Media Investments Ltd v M* 2009 8 BCLR 751 (CC), 2009 4 SA 7 (CC) par [25]: '[T]he right infringed must be identified, and its nature as well as the importance in a particular context must be considered. The purpose of the limitation must be pin pointed, together with its extent, to determine the relation between the limitation and the purpose it is designed to achieve. It should be considered whether the purpose could be achieved by less restrictive means'.
[158] Duff op cit note 3 at 253 with reference to R Alexy *A Theory of Constitutional Rights* (2002).
[159] Duff ibid at 253.
[160] Duff ibid.
[161] Duff ibid.
[162] Douglas Husak 'Reservations about Overcriminalization' (2011) 14 *New Crim. L. Rev.* 97.
[163] Husak ibid at 105 with reference to Alan Brudner *Punishment and Freedom: A Liberal Theory of Penal Justice* (2009) 170.
[164] Husak ibid at 106.

than abolish it.[165] Husak concludes that none of the reservations raised by Brudner led him to rethink his basic framework.[166] Other writers consider Husak's work as one of the most influential recent accounts of criminalization.[167]

According to Ashworth and Zedner, '[Husak] rightly acknowledges that there should be clear limits to the preventive function of the criminal law.[168] They also support and summarise Husak's 'four distinct principles to limit the authority of the state to punish persons who engage in conduct that creates the risk of harm rather than the harm itself'.[169] In the context of environmental law, offences of an administrative nature (e.g., failing to submit specific reports to authorities in time) could be offences that relate instead to a possible risk of harm but not actual environmental harm. The four basic requirements are the '*substantial risk requirement'*, the '*prevention requirement'*, the '*consummate harm requirement'*, and the '*culpability requirement'*.[170] Although described as 'sophisticated and often complex preconditions', they explain these as follows. First, the offence can only be justified if it 'is designed to reduce a substantial risk'; in other words, 'the harm to be avoided' and the risk of the harm occurring 'must not be insubstantial'. Second, 'an offence is justified only if it is likely to be effective in reducing the likelihood of the harm occurring'. Third, the 'consummate harm' test means that 'a crime of risk prevention or an inchoate offence is justified only if it would also be justified to criminalize the consummate offence'.[171] In other words, the intentional and direct harm must also be an offence if an inchoate (anticipating or preparatory) offence is created. Fourth, the 'culpability requirement' suggests rejecting 'criminal laws that are more extensive than necessary to achieve their objectives' and imposes 'a presumption against over-inclusive

[165] Husak ibid at 107.
[166] Husak ibid.
[167] Duff op cit note 3 at 217; Luna, Erik (ed) *Reforming Criminal justice: Introduction and criminalization* (2017) Vol 1 25 to 38 - Husak's work on overcriminalization formed part of this four-volume report authored and reviewed by leading criminal law scholars on criminal justice reform. In this report, Husak restates that his theory was formulated to be non-ideological or politically partisan, and he believes that his original assumptions are basically correct. He also notes that those who critique his theory usually are at two extreme opposing ends, i.e., anarchists and criminal law abolitionists, on the one end, and those who think any law is justified if enacted following procedures within a constitutional democracy on the other end. A position midway between two extremes, i.e., the 'golden mean', is usually the desirable resolve.
[168] Duff ibid at 80.
[169] Husak op cit note 2 at 161 and Duff op cit note 3 at 80. These are requirements in addition to his internal and external constraints mentioned above, which he applies to 'crimes of risk prevention', i.e., not crimes that result in direct harm.
[170] Duff op cit note 3 at 80.
[171] Duff ibid at 80 - 81.

criminal legislation'.[172] This requirement appears to relate to considerations of condemnworthiness, just desert, blameworthiness, and proportionality discussed earlier.

3.2 Criminal law as a last resort

South African writers comment that the criminal sanction is 'the ultimate weapon' and 'should be used as a last resort.'[173] Overutilisation of criminal sanctions, including in environmental law, may encumber its enforcement.[174] When the criminal sanction is not used as the last resort, resources are directed toward criminal prosecutions where less severe and costly remedies exist. The burden in criminal matters is more onerous than in civil law matters. The prosecution must prove certain elements beyond a reasonable doubt, to prove that a crime was committed.[175] Accordingly, Nurse states that criminal law should be resorted to 'when other means of dealing with offending and non-compliance fail'.[176] Lazarus says criminal sanctions should be tempered by the gravity of the decision subjecting conduct to the most severe sanctions. It should not simply be 'another enforcement tool in the regulator's arsenal',[177] as criminal sanctions are 'fundamentally different in character'.[178] Critics believe that criminal prosecution should be a last resort enforcement tool, including for environmental law transgressions.[179] Others contend, however, that 'the threat of criminal prosecution and punishment is needed to preserve the integrity of the environmental regulatory regime'.[180]

As mentioned earlier, Nuotio considers criminal law as an *ultima ratio* or last resort[181] and 'something that should basically be avoided'.[182] He says that '[a] theoretical model of criminalization that does *not* recognize the role of *ultima ratio,* as a powerful limiting principle, could be accused of not understanding the fundamental character of criminal law and its

[172] Husak op cit note 2 at 168.
[173] Skeen op cit note 6 para 9.
[174] Skeen ibid para 9(d), 11. In other words, creating similar penalties for serious and less serious offences may weaken the effect of the criminal sanction.
[175] Burchell op cit note 6 at 19.
[176] Angus Nurse *An Introduction to Green Criminology and Environmental Justice*s (2016) at 84.
[177] Kathleen F. Brickey *Environmental Crime, Law, Policy, Prosecution* (2008) 179 at 21, and Richard J. Lazarus 'Assimilating Environmental protection into legal rules and the problem with Environmental Crime' (1994) 27 *Loy. L.A. Rev.* 867 at 881-883.
[178] Brickey ibid.
[179] Brickey op cit note 177 at 17.
[180] Brickey ibid at 17-18 with reference to Brickey 'Environmental Crime at the Crossroads: The Intersection of Environmental Law and Criminal Law Theory (1996) 71 *TUL. L. Rev*. 487 at 509.
[181] Duff op cit note 3 at 255 with reference to P Minkkinen 'If taken in Earnest: Criminal Law Doctrine and the Last Resort' (2006) *Harvard Journal of Criminal Justice* 521.
[182] Duff ibid at 256.

distinguishing feature'.[183] Husak also defends the *ultima ratio* principle on the ground that 'criminal law is different' 'because it burdens the interests not implicated when other modes of social control are employed' and therefore it 'must be evaluated by a higher standard of justification'.[184]

According to Duff, criminal law has a distinctive character, with a limited range of outcomes it can achieve.[185] He says that there is a high 'material, and moral cost' of enforcing criminalization and 'the chances of doing it justly and effectively [are] so small, that we should not on balance seek to criminalize'.[186] One of the justifications offered in defending legislators for enacting so much criminal law is that '[i]f they criminalize too little, there is some possibility, however, small, that they will be blamed for not giving police and prosecutors the necessary tools to deal with crime'.[187] Considering the 'flood of new criminalization' and what seems to be the traditional approach of merely criminalizing more conduct, Nuotio says it is necessary to think differently about criminal law.[188]

This different way of thinking about criminal law ties into Husak's desert constraint and considerations of criminal penalties being justly deserved; the offender's acts must be condemn-worthy, blameworthy and imposing a criminal sanction must be proportionate to such blameworthiness.

3.3 Moral disapproval, culpability/fault, just desert and wrongfulness

Husak's theory of criminal law minimalism[189] advocates for a theory of criminalization that justifies 'the criminal laws we should retain' and provides criteria for deciding 'whether to enact even more penal legislation.'[190] He says that to criminalize too much conduct that does not excite moral disapproval diminishes the gravity of criminal laws and overstrains the process of law enforcement.[191] According to Husak, criminal legislation must not be over-inclusive but

[183] Duff ibid.
[184] D Husak 'The Criminal Law as Last Resort' (2004) 25 *OJLS* 207 at 234 also referenced in Duff op cit note 3 at 256.
[185] Duff ibid at 107.
[186] Duff ibid.
[187] Stuntz (2002) op cit note 82 at 836.
[188] Duff op cit note 3 at 256-257 with reference to D Husak 'The Criminal Law as Last Resort' (2004) 25 *OJLS* 207 at 234.
[189] Husak op cit note 2 at vi. Husak draws from the work of Stuntz op cit note 57 at 511.
[190] Husak op cit note 2 at v.
[191] Skeen op cit note 6 and Luna op cit note 50 at 706. The 'culpability requirement' suggests rejecting 'criminal laws that are more extensive than necessary to achieve their objectives' and imposes 'a presumption against overinclusive criminal legislation'.

focussed on culpable or blameworthy conduct,[192] tying in with his wrongfulness, just desert and culpability constraints mentioned above. According to Burchell, the meaning of 'wrongful' is not particularly clear in a South African context.[193] Based on the language in judgments, it could refer to a moral test, something that is 'morally wrong' or may refer to the unlawfulness of an act.[194] Burchell explains that it is an overriding principle of the South African criminal law that 'an act is not unlawful unless there is a guilty mind' or 'fault', which is (generally) an element of every crime.[195] Fault takes the form of either negligence or intent.[196]

Prohibited conduct should be 'wrongful' 'in a way that merits formal condemnation as a public wrong'[197] and deserving of the use of the state's most condemnatory response. Duff says that 'without proof of culpable wrongdoing' the conduct 'could be dealt with by non-criminal modes of control or regulation, by preventive orders, or by a non-criminal regime of administrative rules and penalties'.[198] Such preventative orders could be used where the offender is not blameworthy or has a justified basis for lacking knowledge of the offence and cooperates with authorities.

3.4 Harm and significance

The 'harm principle', introduced by Mill, provides that 'the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others'.[199] The type of harm involved could determine the order and ranking of criminal offences.[200] The significance of environmental harm may vary depending on the actual environmental impact. Thus, the crime and punishment should also be subject to gradation. This links to Husak's '*non-trivial harm or evil'* constraint mentioned above.[201] Following his other requirements, offences should be designed to reduce a substantial risk or harm and the likelihood of the harm occurring.[202]

[192] Husak op cit note 2 at 168.
[193] Burchell op cit note 6 at 261.
[194] Burchell ibid.
[195] Burchell ibid at 60 and 341.
[196] Burchell ibid at 60 and 341.
[197] Duff op cit note 3 at 94.
[198] Duff ibid at 106.
[199] John Gray & G.W. Smith (eds) *J.S Mill On Liberty* (1991) 30.
[200] Duff op cit note 3 at 243.
[201] Husak op cit note 2 at 66.
[202] Husak ibid at 168.

Tadros says that criminal law requires a higher standard of proof and contains 'a range of procedural protections' to 'protect people from wrongful convictions.'[203] According to Duff, criminalizing conduct may 'hinder the attempt to allocate costs fairly' where, for example, a person accused in a criminal matter is less likely to admit their responsibility for damage or harm, and there may be a reason to 'prefer a civil law response above a criminal law response'.[204] A compensatory, rather than punitive, response may be more appropriate when harm (which may be significant) is caused through negligence but not intentionally or through gross negligence.[205]

Criminalization may also be an expensive option in circumstances where courts and prosecutors are already constrained. Thus, before enacting a criminal offence, the harm being protected against must be identified and should be sufficiently substantial. The crime being created must be enforceable and capable of protecting against the harm; otherwise, the creation of the crime is pointless.

3.5 Legitimate state purpose

In addition to Husak's external constraints relating to a substantial state interest being protected and ensured with criminal sanctions, Nuotio's conceptions under criminalization theory above are relevant. He explains that the '[b]alance of utility needs to be clearly positive before criminalization should be resorted to'.[206] Labelling an action (or inaction) a crime must be a 'legitimate purpose of the law', which justifies punishment.[207]

3.6 A modified normative framework for use in this research

The norms or principles outlined above could be used when legislators intend to enact more criminal laws or statutory crimes and to limit or avoid overcriminalization. Drawing from the sources discussed above, the normative framework outlined below could serve this purpose. It also serves as an analytical framework for this study.

[203] Duff op cit note 3 at 165 and Kidd op cit note 28 at 271.
[204] Duff ibid at 108.
[205] Duff ibid at 108.
[206] Duff ibid at 244.
[207] Duff ibid at 242-243.

3.6.1 Substantial state interest to justify state control

Those who propose a criminal law bear the burden of proving why a crime that infringes or limits liberties is the most appropriate response. If they fail to consider the case for enacting crimes properly, it should not be enacted (i.e., Husak's burden of proof constraint).[208] Where laws cannot be enforced fairly, legislatures must also err on the side of caution and refrain from enacting criminal provisions. Legislators must be more careful in enacting crimes simply for the sake of it, as it can be perceived to be a political rather than a carefully considered act (i.e., Nuotio's return to the basic conceptions of criminal law).[209] Because punishments implicate and potentially violate important rights, the burden of proof should be placed on those favouring criminal legislation.[210]

State control that interferes with the liberty of members of a civilized society must be lawful, rational, reasonable, and justifiable in the circumstances.[211] The state must have a substantial interest in the statute's objective; it must be a substantial and legitimate interest to justify a criminal response. The criminal sanction should directly advance that state interest and be the most reasonable response with no alternative existing (i.e. Husak's external constraints and 'substantial risk requirement').[212] The substantial risk must not only justify the use of the criminal sanction, but the sanction should reduce the substantial risk.[213] State regulation should seek to protect the environment as a 'public good' (Nuotio's 'analysis of the sphere of protection').[214] Luna's 'laugh test'[215] for statutory offences also speaks to the legitimate state purpose and substantial interest; in other words, if it is laughable, it cannot be said to serve a legitimate state purpose or advance such a purpose.

The substantial interests or risks being guarded against must involve some form of actual harm (Mill's 'harm principle'), and it cannot include 'victimless' crimes. For purposes of this research, the assumption is made that environmental crimes that result in harm and pollution

[208] Husak op cit note 2 at 100.
[209] Duff op cit note 3 at 261.
[210] Husak op cit note 2 at 100.
[211] Hoexter op cit note 151 at 254, 255 and 122-123.
[212] Husak op cit note 2 at 132-133.
[213] Duff op cit note 3 at 80.
[214] Duff ibid at 261.
[215] Luna (2005) op cit note 50 at 717 with reference to Erik Luna '*Overextending the Criminal Law'*(2013) 25 *CATO POL'Y RPT.* 1.

are not victimless.[216] Moreover, some statutory offences may not result in direct harm, which brings into question the appropriateness of criminal sanctions in those instances.

Thus, this measure combines Nuotio's 'basic conceptions of criminal law', 'legitimacy of the criminal law' and 'sphere of protection' yardsticks, Luna's 'crimes without jurisdictional authority', 'laugh test' and constitutional principles of legality. It also joins Husak's external constraints, substantial risk requirement, the internal 'burden of proof constraint. It overlaps with the harm principle, as a separate consideration discussed below.

3.6.2 The crime must excite moral disapproval, wrongfulness, be condemn-worthy, and deserving of criminal punishment

As mentioned above, legislatures must not enact criminal provisions purely for the sake of it. The intended criminal sanction must align with criminal law's condemnatory role, 'manifesting forms of forbidden conduct' and 'scandalizing prohibited conduct'.[217] The criminalized act must excite moral disapproval and be wrongful in a way that merits formal condemnation[218] through a criminal sanction. The defendant's conduct must be considered wrongful by society at large and enacting a crime should be to prevent harm to others.[219] Punishment under criminal law and being labelled a 'criminal' must be justly deserved (i.e., Husak's desert constraint).[220]

The above combines Skeen's views on overcriminalization of conduct that does not 'excite any moral disapproval',[221] Husak's internal wrongfulness and desert constraints, and Nuotio's reference to the 'true condemnatory role' of the criminal law. [222]

3.6.3 Culpability/fault, knowledge and triviality

Flowing from the previous requirement that includes blameworthy and condemn-worthy conduct, criminal laws must focus on the culpability linked to the crime and the offender. There must be 'proof of culpable wrongdoing' (i.e. Husak's culpability requirements for crimes of

[216] See for example the Environmental Investigation Agency (UK) 'Report on Environmental Crime: a threat to our future' October 2008 accessible at *https://www.unodc.org/documents/NGO/EIA_Ecocrime_report_0908_final_draft_low.pdf*, accessed on 1 April 2020 at 1. The purpose of this study does not involve further deliberating the stated assumption.
[217] Duff op cit note 3 at 243.
[218] Duff op cit note 3 at 94.
[219] Gray & Smith op cite note 199 at 30.
[220] Husak op cit note 2 at 55, 82 and 94.
[221] Skeen op cit note 6 para 9.
[222] Duff op cit note 3 at 243.

risk prevention).[223] Culpability should not be overextended or overstretched (one of Luna's indicators of overcriminalization).[224] Reiterating what Duff says, 'without proof of culpable wrongdoing' conduct should be dealt with by non-criminal modes of control.[225] Knowledge of unlawfulness is an essential aspect of culpability[226] but may be challenging to attain in complex regulatory regimes/legal frameworks. An accused cannot be held to have a guilty mind without knowledge of the unlawfulness of his/her behaviour.[227]

The general rule, and a presumption in South African law, is that fault ('the guilty mind') is an element of statutory offences.[228] Strict (no-fault) liability is an exception to this rule and is 'arguably constitutionally questionable', because it is 'incompatible with the right to a fair trial' and the right to freedom and security of the person and may violate the right to be presumed innocent.[229] Thus, fault in the form of intention or negligence must be proven.

Criminal sanctions must aim to avoid harm to others. If there is no direct harm being avoided, by creating a criminal sanction, then there should be no criminal culpability (Mill's harm principle).[230] Criminal sanctions should be enacted to avoid substantial (non-trivial) harm, and the criminal sanction itself should be capable of preventing actual harm.[231]

Trivial actions should not be criminalized, and only acts that merit formal condemnation as a public wrong should be subject to criminal law. The 'public wrong' cannot be 'too trivial to justify the attention of the criminal law',[232] i.e., the *de minimis* principle and Husak's non-trivial harm constraint. There should not be excessive or pre-textual enforcement of minor violations (one of Luna's overcriminalization indicators).[233]

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[223] Husak op cit note 2 at 168.
[224] Luna (2005) op cit note 50 at 717.
[225] Duff op cit note 3 at 106.
[226] Burchell op cit note 6 at 261.
[227] Burchell ibid at 61.
[228] Burchell ibid 29, 31, 60 and 341 with reference to *S v Coetzee* 1997 (3) SA 527 (CC), and Snyman (2014) op cit note 5 at 238.
[229] Burchell ibid at 31, 396 and 438 and Snyman (2014) op cit note 5 at 238 with reference to ss 35(3) and 12(1) of the Constitution.
[230] Gray & Smith op cit note 199 at 30.
[231] Duff op cit note 3 at 80.
[232] Duff ibid at 107. The *de minimis* principle, or more fully '*de minimis non curat lex*' is defined in the Merriam-Webster Dictionary at *https://www.merriam-webster.com/dictionary/de%20minimis%20non%20curat%20lex* accessed 4 June 2019, as 'the law does not govern trifles**:** law ignores insignificant details'.
[233] Luna (2005) op cit note 50 at 717.

3.6.4 Crimes should be a last resort mechanism when no alternative means to achieve the intended state purpose exists

Criminal law's character is fundamentally different 'because it burdens the interests not implicated when other modes of social control are employed'. Therefore, it 'must be evaluated by a higher standard of justification'[234] (*ultima ratio* / last resort principle supported by Skeen, Nuotio and Husak). One must consider whether the criminal sanction can be avoided and if it could 'be dealt with by non-criminal modes of control or regulation, preventive orders, or a non-criminal regime of administrative rules and penalties'.[235] If a less restrictive way to achieve the desired result exists, that should be used instead of criminalizing the act. In other words, if an offender (without knowledge of unlawfulness, for example) cooperates, then criminalization may hinder achieving the desired outcome.

3.6.5 Proportionality and fairness

As mentioned, proportionality can be applied twofold, to ensure that- (1) only punishment that is deserved is imposed (as discussed above), and (2) there is a correct balancing of interests when criminal sanctions are created. The statute must 'be no more extensive than necessary to achieve its purpose',[236] and there must be 'no alternative that is equally effective'[237] (Husak's consummate harm constraint and Luna's 'grossly disproportionate punishment' indicator of overcriminalization). The criminal sanction should be a proportional response, and it should not be the response if there is a 'less draconian alternative' available.[238]

Snyman explains fairness in the context of culpability as – something a person may 'fairly be blamed for his wrongdoing'.[239] Fairness also implies an accused person's fair trial rights in s 35(3) of the Constitution, including the right to be presumed innocent and to the benefit of the least severe of the prescribed punishment.[240] Fairness is also an element of the right in s 35(5); i.e. that evidence must be obtained in a manner that does not render the trial unfair or be detrimental to the administration of justice.

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[234] D Husak 'The Criminal Law as Last Resort' (2004) 25 *OJLS* 207 at 234 also referred to in Duff op cit note 3 at 256.
[235] Duff op cit note 3 at 106.
[236] Luna (2005) op cit note 50 at 717.
[237] Husak op cit note 2 at 154.
[238] Duff op cit note 3 at 164.
[239] Snyman (2014) op cit note 5 at 202.
[240] The Constitution, s 35(3)(h) and (n).

3.6.6 Practicality, efficacy and enforceability

According to Snyman, '[a] tree is known by its fruit', and that-

> No matter what beautiful sounding phrases or expressions are used (such as 'right to life, dignity', or 'the sanctity of human life') in the formulation of basic legal principles, the ultimate test for determining the success of a system in this case the criminal justice system of South Africa is its practical results.[241]

Statutory enactment is not enough; laws must be practical and capable of equal enforcement, including by authorities, prosecutors, and courts. Prosecutorial discretion should not lead to unequal enforcement. Considering the weaknesses and difficulties in obtaining criminal convictions for environmental offences, an order to remediate any harm may not result if a defendant is acquitted on, for example, technical grounds. A civil law response may be more appropriate than a criminal law response, particularly where the damage or harm should be repaired. A criminal sanction may have the opposite result if transgressors do not want to plead guilty and vigorously defend the prosecution.

Similarly, where an offender lacks culpability or knowledge of unlawfulness and cooperates with authorities, a more practical or efficient solution may fall outside the ambit of criminal law. As a matter of practicality, before the legislator enacts criminal offences, it should be considered if the provisions are drafted clearly, and capable of being enforced in a criminal court context, where a restrictive interpretation may be applied in favour of liberty.[242]

4. Environmental crime and criminalization

Having outlined the key pillars of a normative framework aimed at testing for overcriminalization, this part considers the development of environmental crime as an addition to the collection of criminal laws and the unique features of environmental crime that impact its enforceability. Environmental law's unique features and its enforcement imports a layer of contextual complexity into the general normative framework for criminalizing behaviour. The enforcement approaches or related policies in environmental law are different from ordinary

[241] Snyman (2014) op cit note 5 at 25.
[242] Du Plessis op cit note 143 para 334(c). See also *Democratic Alliance v African National Congress and Another* 2015 (2) SA 232 (CC), para 130, where it is stated that 'the restrictive interpretation of penal provisions is a long-standing principle of our common law. Beneath it lies considerations springing from the rule of law. The subject must know clearly and certainly when he or she is subject to penalty by the state. If there is any uncertainty about the ambit of a penalty provision, it must be resolved in favour of liberty.'

crimes because of the technical nature of environmental law. The normative framework above is considered against environmental crimes' characteristics for purposes of refinement.

4.1 Environmental crime development - the creation of statutory offences

Conventionally, discussions around crime are dominated by 'street crime and serious offences related to crimes of violence, sexual offences and … organized crime'.[243] In contrast, environmental crime committed by industry and corporate (or juristic) entities is not as widely or well-known. In this context, environmental crime is carried out by legitimate corporations, juristic entities or individuals carrying out state-licensed or regulated activities.[244] Immediate differences between environmental and typical crime include a different concept of who the offender is and his/her criminality.[245] Nurse observes that offenders in mainstream crime are 'generally regarded as deviants, by both society and criminal justice agencies'. Whereas 'corporate environmental offenders are frequently characterized as having committed technical, regulatory offences' and are often not subject to mainstream criminal justice agencies' attention.[246]

Nurse explains that within Western conceptions of 'the need to protect the planet and criminalize environmentally damaging actions', the 'concept of criminal environmental activity is relatively new'.[247] Brickey explains that in the US the term "environmental crime" is a recent addition to the criminal law lexicon, and until the mid-1980s, civil enforcement mechanisms were used instead of criminal enforcement mechanisms.[248] She explains that in the 1970s and 1980s, increased public and congressional support arose for sending polluters to jail, transforming the environmental law landscape 'by importing criminal law principles into the mix'.[249] Large-scale pollution incidents lead to public support for criminal sanctions.[250] She further explains that in the 1980s, the Environmental Protection Agency (EPA) was granted full permanent law enforcement authority, and the Justice Department's Environmental Crimes Unit was created and tasked with criminal enforcement of environmental laws. In its

[243] Nurse op cit note 176 at 44 with reference to Lea, J., & Young, J., *What is to be done about law and order?* (1993).
[244] Nurse ibid at 44 where he explains it is seen as mostly 'corporate in nature and concerns the behaviour of legal actors, legitimate corporations engaged in lawful, state-supported activities'
[245] Nurse ibid.
[246] Nurse ibid.
[247] Nurse ibid at 45.
[248] Brickey op cit note 177 at xxiii.
[249] Brickey ibid.
[250] Brickey ibid at 2 with reference to *Hooker Chemicals & Plastics Corp v Train*, 537 F.2ed 620, 627 (2d Cir 1976).

first ten years of operation, the USA's criminal-enforcement program 'obtained more than nine hundred environmental crime indictments that resulted in nearly seven hundred guilty pleas and convictions'.[251] This ratio of guilty pleas is relatively high; 700 out of 900 amounts to a percentage of 77 per cent.

South Africa similarly saw the expansion of environmental laws in the 1990s and 2000s and a significant increase in the criminalization of conduct. Criminal sanctions are widely prescribed for environmental law transgressions in South Africa,[252] and the laws are 'littered with new criminal offences'.[253] The criminal sanction is an example of 'command-and-control' mechanisms in South Africa's environmental laws.[254] Administrative and civil measures also form part of command-and-control mechanisms that can be used to ensure compliance and enforce environmental laws.[255] As mentioned in Chapter One, since 2008, the South African DFFE[256] annually publishes a NECER,[257] to report on the EMI's activities, and which 'aims to provide an overview of environmental compliance and enforcement activities undertaken by the various environmental authorities' in each financial year.[258] The NECER reports an increase in EMI staff, from 903 in the 2008/09 financial year to 3240 in 2019/20.[259] These developments and publications bring attention to environmental crime, inform the public of the actions taken against environmental offenders and seek to deter others from committing such offences.[260] Whether it brings environmental crime within the realm of, or on par with, mainstream crime depends on society's level of awareness or knowledge of the laws, the crimes and perceptions whether it is condemn-worthy.

According to Nurse, seeing environmental crime as 'outside the mainstream criminal justice systems' and being 'the responsibility of nature conservation or environmental

[251] Brickey ibid at 7 with reference to Kathleen F. Brickey 'Environmental Crime at the Crossroads: The Intersection of Environmental and Criminal Law Theory' (1997) 71 *Tul. L. Rev.* 487, 494-497.
[252] Kidd op cit note 28 at 269 with reference to MA Rabie *Implementation of Environmental Law* in Fuggle & Rabie *Environmental Management in South Africa* (1992) at 128 and Kidd's (2002) unpublished PhD thesis op cit note 28.
[253] Craigie, Snijman & Fourie 'Dissecting Environmental Compliance and Enforcement' in Paterson & Kotze (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) at 53.
[254] Craigie, Snijman & Fourie ibid at 52.
[255] Ibid.
[256] As it is now known, and previously known as the Department of Environment, Forestry and Fisheries and before that the Department of Environmental Affairs.
[257] All the reports are accessible on the DFFE website at *https://www.environment.gov.za/otherdocuments/reports#compliance_enforcement*
[258] DFFE *NECER* 2019-20 p1.
[259] DFFE *NECER* 2019-20 ibid p3 & 8.
[260] DFFE *NECER* 2019-20 ibid p1.

protection departments rather than criminal justice ones' creates ambiguity and renders the concept 'undervalued'.[261] Nurse argues that environmental harms are more important than the personal harms of street and property crimes because they could generally cause more widespread and damaging harm.[262] Nurse's 'green criminology' proposes that there should be a wider definition of crime that incorporates these kinds of harms that people may not necessarily consider akin to 'real crime'. He considers environmental law (i.e., statutory) infringements deserving of a response commensurate with the aims of criminal sanctions, i.e., 'punishment, reparation, rehabilitation or changed behaviour.'[263]

Theorists of criminal law such as Husak, Stuntz and Fletcher refer to two categories of crime: core crimes and 'everything else' or 'peripheral crimes'.[264] Core crimes could be described as common-law crimes identified in most jurisdictions over the centuries (or later written into law in some jurisdictions like the US). Core crimes consist of those crimes that consume the bulk of the criminal justice system's workload, e.g., murder, rape, robbery, theft, or assault.[265] Regulatory or statutory (*mala prohibita*) crimes, like environmental offences, may not be considered core crimes, to the extent that they may be excluded from South African common law (*mala in se)* crimes. Farmer argues that this 'uncritically privileges that which is old and customary' and does not consider distinctive ways of thinking about criminal law's nature during different historical periods, which had distinctive or paradigmatic crimes.[266] This critique seems fair because what may be considered 'core' crimes may change over time depending on the social meaning of actions[267] and the change in priority or importance of ideas (for example, the increased public and media attention regarding the importance of adequate climate change response).

A unique feature of environmental law is that it protects common resources. Conduct that violates the value or threatens common resources in need of protection is deserving of public condemnation.[268] However, environmental law violations of an administrative/technical

[261] Nurse op cit note 176 at 18 with reference to Nurse, A 'Repainting the thin green line: the enforcement of UK Wildlife law' (2012) 1 *Internet Journal of Criminology* at 1.
[262] Nurse ibid at 5-6 with reference to Lynch, M., & Stretesky, P., *Exploring Green Criminology: Toward a Green Criminological Revolution* (2014) 8.
[263] Nurse ibid at 21.
[264] Husak op cit note 2 at 33 with reference to Stuntz op cit note 57 and George Fletcher *Rethinking Criminal Law* (1978).
[265] Husak ibid.
[266] Duff op cit note 3 at 220.
[267] Duff ibid at 221, 233 and 237.
[268] Duff ibid at 222.

nature, i.e., that do not directly impact or harm the environment, may fall within the categorization of peripheral and not core crimes. Moreover, minor violations should perhaps not be considered 'crimes' at all. In today's terms, some environmental harms or damage may be considered a core crime in so far as it has direct and significant adverse impacts on the environment or people. As discussed earlier, actual or direct harm forms part of the normative framework for considering criminalization and determining overcriminalization.

As mentioned earlier in this chapter, overcriminalization impairs the deterrent effect of the threat of punishment because the threat becomes more remote with increased criminal sanctions.[269] According to Husak, whether criminal statutes produce any marginal gains in deterrence is doubtful.[270] The lengthy delays in the criminal justice system further erode deterrence value.[271] These critiques of deterrence theory bring into question the deterrence value of environmental sanctions and prosecutions. Environmental sanctions' deterrent value similarly depends on: 'the likelihood of apprehension, prosecution, conviction and significant penalty'.[272] Kidd states that '[e]ffective enforcement is important when deterrence is the goal, and the public must be aware of penalties being utilized since "ultimately, one cannot fear what turns out to be a paper threat"'.[273] Brickey notes that '[f]or individuals the prospect of jail time and the stigma of a criminal conviction will deter wrongdoing if the expected punishment outweighs the anticipated gains.'[274] For organizations, 'the punishment must be sufficiently severe that it cannot reasonably be considered another cost of doing business'.[275] In other words, the maximum authorised fine should be greater than the cost of compliance.[276]

[269] Skeen op cit note 6 para 9.
[270] Husak op cit note 2 at 50 with reference to Paul H. Robinson & John M. Darley 'The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best' (2003) 91 *Georgetown Law Journal* at 949.
[271] Husak op cit note 2 at 146.
[272] Michael Kidd 'Criminal Measures' in Paterson & Kotze (eds) *Environmental Compliance and Enforcement in South Africa Legal Perspectives* (2009) at 241 with reference to C Reasons 'Crimes Against the Environment: Some Theoretical and Practical Concerns' (1991) 34 *Criminal Law Quarterly* 86 at 97; and D Farrier 'In Search of Real Criminal Law' in T Bonyhady (ed) *Environmental protection and Legal Change* (1992) at 96.
[273] Kidd ibid at 241-242 with reference to S Smith 'An Iron Fist in a Velvet Glove: Redefining the Role of Criminal Prosecution in Creating an Effective Environmental Enforcement System' (1995) 19 *Criminal Law Review* 12 at 14.
[274] Brickey op cit note 177 at 16.
[275] Brickey ibid.
[276] Brickey ibid at 16-17.

4.2 The unique features of environmental law and environmental crimes

According to Brickey, environmental law scholars say that 'three characteristics make environmental law distinctive', namely 'its aspirational qualities, evolutionary nature, and high degree of complexity'.[277] Environmental law is 'aspirational' or 'inspirational' because it seeks 'to bring about radical change in human behaviour to minimise environmental degradation and hazards to public health'.[278] Laws must generally ascribe to rational and proportionate responses. If environmental law intends to bring about radical change, it may be too inspirational, necessitating interrogation of the appropriateness of criminal sanctions. Brickey says that 'by mandating unattainable goals, environmental laws impose extraordinarily high standards and simultaneously assure the inability of the regulated community to comply'.[279]

Some commentators attribute the success of the US environmental-enforcement program to its aspirational qualities, while others consider it 'unrealistic and even irrational'.[280] Brickey observes that environmental law's aspirational qualities make criminal enforcement less appropriate.[281] She asserts that 'environmental law is highly complex', 'fraught with highly technical scientific, engineering and economic jargon that, even to one schooled in the intricacies of environmental science and economics, can be truly mind-boggling'. According to her, the drafting of environmental statutes and regulations is notoriously flawed.[282] Nurse has a similar view that 'regulating environmental offending and harm is complex and involves a range of institutional, economic and social frameworks within which environmental management and governance takes place'.[283]

Some of these unique features implicate some of the normative principles outlined in the previous part. They can be supplemented by policy approaches developed in other jurisdictions, like the US. These approaches can be used both by legislators in discerning when conduct

[277] Brickey ibid at 9 with reference to Richard J. Lazarus 'Meeting the Demands of Integration, in the evolution of Environmental Law: Reforming Environmental Criminal Law' (1995) 83 *GEO. L.J.* 2401, 2423-2424, 2453-2454; Christopher H. Schroeder 'Cool Analysis Versus Moral Outrage in the development of Federal Environmental Criminal Law' (1993) 35 *WM & Mary L Review* 251, 252-243.
[278] Brickey ibid at 9.
[279] Brickey ibid at 10-11 with reference to Lazarus (1995) op cit note 277 at 2426 and Schroeder op cit note 277 at 254-55.
[280] Brickey ibid.
[281] Brickey ibid at 11 with reference to Lazarus, 2426.
[282] Brickey ibid at 11-12.
[283] Nurse op cit note 176 at 78 with reference to Lasslett, K *State Crime on the Margins of Empire: Rio Tinto, the War on Bougainville and Resistance to Mining* (2014); and to Nurse, A., *Policing Wildlife: Perspectives on the Enforcement of Wildlife Legislation* (2015).

should or should not be criminalized and can also be used to exercise authorities' discretion in deciding whether to pursue criminal or civil mechanisms.

Brickey explains that since the 1990s and in the US, environmental offence cases would go through a five-step screening process to determine whether it meets the formal criteria for criminal referral by EPA. The Department of Justice also has its own formalized criminal enforcement criteria.[284] Thus, various screening levels take place within two government agencies before a matter goes to criminal court. Other areas of criminal law do not receive the same 'review and scrutiny from prosecutors'.[285] In the US, screening tools were developed, including the 1990 Strock Memorandum,[286] supplemented in 1994 by the Devaney Memorandum.[287] The Devaney Memorandum notes that cases that do not meet the selection criteria should be referred back to EPA's civil enforcement office for appropriate administrative or civil judicial action or to a state or local prosecutor.[288] The Devaney Memorandum's 'criminal case selection process' is guided by two general measures – (1)'*significant environmental harm'* and (2) *'culpable conduct'* and other considerations as referenced in the normative principles discussed below. The Devaney Memorandum's screening criteria are helpful for a normative framework for criminalizing environmental transgressions.

In addition to the EPA Policy, the US Department of Justice also has two relevant guiding Manuals. The first is a Manual containing the Principles of Federal Prosecution, which provides

[284] Brickey op cit note 177 at 358 with reference to Kathleen F. Brickey 'The rhetoric of environmental crime: culpability, discretion and structural reform' (1998) 84 *Iowa L. Rev*. 115, 126-131.
[285] Brickey ibid with reference to Michael Penders who served as Special Counsel with the United States EPAs Office of Criminal Enforcement, Forensics and Training.
[286] Brickey ibid with reference to the Memorandum from Assistant Administrator James Strock, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, to the Regional Administrators (Dec 3, 1990) as referenced in Brickey. The criteria outlined in the Strock Memorandum in making a determination whether a criminal investigation is warranted includes considering '(1) a history of repeated violations; (2) deliberate wrongdoing; (3) falsifying or withholding information in cases where other aggravating circumstances were present; (4) tampering with pollution control monitoring devices; and (5) facts indicating the existence of potential environmental harm'
[287] Brickey ibid at 342-346 with reference to the *Environmental Protection Agency, Memorandum: the Exercise of Investigative Discretion, from Earl E Devaney, to all EPA employee working in or in support of the criminal enforcement programme,* as reproduced in Brickey. It acknowledges that '[t]he criminal provision of the environmental laws are the most powerful enforcement tools available to EPA…[and] criminal enforcement authority should target the most significant and egregious violators.' The Devaney Memorandum advises the EPA Office of Criminal Enforcement to 'maximize its presence and impact through discerning case selection', a process 'designed to identify misconduct worthy of criminal investigation' and ensure that it purposefully directs 'its investigative resources toward deserving cases.'
[288] Brickey ibid.

policies and practices for prosecutors, including prosecutorial discretion.[289] It acknowledges that the exercise of prosecutorial discretion has far-reaching consequences; the principles it outlines aim to ensure 'fair and effective administration of justice' and serve as a guideline to Federal prosecutors.[290] This Manual states that '[i]n determining whether a prosecution should be declined because no substantial Federal interest would be served', the prosecutor must weigh all relevant considerations.[291] The US Department of Justice also issued 'Factors in decisions in criminal prosecutions for environmental violation'.[292] It aims to ensure that 'prosecutions do not create a disincentive to or undermine the goal of encouraging critical self-auditing, self-policing, and voluntary disclosure', as the Department's policy encourages voluntary compliance mechanisms.[293] It provides prosecutors with 'direction concerning the exercise of prosecutorial discretion' and 'give the regulated community a sense of how the government exercises its criminal prosecutorial discretion with respect to such factors'.[294] The factors to be considered (even if the evidence is satisfactory for purposes of prosecution) are: whether a violator has made a 'Voluntary Disclosure' (not required by law); whether there has been 'full and prompt cooperation' with authorities, including providing all information and assisting the investigation; existing comprehensive 'Preventative Measures and Compliance Programmes'; and any 'Additional relevant factors' such as 'pervasiveness of non-compliance, internal disciplinary action, and subsequent compliance efforts'.[295] Thus, at least three policies or frameworks offer screening tools or indicate the US's prosecutions policy for environmental offences. These can certainly be drawn from to establish a normative framework for environmental criminalization in South Africa. Similar guiding principles or guidelines for use by South Africa enforcement authorities are not available in the public domain.[296]

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[289] Brickey ibid at 347 with reference to US Department of Justice*, United States Attorneys Manual: Principles of Federal Prosecution*. Also accessible at: *https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution*.

[290] Brickey ibid.

[291] Brickey ibid at 349. These relevant considerations include: '(1) Federal law enforcement priorities; (2) The nature and seriousness of the offence; (3) The deterrent effect of prosecution; (4) The person's culpability in connection with the offense; (5) The person's history with respect to criminal activity; (6) The person's willingness to cooperate in the investigation or prosecution of others; and (7) The probable sentence or other consequence if the person is convicted'.

[292] Brickey ibid at 351 with reference to US Department of Justice*, Factors in decisions in criminal prosecutions for environmental violations. in the context of significant voluntary compliance or disclosure efforts by the violator.* Also accessible at*: https://www.justice.gov/enrd/factors-decisions-criminal-prosecutions-environmental-violations-context-significant-voluntary*

[293] Ibid.

[294] Ibid.

[295] Ibid.

[296] The researcher was advised by DFFE officials that they have an Operating Manual aimed at guiding and discerning matters worthy of criminal investigation, but its content is considered confidential and not in the public domain.

4.3 The different nature of environmental criminal law, attainability, and flux

Brickey asks, 'if environmental law's aspirational qualities, evolutionary nature and complexity are truly distinctive and sets it apart from other fields of law, then to what extent is it appropriate to criminalize environmental violations?'[297] She questions whether it is desirable or appropriate to incorporate general principles of criminal law into environmental law or if a different approach is needed.[298] The attainability of environmental law goals is also essential. Environmental law's description as 'aspirational'[299] may require a question in the normative framework regarding achievability. Criminalization cannot reasonably follow if the requirements or timeframes for compliance are unrealistic and irrational. The challenge is to balance this and the importance of protecting environmental resources as common or public resources.

According to Brickey, environmental law 'is in a constant state of flux'. Continuous changes in these laws are inevitable because they are affected by changes in science[300] and technology. The 'volatile forces of public opinion and political conflict over a hierarchy of competing values and interests' affect environmental policymaking.[301] Consequentially, there is 'uncertainty about what the law is or is likely to be, including what conduct will be considered criminal'.[302] Where the law and legal standards are unpredictable, it brings into question the fairness of criminal enforcement.[303] It reinforces 'the belief that the *distinctive features of environmental law* should not only inform criminal-enforcement policymaking but should also prescribe its bounds'.[304]

Lazarus argues that 'criminal liability standards should be more settled and less dynamic' and 'more reflective of what in fact can be accomplished rather than of the public's aspirations of how, if pushed, the world can change'.[305] Consequently, there should be some degree of

[297] Brickey op cit note 177 at 13.
[298] Brickey ibid at 8.
[299] Brickey ibid at 9 with reference to Richard J. Lazarus 'Meeting the Demands of Integration, in the evolution of Environmental Law: Reforming Environmental Criminal Law' (1995) 83 *GEO. L.J.* 2401, 2423-2424, 2453-2454; Christopher H. Schroeder 'Cool Analysis Versus Moral Outrage in the development of Federal Environmental Criminal Law' (1993) 35 *WM & Mary L Review* 251, 252-243.
[300] Brickey ibid at 11 with reference to A. Dan Tarlock 'The Nonequilibrium Paradigm in Ecology and the Partial Unravelling of Environmental Law' (1994) 27 *Loy. L.A. Rev*. 1121, 1133.
[301] Brickey ibid.
[302] Brickey ibid.
[303] Brickey ibid.
[304] Brickey ibid.
[305] Brickey ibid at 21 and Lazarus op cit note 177 at 881-883.

consistency in environmental law to ensure legal certainty, fairness, increased compliance and effective enforcement. Criminal sanctions' appropriateness and limits need examination where the law constantly changes because of improvement, scientific or technological development. Changes may also occur due to regulators, authorities' or legislators' improved understanding of environmental law and how to regulate it or become aware of gaps in current law. Arguably, that alone is insufficient justification to criminalize, particularly if the other normative requirements are absent.

4.4 Culpability/fault and knowledge

One of the key claims emerging from criminal law theory, including environmental law theory, is that criminal sanctions should be reserved for serious offences.[306] In the US, some environmental criminal statutes require proof of *intent* and 'others provide that *negligence* would suffice'. In South Africa, the basic requirement is that offences are committed with a fault (in other words, intentionally or negligently), and to do so, the offender requires knowledge of unlawfulness.[307] Fundamentally, South African law requires *mens rea* unless it is expressly overridden by law.[308] Brickey explains that 'the most commonly required mental state for environmental crimes is knowledge'.[309] Nurse explains that in the US, 'civil penalties are most typically involved as the legal remedy against environmental wrongdoers', whereas '[c]riminal penalties are usually invoked only when environmental statutes have been wilfully or knowingly broken'.[310] South African environmental law does not provide a similar rule, and the approach, whether civil or criminal or both, is left to authorities' discretion.

Husak's view is that 'white-collar environmental polluters who know they are violating the law are more blameworthy than white-collar polluters who do not know they are violating the law'.[311] Considerations surrounding knowledge could include whether the element of knowledge is clear from an intended criminal sanction, what level of knowledge is required,

[306] Kidd op cit note 28 at 276. See also Zada Lipman 'Compliance and Enforcement of International Environmental Conventions in Australia' in Paddock, Qun, Kotze (eds) *Compliance and Enforcement in Environmental Law: Toward More Effective Implementation* (2011) at 54 where she states that 'a criminal prosecution may be more appropriate in a case… where there has been an intentional breach of environmental legislation and warnings have been ignored.'
[307] Burchell op cit note 6 at 3 and 341.
[308] Kidd op cit note 272 at 248 with reference to *S v Qumbella* 1966 (4) SA 356 (A); Michael Kidd 'The use of strict liability in the prosecution of environmental crimes' (2002) 15 *SACJ* 23 at 25.
[309] Brickey op cit note 177 at 8.
[310] Nurse op cit note 176 at 122 with reference to Situ and Emmons at 38.
[311] Douglas Husak 'Overcriminalization' in Erik Luna *Reforming Criminal Justice, Volume 1: Introduction and Criminalization* (2017) 36.

and who is required to have such knowledge. In other jurisdictions, doctrines, such as wilful blindness, where specific facts or circumstances a person suspects exist but deliberately ignores, may be sufficient to impute knowledge.[312] Doctrines such as 'conscious avoidance' or 'collective knowledge' may also apply. A defendant could be found to have been aware of 'a high probability of a fact in dispute and consciously avoided confirming that fact'.[313] A manager who turns a blind eye, although it is clear that sampling results have been tampered with, but who proceeds to sign off on the sampling results submitted to the authority, is an example of conscious avoidance.[314] A corporation could be charged based on collective knowledge, being 'the sum of all knowledge of the employees' within an organization.[315] Negligence has lower culpability than knowledge, and '[a]n actor is negligent if his conduct deviates from the standard of care that a reasonable person would have observed under the circumstances'.[316] There is room for applying and developing these doctrines of wilful blindness, conscious avoidance and collective knowledge in South Africa.

According to the US Devaney Memorandum, the measure of *culpable conduct* 'is not necessarily an assessment of criminal intent', as intent may not necessarily be immediately evident, but five factors could indicate it. The first is a '*[h]istory of repeated violations*', for example, where repeated action by authorities 'failed to bring a violator into compliance, criminal investigation may be warranted'. Secondly, there may be '*[d]eliberate misconduct resulting in violation*', which could be proved by direct or circumstantial evidence. Thirdly, the '*[c]oncealment of misconduct or falsification of required records'* is considered serious and may 'serve as the basis for serious consideration to proceed with a criminal investigation'. Fourthly, tampering with monitoring or control equipment leading to false data is considered an 'assault on the regulatory infrastructure and calls for the enforcement leverage of criminal investigation'. Finally, intent may be apparent in undertaking 'pollution-related activities without a permit, licence, manifest or other required documentation'. The US Devaney Memorandum states that criminal enforcement resources will be used against those 'who chose to ignore regulatory requirements altogether and act outside of EPA's regulatory scheme'.[317] These factors could similarly be helpful in a South African context to determine culpability.

[312] Brickey op cit note 177 at 44.
[313] Brickey ibid at 48 with reference to *United States v Hopkins* 53 F.3d 533 (2nd Cir. 1995).
[314] Brickey ibid.
[315] Brickey ibid at 49.
[316] Brickey ibid at 50.
[317] Brickey ibid at 344-345.

According to Nurse, corporate offenders may rationalize 'on the grounds of a corporation's wider good works, the services it provides and the jobs it creates while arguing that nobody is being harmed because natural resources belong to no one and are there to be exploited'.[318] He says that environmental offences such as pollution and toxic waste offences may be profit-driven offences (to gain profit for a company), and it may also 'fit the economic offender model, where crimes are committed by those in otherwise lawful employment as a result of economic and employer pressures whether real or imagined'.[319] This concept of *profit-driven* offences could also be a relevant factor in ascertaining the culpability of those responsible in an organization. For example, the failure to submit a document to a regulator or register with the regulator may not necessarily be a profit-driven or intentional offence. However, it may be an administrative oversight and would not be likened (in the first instance) to criminal conduct. The failure to install pollution abatement equipment or dispose of hazardous waste in a cheaper yet illegal way may, due to its cost, be driven by economic factors such as the business' survival or profit.

4.5 Additional considerations regarding the practicalities and enforceability of environmental crimes

Kidd's work in environmental law, particularly the use of criminal sanctions, is foundational to this study. He explains the inherent and contingent weaknesses of criminal law.[320] The inherent weaknesses include that: the prosecution carries a 'burden of time and cost';[321] the criminal law is 'reactive'; in other words, the harm has already been inflicted when a transgression is prosecuted; and the burden of proof is more onerous than in civil cases.[322] Criminal cases require 'procedural safeguards' stipulated in the South African Constitution, 1996, including 'the rights to a fair trial' and 'due process'.[323] The burden on enforcement agencies to prepare cases for prosecution 'may be a significant drain on the resources of an

[318] Nurse op cit note 176 at 60 with reference to Stallworthy *Understanding Environmental Law* (2008); Dine, J 'The capture of corruption: complexity and corporate culture' (2007) 20 *Global Business and Development Law Journal* (2007) 1-26.
[319] Nurse ibid at 57 with reference to Nurse *Animal Harm: Perspectives on why people harm and kill animals* (2013) 70.
[320] Kidd op cit note 28 at 270-274 and Kidd op cit note 272 at 242-243.
[321] Kidd ibid at 270 and refers to, for example, C Veljanovski 'Regulatory Enforcement: An Economic Study of the British Factory Inspectorate' (1983) 5 *Law and Policy Quarterly* 75; and *Feedmill Developments (Pty) Ltd and Another v Attorney-General, KwaZulu-Natal* (1998) 4 All SA 34.
[322] In other words, in criminal cases the burden of proof is beyond reasonable doubt whereas in civil cases the burden is to prove on a balance of probabilities.
[323] Kidd op cit note 28 at 272 and Kidd op cit note 272 at 243 refers to cases such as *S v Bhulwana, S v Gwadiso* 1996 (1) SA 388 (CC) para 24.

enforcement agency' - Kidd says this is so, especially where punishment is not severe.[324] In addition, securing the attendance of enforcement officials in court is challenging, and officials are reluctant to punish offenders for conduct seen as 'morally neutral'.[325]

The contingent weaknesses of criminal law described by Kidd include 'inadequate policing' and 'lack of public awareness', describing that as a society, we have an insufficiently developed 'environmental ethos'. Additional contingent weaknesses include 'difficulties in investigation' and lack of expertise of court officials, including prosecutors or magistrates unfamiliar with the ever-changing environmental laws and who do not specialize in this complex area of law. Lastly, 'inadequate penalties' that are imposed, not necessarily as prescribed in law, but the actual penalty imposed by the judicial officer, is also considered a weakness.[326] He also reasons that 'the criminal sanction should be reserved for the most serious environmental offences'.[327] Subsequent chapters of this thesis consider whether this recommendation has been applied.

Nurse also identifies a range of difficulties within environmental law enforcement (across jurisdictions), some comparable to those listed by Kidd. These difficulties include (1) insufficient resources of the statutory agencies, for example, 'a lack of available scientific or technical support in gathering evidence'; (2) '[l]ack of specialist environmental or wildlife legislative knowledge' on the part of investigators; (3) '[p]erceived loopholes in legislation meaning that some illegal activities are similar to legal ones'; (4) '[l]ack of expertise on the part of prosecutors and the low priority afforded to these cases'; and (5) the 'use of the available sentencing options is often at the lower end of the scale' meaning 'fines can simply be absorbed as the cost of doing business'.[328] These practicalities and challenges appear to be shared across jurisdictions, raising the question of why the law or legislators have not responded by ensuring more precise and better-defined laws.

The technical nature of the operations and industries regulated by environmental law poses additional practical challenges to effectively using a criminal sanction.[329] Disputes (factual or

[324] Kidd ibid.
[325] Kidd op cit note 272 at 243 refers to S Kadish 'Some observations on the Use of Criminal Sanctions in Enforcing Economic Regulation' (1963) 30 *University of Chicago Law Review* 423 at 444-9.
[326] Kidd op cit note 28 at 273.
[327] Kidd ibid at 276.
[328] Nurse op cit note 176 at 150 with reference to Nurse *Policing Wildlife: Perspectives on the enforcement of wildlife legislation* (2015) at 146.
[329] Brickey op cit note 177 at 11-12.

technical) may arise between the authorities and industries regarding interpreting and applying the law to complex industrial operations. Such disputes can cause difficulties in proving all the elements of an alleged crime beyond a reasonable doubt, hindering successful prosecution. If the law is not clear, it may be better to obtain a declaratory order in a civil court than expect a favourable outcome in a criminal court because, in the event of uncertainty, statutes are given the least restricting meaning favouring liberty.[330] Stuntz explains a similar principle, 'the rule of lenity', which protects defendants against unfair surprise by resolving interpretive doubts in the defendants' favour.[331]

Transgressors cooperating with authorities within a complex and technical legislative regime may also affect the enforcement mechanism to be used. Other considerations in the Devaney Memorandum include that 'full and complete disclosures' by companies who take 'constructive action' are 'considered as mitigating factors in the exercise of investigative discretion.'[332] Thus, where a transgressor cooperates, voluntarily reveals its violation, thoroughly and promptly remedies it 'as part of a corporation's systematic and comprehensive self-evaluation program', it would generally not be 'a candidate for the expenditure of scarce criminal investigative resources'.[333]

4.6 Certainty and precision of environmental crimes

Environmental crimes are perceived to be overly broad, vague, with 'minimal culpability requirements, and result in broad discretionary powers that rest almost entirely in the prosecutor's hands'.[334] Lazarus says that by criminalizing so much conduct, the legislator effectively delegates the decision-making to the executive branch of government, and 'open-ended delegation can be a recipe for disaster'.[335] Thus, truly culpable and morally innocent conduct is made criminal under the law[336] but is left to prosecutorial discretion. Although the law requires the prosecution of all offences, this is tempered by justice and limited resources and 'by the judicious exercise of criminal enforcement power'.[337] But Brickey argues that without prosecutorial discretion to remove negligible cases, 'the criminal justice system would

[330] Du Plessis op cit note 143 para 334(c).
[331] Stuntz (2002) op cit note 82 at 837.
[332] Brickey op cit note 177 at 346.
[333] Brickey ibid at 346.
[334] Brickey ibid at 355.
[335] Brickey ibid at 354.
[336] Brickey ibid at 355.
[337] Brickey ibid at 358 with reference to Kathleen F. Brickey 'The rhetoric of environmental crime: culpability, discretion and structural reform' (1998) 84 *Iowa L. Rev*. 115 at 126-131.

(deservedly) fall into disrepute and collapse under its own weight'.[338] More accurate law would seek to achieve a balance between too much or too little discretion.

The complexity of environmental legislation and its constant and frequent amendment inhibits certainty and precision. According to Fuller, one of the ways a legal system can miscarry includes 'introducing such frequent changes in the rules that the subject cannot orient his action by them'.[339] Continuous changes to the applicable legislation put legal certainty at risk and inhibit effective compliance and enforcement.

4.7 Significance of environmental harm and direct impacts

Criminal sanctions are often reactive, in that they are invoked once the harm has occurred, for environmental but also for common law crimes (for example, murder, robbery, assault - crimes against the bodily integrity of people). The prevention of significant harm may lie within the deterrent impact of effectively invoking criminal sanctions. In the case of environmental offences (considered in this research), significant harm can also be mitigated or reduced through appropriate sentences imposed by courts, e.g., remedial or restorative obligations within court orders/sentences.

In an environmental context, before imposing a sentence, courts would consider the severity and seriousness of the environmental harm caused and would consider it contextually, based on the applicable regulatory framework to that operation, and its approvals to operate, which may well allow it to pollute within specified parameters. Courts emphasize three primary considerations at sentencing, namely (1) the seriousness of the crime and the harm it caused, (2) the criminal's personal circumstances, prospects of reform, (3) society's interests and protecting the community against a dangerous offender, deterring others,[340] and the interest of the victim.[341] The nature and facts of a transgression need to be carefully scrutinized to determine whether the transgression justifies prosecution within an already burdened criminal justice system. The impact on society by the particular transgression may involve considering

[338] Brickey ibid at 358.
[339] Lon L Fuller *The Morality of Law* (1969) 39 includes in his description of eight ways how a legal system can miscarry, the following: '…rules that require conduct beyond the powers of the affected party; introducing such frequent changes in the rules that the subject cannot orient his action by them; and a failure of congruence between the rules as announced and their actual administration.'
[340] Snyman (1999) op cit note 6 with reference to several cases including *S v Zinn* 1969 2 SA 537 (A); *S v Khumalo* 1973 3 SA 697 (A) 698; *S v Roux* 1975 3 SA 190 (A) 197; *S v Rabie* 1975 4 SA 855 (A) 861-863; *S v Khumalo* 1984 3 SA 327 (A) 330, 1997 2 SACR 171 (T) 183; *Cassiem* 2001 1 SACR 489 (SCA) 494
[341] Snyman (2014) op cit note 5 at 19 with reference to *S v Matyityi* 2011 1 SACR 40 (SCA) par 16-17.

the direct impact on people and its severity alongside the socio-economic benefits of that industry's activities and its ability to continue to conduct business. The alleged offender's state of mind and blameworthiness should be considered, i.e., does the offender undertake measures to operate within the parameters of the law.

In regard to 'significant environmental harm', the US Devaney Memorandum provides that it could include 'the presence of actual harm' or 'the threat of significant harm to the environment or human health'. It outlines four factors to measure significant environmental harm. The first factor is that '*[a]ctual harm* be demonstrated by an illegal discharge, release or emission that has an identifiable and significant harmful impact on human health or the environment'. The second factor is that *'[t]he threat of significant harm* to the environment or human health is demonstrated by an actual or threatened discharge, release or emission'. (This could link to Husak's 'substantial risk requirement' that applies to crimes of risk prevention.)[342] The third factor is the '*[f]ailure to report* an actual discharge, release or emission within the context of Factors 1 and 2', which 'will serve as an additional factor favouring criminal investigation'. However, although 'the failure to report, alone, may be a criminal violation', the Devaney Memorandum states that 'investigative resources should generally be targeted toward those cases in which the failure to report is coupled with actual or threatened environmental harm'. (Here, the failure to report per se may not have resultant environmental impacts and may not be considered worthy of criminal prosecution.) The fourth factor envisages circumstances where a '*trend or common attitude'* towards illegal conduct appears within a regulated community. A criminal investigation may be required to deter that particular offender or community.[343] These factors supplement the normative considerations in using criminal sanctions to address environmental harm.

4.8 Proportionality, fairness, and consistency in environmental sanctions

Where authorities do not enforce the law, it creates '[c]ynicism and disrespect for the law'.[344] Disrespect for the law can also be created where penalties are disproportionate to the offence. Kidd says that where 'relatively minor penalties are punished with heavy penalties, this will lead to disrespect for the law, especially in a society where there is a perception that "real"

[342] Duff op cit note 3 at 80.
[343] Brickey op cit note 177 at 344.
[344] Kidd op cit note 272 at 242 with reference to S Kadish 'The Crisis of Overcriminalization' (1967) 374 *Annals of the American Academy of Political Social Science* 157 at 160 and A Ashworth *Principles of Criminal Law* (1991) at 28.

criminals are either avoiding arrest or prosecution altogether, or being leniently treated by the legal system'.[345] The successful enforcement of environmental law depends on 'effective implementation of sanctions and processing of offenders through justice systems'.[346] Nurse contends that similar to mainstream crime, environmental law's effectiveness is undermined by the general problems faced by criminal enforcement regimes and inconsistent approaches by enforcers.[347] To ensure a 'level playing field', the regulated community must be informed of the uniform standards set by enforcement authorities, and the law must be consistently enforced against those who do not comply.[348] It seems unrealistic to meet this objective of certainty, equal and consistent enforcement within the context of complex, frequently changing, and many environmental laws and offences.

In the US, based on Brickey's research, it 'appears that the government gives priority to prosecuting cases in which defendants are "rogue" operators who engage in highly regulated business activities without subjecting themselves to the rules of the game'.[349] She explains that 'criminal enforcement priorities' developed along two lines. On the one hand, they focus on 'rogue' operators, i.e., 'prosecuting those who operated completely outside of the system' - on the other, looking at those who operate within the system but misrepresent or conceal 'the nature of extent of their regulated activities' for example misrepresenting its permit condition compliance in reports to the authority.[350] The position based on South African cases is considered in Chapter Four of this thesis, but it must be mentioned that none of the concluded cases considered involved the prosecution of organs of state, despite organs of state being some of the largest polluters in South Africa.[351]

Environmental enforcement is subject to a range of factors determining whether an offence is detected and prosecuted or punished, such as the probability of detection, arrest, prosecution

[345] Kidd ibid at 242.
[346] Nurse op cit note 176 at 156.
[347] Nurse ibid at 148 with reference to Nurse *Policing Wildlife: Perspectives on the enforcement of wildlife legislation* (2015), and Nurse 'Repainting the thin green line: the enforcement of UK wildlife law' October (2012) *Internet Journal on Criminology* 1-20.
[348] Nurse ibid at 150 with reference to Bundy, R., Devaney, E., Dowd, E., and Solow, S., 'Deterrence: a strong environmental crime program leads to industry compliance and a cleaner environment' (1999) US Attorneys' *Bulletin: Enforcement Issues* 47(5) Washington Department of Justice at 1-2.
[349] Brickey op cit note 177 at 210 with reference to Kathleen F. Brickey 'Charging Practices in Hazardous Waste Crime Prosecutions' (2001) 62 *Ohio St. L.J* 1077, 1088, n.37.
[350] Brickey ibid at 367.
[351] Friedo J.W. Herbig 'Talking dirty - effluent and sewage irreverence in South Africa: A conservation crime perspective' (2019) 5:1 Cogent Social Sciences 1 at 14, 15; Mushtak Parker 'Deadly air: South African court gives polluters one year to clean up act' *NewAfrican* 12 May 2022; Van Wyk, Andre 'South Africa: Is Africa's Biggest Polluter Capable of Transformation?' *AllAfrica* 4 June 2021; CER 'Deadly Air: Eskom is now the world's most polluting power company' 6 October 2021.

and conviction.[352] Nurse says that '[i]mplicit in these various activities is the role of discretion among investigating and prosecuting agencies and the uncertainty of detection, apprehension and punishment model that dominates the environmental enforcement landscape'.[353] He asserts that investigators' and prosecutors' approaches to enforcement are generally dominated by reactive (versus proactive) enforcement approaches.[354] This reactive approach classification means that pollution incidents or non-compliance become known to authorities 'after the fact' through, for example, community complaints. In such instances, 'rogue' operators may come to the attention of authorities.

5. CONCLUSION

Many criminal law and environmental law theorists accept that criminal law, or criminal sanctions, should be a last resort mechanism. More criminal laws do not result in less crime, and pursuing criminal sanctions involves a higher burden of proof, increased costs, and a delay, which may hamper environmental laws' aims. Moreover, more crimes reduce the deterrent effect of actually being caught, prosecuted and sentenced. The general challenges facing criminal law are exacerbated for environmental law crimes, which are complex, technical, involving law that is frequently amended, and where prosecutors and courts do not deal with such matters regularly.

Overcriminalization, through the increasing enactment of statutory crimes, threatens the rule of law and the whole justice system, which is increasingly incapable of dealing with the growing number of criminal sanctions. Many authors express strong views against overcriminalization, which is objectionable because more laws exist than what is possible to enforce, and it is incapable of equal enforcement.

There are good reasons for criminalizing specific actions and behaviour, where transgressors deserve to be punished. There seems to be no dispute amongst authors that a time and place exists for using criminal sanctions in an environmental law context. The environment is our most important resource in dire need of protection. Based on the 'inherent and contingent weaknesses' of the criminal sanction[355] (and additional weaknesses outlined in this chapter), the abundant creation of statutory crimes may not achieve the actual aim of environmental

[352] Nurse op cit note 176 at 148.
[353] Nurse ibid with reference to Bright, J., 'Crime prevention: the British experience' in K Stenson & D Cowell (eds) *The Politics of Crime Control* (1993) 62-86.
[354] Nurse ibid at 147-148.
[355] Kidd op cit note 28 at 270-274 and Kidd op cit note 272 at 242-243.

protection, rehabilitation, or offenders' punishment and deterrence. Several factors and considerations offered by theorists and other resources (or guideline documents) help discern whether or not a criminal sanction may be justified and may be used to limit the extent of the criminal law.

The criminal sanction may not be the most effective tool to achieve the aims sought (depending on the circumstances) and should not be a default approach. The criminal sanction should be one 'tool in the state's arsenal'.[356] Within an environmental enforcement regime (within 'command-and-control' mechanisms), many tools can be used. An adequately structured range of enforcement measures, when used appropriately, could result in more effective enforcement and use of the criminal sanction, to be used only 'if all else fails'. A criminal offence does not always have to be the primary prescribed tool. The same criminal penalties and fines cannot be prescribed for less severe and severe environmental impacts, as this diminishes the value and impact of the criminal sanction.

A proposed basic normative framework for criminalization could include the categories and questions outlined in the table below to prevent overcriminalization. It is enhanced considering the unique traits of environmental law. This table's categories and questions are based on and draw from the authors mentioned in this chapter. It may not be a definitive list of considerations before criminalizing behaviour but may offer a helpful succinct starting point.

Legislators can use this normative frame in discerning when conduct should or should not be criminalized.

PROPOSED NORMATIVE FRAMEWORK FOR CRIMINALIZATION	
1.	**The different nature of criminal law, the legislature's burden, and the substantial state interest to justify state control.**
1.1.	Those who favour criminal legislation should carry a burden of proof and make a properly considered case for enacting a criminal law or offence provision. If such a case cannot be made, then an offence provision should not be enacted.
1.2.	Is creating a criminal sanction, which interferes with the liberty of members of civilized society, a mode of state control that would be considered lawful, rational, reasonable and justifiable in the circumstances?
1.3.	Is there a substantial risk being guarded against or a substantial interest being protected that can only be addressed through a criminal sanction, and will a criminal sanction advance that interest? I.e., the imposition of the sanction should reduce the risk.
1.4.	Does the proposed criminal sanction pass the 'laugh test'?

[356] Brickey op cit note 177 at 21 and Lazarus op cit note 177 at 881-883.

PROPOSED NORMATIVE FRAMEWORK FOR CRIMINALIZATION	
2.	**Crimes should be a last resort mechanism when no alternative means to achieve the intended state purpose exists**
2.1.	Can the state objective be achieved by non-criminal modes of control or less-restrictive means?
3.	**The different nature of environmental criminal law, attainability, and flux**
3.1.	Does the crime relate to aspirational, unattainable and unrealistic goals or requirements?
3.2.	Does the frequency of environmental requirement amendments result in a state of flux where legal requirements are unpredictable and compromise knowledge (of unlawfulness)? There should be some degree of consistency in environmental law, particularly criminal sanctions, to ensure legal certainty, fairness, increased compliance and effective enforcement.
4.	**The crime must excite moral disapproval, wrongfulness, be condemn-worthy, and deserving of criminal punishment.**
4.1.	Does the act being criminalized excite moral disapproval because it aims to prevent environmental harm, i.e., is it considered wrongful by society at large and in a way that merits condemnation through a criminal sanction?
5.	**Culpability/fault, knowledge, harm, and triviality**
5.1.	Crimes should require proof of culpable wrongdoing (with fault), including knowledge of unlawfulness. Does the sanction overextend or overstretch culpability?
5.2.	Does the crime relate to significant environmental harm, where one considers: the presence of actual harm or the threat of significant harm to the environment or human health?
5.3.	Is the action being criminalized too trivial to justify the attention of the criminal law?
5.4.	Does the crime relate to culpable conduct measured by a history of repeated violations, deliberate misconduct resulting in violation and concealment of misconduct or falsification of required records?
6.	**Proportionality, fairness, and consistency**
6.1.	Is the criminal sanction a proportional response considering the objective of this mode of control? I.e., the statute should be no more extensive than necessary to achieve its purpose and should not lead to disproportional punishment that is not deserved.
6.2.	Is the prescribed punishment just and fair? Should there be gradation of sanctions linked to the severity of the offence?
6.3.	Can the intended sanction be enforced consistently, i.e., will all offenders be prosecuted equally?
7.	**Practicality, efficacy, and enforceability**
7.1.	The crime created should be something an enforcer, prosecutor, and a court would enforce equally. Will its enactment overstrain the process of law enforcement?
7.2.	Is it more important to ensure that the harm is repaired or paid for or call those who cause it to be held publicly and criminally accountable?
7.3.	Is the transgressor cooperative, and has it made complete disclosures and thoroughly and promptly remedied its wrongdoing? (In addition to the considerations of culpability and knowledge of unlawfulness.)
7.4.	What is the best available and most efficient mechanism (in terms of time and costs) to avoid, remedy or prevent the harm and achieve the desired result, including punishment?

PROPOSED NORMATIVE FRAMEWORK FOR CRIMINALIZATION	
8.	**Certainty and precision of environmental crimes**
8.1.	Is the purpose and wording of the legal requirement clear, sound and defensible based on the principles of legality, and will it survive a narrow interpretation?
8.2.	Are the elements of the crime clear?
8.3.	Does the provision create too much discretion? If so, how can it be limited?

CHAPTER 3: CRIMINAL SANCTIONS IN SOUTH AFRICAN ENVIRONMENTAL LAWS

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1. INTRODUCTION

In South Africa, the potential to be held criminally liable for conduct affecting the environment has existed for some time. For example, in the mid-1900s, the Water Act 54 of 1956 ('the Water Act') included water pollution or permit contraventions as crimes.[1] The Atmospheric Pollution Prevention Act 45 of 1965 ('the APPA') included air pollution offences.[2] Later in the twentieth century, specific environmental impacts and waste-related activities were among the aspects regulated by the Environment Conservation Act 73 of 1989 ('the ECA'), which also contained offence and penalty provisions.[3]

After 1996, the government enacted a suite of environmental laws that increased the range of conduct that could attract criminal sanctions. The legislature passed these laws in furtherance of the constitutional obligation to protect the environment through reasonable legislative measures.[4] The enactment of such laws has expanded the environmental law regime significantly. Several environmental laws now regulate various topics in more detail, including protecting the environment (in general[5] or specifically[6]), waste management,[7] atmospheric emissions,[8] water use and pollution regulation,[9] and natural resource exploitation.[10] These laws include many criminal sanctions[11] and are said to be 'littered with new criminal offences'.[12]

[1] Water Act 54 of 1956 ss 5(4), 9A(5), 9B(2), 9C(6)(c), 12(8), 12A(5), 12C(8), 20(11), 21(5), 22(4), 23, 23A, 24(5), 25(3), 26H, 33I and 170, which was substantially repealed by the National Water Act.
[2] APPA ss 7(2), 9(2), 15(6), 17(4), 18(4), 19(5) and (6), 20(11), 23(3), 24(2), 28(3), 29(4), 31(6), 32(2), 34(4), 37(5), 41(2), read with s 46, which was substantially repealed by the Air Quality Act.
[3] Predominantly in ECA Part VII, ss 29 to 30.
[4] The Constitution s 24 and the NEMA principles in s 2, including ss 2(1)(o) and (p).
[5] NEMA.
[6] Including through the National Environmental Management: Biodiversity Act 10 of 2004, the National Environmental Management Protected Areas Act 57 of 2003, the National Environmental Management: Integrated Coastal Management Act 24 of 2008, the National Heritage Resources Act 25 of 1999 and the National Forests Act 84 of 1998.
[7] The Waste Act.
[8] The Air Quality Act.
[9] Including the National Water Act.
[10] Including the Mineral and Petroleum Resources Development Act 28 of 2002.
[11] Michael Kidd *Environmental Law* 2 ed (2011) 269 with reference to MA Rabie 'Implementation of Environmental Law' in Fuggle & Rabie *Environmental Management in South Africa* (1992) 128; and Michael Anthony Kidd *The protection of the environment through the use of criminal sanctions: a comparative analysis with specific reference to South Africa* (unpublished PhD thesis, University of Natal, 2002).
[12] Frances Craigie, Phil Snijman & Melissa Fourie 'Dissecting environmental compliance and enforcement' in Paterson & Kotze (eds), *Environmental Compliance and Enforcement in South Africa: legal perspectives* (2009) 53.

Kidd has made the leading contribution on the use of environmental law criminal sanctions in South Africa.[13] His work has considered whether criminal sanctions are the best enforcement method. One of his conclusions is that there is 'a commonly held perception that penalties for environmental crimes are inadequate',[14] but this perception is largely untrue 'as far as those provided for by legislation are concerned'.[15] In 2009, an Interpol group working with the DFFE[16] found that 'South Africa's penalties are far too low to discourage lawbreakers',[17] suggesting that legislation should prescribe high fines as a deterrent. Other views include that enforcement and the penalties imposed are inadequate.[18]

No one, however, has considered the suite of criminal sanctions in South African environmental laws from the perspective of overcriminalization. This chapter studies the changes in these laws and the prescribed penalties, considering whether overcriminalization has occurred. The themes discussed in this chapter concern the parts of the normative framework in Chapter Two that relate to (1) the complexity and particular nature of environmental law, its attainability, flux and legitimate state control; (2) whether some of the enacted offences are deserving of criminal punishment, condemn-worthy and not trivial; (3) the proportionality of high prescribed fines for most offences; and (4) the practicality, efficacy and enforceability of statutory crimes where knowledge may be inhibited due to frequent changes. Chapter Six analyzes the themes in this chapter against the normative principles in Chapter Two.

As explained in Chapter One, this study focuses on the criminal sanctions in four specific environmental laws selected based on their overarching relevance to industrial facilities, considering the potentially significant environmental impacts of such operations. In this context, 'industrial facilities' focus on facilities established for manufacturing or production of commodities (including metals or chemicals), the generation of electricity, and the treatment and disposal of waste, which are activities undertaken in areas usually zoned for industrial use

[13] See Kidd op cit note 11; Michael Kidd 'Criminal Measures' in Paterson & Kotze (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009); and Michael Kidd 'Administrative law and implementation of environmental law' in King et al *Fuggle & Rabie's Environmental Management in South Africa* 3ed (2018).
[14] Kidd op cit note 11 at 260.
[15] Kidd (2002) op cit note 11 at 432.
[16] As it is currently known.
[17] The Portfolio Committee on Environmental Affairs and Tourism *'Heavy fines proposed for six environmental laws' 13 August 2009 accessed at https://legal.sabinet.co.za/articles/heavy-fines-proposed-for-six-environmental-laws/* on 17 April 2020.
[18] Loretta Feris 'Environment' in Ian Currie & Johan de Waal *The Bill of Rights Handbook* 5ed (2005) 521.

in terms of relevant land use legislation. The laws considered for this study are the: NEMA, National Water Act, Air Quality Act and Waste Act. Part 2 of this chapter briefly contextualizes these laws. Although focussing on the laws mentioned above, reference is also made to criminal sanctions in repealed environmental laws to show changes over time, including increased prescribed criminal penalties.

An industrial operation may consist of different mechanical, chemical, metallurgical (or other) processes or activities. Each process may result in different environmental impacts. For example, air emissions or wastewater may arise from industrial processes requiring treatment and discharge. Environmental impacts may occur from construction activities impacting natural features, for example, vegetation clearance or impacts on watercourses. Waste may be generated, stored, treated, or disposed of as a result or part of industrial activities. Thus, such activities might require approvals under several environmental laws, for example, an environmental authorisation under NEMA,[19] a water use license under the National Water Act,[20] a waste management licence under the Waste Act,[21] and an atmospheric emissions licence under the Air Quality Act[22] (collectively referred to as 'approvals').

Whether such statutory approvals are required depends on factual circumstances, including the nature of the activities and processes undertaken at an operation. When the activities commenced and whether thresholds or parameters are triggered (at the time) are essential to determine the approval requirements. Often the same activity may require approval under more than one law; for example, construction activities that may impact watercourses are likely to require both a NEMA and a National Water Act approval. In addition, competent/approval authorities issue such approvals with numerous conditions that the holder must obey and observe.[23] The failure to comply with such conditions can also result in authorities issuing compliance notices or pursuing criminal sanctions (or both).[24]

However, even if the activities at an industrial facility do not trigger an approval requirement, the operation of such facilities is still subject to these four laws in so far as they impose other duties or 'duties of care' towards the environment. For example, a person who causes or may cause significant pollution or environmental degradation must undertake

[19] NEMA s 24.
[20] National Water Act s 21.
[21] Waste Act s 20.
[22] Air Quality Act s 22.
[23] The person or entity to whom the approval is issued.
[24] For example, NEMA s 49A(1)(c) and National Water Act s 151(1)(c).

reasonable measures to prevent such pollution or environmental degradation.[25] Where harm to the environment is authorised or cannot reasonably be avoided or stopped – such a person must minimise and rectify pollution or environmental degradation.[26] A landowner, person in control of land, occupier, or land user must take reasonable measures to prevent water pollution.[27] Holders of waste have general duties regarding waste management, including that reasonable measures must be undertaken to avoid or minimise waste generation, reduce, re-use, recycle and recover waste, or ensure lawful disposal.[28] If the owners and operators of industrial facilities fall short of these requirements, they could be subject to criminal action.[29]

Environmental authorities are mandated and empowered to issue compliance notices[30] or directives[31] requiring transgressors to rectify their contraventions or cease unlawful activities. The failure to comply with such notices is also a criminal offence.[32] Furthermore, subordinate regulations and notices published under these laws also prescribe requirements and criminal penalties for compliance failures. In some cases, regulations stipulate obligations of a more administrative nature, e.g., relating to registrations and submitting documents and reports to the authorities. Often such subordinate regulations prescribe criminal penalties similar to the sanctions specified in primary legislation for more severe offences.[33] Therefore, the activities or failures that may attract criminal sanctions are numerous and include other contraventions beyond the above.

The categories of possible criminal sanctions canvassed in this chapter include the failure to obtain approval or comply with approval conditions, causing pollution, degradation or detrimentally impacting the environment, comply with authority notices, or comply with subordinate regulations. Examples of other offences include failing to comply with norms and standards, failing to submit required plans, reports or documents to the authority, hindering or

[25] NEMA s 28(1).
[26] Ibid.
[27] National Water Act s 19.
[28] Waste Act s 16.
[29] For example, see the offence provisions in NEMA s 49A, the National Water Act s 151, the Air Quality Act s 51 and Waste Act s 67.
[30] For example, NEMA s 31L.
[31] NEMA s 28(4) and National Water Act s 19(4).
[32] National Water Act s 151(1)(d) and NEMA s 49A(1)(g).
[33] For example, regulation 5 read with 13(b) and 14 of the National Atmospheric Emission Reporting Regulations, 2015 published under the Air Quality Act in GN R283 *GG 38633* of 2 April 2015.

interfering with the EMIs' duties, failing to comply with EMI requests, and furnishing false or misleading information to EMIs.[34]

While the analysis in this chapter is limited to the four laws mentioned above, industrial facilities also require compliance with many other laws, such as those regulating municipal services, planning, hazardous substances, heritage resources, and biodiversity impacts, to name a few. Those further laws each also contain collections of requirements and related criminal sanctions.

Focusing on the four laws and the range of criminal sanctions highlighted above, this chapter identifies three themes relevant to the overarching research concern with overcriminalization, namely: (1) changes to approval requirements and resultant complexities; (2) the changes in prescribed penalties for the failure to obtain approvals or comply with approval conditions, causing environmental pollution or degradation, and failure to comply with compliance notices or directives; and (3) offences in terms of regulations or notices published under these four Acts.

Part 3 of this chapter illustrates the changes to approval requirements under the mentioned laws over time. Part 4 explains the changes to the prescribed penalties for three kinds of contraventions mentioned above, whereas Part 5 shows how similar penalties have been prescribed for serious and less serious offences. Moreover, different forms of criminal liability in environmental law also add complexity to the use of criminal sanctions, as discussed in Part 6.

2. LEGISLATIVE CONTEXT

As mentioned above, this part briefly contextualizes the selected laws, i.e., NEMA, the Air Quality Act, the Waste Act and the National Water Act. Although not directly relevant to this chapter's discussion, several regulations, notices, standards, guidelines, strategies, schemes, and other plans or documents have been published under these laws, which form part of the collection of legal requirements possibly applicable to industrial facilities. Some are illustrated in Parts 3 and 4 of this chapter.

2.1 NEMA

[34] These are just examples in terms of NEMA s 49A(1), others exists in the National Water Act s 151, Waste Act s 67 and Air Quality Act s 51.

NEMA is the overarching framework environmental law in South Africa and outlines general national environmental management principles. Its principles, for example, require that developments must be socially, environmentally, and economically sustainable - determined by considering several factors in s 2.[35] NEMA also provides that those responsible for harming the environment must pay for remediation costs (i.e., 'the polluter pays' principle).[36] It regulates various matters that may affect the environment, including institutions and authorities responsible for decision-making and the administration of its requirements. It contains compliance and enforcement mechanisms, including civil (involving administrative) and criminal tools, which also apply to SEMAs as defined in NEMA s 1, and which include the ECA, Waste Act, the Air Quality Act and National Water Act.

The NEMA principles (including sustainable development and 'the polluter pays') are foundational considerations in enforcing environmental laws, ultimately, to benefit the environment. If enforcement mechanisms do not directly or indirectly achieve this, it should be interrogated. In other words, if enforcement does not benefit the environment, what other purpose does it serve – it may be to seek retribution and punishment of offenders or to deter the offender or others from committing such offences. The multitude of factors that influence the decision to criminalize include those contained in the normative framework established in Chapter Two of this thesis, and which are analyzed in Chapter Six.

Since its commencement on 29 January 1999, NEMA has been amended ten times, and further amendments are contemplated.[37] NEMA repealed many of the ECA provisions, including the requirement to obtain an environmental authorisation for listed activities. Although most of the substantive provisions of the ECA have been repealed, the offence provisions under the ECA are still in force to the extent that prior contraventions under the ECA are still pursued. NEMA contains numerous criminal offences and related penalty provisions, some of which are discussed in this chapter.[38]

2.2 The Air Quality Act

The Air Quality Act regulates air quality, air pollution, and related matters, including requiring atmospheric emissions licences for listed activities to which minimum emission standards

[35] Including, for example in s 2(4)(a)(ii) that 'that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied'.
[36] NEMA s 2(4)(p).
[37] In terms of the National Environmental Management Laws Amendment Bill B14D-2017.
[38] NEMA ss 49A and 49B.

apply.[39] Before the Air Quality Act, the APPA, which commenced on 21 April 1965, required registration certificates for scheduled processes listed in Schedule 2 (the older version of the listed activities).[40] The Air Quality Act provided for a transition from APPA registration certificates to atmospheric emissions licences under the newer Act.[41] The Air Quality Act repealed the APPA with effect from 1 April 2010 but 'saved' some APPA provisions in its repeal and transitional provisions.[42] It also contains several criminal offences and related penalties.[43]

2.3 The Waste Act

The Waste Act commenced on 1 July 2009,[44] except for the provisions regulating contaminated land, which took effect in 2014.[45] The Waste Act repealed the ECA in so far as it regulated and required permits for waste disposal sites.[46] The Waste Act regulates waste management more extensively than the ECA; among its various provisions are the requirements for waste management licences for listed waste management activities.[47] The Waste Act also contains criminal sanctions for various transgressions.[48]

2.4 The National Water Act

The National Water Act, which commenced on 1 October 1998,[49] regulates water uses, the protection of, impacts on, use, conservation, and management, of water resources (among other water impact-related aspects). The National Water Act repealed several Acts, including the Water Act 54 of 1956 (although the repeal and transitional provisions 'saved' certain acts under prior laws).[50]

The National Water Act contains licencing or authorisation requirements for undertaking specified water uses and duty of care provisions that require the prevention or remediation of

[39] Air Quality Act s 21. The first list of activities was published GN248 of 31 March 2010, which was repealed by GN893 of 22 November 2013.
[40] APPA s 9.
[41] Air Quality Act s 60.
[42] Ibid.
[43] Air Quality Act ss 51 and 52.
[44] Proc. 34 on 30 April 2009.
[45] The contaminated land provisions commenced on 2 May 2014, in Proc. 26 of 11 April 2014.
[46] Waste Act s 80 read with Schedule 2.
[47] Waste Act ss 19 and 20.
[48] Waste Act s 67.
[49] Proc 95 *GG* 19269 of 25 September 1998.
[50] National Water Act s 163.

water pollution.[51] It is an offence to use water other than permitted under the National Water Act. The National Water Act also includes several criminal offences and related penalties[52] – which are much lower than the Acts mentioned above – as discussed and illustrated in this chapter. Thus, it is worth mentioning that for such contraventions, on the first conviction, a person can be liable to a penalty not exceeding five years imprisonment or a fine, or both.[53] Where a penalty amount is not specified, it is determined in the court's discretion, guided by the maximum term of imprisonment[54] in terms of the Adjustment of Fines Act read with the Magistrates Court Act. A five-year imprisonment penalty could equate to a fine of R200,000[55] if the matter is heard in the Magistrates Court.

Some of the changes to the laws above and the prescribed criminal sanctions are discussed in the following parts.

3. CHANGES TO ACTIVITIES REQUIRING APPROVALS

Kidd observes that '[g]enerally speaking, it is easier to prove an offence of acting without a licence than an offence defined in terms of environmental harm'.[56] The reasoning for this view may be that the elements of the crime of not having approval are more limited and easier to prove (than an offence relating to harm). The prosecution must prove the wrongful act (*actus reus*), i.e., the failure to obtain the approval and fault in the form of either negligence or intention (*mens rea*). Various environmental authorities[57] are mandated to issue such approvals and would have a record thereof. Thus, determining the absence of such approvals (where it is required) should be a simple enquiry with the relevant authority. Establishing if approval is needed involves considering the listed activities (listed under the mentioned laws) in the context of the facility's activities. The time at which the activities were undertaken or commenced is critical. A facility might not need such approval if its activity was lawful before a new law was promulgated. In other words, the law works prospectively (looking forward),

[51] National Water Act ss 21 and 19.
[52] National Water Act ss 151(1) and (2).
[53] National Water Act ss 151(1)(a) and (2).
[54] Kidd op cit note 11 at 212. See also ss 1(1)(a) the Adjustment of Fines Act 101 of 1991 read with 92(1)(b) of the Magistrates Court Act and GN217 *GG 37477* of 27 March 2014.
[55] Section 1(1)(a) the Adjustment of Fines Act read with s 92(1)(b) of the Magistrates Court Act and GN217 in *GG* 37477 of 27 March 2014, which determines that the fine a court can impose is 'R120 000 where the court is not the court of a regional division, and R600 000 where the court is the court of a regional division'.
[56] Kidd op cit note 11 at 177.
[57] For example, the DFFE, DWS and DMRE, provincial departments as competent authorities in environmental matters under NEMA or the Waste Act, district municipalities as licensing authorities under the Air Quality Act.

and there is a legal presumption against retrospectivity.[58] A person can only be held responsible for an act or omission that was unlawful when committed.[59] Establishing the law at a point in time is therefore critical to determining criminal liability. This determination is not as simple as it might seem, as explained by the various amendments mentioned below.

Although it may (at face value) be easier to establish if an activity is unlawful due to lack of approval, such a determination can also be a complex undertaking, complicated by frequent changes to the approval requirements. Such frequent changes inevitably complicate proving criminal liability.

3.1 NEMA

When NEMA commenced, Environmental Impact Assessment ('EIA') Regulations and notices listing activities requiring authorisation under NEMA ('listed activities') had not yet been published. The EIA Regulations and listed activity notices published under the ECA in 1997 (the 'ECA Regulations' and 'ECA listed activities')[60] continued to apply until its repeal in 2006.[61] When NEMA commenced, it did not contain offence provisions for the failure to obtain approval because of the provision that the ECA Regulations and ECA listed activities would apply until replaced and repealed.[62]

Thus, before 2006 and the publication of NEMA EIA Regulations and listed activities, ss 21 and 22 of ECA still applied with its Regulations and listed activities. ECA s 21 provided that the Minister could publish activities which in his/her opinion 'may have a *substantial detrimental effect on the environment*, whether in general or in respect of certain areas' (emphasis added). Section 22 of the ECA prohibited people from undertaking activities listed under s 21 without environmental authorisation. The ECA Regulations[63] provided for the process of applying for such an authorisation. The ECA listed activities set out 27 activities

[58] LM Du Plessis 'Statute Law and Interpretation' in J A Faris (ed) *The Law of South Africa* Volume 25(1) 2 ed (2011) at 83 para 341. See also *Minister of Environmental Affairs and Others v ArcelorMittal South Africa* (case no 342/2019) [2020] ZASCA 40 (17 April 2020) para 29 S *v Mhlungu and others* 1995 (3) SA 867 (cc) para 65.
[59] The Constitution s 35(3)(l).
[60] GN R1182 and GN R1183 *GG* 18261 of 5 September 1997, the first set of activities requiring authorisations commenced with effect from 8 September 1997.
[61] GN R385, GN R386 and GN R387 *GG* 28753 of 21 April 2006, which commenced on 3 July 2006 in terms of GNR 612 *GG* 28938 of 23 June 2009.
[62] NEMA ss 50(2) and (4).
[63] GN R1182 *GG* 18261 of 5 September 1997.

requiring approval before commencement, providing four different commencement dates for various listed activities between 8 September 1997 and 1 April 1998.[64]

In addition to being a relatively short list of activities considered to have environmental impacts, some of the ECA listed activities were vague, and their application was unclear (an example is illustrated later in this part). Such activities had to be interpreted in terms of the governing provision's principles that it had to result in a 'substantial detrimental effect on the environment' (as emphasised above). In the time of the ECA, it was not always clear what would be considered a 'substantial detrimental impact on the environment.' It appears that the amendments over the years sought to clarify aspects such as definitions, establishing thresholds for triggering listed activities that would result in a substantial detrimental environmental impact and adding activities that were not contemplated in prior lists.

NEMA s 24 is phrased differently from s 21 of ECA and does not contain the threshold of listed activities having 'a substantial detrimental effect on the environment'. NEMA s 24 requires that the impact or potential environmental impacts of listed activities 'must be considered, investigated, assessed and reported on to the competent authority'.[65] Section 24 gives a wide discretion for mandated officials to publish 'activities which may not commence without environmental authorisation from the competent authority'.[66]

In 2006 more extensive NEMA EIA Regulations and listed activities[67] were published, which replaced the ECA Regulations and listed activities. The 2006 NEMA listed activities consisted of two lists, distinguishing between activities requiring a basic assessment process (lower threshold and impact activities – Listing Notice 1) and activities requiring a more extensive scoping and EIA process (higher threshold and impact activities – Listing Notice 2).[68] Subsequently, the 2006 NEMA listed activities were amended by at least two

[64] For example, 'the construction or upgrading of- (a) facilities for commercial electricity generation and supply' after 8 September 1997 required an environmental authorization, whereas 'the change of land use from - (a) residential us to industrial or commercial use' only required an environmental authorization if it commenced after 1 April 1998. The ECA listed activities were amended at least four times between 1997 and 2002.
[65] NEMA s 24(1).
[66] NEMA s 24(2)(a).
[67] GNR 385 contained the EIA Regulations, GNR 386 contained activities for which a basic assessment process was required and GNR 387 contained activities for which a full EIA process (which is more extensive than a basic assessment process) was required. All three notices were published on 21 April 2006.
[68] GNR 386 and GNR 387 of 21 April 2006, which commenced on 3 July 2006 in terms of GNR 612 *GG* 28938 of 23 June 2009.

notices in 2009.[69] On 2 August 2010, new NEMA EIA Regulations and listed activities were published, replacing those published in 2006.[70] A third list was added containing activities requiring a basic assessment process based on their geographical location or proximity to sensitive areas ('Listing Notice 3'). In the same year, corrections were published to the 2010 EIA Regulations and listed activities,[71] and further amendments were effected in 2013.[72] In 2014 new EIA Regulations and listed activities were published,[73] which were substantially amended in 2017,[74] and again amended in 2018,[75] 2020,[76] and 2021.[77]

Table 3.1 below illustrates the changes over time and includes when: the ECA commenced; the ECA Regulations and listed activities were published and amended; when NEMA commenced and was amended; and when NEMA EIA regulations and listed activities were published, amended, or replaced (up to the date of writing of this chapter). This Table does not illustrate all the amendments to the ECA or NEMA, or Regulations, notices or other activities published in terms of NEMA. Still, it intends to highlight changes to the EIA Regulations and listed activities to illustrate the difficulty many changes create. For example, several other listed activities were also published under the ECA in sensitive areas.[78]

Table 3.1: Timeline of select ECA and NEMA publications

No	Date	Notice No	Event/change summary
1.	9 Jun 1989	GN 1188	ECA commenced[79] and was amended sixteen times between 1991 and 2009.
2.	5 Sept 1997	GNR 1184	Competent authorities designated in provinces to issue environmental authorisations.

[69] The EIA Regulations in GNR385 commenced on 3 July 2006 in terms of GNR612; GNR613 and GNR614 of 23 June 2006, respectively amended GNR386 and 387 in terms of which the commencement of the listed activities regarding prospecting and mining was suspended. GNR971 of 9 October 2009 amended GNR387 and GNR719 of 3 July 2009 amended aspects of GNR386 and 387 in so far as certain waste management activities were removed from GNR386 and 387 and included in GNR718 published under the Waste Act on 3 July 2009.
[70] GNR543, 544, 545 and 546 published on 18 June 2010, which commenced on 2 August 2010 in terms of GNR 660 to 664 *GG* 33411 of 30 July 2010. Corrections were made to the EIA regulations in GNR 1159 of 10 December 2010, deemed to have taken effect on 2 August 2010.
[71] GNR 1159 of 10 December 2010, deemed to have taken effect on 2 August 2010.
[72] GNR 922 and GNR 923 of 29 November 2013.
[73] GNR 982, 983, 984 and 985 of 4 December 2014.
[74] GN324, 325, 326 and 327 of 7 April 2017.
[75] GN706 of 13 July 2018.
[76] GN599 of 29 May 2020.
[77] GN517 of 11 June 2021.
[78] For example, the identification of activities which may have a detrimental effect on the environment: Outeniqua Sensitive area, GN 1526 *GG* 19493 of 27 November 1998; or in the Pennington and Umtanvuna Sensitive Areas in GN 1529 *GG* 19494 of 27 November 1998
[79] GN 1188 *GG* 11927 of 9 June 1989.

Table 3.1: Timeline of select ECA and NEMA publications			
No	**Date**	**Notice No**	**Event/change summary**
3.		GNR 1182 and GNR 1183	ECA Regulations and listed activities published.[80]
4.	27 Mar 1998	GNR 448	ECA listed activities amended (deletion of items 2(a) and (b) of Schedule 1.
5.	17 Oct 1997	GNR 1355	ECA listed activity notice amended to clarify that GNR 1182 does not apply to an activity commenced before the commencement date indicated in GNR 1182.
6.	11 Dec 1998	GNR 1645	ECA Regulations (regulation 4) amended.
7.	29 Jan 1999	Proc 8	NEMA commenced (it has subsequently been amended ten times (so far)).
8.	12 May 2000	GNR 467	ECA- designation of Gauteng local authority who may issue authorisations.
9.	10 May 2002	GNR 670	ECA listed activities amended – several activities were amended, and four definitions were added.
10.		GNR 672	ECA Regulations amended (regulations 3A, 4, 9 and 10).
11.	7 Jun 2002	GNR 783 and GNR 782	ECA Regulations and listed activity correction notices of preceding amendment.
12.	7 Jan 2005	Proc R1 of 6 January 2005	Section 24F inserted into NEMA, which provides for the offence when commencing with a listed activity without approval.
13.	23 Jun 2006	GNR 614	NEMA listed activities in GN 387 were amended in that activities 7 and 8 did not commence with the rest of the activities.
14.		GNR 613	NEMA listed activities in GN 386 were amended in that activities 8 and 9 did not commence with the rest of the activities.
15.	3 Jul 2006	GNR 385, 386 and 387 (commencement in GNR 612 of 23 June 2006)	NEMA EIA Regulations and listed activities published, which replaced the ECA Regulations and listed activity notices.
16.		GNR 719	NEMA listed activities amended by removing seven activities from GNR 836 and six activities from GR 387 relating to waste management; these were moved to the list of waste management activities published under the Waste Act.
17.	9 Oct 2009	GNR 971	NEMA listed activities amended- activity 1(i) in GNR 387.
18.	18 Jun 2010	GNR 543, 544 and 545 and 546 (commencing on 2 August 2010)	NEMA EIA Regulations and listed activities were published to replace the 2006 EIA Regulations and listed activities. Listing Notice 3 – activities within specific geographical areas added. Its commencement date was subsequently determined as 2 August 2010 in GNR 660 to 664.
19.	30 Jul 2010	GNR 660 and GNR 664	NEMA EIA Regulations in GNR 543 were amended and the commencement date published.
20.		GNR 661, GNR 662 and GNR 663	NEMA listed activities in GNR 544, 545 and 546 to commence on 2 August 2010.
21.	10 Dec 2010	GNR 1159	NEMA EIA Regulations and listed activities corrections deemed to have taken effect on 2 August 2010.

[80] GN 1188 *GG* 11927 of 9 June 1989.

Table 3.1: Timeline of select ECA and NEMA publications			
No	**Date**	**Notice No**	**Event/change summary**
22.	29 Nov 2013	GNR 922	NEMA listed activities in Listing Notice 1 amended by adding two activities relating to the construction of facilities to treat effluent, wastewater, and sewerage with a daily throughput of 2000m^3 ≤15000m^3 or expansion, increasing the capacity by ≥15000m^3.
23.	29 Nov 2013	GNR 923	NEMA listed activities in Listing Notice 2 amended by adding activity 27 for the construction of facilities to treat effluent, wastewater, and sewerage with a daily throughput of ≥15000m^3.
24.	4 Dec 2014	GNR 982, 983, 984, and 985	NEMA EIA Regulations and listed activities replaced
25.	7 Apr 2017	GN 324, 325, 326 and 327.	NEMA EIA Regulations and listed activities amended
26.	13 Jul 2018	GN 706	Corrections were made to four regulations in the NEMA EIA Regulations, and Listing Notices 1 and 3 were amended
27.	29 May 2020	GN 599	Regulation 54A of the EIA Regulations was amended.
28.	11 June 2021	GN 517	Several EIA Regulations were amended, definitions amended in Listing Notices and some activities substituted

Without subscribing to expensive legislative databases that consolidate changes and reflect the law, the general public, entrepreneurs, small businesses, or small legal practices, would have difficulty following these changes. Moreover, these databases reflect the law as it currently is. To know of these changes over time either requires knowledge or experience or searching through old *Gazettes*. Table 3.1 above illustrates that at least thirty-five *Gazette* notices amended the listed activities over the last twenty-three years – this cannot assist legal certainty.

Comparatively, Table 3.2 below lists some differences between the ECA and NEMA regulations and listed activity notices. It illustrates the increase in regulation and activities requiring authorisation over time.

Table 3.2: Comparison between ECA and NEMA listed activities and regulation changes				
Observation	**1997**	**2006**	**2010**	**2014**
Number of listing notices:[81]	1	2	3	3
Number of activities:	27	72[82]	107[83]	122[84]
Number of pages of listed activities:	2	26	108[85]	210[86]
Regulations number of pages:	8	60	79	72

[81] Distinguishing between basic assessment or EIA activities, or activities in geographical areas based on environmental attributes.
[82] Comprising 46 activities in Listing Notice 1 and 26 activities in Listing Notice 2.
[83] Comprising 56 activities in Listing Notice 1, 25 in Listing Notice 2, and 26 in Listing Notice 3.
[84] Comprising 67 activities in Listing Notice 1, 29 in Listing Notice 2, and 26 in Listing Notice 3.
[85] Comprising 25 pages of Listing Notice 1, 11 pages of Listing Notice 2, and 72 pages of Listing Notice 3.
[86] Comprising 31 pages of Listing Notice 1, 14 pages of Listing Notice 2, and 165 pages of Listing Notice 3.

Table 3.2: Comparison between ECA and NEMA listed activities and regulation changes				
Observation	**1997**	**2006**	**2010**	**2014**
Number of regulations:	13	87	79	57 with 7 Appendices prescribing the requirements of different reports
Notable additions:	-	-	Listing Notice 3 added	Regulations reduced, but several appendices added

One example of the changes to the listed activity descriptions is the activity relating to 'dangerous goods storage', first introduced in 1997 and described as-

> Activity 1(c): The construction or upgrading of-(c) transportation routes and structures, and manufacturing, storage, handling, or processing facilities for any substance which is dangerous or hazardous and is controlled by national legislation.[87]

The above activity description was amended in 2002[88] and reintroduced with a different description, threshold, and defined terms under the 2006 NEMA listed activities.[89] In 2006, the activity (for the first time) contained a volume threshold trigger; requiring a basic assessment process for above-ground storage 'with a combined capacity of more than 30 m^3 but less than 1 000m^3 at any one location or site' or a scoping and environmental impact assessment for storage exceeding 1 000m^3.[90]

In 2010, the activity description was amended to include 'handling' and not only storage; it applied to any storage and not only 'above ground' as per the 2006 description. The threshold trigger was changed to requiring a basic assessment process for a capacity of '80 but not exceeding 500m^3' and above 500m^3 for a scoping and environmental impact assessment process.[91] The volume threshold trigger was lowered in 2010, indicating the uncertainty in the volumes to be regulated, which may result in significant detrimental environmental impacts. Also, in 2010, a similar but lower threshold activity, i.e., between 30 and 80m^3, was introduced

[87] This activity commenced on 2 March 1998, GN R1183 *GG* 18261 of 5 September 1997.
[88] Amended by GNR 670 *GG* 23401 of 10 May 2002 as 'The construction, erection or upgrading of- (c) with regard to any substance which is dangerous or hazardous and is controlled by national legislation:
(i) infrastructure, excluding road and rail, for the transportation of any such substance; and
(ii) manufacturing, storage, handling, treatment, or processing facilities for any such substance.'
[89] GNR 386 and 387 *GG* 28753 of 21 April 2006, which commenced on 3 July 2006 GNR 612 *GG* 28938 of 23 June 2009.
[90] Listing Notice 1, Activity 7 and Listing Notice 2, Activity 1(c) respectively.
[91] Listing Notice 1, Activity 13 and Listing Notice 2, Activity 3 respectively.

in Listing Notice 3, subject to the area in which the activity was undertaken. The 'dangerous goods' activity was amended (at least) three more times in 2010,[92] 2014[93] and 2017.[94]

In addition, 'dangerous goods' was not a term defined in the ECA listed activities. A definition was introduced in 2006[95] and was also amended twice after that.[96] This example of the 'dangerous goods storage' activity and its threshold triggers is one of many changes to listed activities over time. The changes result in different requirements applying to the same infrastructure depending on its construction date. At face value, this may not seem problematic. However, in the researcher's experience,[97] authorities often apply the current statutory requirements to a facility built at a completely different time, requiring clarification when responding to authority enforcement action, making such authority action unnecessary. These practical challenges demonstrate why any proposed changes to the law should be viewed through a more critical lens. Before a statutory amendment is effected, the law-maker should consider its importance, the environmental benefit of the change, and if the frequency of changes will result in uncertainty and inconsistent enforcement or confusion in enforcement. Such frequent and varied changes do not provide legal certainty to the regulated community.

As a result of frequent and many changes, particularly for operating facilities, small businesses, or sole proprietors, establishing the approval triggers becomes a specialist endeavour. Ignoring the presumption against retrospectivity could result in a person admitting to a contravention where none was committed. The frequent amendment of listed activities complicates this process, resulting in a knock-on effect of complicating enforcement action. Many people are unaware of all the *Gazette* publications. Knowledge of the information illustrated in Tables 3.1 and 3.2 above becomes complicated by the number of publications.

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[92] GNR 543, 544, 545 and 546 *GG* 33306 of 18 June 2010, which commenced on 2 August 2010 GNR 660 to 664 *GG* 33411 of 30 July 2010.
[93] GNR 982, 983, 984 and 985 *GG* 38383 of 4 December 2014.
[94] GNR 326, 327, 329 and 329 *GG* 40772 of 7 April 2017.
[95] In GNR 386 and 387 *GG* 28753 of 21 April 2006, which commenced on 3 July 2006 GNR 612 *GG* 28938 of 23 June 2009 'Dangerous goods' was defined to mean 'goods that are capable of posing a significant risk to the health and safety of people or the environment and which are listed in South African National Standard ('SANS') No. 1 0228 designated "The identification and classification of dangerous goods for transport", SANS 10228:2003, edition 3, published by Standards South Africa ('SABS'), ISBN 0-626-1441 7-5, as may be amended from time to time.'
[96] GNR 543, 544, 545 and 546 *GG* 33306 of 18 June 2010, which commenced on 2 August 2010 GNR 660 to 664 *GG* 33411 of 30 July 2010 and corrected in GNR 1159 *GG* 33842 of 10 December 2010 to be 'goods containing any of the substances as contemplated in SANS 10234, supplement 20081.00: designated "list of classification and labelling of chemicals in accordance with the Globally Harmonized Systems (GHS) published by SABS, and where the presence of such goods, regardless of quantity, in a blend or mixture, causes such blend or mixture to have one or more of the characteristics listed in the Hazard Statements in s 4.2.3, namely physical hazards. health hazards or environmental hazards.'
[97] The researcher's experience of more than ten years in environmental law practice.

The frequent legislative changes also need to be understood by prosecutors and officers presiding over criminal matters, who would need to similarly consult with specialists and/or consolidate all relevant *Gazette* publications to determine what applies.

3.2 Air Quality Act

The list of APPA activities requiring approval appear in its Schedule 2, which was amended twelve times between 1966 and 1997. Schedule 2 started with 28 scheduled processes in 1966 and ended with 72 scheduled processes before the Air Quality Act commenced. The Air Quality Act's list of activities requiring an atmospheric emissions licence was published on 31 March 2010,[98] establishing ten categories with several subcategories of activities that may have a significant detrimental effect on the environment or health. This list also contains minimum emission standards to be achieved by new and existing plants.[99] The Air Quality Act's listed activities are different from those under NEMA because of their nature as atmospheric pollution activities. These activities are not triggered by 'commencement' but are linked to 'conducting' such an activity. Section 22 of the Air Quality Act prohibits any person from conducting a listed activity without an atmospheric emissions licence. Conducting a listed activity without a licence is a criminal offence.[100]

The Air Quality Act list was replaced and repealed on 22 November 2013[101] and after that was amended four times, in 2015, 2018, 2019 and 2020, respectively,[102] as illustrated in Table 3.3 below.

Table 3.3: Air Quality Act listed activity amendments

Date	Notice	Comment
31 Mar 2010	GN 248	Set out ten categories with a total of 59 subcategories of activities requiring a licence. It also contained regulations regarding its applicability, emissions measurements, compliance timeframes, the postponement of compliance timeframes, monitoring and reporting requirements.
22 Nov 2013	GN 893	Replaced the 2010 list, including additional subcategories, resulting in 69 listed activities requiring an atmospheric emissions licence, including ten

[98] GN 248 of 31 March 2010.
[99] GN 248, at the time of commencement of this list 'New plant' had to comply with the minimum emissions standards for new plant. 'Existing plant' must comply with the minimum emissions standards for Existing Plant within 5 years from the date of this notice, i.e., from 1 April 2015. 'Existing plant' must comply with minimum emission standards for new plant within 20 years of the date of publication of this notice, i.e., from 1 April 2020. The application of the minimum emissions standards could be postponed on approval as contemplated in Regulation 6 of GNR 248 at the time. GN 248 was replaced by GNR 893 of 22 November 2013.
[100] Air Quality Act s 51(1)(a).
[101] GN 893 of 22 November 2013.
[102] GN 551 of 12 June 2015; GN 1207 of 31 October 2018; GN 687 of 22 May 2019; GN 421 of 27 March 2020.

Table 3.3: Air Quality Act listed activity amendments		
Date	**Notice**	**Comment**
		additional processes not in the 2010 notice. This list also added several new definitions.
12 Jun 2015	GN 551	In 2015 amendments were made to activities under five of the categories of listed activities.
31 Oct 2018	GN 1207	Made substantive additions to the provisions regarding the postponement of compliance timeframes, amended and added to several listed activities, and provided substituted methods for sampling and analysis. Controversially increased the emission limits applicable to existing Solid Fuel Combustion Installation for sulphur dioxide from 500 mg/Nm^3 to 1000mg/Nm^3 without public consultation.
22 May 2019	GN 687 and GN 686	Withdrew the notice with the sulphur dioxide increase and published another notice inviting public comment on the proposed doubling to cure the deficiencies of the 2018 notice.
27 Mar 2020	GN 421	The Minister changed the sulphur limit for existing plants from 500mg/Nm^3 for sulphur to 1000mg/Nm^3.

In 2018 the Minister of Environmental Affairs doubled the sulphur dioxide limits[103] without public participation. It was only at the threat of litigation by civil society that this doubling was withdrawn,[104] but at the same time, public comments were invited in another notice on the same day for such a change.[105] Nevertheless, it appears that pressure from industry again resulted in the change being published in 2020,[106] making South Africa's sulphur dioxide laxer than other BRIC countries.[107] The DFFE's explanation of this is that 'neither Eskom nor Sasol, the major emitters of sulphur dioxide, meet current minimum standards for plants constructed before 2010' and given financial difficulties, neither could meet the (unamended) standards.[108] These changes illustrate that either (1) the regulators cannot make up their minds as to the acceptable standards; or (2) they bow to industry/political

[103] GN 1207 *GG* 42013 of 31 October 2018.
[104] GN 687 *GG* 42472 of 22 May 2019, Melissa Reitz 'Lobby group to fight state on doubling allowed emissions of sulphur dioxide' *BusinessDay* 9 May 2019 accessible at: *https://www.businesslive.co.za/bd/national/health/2019-05-09-lobby-group-to-fight-state-on-doubling-allowed-emissions-of-sulphur-dioxide/* CER 'Victory: Environment Minister withdraws illegally-doubled SO2 pollution standards' accessible at: *https://cer.org.za/news/victory-environment-minister-withdraws-illegally-doubled-so2-pollution-standards*
[105] GN 686 *GG* 42472 of 22 May 2019.
[106] GN 421 *GG* 43174 of 27 March 2020.
[107] CER 'Minister Creecy weakens sulphur dioxide pollution standards' 27 March 2020 accessible at: *https://cer.org.za/virtual-library/whats-new/minister-creecy-weakens-sulphur-dioxide-pollution-standards* and Paul Burkhardt 'Government doubles emission limits for sulphur dioxide' *BusinessDay* 30 March 2020 accessible at: *https://www.businesslive.co.za/bd/national/2020-03-30-government-doubles-emission-limits-for-sulphur-dioxide/*
[108] DFFE Media Release 'Cabinet approves amendment of sulphur dioxide minimum emission standards for coal combustion installations – mainly power generation existing plants' 27 March 2020 accessible at: *https://www.environment.gov.za/mediarelease/creecy_emmissionstandards_amendmentpromulgated_sulpurdioxide_combustioninstallation*

pressure; or (3) sufficient mechanisms and safeguards were not put in place since the promulgation of the listed activities in 2010 to achieve the targets set for 2020; or (4) the ten-year target established in 2010 was never attainable.

The Air Quality Act must be read with the NEMA provisions, and its application and interpretation must be guided by the NEMA s 2 principles.[109] A NEMA environmental authorisation is also generally required for activities that require an atmospheric emissions licence. That is, developing facilities for any process or activity requiring approval 'in terms of national or provincial legislation governing the generation or release of emissions, pollution or effluent',[110] which requires a scoping and environmental impact assessment process. An integrated approval process can be followed.[111]

The changes relating to the Air Quality Act may not appear as extensive as the NEMA changes above. However, this adds to the legislative changes that regulated facilities must consider to ensure compliance. It also adds to the load of notices that authorities, prosecutors, and magistrates must consider when taking enforcement action, prosecuting or adjudication, particularly when imposing criminal sanctions.

3.3 Waste Act

The ECA regulated waste activities by requiring a permit for a waste disposal site.[112] This minimalistic regulation changed extensively with the commencement of the Waste Act on 3 July 2009. Similar to the approach taken under NEMA and the AQA, the Waste Act lists activities requiring a waste management licence.[113] The original list distinguished between Category A and B activities, the latter requiring a full EIA process, whereas the former only required a basic assessment process. It also contained 31 different waste management activities within several subcategories, covering storage, re-use, recovery, recycling, treatment, and waste disposal. Commencing, undertaking or conducting a listed waste management activity without a licence is a criminal offence.[114]

[109] Air Quality Act s 5.
[110] Listing Notice 2, listed activity 5 in GN R984 *GG* 38282 of 4 December 2014 as amended.
[111] NEMA s 24L.
[112] ECA defined a 'disposal site' as 'a site used for the accumulation of waste with the purpose of disposing or treatment of such waste.' The ECA listed activities also listed 'The disposal of waste in terms of s 20 of the Environment Conservation Act, 1989' as an activity requiring authorization under s 21 of ECA - Activity 7 in GNR 1182 *GG* 18261 of 5 September 1997 which commenced on 8 September 1998.
[113] GN 718 *GG* 32368 of 3 July 2009.
[114] Waste Act ss 20 and 67(1)(a).

On 29 November 2013, the 2009 list was replaced[115] and amended in 2014, 2015 and 2017, respectively.[116] The 2013 list provided for 'norms and standards' activities (as a new category) that no longer trigger the need for a waste management licence but instead require compliance with certain norms and standards. Table 3.4 below illustrates the changes in the approval requirements for listed waste management activities.

Table 3.4: Waste Act listed activity amendments

Date	Notice	Comment
3 Jul 2009	GN 718	List of waste management activities that have or are likely to have a detrimental effect on the environment, containing 20 Category A activities requiring a basic assessment process and 11 Category B activities requiring an EIA process. It also included a listed activity for the 'remediation of contaminated land' – removed on 2 May 2014.
29 Nov 2013	GN 921	Replaced the previous list; it contained 14 Category A activities and 10 Category B activities. It introduced Category C activities, relegating previous activities under Categories A and B as 'norms and standards' activities that no longer needed licences. Category C lists 5 activities. It also removed effluent treatment-related activities from the waste licensing regime, moving it back to the NEMA regime where it was previously regulated. The rationale for this backwards and forwards is unclear.
2 May 2014	GN 332	This notice made a deletion to Category A, activity 3(8) – removing the 'remediation of contaminated land' because the provisions in the Waste Act itself commenced on 2 May 2014.
24 Jul 2015	GNR 633	This notice added waste management activities to the list, requiring licences for residue stockpiles and residue deposits.
11 Oct 2017	GN 1094	This notice repealed Category A, Activity 3(2) and substituted the category C part of the list, containing 6 'norms and standards' activities.

Some notable changes include relegating certain listed activities from licensing to 'norms and standards' activities. The legislator is empowered to categorize activities and indicate which do not require a licence but can be regulated by subjecting them to compliance with standards.[117] The description and nature of the relegated activities, the processes involved (i.e., storage, treatment or disposal), and the likelihood of causing lower environmental impacts explain its 'downgrading'.[118] Category C norms and standards activities predominantly include waste storage activities and particular recycling or recovery activities. In contrast, waste treatment or disposal would generally trigger a licence - if the stipulated capacity thresholds

[115] GN 921 of 23 November 2013.
[116] GN 332 of 2 May 2014; GN 633 of 24 July 2015; and GN 1094 of 11 October 2017.
[117] Waste Act ss 19(3)(a) and 19(9).
[118] For example, the storage of general waste exceeding 100m3 (with certain exclusions) is a norms and standards activity that no longer needs a licence – Category C, Activity (1). Whereas the storage of 'general waste in lagoons' requires a licence – Category A, Activity (1).

are triggered. However, it is unclear why activities were only relegated to norms and standards activities in 2013 and not identified as such from the outset.

Another significant aspect is the change in the regulation of contaminated land, in Chapter Four, Part Eight of the Waste Act - which took effect on 2 May 2014 (five years after the Waste Act commenced).[119] An owner of significantly contaminated land, or a person who caused the significant contamination, must notify the authority thereof as soon as they become aware of it.[120] An assessment of the pollution in the soil, and if it exceeds the prescribed soil screening values, together with an analysis of background soil quality and the risk to receptors, are relevant to determining whether the land is significantly contaminated.[121] If it is concluded that the land is significantly contaminated, the authorities issue a remediation order.[122] Additional restrictions apply to contaminated land, including that no person may transfer such land without informing the person to whom that land is to be transferred that the land is contaminated and, in the case of a remediation site, without notifying the authorities and complying with any conditions specified by the authorities.[123]

As summarised in the Table above, when the list of waste management activities was published on 3 July 2009, it included the 'remediation of contaminated land' as a listed activity requiring a licence. When the contaminated land provisions of the Waste Act commenced on 2 May 2014, that listed activity was removed. This change illustrates how the same activity could be regulated differently depending on the moment in time. In other words, from 3 July 2009 to 1 May 2014, 'remediation of contaminated land' required a licence. However, the operative provisions in the Waste Act and the norms and standards for determining (and remediating) contaminated land were only published in 2014. From 2 May 2014, this activity no longer required a licence, but the provisions in Chapter Four, Part Eight of the Waste Act applied.

Another example is the backwards and forwards in listing effluent treatment activities as NEMA activities, then moving it to Waste Act activities in 2009, and moving it back to NEMA activities in 2013. These are just some examples of additional changes within the Waste Act regime, adding to the collection of potentially relevant requirements to be considered by the

[119] Proc 26 *GG* 37547 of 11 April 2014.
[120] Waste Act s 36(5).
[121] Published in the National Norms and Standards for the Remediation of Contaminated Land and Soil Quality GN 331 of 2 May 2014, and Waste Act s 37.
[122] Waste Act s 39.
[123] Waste Act s 40.

regulated community, authorities, prosecutors, and magistrates in compliance and enforcement action.

3.4 National Water Act

It is an offence to use water other than as permitted under the National Water Act.[124] Section 21 of the National Water Act lists water uses that require a water use licence. A water use licence is not needed for the limited domestic and business-related water uses listed in Schedule 1 (this includes effluent discharge into a municipal system).[125] A water use licence is also not required for an existing lawful water use, which was undertaken at any time during two years immediately before the National Water Act's commencement date (1 October 1998), and authorised by any law in force before this date.[126] A licence is also not required where the authority publishes a General Authorisation ('GA') for specific water resource uses within particular areas.[127]

GAs are published to generally authorise specific water uses in specified areas and within certain limitations, removing the need for a more extensive licensing process.[128] The notices containing the generally authorised water uses require registration with the relevant authority.[129] Several GAs have been published since 2004, intended for specific periods. These have been amended or extended over time (as illustrated in Table 3.5 below). The applicability of a GA depends on several factors, including the nature, circumstances, and location of the water use undertaken, at a point in time, within the limitations stipulated in each GA. If the GAs are amended, a person whose water use was covered would have to re-assess their water use's continued lawfulness. Pivoting from the s 21 water uses in the National Water Act, Table 3.5 below illustrates the number of changes to the GAs over several years.

[124] National Water Act s 151(1)(a).
[125] National Water Act s 22(1)(a)(i) read with Schedule 1.
[126] National Water Act s 32.
[127] National Water Act s 39.
[128] National Water Act, Chapter Four, Part Six.
[129] See, for example, regulation 7 of GN 538 of 2 September 2016, regulation 13 of GN 509 of 26 August 2016, regulations 1.8, 2.9, 3.11, 3.12 and 4.7 in GN 665 of 6 September 2013, extended by GN 383 of 12 July 2019.

Table 3.5: Changes to the published GAs for specific water uses						
Section 21 Water Use	**1999**	**2004**	**2009**	**2010**	**2012/13**	**2016**
(a) taking water from a water resource and (b) storing water.	GN1191 5-year validity	GN399 5-year validity	GN313[130]	GN837[131]	GN970[132]	GN538[133] effective 20 years
(e) engaging in a controlled activity identified as such in s 37 (1) or declared under s 38 (1)	GN1191[134]	GN399 5-year validity	GN313	GN864[135]	GN94[136] replaced by GN665[137]	GN383[138]
(f) discharging waste or water containing waste into a water resource through a pipe, canal, sewer, sea outfall or other conduit.	GN1191 5-year validity	GN399 5-year validity	GN313	GN864	GN94 replaced by GN665	GN383
(c) impeding or diverting the flow of water in a watercourse. (i) altering the bed, banks, course, or characteristics of a watercourse.	-	GN398 5-year validity	GN314[139] replaced by GN1198[140] and 1199	-	GN94	GN509[141] effective 20 years
(g) disposing of waste in a manner which may detrimentally impact on a water resource.	GN1191 5-year validity	GN399 5-year validity	GN313	GN864	GN94 replaced by GN665	GN383
(h) disposing in any manner of water which contains waste from, or which has been heated in, any industrial or power generation process.	GN1191 5-year validity	GN399 5-year validity	GN313	GN864	GN94 replaced by GN665	GN383
(j) removing, discharging, or disposing of water found underground if necessary for the efficient continuation of	-	GN398[142]	-	-	Replaced by GN665	GN383

[130] Dated 20 March 2009 extending its application to 1 Oct 2010.
[131] Dated 23 Sept 2010 extending its application to 30 June 2012.
[132] Dated 30 Nov 2012 extended its application.
[133] Dated 2 Sept 2016 replaced GN 399 and GN 970.
[134] Extended in GN 1288 to 7 Feb 2003; GN 1163 to 8 Feb 2004; GN 123 to 27 Feb 2004; GN 256 to 26 March 2004.
[135] Dated 29 Sept 2010 extending its application to 1 April 2011.
[136] Dated 11 Feb 2013 extending its application to 3 Sept 2013.
[137] Dated 6 Sept 2013.
[138] Dated 12 July 2019 extending its application until a new GN is published.
[139] Dated 20 March 2009 extending its application to 31 December 2009.
[140] Dated 18 December 2009. GA in terms of National Water Act s 39, ss 21(c) and (i) for the purpose of rehabilitating a wetland for conservation purposes.
[141] Dated 26 Aug 2016 replaced GN 1199 .
[142] Dated 26 March 2004.

Table 3.5: Changes to the published GAs for specific water uses						
Section 21 Water Use	**1999**	**2004**	**2009**	**2010**	**2012/13**	**2016**
an activity or the safety of people.						

Table 3.6 below contains an example of the GA changes applicable to the ss 21(a) and (b) water uses, i.e., taking water from a water resource and storing water. The Table shows where the change was insubstantial or merely extended the validity of the authorisation.

Table 3.6: Example changes to the GA for s 21(a) and (b) water uses, i.e., taking water from a water resource and storing water		
Date	**Notice**	**Summary of change**
8 Oct 1999	GN 1191	Introduced: Applied only to surface or groundwater abstraction in drainage regions not excluded in the notice. Not applicable to government water control areas published under the preceding Water Act, to persons who do not have lawful access to a waterwork or water resource or wetlands, the dewatering of mines or storage of water underground. Valid for five years.
26 Mar 2004	GN 399	Substantial change: Replaced GN 1191. Valid for five years.
20 Mar 2009	GN 313	Extension: GN 399 extended to 1 October 2010.
23 Sept 2010	GN 837	Extension: GN 399 extended to 30 June 2012.
30 Nov 2012	GN 970	Extension: GN 399 until it is withdrawn.
2 Sept 2016	GN 538	Substantial change: Replaced GN 399. Valid for 20 years.

As illustrated above, three of the notices extended the validity of this GA because it was issued with specific validity periods (five years or less). Notably, the penultimate notice above extended it indefinitely. In comparison, the last amendment stipulated a validity period of twenty years. The reasons for the validity periods are unclear nor explained in the notices (and fall outside the scope of this research).

As mentioned, the above GA (GN 1191) was first published on 8 October 1999 and substantively amended on 26 March 2006 (GN 399) and 2 September 2016 (GN 538). Some of the substantive amendments in GN 399 and GN 538 are summarised below.

The s 21(a) and (b) water uses in GN 399 are about four pages longer than its predecessor. GN 399 added two additional exclusions to the application of the GA, i.e., it would also not apply to ‘an exclusion zone of 750 metres inland from the high-water mark’ or ‘an area where the limits of taking and storage of water were reduced’. A definition for ‘small industrial users’ was added, and a new s 1.7 solidified that- persons with lawful access to land might also rely on this GA. GN 399 changed the areas excluded from the notice; for example, certain drainage regions in the Vaal river region were no longer excluded from the GA’s ambit.

GN 538 contains only the GA for s 21(a) and (b) water uses, whereas the previous notices contain other s 21 water uses. This notice is more extensive than the prior notices (34 pages compared to the previous eleven), indicating a more detailed and somewhat different approach with an added explanatory note with some contextual clarification. GN 538 includes seven new defined terms, different from the four previously defined terms, also indicating a changed approach. Its structure is different and more descriptive when compared to its predecessor. It includes provisions regarding the 'relation to other entitlements to take or store water' and 'payment of charges' not previously included. GN 538 contains fewer exclusions than its predecessor; its application is excluded where (1) water is taken within 500m from the delineated edge of a wetland, pan or estuary, and (2) no groundwater can be taken within (a) 500m from the boundary of a wetland or estuary, (b) 100m from the edge of a watercourse or state dam, (c) 500m of a state dam wall or (d) 500m from the high-water mark of the ocean. Notably, this GA does not list the excluded areas (as its predecessors did). It lists only the surface and groundwater abstraction, storage volumes, and rates specified for different water catchments.

Tables 3.5 and 3.6 also illustrate the complexity of the regulatory framework facilities operate in, and which authorities must apply. Determining the application of these notices at particular points in time is a specialist endeavour.

3.5 What explains the frequent changes?

Looking at the above sample of amendments, some appear excessive, for example, the 27 ECA and NEMA amendments illustrated in Table 3.1. The relegation of some Waste Act activities in later years indicates that perhaps licensing requirement, initially required, was an unnecessary mode of regulation.

Several factors could explain the frequency of the changes and amendments outlined above. It may be that omissions or inadequate regulation in earlier versions of laws, regulations or notices only became apparent through practical application. A more developed understanding of activities with environmental impacts, which justify approval requirements, may have led to some of these amendments. Changes in government officials or policy may also result in changes to the approach and, consequently, the law or regulation. Insufficient or selective public participation (or private sector lobbying) could also lead to limited or inadequate regulation.

Chapter Five captures research participants' comments on the frequent legislative changes and how it impacts enforcement. Some participants explained that amendments might be required and justifiable based on technological advancement. However, technological advancement cannot be the sole reason or justification for the frequency of amendments illustrated in this chapter. Other participants shared concerns about requirements not being practical/implementable rather than highlighting frequent amendment as a concern. One participant wondered whether officials are measured against inappropriate performance targets, i.e., the impression is created that officials chase targets to achieve a particular number of publications in a year. This may seem like an unusual comment made by a single participant, but it cannot be dismissed without investigation; and may require further research, particularly considering the different frequency and volume of amendments across different environmental laws.

Several enforcement officials affirmed that frequent changes in the law make compliance and enforcement difficult. Because this research involves interviews with enforcement officials and not those responsible for legislative drafting, the input on possible explanations for these frequent legislative changes is limited and falls outside the parameters of this research.

4. PRESCRIBED PENALTY CHANGES

4.1 Failing to obtain approvals

This part tests the theory mentioned in the introduction that 'South Africa's penalties are far too low to discourage lawbreakers'.[143] It considers the increases in the penalty amounts in the four laws for the failure to obtain an approval; in doing so, reference is also made to penalties in the preceding laws to contextualize the increases over time. Table 3.7 below summarizes the penalty amount increases in the four laws over time.

Table 3.7: Increased penalty amounts for failure to obtain approval - in ZAR based on dates

Act	21 Apr 1965	4 Apr 1973	9 June 1989	3 April 1991	8 Sept 1997	1 Oct 1998	7 Jan 2005	1 July 2009	18 Sep 2009	1 April 2010	18 Dec 2013	27 Mar 2014
Environmental Impact Activities												
ECA					R100 000				R5 m			
NEMA							R5 m				R10 m	
Waste Activities												
ECA			R100 000						R5 m			
Waste Act								R10 m				
Air emissions activities												

[143] The Portfolio Committee on Environmental Affairs and Tourism op cit note 17.

Table 3.7: Increased penalty amounts for failure to obtain approval - in ZAR based on dates												
Act	21 Apr 1965	4 Apr 1973	9 June 1989	3 April 1991	8 Sept 1997	1 Oct 1998	7 Jan 2005	1 July 2009	18 Sep 2009	1 April 2010	18 Dec 2013	27 Mar 2014
APPA	R200	R500							R5 m			
Air Quality Act										R5 m		
Water uses												
Water Act				R50 000								
National Water Act						R100 000						R200 000

The figure below illustrates the same information in a graph form, i.e., the changes in the prescribed penalty amounts in the four laws over this period. The increased penalty amounts and differences over time (in some of the laws) are noticeable in the graph below.

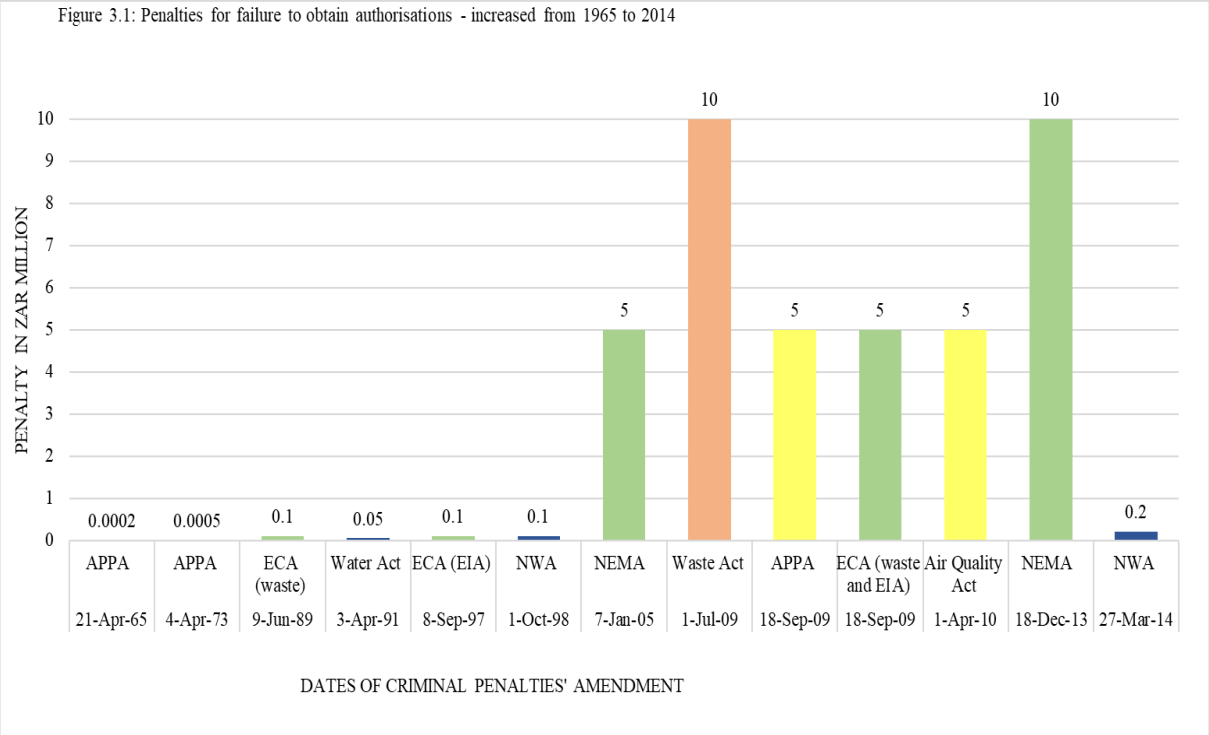


Table 3.7 above shows that:

- The offence of commencing a listed activity without an environmental authorisation, under the ECA and after that the NEMA, saw a significant increase in the maximum penalty amount, from R100,000 in ECA (applicable from 8 September 1997[144]) to

[144] GN R1182 *GG* 18261 of 5 September 1997, the first set of activities requiring authorisations commenced with effect from 8 September 1997.

R5 million on 7 January 2005[145] and R10 million under NEMA from 18 December 2013[146] onwards. Thus, the penalty increased a hundred-fold in sixteen years.

- The penalty for the offence of failing to obtain a registration certificate under APPA was R200 on 21 April 1965,[147] increased to R500 on 4 April 1973[148] and R5 million on 18 September 2009.[149] When the Air Quality Act commenced on 1 April 2010,[150] it included a penalty amount of R5 million for the failure to have a licence. This increase is 10,000-fold over 36 years.

- The offence of failing to obtain a waste permit or licence under ECA from 9 June 1989[151] could have resulted in a maximum penalty amount of R100,000. From 1 July 2009,[152] the equivalent potential maximum penalty amount is R10 million in the Waste Act. This increase is 100-fold over 20 years.

- For some water use related offences, the maximum penalty amount in 1991 (for a first conviction) was a fine of R50,000 in terms of the 1956 Water Act.[153] Under the National Water Act, which commenced on 1 October 1998,[154] the possible penalty was five years imprisonment. Because no monetary penalty was stipulated, it has to be calculated based on the Adjustment of Fines Act,[155] in terms of which the fine in 1998 was R100,000. From 27 March 2014, the potential maximum penalty amount doubled, to

[145] The National Environmental Management Amendment Act 8 of 2004 s 3 and Proc R1 *GG* 27161 of 6 January 2005. On 7 January 2005 amendments to NEMA s 24 took effect, which included as s 24F the provision that it is an offence to commence with a listed activity without authorisation (ss 24F and 24G).
[146] Amended by s 25 of Act 30 of 2013 w.e.f. 18 December 2013.
[147] APPA s 46.
[148] The Atmospheric Pollution Prevention Amendment Act 17 of 1973 s 20 *GG 3836* of 4 April 1973.
[149] The National Environment Laws Amendment Act 14 of 2009 s 2 and Proc 65 *GG 32580* of 18 September 2009.
[150] The commencement date of the repeal and transitional provisions of the Air Quality Act by GN 220 *GG* 33041 of 26 March 2010.
[151] The ECA's date of commencement and s 29(4).
[152] The Waste Act's date of commencement in Proc 34 *GG* 32189 of 30 April 2009, and in terms of Waste Act ss 20, 67(1)(a) and 68(1).
[153] 1956 Water Act s 170(2), which was amended by Act 108 of 1977, Act 96 of 1984, Act 68 of 1987 and Act 16 of 1991.
[154] The commencement date of the National Water Act by Proc 95 on 25 September 1998.
[155] Section 1(1)(a) the Adjustment of Fines Act read with s 92(1)(b) of the Magistrates Court Act which provides that a district court (i.e., Where the court is not the court of a regional division) can impose a sentence of a sentence of imprisonment for a period not exceeding three years, and a regional court can impose imprisonment not exceeding 15 years. GN 1411 of 30 October 1998 determines that the fine a court can impose is 'R60,000 where the court is not the court of a regional division, and 300 000 where the court is the court of a regional division'.

R200,000 for a first conviction and R400,000 for a second conviction.[156] In comparison with the other Acts, the National Water Act potential maximum penalty amounts are significantly lower.

In addition to the penalty changes above, further notable aspects regarding the criminal sanctions are discussed below.

4.1.1 The increase of historical ECA penalties in 2009

A notable inclusion, in Table 3.7 and the Figure above, is that on 18 September 2009, the ECA maximum penalty for the failure to obtain a waste disposal site permit or environmental authorisation was increased to a maximum fine of R5 million or five years imprisonment (for a first conviction).[157] This increase is somewhat strange because it could only apply to listed activities commencing between 8 September 1997 and 23 June 2006, whereafter new NEMA listed activities applied. The penalty at the time of committing the criminal offence would apply, i.e., for the failure to commence with ECA listed activities from 1997 to 2006. This amendment in 2009 (to increase the maximum penalty amount) appears to have limited (if any) effect. The Bill of Rights provides an accused person with the right 'to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing'.[158]

If an activity were unlawful between the dates the ECA applied (i.e., in the case of waste disposal between 9 June 1989 and 1 July 2009, and in the case of environmental activities between 8 September 1998 and June 2006), the lesser ECA offence, i.e., R100,000 or ten years imprisonment would apply. It is unclear how an increased penalty amount in 2009 would apply. It appears that the law was amended to reflect the values of the day. However, those cannot apply to crimes in the past.

[156] The Adjustment of Fines Act and Magistrates Court Act ibid and GN 217 *GG 37477* of 27 March 2014, which determines that the fine a court can impose is 'R120 000 where the court is not the court of a regional division, and R600 000 where the court is the court of a regional division'.
[157] The National Environment Laws Amendment Act 14 of 2009 and Proc 65 *GG* 32580 of 18 September 2009. On a second and further convictions a R10 million fine or ten years imprisonment (or both) could be imposed.
[158] The Constitution s 35(3)(n).

4.1.2 Factors that may have influenced the increases

Inflation could be a driver behind the increased penalties. Using an inflation calculator, the ECA penalty of R100 000 in 1997 would have an estimated value of R342 346.01 in 2021.[159] This value is *significantly lower* than the NEMA or Waste Act maximum penalties of R10 million. With inflation, the APPA penalty in 1973 of R500 would amount to R30 142,74 in 2021,[160] also *significantly lower* than the R5 million Air Quality Act maximum penalty. The National Water Act penalty of R100,000 in 1998 would equal R320,892.30 in 2021, which is *higher* than the maximum prescribed penalty of R200,000.[161]

Although the discrepancies between the old and new maximum prescribed fines, as illustrated above, appear significant, inflation cannot be the only factor relevant to the penalty increases. Other factors that may have played a role in these increases include a general heightened societal concern for sustainability and environmental protection, the importance of environmental protection, and the need to deter offenders. As previously explained, the ambit of this research involved interviews with participants who focus on compliance and enforcement and did not involve officials responsible for law reform. Thus, considering the logic or reasoning for the maximum penalty increases, or the lack thereof in the National Water Act, forms part of a different inquiry. It is, nevertheless, useful to illustrate the differences between the initial and current potential maximum penalties in considering overcriminalization. The penalty amounts are relevant to considerations of (at least) proportionality and just desert.

As illustrated above, the maximum prescribed penalty under the National Water Act is staggeringly lower than the other environmental laws' penalties. The penalty increase has not even taken inflation into account. There can be no argument that the prescribed penalty is adequate, considering the importance of water resources and the need to deter contraventions of the National Water Act.

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[159] Calculated at a compounded rate using the calculation FV – PV $(1 + i)^n$ where FV = future value, PV = present value, I = the interest rate (inflation) and n = the number of times the interest is compounded (i.e., the number of years). The present value was calculated using the calculator on the following website: *https://www.inflationtool.com/south-african-rand#:~:text=Given%20that%20money%20changes%20with,i%3A%20Interest%20rate%20(inflation)*

[160] Using the calculator on the following website: *https://www.inflationtool.com/south-african-rand#:~:text=Given%20that%20money%20changes%20with,i%3A%20Interest%20rate%20(inflation)*

[161] National Water Act s 151(2), read with s 1(1)(a) the Adjustment of Fines Act, s 92(1)(b) of the Magistrates Court Act and GN217 *GG 37477* of 27 March 2014, which determines that the fine a court can impose is 'R120 000 where the court is not the court of a regional division, and R600 000 where the court is the court of a regional division'.

4.1.3 Factors considered in penalty determination

The Waste Act provides that a fine must be determined with due consideration of two factors, (1) the severity of the impacts of the offence (or potential impact) on health, well-being, safety, and the environment; and (2) the monetary or other benefits the convicted person gained.[162]

The Air Quality Act provides that its penalties must be determined with due consideration of three factors: (1) the severity of the impacts (or potential impact) on health, well-being, safety, and the environment; (2) the monetary or other benefits the convicted person gained; and (3) 'the extent of the convicted person's contribution to the overall pollution load of the area under normal working conditions'.[163]

NEMA and the National Water Act do not have similar provisions, suggesting some inconsistency in the legislator's approach, which may be attributable to different national departments administering these laws. However, sentencing in a criminal court is subject to the Criminal Procedure Act 51 of 1997 ('CPA'), in terms of which the court may receive any evidence it sees fit to inform itself as to the proper sentence.[164]

A prosecutor or presiding officer would have regard to the provisions of environmental laws. The offences in these laws are wide-ranging and could be subject to different degrees of seriousness, harm, intention, or negligence. Courts have the discretion to impose an appropriate sentence in the circumstances. However, this discretion could be exercised inconsistently if not limited. Arguably, legislation should provide differing degrees of transgression and penalties to limit the inconsistent exercise of discretion.

4.1.4 Practical implications of changes at different intervals

Further complexity may arise when industrial facilities were constructed before the enactment of requirements, particularly where such facilities have been expanded or changed over time – which is often the case with changing business activities. These practicalities make it imperative to determine the law at a particular point in time, but it also complicates having to work out what approvals were required at intervals during the past. Examples could include power stations constructed in the mid to later-1900s on which we still rely for power. These power stations may have been refurbished or expanded over time, at different intervals, which

[162] Waste Act s 68(5).
[163] Air Quality Act s 52(2).
[164] CPA s 274(1).

may have triggered newer approval requirements. Although there have been plans to decommission these facilities, including for environmental impact reasons, decommissioning has been delayed due to capacity constraints.[165] Another example could be iron and steel manufacturing facilities constructed in the mid-1900s, which still operate and many people rely on for income.[166] The historical nature of these facilities, and the use of old technology with which it was constructed (or still operate) complicates the application of current environmental laws.

Practically, because of all of these legislative changes, industrial facilities may hold numerous different approvals under the different iterations of these laws, sometimes for the same or overlapping infrastructure. For example, a facility could be issued with separate waste licences for different waste management areas within its premises depending on when each was constructed; separate environmental authorisations for new and additional dangerous goods storage facilities. Thus, an industrial manufacturing facility may have many other authorisations that regulate its activities as it may have developed or changed over time. The environmental laws contain 'integrated licences' provisions,[167] but these provisions were only enacted in more recent years, so they would not assist facilities that started operations several decades earlier.

The approvals under each of the four laws are all issued by different authorities (or different functionaries within the same authority, e.g., waste licences), resulting in inconsistencies in processes, efficiency, compliance, and enforcement action. The same activity may require approval under more than one law; for example, construction activities that may impact watercourses are likely to require both a NEMA and a National Water Act approval. Integrated approvals rely on different authorities considering an application and agreeing to the licence form, resulting in more bureaucratic red tape and delays. The need for integrated approval may not necessarily be foreseen at the outset of a project. In other words, additional expanded infrastructure constructed later may trigger approval requirements in other laws that were not foreseen when the project or facility started. Many factors may influence an existing facility's

[165] David MacKay 'Eskom hoping to delay closure of three oldest coal-fired power plants' Miningmx 15 May 2020 available at *https://www.miningmx.com/news/energy/41870-eskom-hoping-to-delay-closure-of-three-oldest-coal-fired-power-plants/*, accessed on 10 November 2020.
[166] ArcelorMittal 'Company History' available at *https://www.arcelormittalsa.com/Whoweare/OurHistory.aspx* accessed on 10 November 2020.
[167] NEMA s 24L.

expansion or contraction, including technological advances, environmental, social, or economic considerations.

Legislative changes may impose stricter requirements, such as the minimum emissions standards under the Air Quality Act, which likely requires refurbishment or upgrades to emission abatement equipment. Such changes may come at high costs requiring significant capital expenditure.

As illustrated in this part, the prescribed penalties for the failure to obtain environmental approvals have significantly increased over the last few decades, more than mere inflationary increases. It is not always easy to determine the exact approval requirements because of all of the changes mentioned in Part 3 of this chapter, nor is it a simple endeavour to determine which prescribed penalties apply. Seemingly the increase is to deter offenders from contravening approval requirements. However, the high penalties prescribed in NEMA, the Waste Act and Air Quality Act contrast with the National Water Act penalty.

4.2 Causing pollution and degradation and 'duty of care'

In addition to the offence of failure to obtain approval, causing pollution or degradation or failing to adhere to these laws' duties are also offences. As mentioned in the introduction to this chapter, this type of offence could be more complicated than proving the failure to obtain approval.

To prove an offence involving environmental harm or 'duty of care' obligations involves proving more complex elements. A prosecutor would have to prove that the alleged offender caused, or may cause significant pollution or environmental degradation. Various factors may complicate the evidentiary burden; for instance, different facilities within the same area may produce contaminants that may pollute the surrounding environment. Establishing the actual source of pollution would require scientific testing and determination over time. There is no threshold for what is considered 'significant', although the court has held that this is not

necessarily a high threshold.[168] NEMA[169] and the National Water Act[170] requires that a person undertake 'reasonable measures to prevent … pollution or degradation'. If the alleged offender took measures as advised by specialists, it might be difficult for the prosecution to prove that the measures taken were unreasonable.

The penalty provisions for the pollution and degradation offences have also increased at similar intervals as the penalty increases mentioned in Table 3.7 above. To illustrate this, the increase in potential maximum penalties for contravening duty of care (or the pollution and degradation) provisions in NEMA and the National Water Act, including in ss 28 and 19, respectively, are discussed below.

The NEMA 'pollution or degradation' offences were added from 18 September 2009[171] and were subject to a penalty not exceeding R1 million or one-year imprisonment (or both). On 18 December 2013, this was increased to R10 million or ten years imprisonment (or both).[172] The potential maximum penalty amount and term of imprisonment for these offences have, within four years, increased tenfold (much more than an inflationary increase which would have been about R1,3 million in 2014).[173]

The National Water Act potential penalty for the 'pollution of a water resources' offence is, for a first offence, a maximum of five years imprisonment, or both a fine and imprisonment and, for a second or subsequent conviction, a fine or imprisonment for a maximum of ten years or both a fine and imprisonment.[174] The penalty provision in the National Water Act is the same for all offences (see Table 3.7 and Figure 3.1 above). Since the National Water Act's commencement on 1 October 1998, the penalty has doubled from R100,000 in 1998[175] to R200,000 from 27 March 2014,[176] over sixteen years. As mentioned above, its increase is less than inflation.

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[168] *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd T/A Pelts Products, and others* 2004 (2) SA 393 (E), p414 (paras I & J), and 415.
[169] NEMA s 28 that could arguably be read with ss 49A(1)(e) which provides that it is an offence to 'unlawfully and intentionally or negligently commit any act or omission' which (1) 'causes significant pollution or degradation of the environment or is likely to cause significant pollution or degradation of the environment' or (2) 'detrimentally affects or is likely to detrimentally affect the environment'.
[170] National Water Act s 19 that could arguably be read with ss 151(1)(i) and (j) which provide that it is an offence to 'unlawfully and intentionally or negligently commit any act or omission' which (1) 'pollutes or is likely to pollute a water resource' or (2) 'detrimentally affects or is likely to affect a water resource'.
[171] The National Environment Laws Amendment Act 14 of 2009 and Proc 65 *GG* 32580 of 18 September 2009.
[172] NEMA ss 49A(1)(g) and 49B(1).
[173] *https://www.inflationtool.com/south-african-rand?amount=1000000&year1=2009&year2=2014*
[174] National Water Act s 151(2).
[175] GN 217 *GG* 37477 of 27 March 2014
[176] GN R1411 *GG 19435* of 30 October 1998.

Thus, the NEMA penalty provision for causing significant pollution or degradation has increased ten-fold within four years, which may result in a significant potential maximum penalty of R10 million. However, the equivalent National Water Act offence has only doubled over sixteen years and is insignificant compared to the potential penalty under NEMA. This disparity is problematic because the degree of criminal punishment must be proportional to the degree of the harm, the violation, and the offender's moral blameworthiness.[177] This disproportionality casts doubt on the justification for the penalties concerning the pollution and degradation provisions under NEMA and the National Water Act. In other words, it is unclear how the legislator arrived at these disparate prescribed penalties, what justifies them and why this has not been harmonized.

4.3 Failing to comply with authority directives or notices

Where a facility does not comply with its obligations under environmental laws, the environmental authorities have the power to issue compliance notices[178] or directives[179] and require specific steps to rectify contraventions or cease operations. The failure to comply with such instructions is also a criminal offence.[180] Such an offence may be easier to prove compared to the pollution and degradation offences above, as it does not give rise to possible debates of reasonableness or negligence. Either the recipient of the instruction complied, or they did not. If the instruction were deemed unreasonable, the recipient would have followed the statutory appeal or other review remedies at its disposal – if it fails to do so, the instruction can have legally valid consequences.[181] The elements of the crime are arguably limited, i.e., the recipient's failure to comply with the instruction. That is, of course, if the instruction is clear, leaving no room for interpretation or defences of compliance.

Under the ECA, the empowering provision for issuing directives (addressing environmental damage or degradation) was introduced on 26 June 1992.[182] If convicted, a person could be subject to a penalty of three months imprisonment,[183] which amounted to a

[177] CR Snyman *Criminal Law* 6 ed (2014) 13 and 19 and CR Snyman *Strafreg* 4 ed (1999) 22 with reference in fn 26 to Albert Kruger *Hiemstra's Criminal Procedure* (2018).
[178] For example, NEMA s 31L.
[179] NEMA s 28(4) and National Water Act s 19(4).
[180] National Water Act s 151(1)(d) and NEMA s 49A(1)(g).
[181] *Oudekraal Estates v City of Cape Town* 2004 (6) SA 222 (SCA) para 26, see also Cora Hoexter *Administrative law in South Africa* 2 ed (2012) 547.
[182] In terms of the Environment Conservation Amendment Act 79 of 1992, it was added as s 31A to ECA.
[183] ECA s 29(3).

penalty of R1667, applicable from 31 December 1992.[184] The penalty increased to R5,000 on 30 October 1998[185] and R10 000 on 27 March 2014.[186] However, the increase in March 2014 is likely redundant as directives would have been issued under NEMA from 18 September 2009, being the date the NEMA power to issue directives (regarding environmental damage or degradation) took effect.[187] At that point, the failure to comply with a directive could be subject to a prescribed penalty not exceeding R1 million or one-year imprisonment (or both). On 18 December 2013, this was increased to R10 million or ten years imprisonment (or both).[188] After 18 September 2009, such offences would likely be pursued under NEMA and not the ECA, so the NEMA offence and penalty provision would apply.

In essence, the maximum criminal penalty for failing to comply with an ECA directive increased from R1667, applicable from 31 December 1992, to R10 million from 18 December 2013, amounting to a nearly six-thousand-fold increase in twenty years. It is significantly more than an inflationary increase which would have amounted to about R6,000 (from 1992 to 2013).[189] Thus, substantial increases in the potential penalty for these transgressions were made, evidencing the legislator's contempt for non-compliance with the requirement to comply with authority instructions and the move to impose more significant fines for these kinds of offences.

Failure to comply with a compliance notice[190] is also an offence.[191] From 11 September 2009,[192] the potential maximum prescribed penalty was R5 million or ten years

[184] Section 1(1)(a) the Adjustment of Fines Act read with s 92(1)(b) of the Magistrates Court Act which provides that a district court (i.e., Where the court is not the court of a regional division) can impose a sentence of a sentence of imprisonment for a period not exceeding three years, and a regional court can impose imprisonment not exceeding 15 years. GN R3441 *GG* 14498 of 31 December 1992, indicating the jurisdiction of the district court as being R20 000 and R200 000 for a regional court, (i.e., R20 000 /(3*0.25)= R1667).
[185] GN R1411 *GG* 19435 of 30 October 1998 determines that the fine a court can impose is 'R120 000 where the court is not the court of a regional division, and R600 000 where the court is the court of a regional division' (i.e., R600 000/(3*0.25)=R5,000).
[186] GN 217 *GG* 374775 of 27 March 2014 determines that the fine a court can impose is 'R60 000 where the court is not the court of a regional division, and 300 000 where the court is the court of a regional division' (i.e., R120 000/(3*0.25)=R10 000).
[187] The National Environment Laws Amendment Act 14 of 2009, with effect from 18 September 2009 in terms of Proc 65 of 18 September 2009.
[188] NEMA ss 49A(1)(g) and 49B(1).
[189] *https://www.inflationtool.com/south-african-rand?amount=1667&year1=1992&year2=2013*
[190] Which authorities are empowered to issue under NEMA s 31L, usually where there is a contravention of a legal requirement. Authorities can require the recipient of such a notice to take steps to rectify the non-compliance.
[191] NEMA s 31N (now captured in s 49A(1)(k) after amendment by Act 30 of 2013).
[192] The sanction took effect from 11 September 2009, in terms of the National Environment Laws Amendment Act 44 of 2008, GN 902 of 11 September 2009. The National Environmental Management Amendment Act 46 of 2003 took effect on 1 May 2005, in Proc 20 dated 29 April 2005. This included provisions regarding the designation of EMIs, their mandates, powers including the power to issue compliance notices contemplated in NEMA s 31L. This provision was subsequently amended in 2013, to reflect the current penalty provision.

imprisonment (or both).[193] On 18 December 2013, it increased to R10 million, but the ten-year imprisonment terms remained unchanged.[194] The maximum penalty amount doubled in four years, more than an inflationary increase (which would have been approximately R6,2 million).[195]

5. SIMILAR PENALTIES FOR SERIOUS AND 'LESS' SERIOUS OFFENCES

In addition to the criminal sanctions mentioned above, the four laws create various other criminal offences for transgressions concerning no or lesser environmental impacts. Subordinate regulations and notices published under these laws also require compliance and prescribe criminal penalties for the failure to comply. Regulations often stipulate obligations of a more administrative nature, e.g., relating to registrations, documents, and report submissions to the authorities. Nevertheless, they prescribe significant criminal penalties similar to the sanctions in primary legislation – prescribed for more severe offences.[196] Because of the magnitude of environmental laws and changes presented in this chapter, these notifications, registration or reporting requirements could easily be overlooked.

For example, it is a requirement to comply with approval conditions; failing to do so is an offence and subject to the same penalty as not having approval at all, i.e., R10 million in NEMA[197] and the Waste Act,[198] R5 million in terms of the Air Quality Act,[199] and R200,000 in terms of the National Water Act.[200] Approvals are generally issued with numerous (between approximately 50 and 80) conditions depending on various factors, including the nature of the activity, its environmental impact and the nature and number of activities authorised. Approvals may include specific conditions for the management of the activity through an Environmental Management Programme or Integrated Waste and Water Management Plan; the appointment of independent specialists; recording, reporting, and notifications to the relevant

[193] NEMA s 31N, prior to its amendment.
[194] NEMA ss 49A(1)(k) and 49B(2).
[195] *https://www.inflationtool.com/south-african-rand?amount=5000000&year1=2009&year2=2013*
[196] For example, regulation 5 read with 13(b) and 14 of the National Atmospheric Emission Reporting Regulations, 2015 (published under the Air Quality Act in GN R283 *GG 38633* of 2 April 2015) required certain persons to register on the NAEIS within 30 days from publication of the notice and the failure to do so is an offence. On first conviction of this offence a person can be liable to a maximum fine of R5 million or imprisonment not exceeding five years.
[197] NEMA ss 49A(1)(a), (c) and 49B(1).
[198] Waste Act ss 68(1)(a), (h) and 68(1).
[199] For a first conviction, see Air Quality Act ss 51(1)(a), (e) and 52(1).
[200] National Water Act ss 151(1)(a), (c) and 151(2).

authority; site closure and decommissioning; transfer of the authorisation; and specific conditions regarding specific impacts.[201]

Several conditions typically relate to administrative matters, such as requirements to appoint independent external specialists or to submit monitoring, audit, or compliance reports to the authority within specific timeframes. Inadvertent submission delays could occur because of the reliance on independent specialists, which could be affected by a shortage of qualified specialists, specialists' capacity constraints, or other unintended delays. Operational delays could be caused by unforeseen equipment failure or delays in importing new equipment. Delays in making submissions to the authority could also occur because the anticipated timeframe imposed in the authorisation is unreasonable.[202] Such delays may be justifiable and easily rectified, e.g., if an audit report is submitted to the authority a week late, this delay would not cause environmental damage *per se*. These transgressions are unlikely to have direct environmental impacts and are considered 'less serious offences'.

More serious offences would be the failure to comply with conditions that directly impact the environment resulting in degradation or pollution. Less serious offences may be considered trivial and not worthy of prosecution (*de minimis*) by enforcement authorities or prosecutors, particularly if they are easily rectified and no environmental harm results. Such non-compliance should not qualify as criminal conduct. There are other more appropriate means, such as compliance notices, to rectify the non-compliance. Less severe offences would not necessarily result in the same moral reprehensibility as an act that directly results in detrimental environmental impacts. Logically, less severe offences should not be subject to the same potential maximum penalty as more significant offences.

In certain circumstances, more severe condition non-compliances could also be reasonably justifiable. For example, a delay in installing pollution abatement equipment by a stipulated time may be outside the approval holder's control if the manufacturer indicated a delivery date that is then delayed.[203] The authorities may exercise discretion to follow a criminal enforcement route, where prosecution may not be justifiable. If the law does not distinguish between more

[201] This is based on experience, as well as examples of authorisations available online, see for example: *https://cer.org.za/wp-content/uploads/2018/04/ipp-thabametsi-power-station-ea.pdf* and the environmental authorisations at *https://www.coega.co.za/documentlist.aspx?cmd=browse&objid=80&catid=20*; and *http://www.eskom.co.za/ourcompany/sustainabledevelopment/environmentalimpactassessments/gromisoranjemund/pages/environmental-authorisation.aspx* accessed on 20 April 2020.
[202] Examples based on practical experience.
[203] Examples based on practical experience.

minor and more severe offences, it inevitably leaves it up to official discretion in different agencies. Chapter Five captures research participants' comments on the different approaches taken in enforcement, depending on the seriousness of an offence.

Nonetheless, the law does not differentiate between serious and trivial, creating discretion that may result in inconsistent practises because different authorities implement these laws. The discretion is then perpetuated in that prosecutors could also exercise it in deciding what to prosecute. Inexperienced prosecutors may view non-compliance from a 'black letter law' perspective and not from the perspective of actual environmental impacts, resulting in inconsistent use of criminal sanctions. Similarly, magistrates who do not hear these types of cases often may also be left to exercise their discretion instead of being guided by the law.

Regulations published under these Acts also include criminal sanctions[204] that do not differentiate between serious and non-serious thresholds or are not graded according to their severity. For example, failing to register under some regulations[205] also carries a potential maximum fine of R5 million or five years imprisonment (or both), but this could be easily rectified and has no direct environmental impact. In the first instance, it would be more reasonable to make these transgressions subject to notices or warning letters, which was done in the 2018/19 reporting year when 792 warning letters were sent to recipients requiring prescribed reporting.[206] 'Warning letters'[207] is not a mechanism provided for in these laws and appear to be a discretionary instrument used by authorities to achieve compliance before resorting to formal proceedings, including criminal prosecutions. It is excessive and unnecessary to use the criminal sanction as a first instance for this type of failure or to seek such high penalties. The authorities have clearly recognized this problem, which raises why the law would provide for such an offence in the first place.

If such requirements and offences are justifiable, they should, at the very least, be subject to lower sanctions based on the degree of non-compliance involved (or how morally

[204] In terms of, for example, NEMA s 44, Waste Act s 69, Air Quality Act s 53, and National Water Act s 26. Empowered by, for example, Air Quality Act ss 55(2), Waste Act s 71(2), National Water Act s 69(2) and NEMA ss 24(5)(g), 25(3)(g) and 44(3).

[205] For example, the National Atmospheric Emission Reporting Regulations, 2015, published under the Air Quality Act in GN R283 *GG* 38633 of 2 April 2015, specifically regulation 5, 13(b) and 14. The National Greenhouse Gas Emissions Reporting Regulations, 2016, published under the Air Quality Act in GN R275 *GG* 40762 of 3 April 2017. See regulation 5 read with 16(b) and 1, also provide that the failure to register within 30 days is subject to a similar penalty, i.e., R5 million.

[206] DFFE *NECER* 2018-19, 51.

[207] This is defined in the NECER as 'written documents that afford an opportunity to an offender to comply without initiation of a formal enforcement notice, civil or criminal enforcement proceedings'.

reprehensible it is). For example, the Competition Act 89 of 1998 empowers the Competition Tribunal to impose administrative penalties calculated as a percentage of a firm's annual turnover,[208] i.e., a maximum of 10 per cent for a first and 25 per cent for a second offence. To determine an appropriate penalty, the Competition Tribunal must consider several factors, including the nature, duration, gravity, and extent of the contravention; any loss or damage suffered as a result of the contravention; the respondent's behaviour and degree of co-operation; the profit derived from the contravention; and previous similar conduct.[209] Environmental laws do not provide for the exercise of such discretion subject to a consistent set of factors. As mentioned above, only the Air Quality Act[210] and the Waste Act[211] require considering certain factors in determining the appropriate penalty.

The environmental laws do not provide for a range of penalties based on a scale between the extremely low or high penalty amounts and no gradation of the significance of offences. Some of the environmental laws provide for lesser penalties; for example, it is an offence under the Waste Act to fail to provide the information requested by an organ of the state, and on conviction, a maximum fine or imprisonment of six months may be imposed.[212] Admission of guilt fine regulations are published in terms of NEMA but are limited to waste and protected areas.[213] These regulations list offences at the lowest end of the scale, such as feeding species in a protected area without permission, with fines ranging between R500 to R1,500. Waste-related admission of guilt fines are set at a maximum penalty of R5,000 and relate to ten types of offences that could otherwise have been offences under the Waste Act (i.e., subject to significant penalties). For example, a person who stores waste and fails to prevent nuisances (i.e., odour, visual impacts, and breeding of vectors)[214] could pay an admission of guilt fine of R5,000. In comparison, this would otherwise be a s 21 of the Waste Act offence subject to a potential maximum penalty of R5 million. Admission of guilt fines may be valuable alternatives to the high penalties mentioned above but may, in any event, result in criminal records[215] for offences not considered that serious.

[208] Competition Act s 55.
[209] Competition Act s 55(3).
[210] Air Quality Act s 52(2).
[211] Waste Act s 68(5).
[212] Contemplated in s 29(5) or 63(4) read with s 67(1)(m) of the Waste Act.
[213] In GN R635 *GG* 39014 of 24 July 2015 and GN R574 *GG* 34448 of 15 July 2011, respectively.
[214] Waste Act ss 21(d) and 67(1)(b).
[215] See CPA s 57(6). There have recently been conflicting judgments on whether admission of guilt fines result in criminal convictions, see *S v Madhinha* (18617) [2018] ZAWCHC 172; 2019 (1) SACR 297 (WCC) (7 December 2018), *Mong v Director of Public Prosecutions and Another* (17593/2018) [2019] ZAWCHC 116 (23 August

This illustrates the proclivity of attaching a criminal sanction to each legal prescript and criminalising every transgression, even those at the lower end of the spectrum.

6. DIFFERENT FORMS OF CRIMINAL LIABILITY AND REASONABLENESS

Increasing the stakes of criminalization in environmental law is s 34 of NEMA, which contains further consequences should a person be convicted of the offences listed in NEMA's Schedule 3, in addition to the offence and penalty provisions discussed above.

Schedule 3-listed offences include, for example, the failure to obtain an authorisation or comply with authorisation conditions, and to cause significant pollution or degradation or detrimentally affect the environment,[216] the failure to obtain an air emissions licence or contravening a licence condition,[217] to cause pollution or detrimentally impact a water resource,[218] and many sections of the Waste Act including the failure to obtain a waste management licence.[219]

The extended forms of liability (or additional burdens on a convicted accused) in s 34 illustrate that there may be further substantial and far-reaching consequences in addition to a conviction for environmental offences (whether significant or negligible transgressions). These further consequences include that after convicting a person, the court could summarily inquire into the amount of the *loss or damage caused or costs incurred* and give judgment against the convicted person (in favour of the party who suffered the loss).[220] The court can also summarily enquire into and assess the monetary value of any *advantage gained* (or likely to be gained) from the offence and impose an award of *damages or compensation* or a fine equal to that amount.[221] The court may also order the convicted person to undertake *remedial measures*.[222] The convicted person may also be ordered to pay the reasonable *costs* incurred by the public prosecutor and state organ.[223]

2019), and *NGJ Trading Stores (Pty) Ltd v Guerreiro* 1974 (4) SA 738 (A). Based on the *stare decisis* principle, the position in the latter two judgments are reflected. For a criminal conviction or payment of an admission of guilt fine not to result in a criminal record it should be classified in terms of CPA s 341 and schedule 3.

[216] NEMA s 49A.

[217] Air Quality Act ss 51(1)(a) to (h), 51(2) and (3).

[218] National Water Act ss 151(1)(i) and (j).

[219] Waste Act ss 20 (a), (b), and 67(1)(a).

[220] NEMA ss 34(1) and (2).

[221] NEMA s 34(3).

[222] Ibid.

[223] NEMA s 34(4).

Because regulatory (*mala prohibita*) offences result in some form of benefit to a corporate entity, forms of corporate liability exist to ensure that employers cannot 'hide behind' the mistakes or actions of employees that may benefit the organization.[224] Corporate liability involves the liability of corporations for the acts of their employees. Section 332(1) of the CPA imputes the fault of directors or servants on the corporation rather than making the company vicariously liable for its directors or servants' crimes.[225] It does so without allowing the company to raise a defence, which is constitutionally questionable.[226]

Vicarious liability applies to cases where an employee acts within the course and scope of their employment.[227] Section 34(5) of NEMA[228] stipulates vicarious liability if the employer failed to take all reasonable steps to prevent the employee's act or omission.[229] Other authors identify this as 'imputed criminal liability', where employers or directors of companies are held liable for employees' crimes.[230] Managers, agents or employees could also be liable where they act or omit an act that was their task to do or omit on behalf of the employer (if it is a Schedule 3 offence).[231]

Directors can also be liable if an offence resulted from the director's failure to take all reasonable steps necessary under the circumstances to prevent the commission of the offence. Proof of the offence by the firm/employer constitutes *prima facie* evidence that the director is guilty.[232] The different forms of liability each have their own complexities, including

[224] Michael Kidd 'Administrative law and implementation of environmental law' in King et al *Fuggle & Rabie's Environmental Management in South Africa* 3ed (2018) at 245.
[225] Kidd's thesis op cit note 11 at 353 with reference to JM Burchell & JRL Milton *Principles of Criminal law* 2 ed (1997) at 386; and Michael Kidd 'Criminal Measures' in Paterson & Kotze, *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* 2009 at 253.
[226] Kidd ibid.
[227] Kidd ibid.
[228] Which reads 'Whenever any manager, agent or employee does or omits to do an act which it had been his or her task to do or to refrain from doing on behalf of the employer and which would be an offence under any provision listed in Schedule 3 for the employer to do or omit to do, and the act or omission of the manager, agent or employee occurred because the employer failed to take all reasonable steps to prevent the act or omission in question, then the employer shall be guilty of the said offence and, save that no penalty other than a fine may be imposed if a conviction is based on this subsection, liable on conviction to the penalty specified in the relevant law, including an order under ss (2), (3) and (4), and proof of such act or omission by a manager, agent or employee shall constitute prima facie evidence that the employer is guilty under this subsection'.
[229] Michael Kidd 'Criminal Measures' in Paterson & Kotze, *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* 2009 at 250, and Michael Kidd 'Administrative law and implementation of environmental law' in King et al *Fuggle & Rabie's Environmental Management in South Africa* 3ed (2018), at 245.
[230] M Oosthuizen, M van der Linde & E Basson 'NEMA' in King et al *Fuggle & Rabie's Environmental Management in South Africa* 3ed (2018) at 194.
[231] NEMA s 34(6).
[232] NEMA s 34(7). Authors seem to have different views regarding this provision's constitutionality and whether this is an evidential burden or a reverse onus. See Kidd op cit note 229 at 258, Michael Kidd 'Administrative law

considerations of constitutionality. These are not discussed for purposes of this thesis and have been considered by other writers. Nevertheless, these complexities and the potentially far-reaching consequences are exacerbated by the frequent amendments to environmental laws. Ultimately, all offence provisions must be tested against the constitutional imperative that the environment must be 'protected, for the benefit of present and future generations, through reasonable legislative and other measures'.[233]

There appears to be no clear authority in an environmental law context on what these 'reasonable legislative measures' would include. Most writers refer to the suite of environmental laws as being enacted as such 'reasonable legislative' measures.[234] Reasonable measures must accord with the aims set out in s 24 of the Constitution. It must aim to '(i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'. These aims may define (or limit) the 'reasonable legislative measures'. The Constitutional Court interpreted the meaning of 'reasonable legislative measures' in *Grootboom*,[235] which dealt with the right of access to housing in terms of s 26 of the Constitution. It has been stated that the approach to reasonableness 'rejects a substantive interrogation of the right, and merely determines whether the state has acted reasonably in giving effect to the particular right'.[236]

The Constitutional Court explained that rights must be interpreted in their textual setting and within the Constitution as a whole.[237] The court outlined principles for determining what reasonable legislative measures might be. For example, '[w]hat constitutes reasonable legislative, and other measures must be determined in the light of the fact that the Constitution creates different spheres of government', which may require the allocation of responsibilities

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and implementation of environmental law' in King et al *Fuggle & Rabie's Environmental Management in South Africa* 3ed (2018) at 247; and M Oosthuizen, M van der Linde & E Basson 'NEMA' in King et al *Fuggle & Rabie's Environmental Management in South Africa* 3ed (2018) at 195 and footnote 450 with reference to *S v Coetzee and Others* 1997 (3) SA 527 (CC) paras 5, 6, 8 and 14.

[233] The Constitution s 24(b).

[234] Loretta Feris 'Environment' in Ian Currie & Johan de Waal *The Bill of Rights Handbook* 5ed (2005) 528, Hashali Hamukuaya & Anthea Christoffels-Du Plessis 'The impact of customary rights on marine spatial planning' (2018) *JOLGA* 78, 79, HH Stoop 'Towards Greener Companies – Sustainability and the social and ethics committee' (2013) STELL LR (3) 561, 573, Jan Glazewski 'The bill of rights and environmental law' in Jan Glazewski & Louise du Toit (Eds) *Environmental Law in South Africa* (2019) 20.

[235] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).

[236] Lorette Arendse 'Slowly but surely: The substantive approach to the right to basic education of the South African courts post-*Juma Musjid'* (2020) *AHRLJ* 285 at 288.

[237] *Grootboom* op cit 235 para 22-23.

within these different spheres.[238] National framework legislation must be designed to meet the Constitutional obligations.[239] It can be inferred from what the court says about socio-economic rights that 'reasonable legislative measures' must establish a 'coherent program directed towards the realization of the right in the bill of rights'.[240]

Where law or regulations impose significant maximum penalties for otherwise trivial transgressions, it may miss the aim of s 24 of the Constitution. However, courts may likely interpret this widely and employ a purposive interpretation.[241] In other words, the court may consider if the legislative measures in this context appear reasonable in achieving the aims of s 24. It may find that these ancillary requirements and offences for less serious penalties may be necessary for pursuing these objectives - even if it does not directly achieve these aims. Such offences may be considered part of the larger legislative framework aimed at achieving these constitutional aims. In other words, the offence and penalty provisions discussed above, even if inconsistent or sometimes absurd (where the same penalty is prescribed for serious or less serious offences), may pass constitutional muster in the eyes of a court. However, it may undermine the principles of criminalization and the body of authority on the need to rethink criminal law (as discussed in Chapter Two).

7. CONCLUSION

The changes described in this chapter demonstrate the complexity of navigating these environmental laws and the importance of interpreting and applying the law to activities undertaken at a particular time. This manner of application is essential because a person can only be liable for any act or omission that was unlawful at the time it was committed.[242] Determining the law's application to a particular facility is a potentially complex exercise involving extensive knowledge of all of the amendments in environmental laws over (at least) the last decades. The changes described in this chapter only illustrate select categories. Many other regulations, notices or changes to the laws and regulations may also be relevant to an industrial facility.

Frequent amendments put legal certainty and fairness at risk and inhibit effective compliance and enforcement action. It is challenging for industry to ensure compliance, and it

[238] *Grootboom* ibid para 39.
[239] *Grootboom* ibid para 40.
[240] *Grootboom* ibid para 41.
[241] Du Plessis op cit note 58 para 323.
[242] The Constitution s 35(3)(l).

is also challenging to enforce compliance in a legal landscape where the goalposts keep shifting. It cannot be said that the requirements are clear or certain where the law changes as frequently and extensively as described. Where the goalposts often shift, the criminal sanction cannot be the most appropriate mechanism to address non-compliance. The most appropriate enforcement approach must be determined, considering all relevant contextual factors.

The *ius certum* principle requires that crimes cannot be formulated vaguely.[243] Clear language and certainty of the law are thus essential, particularly in the context of criminal prosecution because it is the state's most condemnatory response.[244] Often the language and requirements of legal provisions are difficult to understand without legal advice.[245] As explained in this chapter, determining the requirements and application of these laws (at a particular moment) requires specialist or expert resources (e.g. scientific, technical, and legal). Expertise is required to ensure compliance but also creates the potential for loophole spotting. The determination of the applicable law is more complex where industrial facilities were constructed before the expansion of the environmental laws, where these facilities (particularly with old technology) continue to operate and contribute to the economy. The complexity is exacerbated where these facilities have undergone changes and upgrades over many years as a matter of usual business practice. These complexities raise questions about the level of legal certainty that results from frequent changes to the laws. In instances of interpretational uncertainty in a criminal context, which is likely to result from the complexities illustrated above, a court is likely to use the least restrictive meaning favouring liberty.[246]

There does not appear to be consistency across the laws in how penalties are drafted; for example, only the Waste Act[247] and the Air Quality Act[248] contain considerations for determining the appropriate penalty amount. Nevertheless, a court may exercise discretion, as the penalties in these laws are maximum prescribed penalties. In the context of a criminal

[243] Rita Mare '*Criminal Law and the Bill of Rights'* in Bill of Rights Compendium LexisNexis Commentary (1997), accessed 7 February 2019, with reference to Snyman CR *Criminal Law* 3ed (1995) 34ff; Rabie MA, Strauss SA & Maré MC *Punishment: Introduction to Principles* 5ed (1994) 69ff; Burchell J & Milton J *Principles of Criminal Law* 2ed (1997) 57ff; Joubert JJ, 'Die legaliteitsbeginsel in die Strafprosesreg', LLD Unisa, 1995, at 108ff; Labuschagne JMT 'Die sekerheidsbasis van die strafreg' 1988 *SACJ* 52.
[244] D Husak 'The Criminal Law as Last Resort' (2004) 25 *OJLS* 207, 234, R.A. Duff et al *The Boundaries of the Criminal Law* 1 ed (2010) 240, 256
[245] Douglas Husak *Overcriminalization, The Limits of the Criminal Law* (2008) 11-12.
[246] Du Plessis op cit note 58 para 334(c). See also *Democratic Alliance v African National Congress and Another* 2015 (2) SA 232 (CC), para 130, where it is stated that 'the restrictive interpretation of penal provisions is a long-standing principle of our common law.
[247] S 68(5).
[248] S 52(2).

justice system that is already constrained, the same level of expertise in this area of law cannot reasonably be expected of prosecutors or presiding officers.

This chapter has described the generally significant increase in fines for ECA, NEMA, Waste Act, APPA and Air Quality Act offences within specific categories (generally, currently at prescribed maximum fines of R5 million or R10 million). Although most of these laws have reached a somewhat consistent maximum penalty amount for the failure to obtain approvals, the Water Act potential maximum penalty amount is significantly lower (i.e., R200,000 compared to the R5million or R10 million provided in the other Acts).

Except for the National Water Act, the rise in the prescribed maximum penalties far exceed inflationary increases. Numerous reasons may justify such increases, including the need to raise penalties because they were considered too low before (considering the importance and need to protect our environment) and should be substantial to have a real deterrent value.[249] These are only potential maximum penalties, and several mitigating factors are considered in sentencing[250] or where the accused enters into a plea and sentence agreement.[251]

It is problematic that there is no gradation of penalties, i.e., prescribing the same maximum penalties for serious and less serious offences, and no distinction based on the nature or resources of the offender (i.e., natural vs juristic persons). For the legislator to criminalize offences with limited or no environmental impacts the same way as offences that may result in pollution or degradation point to a tendency to overcriminalize. Similarly, prescribing the same maximum penalties without taking into account the nature or resources of an offender could amount to disproportionality and also lead to possible overcriminalization. Arguably, less serious offences do not have the same level of moral reprehensibility, could be easily rectified, and constitute transgressions that the authorities would not necessarily pursue criminally. If these transgressions have been rectified and have no environmental impact, a successful prosecution should be unlikely. To subject all environmental law requirements to similar high penalties may create disrespect for the law (as considered later in this thesis).

[249] Kidd's thesis op cit note 11 at 418 and 419.
[250] Kidd's thesis op cit note 11 at 418 and 419. See also Melissa Fourie 'How civil and administrative penalties can change the face of environmental compliance in South Africa' (2009) *SAJELP* at 7; Robyn Hugo *Administrative penalties as a tool for resolving South Africa's environmental compliance and enforcement woes* (unpublished LLM thesis, University of Cape Town, 2014) 5.
[251] CPA s 105A.

The additional criminal liability consequences, particularly for individuals and otherwise contributing members of society, further increase the need for a deeper and more critical consideration of the aims these laws seek to achieve, within the confines of the 'reasonable legislative measures' and the aims stipulated in s 24 of the Constitution. Significant maximum penalties for otherwise trivial transgressions may miss the aim of s 24 of the Constitution or ignore the extensive research on criminalization and avoiding overcriminalization.

There is a need to consider the current criminal sanctions carefully and contextually by taking into account: the aims it seeks to achieve; whether these aims align with the objectives of s 24 of the Constitution, the likelihood of those aims being achieved through criminal sanctions and the criminal justice system; the reasonableness and proportionality of criminal sanctions; the justification for burdening the criminal justice system; if other measures are available; which measures require the least effort, time and cost to achieve the aim.

CHAPTER 4: PROSECUTION OF INDUSTRIAL ENVIRONMENTAL CRIMES IN SOUTH AFRICA, TRENDS FROM CONCLUDED CASES

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1. INTRODUCTION

Holmes, an influential jurist of the twentieth century,[1] asserts that the law consists of 'prophecies of what the courts will do … and nothing more pretentious'.[2] Following Holmes' assertion, completed prosecutions should assist in determining whether overcriminalization occurs in environmental law and if criminal sanctions are being used successfully.

The research presented in this chapter involved obtaining information on 53 environmental prosecutions under the NEMA, the Waste Act, the National Water Act and the Air Quality Act, using the methodology outlined in Part 2 below. Part 3 of this chapter contextualizes aspects of criminal investigations and prosecutions for environmental crimes, and considers limitations in readily accessing prosecution outcomes. Part 4 highlights themes arising from these cases relevant in assessing overcriminalization. The intention is to assess this information against the normative framework (proposed in Chapter Two) later in this thesis.

2. METHODOLOGY TO COLLECT AND COLLATE CASE INFORMATION

The research involved gathering publicly available information on relevant concluded prosecutions (ending in a conviction or acquittal), whether reported by the media, published by public benefit or other organisations and in reported judgment databases, which cases were concluded between 2005 and 2020. It also required considering the annual NECERs published by the DFFE[3] from 2008[4] to 2020.[5] The objective was to identify prosecutions against industrial operations/facilities (in the 'brown' sector)[6] and offences under the four laws mentioned above.

Initially, there did not appear to be much information on, or sufficient detail of, concluded industrial-related prosecutions. Thus, the scope of cases collected was expanded to include offences under the target four laws, more broadly, i.e., not necessarily perpetrated by industrial operations or as part of industrial activities. In this regard, prosecutions of mining, farming-

[1] Steven J Burton (ed) *The Path of the law and its influence: The legacy of Oliver Wendell Holmes, Jr* (2000) preface.
[2] Douglas Husak *Overcriminalization: The Limits of the Criminal Law* (2008) 27 with reference to Oliver W. Holmes, Jr 'The Path of the Law' X *Harvard Law Review* (1897) 457.
[3] As it is now known, and previously known as the Department of Environment, Forestry and Fisheries and before that the Department of Environmental Affairs.
[4] This is the first publicly available report,
see *https://www.environment.gov.za/branches/regulatorycompliance_sectormonitoring*
[5] This is the last report considered for this research.
[6] Defined in NECER as the 'pollution, waste and EIA (brown) sub-sector'.

related or other activities that contravene these Acts were also collected and considered. The intention was to establish a comprehensive database of collected cases.

By the end of the collection process, information about 53 cases was obtained, of which 40 relate to industrial-type contraventions. The other thirteen cases consist of five relating to mining and prospecting activities[7] involving NEMA or National Water Act contraventions, four of which resulted in convictions. Five cases related to farming activities resulting in convictions for contraventions of NEMA or the Water Act.[8] In one case, an environmental assessment practitioner was successfully prosecuted because he failed to undertake the necessary impact studies relating to a development project.[9] The penultimate (of the thirteen additional cases) involved successfully prosecuting an individual for artificially increasing the water flow between a lake and an estuary without approval.[10] The last of the thirteen is the prosecution of a timber plantation for constructing a road without an environmental authorisation, to which it pleaded guilty.[11]

As these thirteen cases may not technically fall within the description and scope of 'industrial facilities' as delimited, they could have been excluded from this chapter's assessment. However, aspects of these cases may overlap with those considered in an industrial context, such as prosecuting the failure to obtain approvals. Their addition to the collection could thus provide a more comprehensive view of how these provisions are enforced against industrial facilities and other industries or individuals. Moreover, because there is no consolidated database or collection of these concluded prosecutions, the value of retaining the cases seemed to outweigh their exclusion because it may contribute to broader knowledge of concluded environmental prosecutions.

Without a central, readily accessible database of these cases, it is difficult to determine the number or outcome of environmental prosecutions or associated trends. A publicly accessible database would have extensive benefits; it would improve knowledge and understanding of environmental prosecutions, adjudication, and application of complex environmental laws,

[7] *S v Vunene Mining*, 2011, *S v Anker Coal,* 2012, *S v Golfview Mining*, 2013 - these three concluded by way of plea and sentence agreements in terms of CPA s 105A. *S v Blue Platinum Ventures 16 (Pty) Ltd and others,* 2014 concluded as a guilty plea to one charge, and *S v Middleground Trading and others*, 2017 resulted in an unsuccessful trial.
[8] *Mostert v The State,* 2009, *S v Tierhoek Boerdery*, 2019, *S v Die Straat Trust,* 2017, *S v Groenrivier Eiendomme (Pty) Ltd and Pieterse*, 2017, and *S v Melville,* 2010.
[9] *S v Frylinck and others*, 2011.
[10] *S v Richard Batson* 2011 - the accused was convicted of breaching NEMA and the National Water Act.
[11] *S v York Timbers,* 2013.

which may improve its practical understanding and application. Expanded knowledge of the practical application of these laws in criminal courts may, in turn, improve legislative drafting that ensures practical, accurate and enforceable laws.

A case database will benefit regulators, enforcement authorities, prosecutors, magistrates, defence counsel, the regulated community, the general public and, in turn, the environment. If there is increased knowledge of successful prosecutions, it may offer an increased deterrent effect that may lead to less environmental crime. An increase in knowledge may improve the quality of arguments in court, which may reduce time wasted arguing technical points (already dealt with in a prior but unreported case). If cases are not reported or readily accessible, these lessons are otherwise lost. Another benefit of a central public database would be that justice would be more visible to the general public - it would be 'seen to be done'.[12]

A chronological summary of the 53 prosecution records obtained in this research appears in Annexure A to this thesis. This list of prosecutions, and their summaries in Annexure A, may be incomplete because it relies on information from the mentioned sources (i.e., NECERs, public and media reports, or information from research participants). Often the information obtained is limited; for example, although the NECERs contain case summaries or mention matters criminally investigated and prosecuted, it does not necessarily provide a comprehensive account or the exact number of all concluded industrial-type prosecutions. In some instances, the NECER refers to matters generically without providing details of the accused, the charges or relevant legal aspects.

Concluded case information is public unless otherwise directed by a Court,[13] but it was impossible to visit each Magistrate's Court in South Africa to source cases due to time and resource constraints. To obtain more comprehensive case information for concluded prosecutions, I turned to several additional sources, including members of the EMI, other departmental functionaries, prosecutors, magistrates, courts, or attorneys. Thus, reliance had to be placed on the information received from these sources.

The analysis in this chapter is limited to the information obtained for the concluded cases because no detailed information is available on pending cases or cases not selected for prosecution. Although the NECERs provide statistics regarding the number of pending

[12] S Terblanche *The Guide to Sentencing in South Africa* 3ed (2016)142.
[13] Magistrates Court Act s 7.

criminal prosecutions or matters withdrawn by the NPA, information for such cases is not readily or publicly available because they may not have reached the courts or be 'concluded' as contemplated in the Magistrates' Court Act.[14]

The exact number of industrial criminal prosecutions instituted or adjudicated (under the mentioned laws) is unknown as the NECERs do not provide statistics for each different sector. Thus, the cases collected only represent a sample, and there may be older prosecutions predating the annual publication of the NECERs. Nevertheless, the collection of cases in this research may be the most complete current compendium of industrial prosecutions assembled in South African environmental law scholarship.

3. RELEVANT CONTEXT

South African environmental law's expansion in the last two decades, the establishment and increased activity of the EMIs have resulted in an increasing number of criminal prosecutions. The following aspects are briefly discussed below to contextualise the 53 prosecutions considered (1) the process of environmental crime investigations and prosecutions; (2) matters the NPA has reportedly declined to prosecute; (3) the courts where prosecutions occur and restrictions regarding outcome availability; and (4) concluding such cases through plea and sentence agreements in terms of s 105A of the CPA.

3.1. Environmental crime investigation and prosecution – brief description of the process

EMIs can be designated for different mandates, functions or enforce different environmental laws.[15] They can perform several functions, including environmental compliance monitoring or enforcing compliance.[16] EMIs may investigate acts or omissions (within their mandate) where there is a reasonable suspicion that it might constitute an environmental law offence.[17] They have broad general powers, including to question people about suspected unlawfulness.[18] They may inspect or question a person about any relevant document, book, record, or electronic information, require delivery of such information, take photographs and samples.[19] They can,

[14] Ibid.
[15] NEMA s 31D.
[16] NEMA s 31G(1)(a).
[17] NEMA s 31G(1)(b).
[18] NEMA s 31H(1)(b).
[19] NEMA ss 31H(1)(c) to (k).

without a warrant, stop, search, and seize any mechanism of transport[20] if it has been, or there is a reasonable suspicion it has been, used in an offence.[21] EMIs may conduct routine inspections without a warrant. Although 'routine inspections' is not defined in NEMA,[22] when read in context, it means compliance monitoring (not enforcement) inspections, where EMIs determine compliance with laws.

In criminal investigations, as opposed to routine inspections, additional requirements apply, such as those found in constitutional law, criminal procedure, and the law of evidence. In such investigations, considerations of the constitutional right to a fair trial become relevant,[23] and the exclusion of evidence obtained in a manner that violates any right in the Bill of Rights.[24] The right to a fair trial arguably does not only accrue to an accused or only begin once court proceedings commence but may extend to a suspect.[25] Depending on the circumstances, suspects may be entitled to similar warnings as arrested persons.[26] For example, when an EMI conducts a criminal investigation (as opposed to a routine inspection), a warning statement would be issued to the person being questioned, advising that person of their constitutional rights. As mentioned above, EMIs do not need a warrant to obtain information or documents during routine inspections. However, searches or seizures to obtain evidence for use in criminal proceedings generally require warrants[27] because such searches 'are generally more invasive and involve a greater limitation of the right to privacy'.[28] The CPA contains different evidence-gathering mechanisms.[29] These are not aspects covered in NEMA but fall within broader constitutional, criminal law, and the law of evidence principles.

Upon the conclusion of a criminal investigation, EMIs would refer a case to the National Director of Public Prosecutions ('NDPP') at the NPA, who decides whether to institute a prosecution.[30] If evidence is outstanding, the prosecutor will request the investigating officer to conduct further investigations. Because of the specialised nature of environmental

[20] For example, any vehicle, vessel or aircraft, any pack-animal or any other mechanism of transport, see NEMA s 31J(1).
[21] NEMA s 31J.
[22] NEMA s 31K.
[23] The Constitution s 35.
[24] The Constitution s 35 (5).
[25] Ian Currie & Johan de Waal *The Bill of Rights Handbook* 5ed (2005) 741, with reference to *S v Sebejan* 1997 (1) SACR 626 (W) 636b. See also Pamela Schwikkard 'Arrested, detained and accused persons' MH Cheadle, DM Davis & NRL Haysom (eds) in *South African Constitutional law: The Bill of Rights* (2004) 29-4.
[26] Currie, de Waal & Schwikkard ibid.
[27] Alistair Price 'Search and seizure without warrants' (2016) 6 *Constitutional Court Review* 245 at 249.
[28] Price ibid at 249, and *Gaertner and Others v Minister of Finance and Others* 2014 (1) BCLR 38 (CC) at 65.
[29] For example, in s 205 of the CPA.
[30] In terms of the CPA.

prosecutions, the prosecutor would usually be assisted by the EMI in various aspects of the law, the evidence, and drafting the charge sheet.[31]

In some cases, the researcher has seen draft charge sheets provided to the accused before the prosecution has formally commenced.[32] Providing draft charges may establish if the accused has a reasonable or valid defence, rendering a prosecution defective and a waste of time and resources. It may also be a way to sway an accused to enter into plea and sentence negotiations early on in the process, thereby avoiding the usual protracted court delays once the matter is enrolled. Alternatively, it could be a form of procedural fairness,[33] notifying a prospective accused of the charges they may face.

In the context of industrial environmental crimes, the accused will ordinarily not be arrested but will be summoned to appear in court,[34] where the accused will face and have to plead to the charges. Most environmental crimes of an industrial nature involve corporate entities, cited as the first accused, as represented by one of its corporate officers. One of the themes considered in this chapter is the frequency of individuals being successfully prosecuted for industrial related crimes and the nature of the sentence imposed. The offence and penalty provisions (discussed in Chapter Three of this thesis) do not distinguish between juristic or natural persons/individual transgressors. However, the sentence imposed and the nature of the accused are relevant considerations in assessing proportionality, just desert and culpability.

The criminal justice process is often delayed with many court appearances and postponements, including for the prosecution to prepare or for the defence to object to the charge sheet,[35] request further particulars,[36] make representations for the withdrawal of charges, or for the parties to enter into plea discussions.[37] Another theme considered in this chapter is how industrial environmental prosecutions are concluded, whether by trial, guilty pleas, or agreement, and if insight can be gained from this for purposes of considering overcriminalization.

[31] This is based on the researcher's experience in practicing environmental law for over 10 years, it is also confirmed by the empirical data collected as discussed in Chapter Five of this thesis.
[32] Ibid.
[33] As a requirement of rationality or legality. The decision to prosecute could be subject to review based on the principle of legality. See Cora Hoexter *Administrative Law in South Africa* 2 ed (2012) 242.
[34] As provided for in Chapter Six of the CPA.
[35] S 85 of the CPA.
[36] S 87 of the CPA.
[37] S 112 or 105A of the CPA.

Criminal prosecutions could have different possible outcomes. For example, an accused can plead guilty[38] and be convicted if the prosecutor accepts the guilty plea and the presiding officer considers the offence deserving of punishment.[39] An accused may also provide a plea explanation, explaining the guilty plea. The court may question the accused to ensure they are guilty and do not have a valid defence.[40] If an accused pleads not guilty, the presiding officer may ask if the accused wants to make a statement that explains his defence.[41] If the accused does not provide such a statement, or it is unclear what is in dispute, the presiding officer may question the accused to establish which charges are in dispute.[42] The matter then ordinarily proceeds to trial unless the prosecutor and a represented accused enter into a plea and sentence agreement as contemplated in s 105A of the CPA ('s 105A agreement').[43]

A prosecution can be withdrawn, or the NPA could decline to prosecute, where the prosecution believes that there is insufficient evidence to prove or sustain the charges.[44] Detailed information about such cases may not be publicly available if the matter has not reached the court or is still pending.[45]

3.2. Cases where the NPA declined to prosecute

The overall compliance statistics, annually recorded in the NECERs, shows the number of cases handed to the NPA and the number of cases the NPA declined to prosecute.[46] Table 4.1 below illustrates the difference between the matters referred to the NPA and those the NPA declined to prosecute, i.e., the last column illustrates the total number of cases that proceeded to prosecution.

The NECER does not explain the dramatic decrease in decisions by the NPA not to prosecute matters from the year 2010/11 onwards. The increase in EMIs in that year was nominal, so the decision to prosecute more cases may not necessarily result from the increase

[38] CPA s 112(1).
[39] Ibid.
[40] CPA ss 112(2) and 113.
[41] CPA s 115(1).
[42] CPA s 115(2).
[43] CPA s 105A, which stipulates several procedural and other requirements.
[44] CPA s 6.
[45] As contemplated in s 7 of the Magistrates' Court Act and s 7 of the Promotion of Access to Information Act 2 of 2000.
[46] See: DFFE *NECER* (2019-20) 14, *NECER* (2018-19) 15, *NECER* (2017-18) 12, *NECER* (2016-17) 13, *NECER* (2015-16) 13, *NECER* (2014-15) 9, *NECER* (2013-14) 12, *NECER* (2012-13) 9, *NECER* (2011-12) 11, *NECER* (2010-11) 10, *NECER* (2009-10) 4, *NECER* (2008-09) 7.

in EMI numbers.[47] The shift to prosecuting more cases may be attributable to increased capacity building and training offered to role players in the preceding years, including prosecutors.[48]

Table 4.1: Comparison of the number of cases handed to the NPA compared to those declined for prosecution

Year	Number of cases handed to the NPA	Number of cases where the NPA declined to prosecute	Cases prosecuted
2007/08	-	16	-
2008/09	-	100	-
2009/10	282	214	68
2010/11	234	22	212
2011/12	201	20	181
2012/13	268	37	231
2013/14	378	15	393
2014/15	257	24	233
2015/16	293	61	232
2016/17	416	74	342
2017/18	446	18	428
2018/19	424	25	399
2019/20	434	73	361

Unfortunately, these are overall statistics and not broken down by sector. The bulk of the cases referred for prosecution appear to be within the biodiversity sector, considering that most of the matters are referred for prosecution by SANParks. For example, in the 2017/18 year, SANParks referred 298 matters to the NPA; two-thirds of the 446 cases referred to the NPA that year.[49] In the same reporting year, 276 cases were reported as having resulted in admission of guilt fines.[50] As mentioned in Chapter Three, admission of guilt fines result in a criminal conviction but are limited to certain aspects (i.e., waste and protected area transgressions) and generally result in low penalty amounts between R500 and R5 000.[51]

The reasons for the NPA's decisions not to prosecute can only be divined from the case details. Based on the analysis of the cases and discerning from the interviews (discussed in the next Chapter), one of the principal reasons for cases not proceeding to prosecution is likely a lack of sufficient evidence. However, other challenges in presenting such cases also exist (discussed in Chapter Five). Cases are also not necessarily opened/registered, investigated, and

[47] DFFE *NECER* (2010-11) 63, DFFE *NECER* (2009-10) 33, and DFFE *NECER* (2008-09) 32.
[48] DFFE *NECER* (2010-11) 3.
[49] DFFE *NECER* (2019-20) at 14 and 25.
[50] Ibid at 25.
[51] In GN R635 on 24 July 2015 and GN R574 on 15 July 2011, respectively.

concluded in the same year, which also influences the inferences that could be made from the annually reported statistics. In other words, the NPA may not necessarily decide whether or not to prosecute a matter in the same year it received the case docket. The NPA may receive a case, request further evidence, and only years later, upon finding insufficient evidence, decide not to proceed with the prosecution. Thus, the statistics reflect a continuous reporting process.

In addition, these NECER statistics do not indicate the number of matters left in abeyance, where the NPA has not formally declined to prosecute but does not intend to proceed. The researcher is aware of at least one case where the prosecution commenced and various court appearances ensued, but the matter did not proceed and was never formally withdrawn.[52]

Therefore, considering the number of cases referred for prosecution over the last thirteen years (excluding the number of conservation offences or where admission of guilt fines was paid), there may be more relevant (industrial prosecution) cases than those obtained and reflected in Annexure A to this thesis. A comprehensive public database of these cases is necessary for thorough research and developing knowledge in this area.

3.3. The courts where prosecutions occur and restrictions regarding outcome availability

Prosecutions mainly occur in lower courts,[53] i.e. regional Magistrates Courts,[54] as NEMA provides that Magistrate's Courts have jurisdiction.[55] However, if the authority believes a more severe penalty could be considered, it may request the NPA to institute the criminal proceedings in the High Court.[56] Although prosecutions can occur in superior/high courts,[57] generally, the High Court becomes involved where a stay of a prosecution in the lower court is sought,[58] or where the outcome of a prosecution or a warrant, or the seizure of items or confiscation orders are challenged.[59]

[52] This is based on a case the researcher worked on and cannot be disclosed due to confidentiality.
[53] Defined in the CPA as **'**any court established under the provisions of the Magistrates' Courts Act, 1944'.
[54] Defined in the CPA as 'a court established for any district under the provisions of the Magistrates' Courts Act, 1944, and includes any other court established under such provisions, other than a court for a regional division'.
[55] NEMA s 34H(1).
[56] NEMA s 34H(2).
[57] See for example, *Uzani Environmental Advocacy v BPSA* 2019 (5) SA 275 (GP).
[58] See for example, *Feedmill Developments (Pty) Ltd and another v Attorney General, KwaZulu-Natal* [1998] 4 All SA 34 (N).
[59] See for example, *NDPP v Ndolose* [2016] JOL 37622 (ECM); *Umhlaba Plant Hire CC v DPP Western Cape* (unreported) (10152/2015) [2015] ZAWCHC 161 (15 September 2015); and *Mineral Sands Resources (Pty) Ltd v Magistrate Vredendal* 18701/16) [2017] ZAWCHC 25; [2017] 2 All SA 599 (WCC) (20 March 2017); *S v Haarburger* 2002 (1) SACR 542 (C).

The outcomes of prosecutions in Magistrates Court are not reported in a central academic or public database (e.g., in case law reports) and are not accessible on research platforms. High Court judgments relating to environmental matters are accessible,[60] but prosecutions rarely take place in these courts. The only known environmental prosecution in the High Court relevant to this research[61] was the private prosecution in *Uzani Environmental Advocacy v BPSA*.[62] It is not general practice in the Magistrates' Courts and not explicitly required by the Rules of the Magistrate's Court for written judgments to be handed down by the presiding officer/magistrate for reporting purposes.[63] The mechanical recording can be transcribed to obtain a written record of the proceedings and details of the outcome, i.e. the judgment. A limited number of outcomes in prosecutions relevant to this research are accessible online. For example, s 105A agreements, judgments, or transcripts, have been published by public benefit organisations such as the Centre for Environmental Rights.[64]

Table 4.2 below provides a summary of how the 53 cases proceeded through the criminal justice system. Of the 53 cases considered, 26 were concluded by s 105A agreements, thirteen (13) were concluded through guilty pleas or trials; for the further thirteen (13), it is unclear if they were concluded by a guilty plea or trial. The conclusion method for one (1) case is unknown due to a lack of readily available information (despite the researcher having requested it from the relevant authority). Cases concluded in a s 105A agreement generally have the most information because the agreement contains all relevant details and is more easily shared/readily accessible.

The lack of a central publicly accessible database is restrictive, as it could not be determined with certainty how all cases were concluded, at least for the further thirteen mentioned above where only minimal information was obtainable.[65] For some cases, written judgments were

[60] For example, on a general case law search on platforms such as LexisNexis there are at least 101 environmental cases available, although these are mostly civil in nature.
[61] I.e., related to industrial-type offences or offences of NEMA, the Waste Act, the National Water Act, and the Air Quality Act.
[62] 2019 (5) SA 275 (GP).
[63] Rules regulating the conduct of the proceedings of the Magistrates' Courts of South Africa, published in GN R740 on 23 August 2010.
[64] See *https://cer.org.za/virtual-library/judgments/magistrates-courts.*
[65] For example, the information is often contained in brief summaries in the NECERs, SAP69 forms (the SAPS form that captures criminal convictions), sentencing annexures containing only the sentence imposed. Where limited documents are provided, it is not always possible to determine the charges the accused faced.

available;[66] for others, transcriptions or High Court appeal judgments provided some information.[67]

Table 4.2: Methods of case conclusion: knowns and unknowns of limited case information availability			
Section 105A agreement	**Trial**	**Guilty Plea**	**Unknown whether trial or guilty plea**
1) *S v Acker* 2) *S v Melville* 3) *S v Aid Safe Waste (Pty) Ltd and Others* 4) *S v Vunene Mining* 5) *S v Anker Coal* 6) *S v Golfview Mining* 7) *S v Nkomati Anthracite* 8) *S v Ganter Scrapmetals CC and others* 9) *S v UNICA Iron Steel (Pty) Ltd* 10) *S v Samancor Chrome Ltd* 11) *S v Bosveld Phosphates (Pty) Ltd* 12) *S v Rob Fonto* 13) *S v Samancor Manganese (Pty) Ltd* 14) *S v Die Straat Trust* 15) *S v Groenrivier Eiendomme (Pty) Ltd and another* 16) *S v Rodeo Solve CC* 17) *S v G Vyacheslav* 18) *S v SA Demolishers CC* 19) *S v D Groenewald* 20) *S v SAM Marie Consulting CC* 21) *S v E Adams* 22) *S v SS Ngcobo and others* 23) *S v RR Govender* 24) *S v Arcelor-Mittal South Africa Limited* 25) *S v Amro Natal CC and others* 26) *S v EnviroServ Waste Management Ltd and others*	1) *Mostert v The State,* 2) *S v Richard Batson,* 3) *S v Arbac Services (CC) and others,* 4) *S v Frylinck and others,* 5) *S v Middleground Trading, and others*, 6) *S v Oil Separation Services,* 7) *S v Moosa Ali and JNR Joubert.*	1) *S v Emporium Base Minerals (Pty) Ltd* 2) *S v Blue Platinum Ventures 16 (Pty) Ltd and others* 3) *S v York Timbers Proprietary Limited* 4) *S v NM Selby* 5) *S v Aesthetic Waste Services,* 6) *S v Silicon Smelters*	1) *S v A Joubert* 2) *S v T Mosekidi* 3) *S v M de Scally* 4) *S v KL Makhubo, DG Zungo, and KLM Drums Collectors CC* 5) *S v GM Mkhulise and TR Lepota* 6) *S v JLH Serfontein (2nd accused) and City Square Trading 323 (Pty) Ltd (3rd accused* 7) *S v Hanste (Pty) Ltd (Innovative Recycling)* 8) *S v Harrismith Galvanizing and Steel (Pty) Ltd and four others* 9) *S v MJ Lourens (RTV),* 10) *S v Deva Kishorelal* 11) *S v John Henry Deale* 12) *S v Tierhoek Boerdery* 13) *S v Nirove South Africa (Pty) Ltd.*

Aside from the obstacle of limited information, several themes emerged from considering the available information, which may be relevant to consider overcriminalization.

[66] *S v Frylinck and others, S v Middleground Trading, and others*, and *Uzani Environmental Advocacy v BPSA.*
[67] *Mostert v The State, S v York Timbers Proprietary Limited* and *S v Blue Platinum Ventures 16 (Pty) Ltd and others.*

3.4. Section 105A Agreements

As mentioned above and illustrated in Tables 4.2 and 4.3, nearly half of the 53 cases considered were concluded through s 105A agreements. Section 105A was inserted into the CPA in 2001, formalising the 'informal and longstanding practice of plea-bargaining'.[68] The plea and sentence provisions are used in all criminal cases and are not limited to environmental prosecutions.[69] Unfortunately, there is also no general database of all s 105A agreements for concluded criminal cases.

A prosecutor authorised in writing by the NDPP, and a legally represented accused, may negotiate and enter into a s 105A agreement before the accused pleads.[70] Entering into such an agreement means entering a guilty plea, which results in a criminal conviction. Section 105A agreements set out the charges to which the accused pleads guilty and will be convicted and the just sentence to be imposed by the court. The sentence can be postponed[71] or suspended[72] or include an award of compensation.[73]

The prosecutor may enter into such an agreement after consulting the investigating officer and considering the nature and circumstances of the offence, the accused's personal circumstances and previous convictions, and the community's interests.[74] The prosecutor must allow the complainant or their representative to make representations regarding the agreement's content and the inclusion of compensation to the complainant for damage or pecuniary loss.[75] The prosecutor may do so where it is reasonable, considering the nature of, and circumstances relating to, the offence and the complainant's interests. The prosecutor may dispense with the requirement to consult the investigating officer if it will delay the proceedings, cause substantial prejudice, and adversely affect the administration of justice.[76]

The formal requirements for s 105A agreements include that it must be in writing, and must state that (before agreeing) the accused was informed of their rights to be presumed innocent until proven guilty beyond a reasonable doubt, to remain silent, not to testify during the

[68] Esther Steyn 'Plea-bargaining in South Africa: current concerns and future prospects' (2007) 2 *SACJ* 206 at 207.
[69] Steyn ibid.
[70] CPA s 105A(1).
[71] CPA s 297(1)(a).
[72] CPA s 297(1)(b).
[73] CPA s 300.
[74] CPA ss 105A(1)(b)(i) and (ii).
[75] CPA s 105A(1)(b)(iii).
[76] CPA s 105A(1)(c).

proceedings, and not to be compelled to give self-incriminating evidence.[77] It must also state the terms of the agreement, the substantial facts of the matter, all other facts relevant to the sentence agreement and any admissions made by the accused.[78] It must be signed by the prosecutor, the accused, and his or her legal representative.[79] Where relevant, a certificate by an interpreter should be attached to the s 105A agreement.[80]

The court may not participate in the negotiations of s 105A agreements.[81] Before the accused is asked to plead, the prosecutor will inform the court that such an agreement has been concluded.[82] The court's role is then to ask the accused to confirm that they entered into the agreement. The court must satisfy itself that the agreement complies with the consultation requirements, i.e., that the prosecutor consulted the investigating officer and complainant.[83] The court must inform the prosecutor and the accused if it is not satisfied, inform the parties of the reasons for non-compliance, and allow an opportunity for these to be rectified.[84]

If the court is satisfied that the agreement complies with the consultation requirements, the court will require the accused to plead to the charge, and the agreement's contents will be disclosed in court.[85] The court then questions the accused to ascertain whether the accused confirms the agreement terms and the admissions; that they admit the allegations to which they agree to plead guilty. The court also confirms that the accused agreed freely and voluntarily, was of sound and sober senses, and not unduly influenced.[86] The court may record a plea of not guilty if it is not satisfied that the accused is guilty, or it appears to the court that the accused does not admit, or incorrectly admitted, an allegation in the charge or has a valid defence. The court must give reasons for such a conclusion.[87] If the court records a plea of not guilty, the trial shall start anew before another presiding officer. However, the accused may waive their right to be tried before another presiding officer.[88]

[77] CPA s 105A(2)(a).
[78] CPA s 105A(2)(b).
[79] CPA s 105A(2)(c).
[80] CPA s 105A(2)(d).
[81] CPA s 105A(3).
[82] CPA s 105A(4).
[83] CPA s 105A(4)(a).
[84] CPA s 105A(4)(b).
[85] CPA s 105A(5).
[86] CPA s 105A(6)(a).
[87] CPA s 105A(6)(b).
[88] CPA s 105A(6)(c).

If the court is satisfied with the accused's admission and guilt, the court proceeds to consider the sentence agreement. The court may direct relevant questions about the accused's previous convictions and hear evidence. There are no prescribed minimum sentences applicable in environmental laws, but generally, the court must consider any applicable prescribed minimum sentences as part of the sentencing enquiry.[89] If the court is satisfied that the sentence agreement is just/fair, the court convicts and sentences the accused accordingly.[90]

If the court believes that the sentence agreement is unjust, the court informs the prosecutor and the accused of the sentence it considers just. The prosecutor and the accused may then either withdraw from the agreement or abide by it subject to the right to lead evidence and present arguments relevant to sentencing.[91] If the parties abide by the agreement and present evidence and argument relevant to sentencing, the court can convict the accused and impose the sentence which it considers just.[92] However, if they withdraw from the agreement, the trial will start anew before another presiding officer unless the accused waives their right to be tried before another presiding officer.[93]

Where a trial starts anew, the s 105A agreement is considered null and void and not considered or referenced. No record of the negotiations or agreement may be used unless the accused consents to recording any of their admissions.[94] The prosecutor and the accused may not enter into another s 105A agreement regarding a charge arising from the same facts.[95] Thus, the s 105A process cannot be pursued more than once on the same charges and facts, which the parties should be conscious of in their negotiations.

4. ASSESSING THE CASES

4.1. Introduction

The 53 prosecutions were analysed to identify emerging themes outlined in Table 4.3 below. The second column in Table 4.3 lists the cases, the subsequent columns indicate: (1) whether a natural or juristic person was prosecuted (column 3); (2) how the matter was concluded, either through a guilty plea, trial or s 105A agreement (columns 4 and 5); (3) the percentages of the

[89] CPA s 105A(7).
[90] CPA s 105A(8).
[91] CPA s 105A(9)(a) and (b).
[92] CPA s 105A(9)(c).
[93] CPA s 105A(9)(d).
[94] CPA s 105A(10).
[95] Ibid.

sentences imposed compared to the maximum prescribed penalty for the charge(s) the accused faced and whether it was comparatively high or low (columns 6 and 7);[96] (4) if additional sanctions were imposed in terms of s 34 of NEMA (column 8); (5) how charges relating to separate listed activities or water uses received different treatment in some cases (column 9); and (6) cases where data was insufficient or absent (column 10).

Numbers are used in columns 3, 4, 5, 8 and 10 to indicate the relevance of themes to each case so that it is easier to ascertain the total number within each theme. The percentages in columns 6 and 7 indicate the comparative percentage of the sentence imposed compared to the maximum prescribed penalty the accused faced for the criminal charges faced by the accused (elaborated on in Annexure A).

Table 4.3: Summary of themes from the cases obtained

1. No	2. Case name and year concluded	3. Natural person/s convicted	4. 105A	5. Trial/Plea	6. Low % sentence	7. High % sentence	8. NEMA s 34 used	9. Listed activities treatment, including in re separate or consolidated charges	10. Data absent
1.	*S v Acker*, 2005	1.	1.	-	-	105%	-	-	-
2.	*Mostert v The State*, 2009	2.	-	1.	5%	-	-	-	1.
3.	*S v A Joubert*, 2010	3.	-	2.	-	100%	-	-	2.
4.	*S v Melville*, 2010	4.	2.	-	0.25%	-	-	-	-
5.	*S v T Mosekidi*, 2011	5.	-	3.	0%	-	-	-	3.
6.	*S v M de Scally*, 2011	6.	-	4.	0.1%	-	-	-	4.
7.	*S v Aid Safe Waste (Pty) Ltd and others*, 2010	7.	3.	-	20% 1%	-	-	-	5.
8.	*S v KL Makhubo, and others*, 2011	8.	-	5.	0% 0.375%	-	-	-	6.
9.	*S v Silicon Smelters*, 2011	-	-	6.	25%	-	-	-	7.
10.	*S v Richard Batson*, 2011	9.	-	7.	0%	-	-	-	8.
11.	*S v Aesthetic Waste Services (Pty) Ltd*, 2011/12	-	-	8.	0%	-	-	-	9.
12.	*S v Arbac Services CC and others*, 2011	10.	-	9.	unknown	-	1.	-	10.
13.	*S v Vunene Mining*, 2011	-	4.	-	49%	-	2.	Five listed activity contraventions were treated as a consolidated charge;	-

[96] On the assumptions that the base data for the calculations are correct, although there may be variables that are not apparent from the information obtained.

Table 4.3: Summary of themes from the cases obtained									
1. No	2. Case name and year concluded	3. Natural person/s convicted	4. 105A	5. Trial/Plea	6. Low % sentence	7. High % sentence	8. NEMA s 34 used	9. Listed activities treatment, including in re separate or consolidated charges	10. Data absent
								similarly, five water uses were treated as a consolidated charge.	
14.	*S v Frylinck and others*, 2011	11.	-	10.	-	100%	-	-	-
15.	*S v Anker Coal,* 2012	-	5.	-	7.8%	-	-	This case did not include a charge for failure to obtain an environmental authorisation for activities within watercourses.	-
16.	*S v GM Mkhulise and TR Lepota,* 2012	12.	-	11.	1%	-	-	-	11.
17.	*S v JLH Serfontein and another,* 2012	-	-	12.	0.27%	-	-	-	12.
18.	*S v Golfview Mining*, 2013	-	6.	-	49%	-	3.	Two listed activity contraventions were treated as a consolidated charge; similarly, two water uses were treated as a consolidated charge.	-
19.	*S v Nkomati Anthracite*, 2013	-	7.	-	19.6%	-	4.	Four listed activities and four water uses were each listed as separate criminal charges.	-
20.	*S v Ganter Scrapmetals CC and others, 2013*	13.	8.	-	0% must remedy	-	-	-	-
21.	*S v NM Selby,* 2013	14.	-	13.	0%	-	-	-	13.
22.	*S v UNICA Iron Steel (Pty) Ltd,* 2014	-	9.	-	15.7%		5.	Three listed activities were each listed as separate criminal charges.	-
23.	*S v Hanste (Pty) Ltd,* 2014	-	-	14.	unknown		6.	-	14.
24.	*S v York Timbers,* 2013	-	-	15.	3.6%	-	-	-	-
25.	*S v Samancor Chrome Ltd*, 2014	-	10.	-	-	1 000%	7.	-	-
26.	*S v Blue Platinum Ventures 16 (Pty) Ltd and others,* 2014	15.	-	16.	0% but ordered to remedy	-	-	The fourteen charges are not apparent from the transcript, but there is only one conviction of NEMA s 24F, suggesting it may be a consolidated charge.	15.

Table 4.3: Summary of themes from the cases obtained									
1. No	2. Case name and year concluded	3. Natural person/s convicted	4. 105A	5. Trial/Plea	6. Low % sentence	7. High % sentence	8. NEMA s 34 used	9. Listed activities treatment, including in re separate or consolidated charges	10. Data absent
27.	*S v Harrismith Galvanizing and Steel (Pty) Ltd and others,* 2015	16.	-	17.	unknown	-	-	-	16.
28.	*S v MJ Lourens (RTV),* 2015	17.	-	18.	0%	-	-	-	17.
29.	*S v Bosveld Phosphates (Pty) Ltd,* 2015	-	11.	-	14%	-	8.	-	18.
30.	*S v Rob Fonto,* 2016	18.	12.	-	0.6%	-	9.	-	-
31.	*S v Samancor Manganese (Pty) Ltd, and others,* 2016	-	13.	-	1.7%	-	10.	-	-
32.	*S v Die Straat Trust,* 2017	-	14.	-	0% but R250k for rehab	-	-	-	-
33.	*S v Groenrivier Eiendomme (Pty) Ltd and Pieterse*, 2017	-	15.	-	0.5% but POCA R850k	-	-	There are two charges regarding two separate listed activities (no charges regarding water uses).	-
34.	*S v Middleground Trading and others,* 2017	-	-	19. Acquitted	unknown	-	-	Three listed activities were each listed as separate criminal charges.	-
35.	*S v Deva Kishorelal,* 2018	19.		20.	0%	-	-		19.
36.	*S v John Henry Deale,* 2018	20.	-	21.	0.29%	-	-	-	20.
37.	*S v Oil Separation Services and another,* 2017	-	-	22.	0.5%	-	-	The Magistrate consolidated two charges of separate listed activities requiring a waste management licence.	21.
38.	*S v Rodeo Solve CC,* 2018	-	16.		0.24%	-	11.	Four waste management activities were each listed as separate criminal charges.	-
39.	*S v G Vyacheslav,* 2018	21.	17.	-	3%		-	-	-
40.	*S v SA Demolishers CC,* 20180	-	18.	-	0.67% or 2%	-	-	-	-
41.	*Uzani Environmental Advocacy v BPSA,* 2019	-	-	23.	unknown	-	-	-	-
42.	*S v Tierhoek Boerdery*, 2019	unclear	unclear	unclear	0.7%		12.	-	22.
43.	*S v D Groenewald,* 2019	22.	19.	-	0.64% or 1.2%	-	13.	-	-
44.	*S v Emporium Base Minerals (Pty) Ltd,* 2019	-	-	24. -	0%	-	-	-	-

Table 4.3: Summary of themes from the cases obtained									
1. No	2. Case name and year concluded	3. Natural person/s convicted	4. 105A	5. Trial/Plea	6. Low % sentence	7. High % sentence	8. NEMA s 34 used	9. Listed activities treatment, including in re separate or consolidated charges	10. Data absent
45.	*S v SAM Marie Consulting CC T/A Biotech SA (Pty) Ltd,* 2019	-	20.	-	0.25%		14.	Two listed activities were each listed as separate criminal charges.	-
46.	*S v E Adams,* 2019	23.	21.	-	0.33%		15.	-	-
47.	*S v SS Ngcobo and others,* 2020	24.	22.	-	0.44%	-	-	-	-
48.	*S v RR Govender,* 2020	25.	23.	-	1.7%	-	16.	Two listed activities were each listed as separate criminal charges.	-
49.	*S v Nirove South Africa (Pty) Ltd,* 2020	-	-	25.	0%	-	-	-	23.
50.	*S v Moosa Ali and and JNR Joubert,* 2018	26.		26.	0.04%	-	-	-	-
51.	*S v Arcelor-Mittal South Africa Limited,* 2020	-	24.	-	-	72.8%	17.	-	-
52.	*S v Amro Natal CC, and others,* 2020	-	25.	-	0.25%	-	-	-	-
53.	*S v EnviroServ Waste Management Ltd and others,* 2020	-	26.	-	14.6%	-	18.	-	-

In summary, Table 4.3 above indicates that of the 53 cases considered:

1) 98 per cent (52) cases resulted in convictions (the addition of the numbers that appear in columns 4 and 5);
2) 49 per cent (26) were concluded by way of s 105A agreements (column 4);
3) 49 per cent (26) resulted in the conviction of natural persons (column 5);
4) 81 per cent (43) resulted in comparatively low sentences/fines (column 6), 9 per cent (five) resulted in comparatively high sentences/fines (column 7),[97] (for the remaining 10 per cent, the comparative percentage is unknown because of limited data);
5) 34 per cent (eighteen) cases resulted in additional fines or payment directly to DFFE in terms of NEMA s 34 (column 8);
6) Listed activities or water uses received different treatment as either combined or separate charges in twelve cases (column 9) (this is not indicated as a percentage of

[97] On the assumptions that the base data for the calculations are correct, although there may be variables that are not apparent from the information obtained.

the 53 cases as it does not indicate an overall measurement but indicates how in some cases, this aspect received different treatment); and

7) 43 per cent (23) cases did not have sufficient information for this assessment.

These themes may be relevant to considering overcriminalization for the reasons that follow. First, it is striking that 52 of the 53 cases resulted in convictions, with only one resulting in an acquittal. It is also striking that nearly half of the cases concluded through s 105A plea agreements. At first glance, it may seem that these results may indicate overcriminalization because of the conviction rate. However, it could simply mean that the NPA only selects/pursues strong cases for prosecution. It could also indicate that the database is incomplete, i.e., that information about unsuccessful cases is not readily shared.

Second, the offence and penalty provisions in the laws considered do not distinguish between natural or juristic entities. Many industrial transgressions are committed for the benefit of a company/juristic entity and its profits. Prescribing the same penalties for natural persons (with more limited resources) and juristic entities (who may have more resources) may indicate disproportionality within the statutory provisions, leading to disproportionate implementation.

Third, a percentage comparison between the fine imposed and the maximum prescribed penalty provides insight into the severity of the statutorily prescribed sentences compared to sentences imposed by courts. If the courts repeatedly impose sentences significantly lower than the statutory prescribed penalties, it raises the question of whether the statutory prescribed penalties are rational, justifiable, and proportional or whether they create a form of overcriminalization.

Fourth, the different treatment of listed activities requiring authorisation as either a combined charge or listing each contravention as separate criminal charges could amount to a duplication of charges or convictions. Convicting and sentencing an accused for multiple statutory offences related to the same underlying acts and elements of the crime may be a prime example of overcriminalization.

Fifth, imposing additional sentences, as provided for in s 34 of NEMA, requires assessment against the normative principles for overcriminalization, depending on the context of the case. Such additional sentences may also raise questions regarding just desert and proportionality.

A discussion of these themes follow.

4.2 Section 105A Agreements

The NDPP, in consultation with the Minister of Justice, must issue directives to achieve the objectives of s 105A,[98] which directives must be submitted to Parliament before it takes effect.[99] It appears that one such directive, published in 2010, exists.[100] It consists of two pages with 17 instructions regarding the practicalities of prosecutors entering into these agreements but does not contain substantive considerations relevant to this thesis. In addition, the NDPP must submit the records and statistics relating to the implementation and application of s 105A to Parliament once a year.[101] The NPA 2019/20 Report provides the number of s 105A agreements entered into in a year. In the 2019/20 reporting year, there were 2166 such agreements - a decrease from 2989 in the previous year.[102] However, the report does not provide a breakdown of the statistics on the different types of crimes. The total number of criminal matters finalised with a verdict in the 2019/20 reporting year is 231 725.[103] Compared to the total matters finalised by s 105A agreements, i.e., 2166[104] or about 1 per cent of all crimes. Generally, it does not seem that there is a trend to conclude criminal matters through s 105A agreements in South Africa. However, as evident from Table 4.3, the ratio is much higher for the considered environmental crimes, i.e., 49 per cent.

There is a trend to plea bargain in the US, as its 'criminal justice system could not survive if every matter went to trial' and 95 per cent of adjudicated cases result in guilty pleas.[105] A similar plea agreement 'upsurge' is visible in a South African environmental law context.[106] However, this may not provide an accurate statistical outcome, as it has not been possible to establish the total number of concluded criminal prosecutions. Nevertheless, it still indicates a tendency to enter into such agreements in environmental prosecutions.

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[98] CPA s 105A(11).
[99] CPA s 105A(11).
[100] National Director of Public Prosecutions *Directives issued in terms of section 105A(11) of the [CPA]* (2010) Accessed at: *https://www.npa.gov.za/sites/default/files/Library/Plea-and-Sentence-Agreement-Directives-with-effect-from-2010-10-22.pdf.* This appears to have been submitted to the National Council of provinces on 21 October 2010 (see *https://pmg.org.za/hansard/30596/*) and possibly the National Assembly on 20 September 2011 (see *https://pmg.org.za/hansard/29741/*), although it is not clear from the latter whether the actual Directive was submitted, but s 105A was discussed during the proceedings.
[101] CPA s 105A(12).
[102] National Prosecuting Authority *Annual Report* (2019/20) 75 accessed at: *https://www.npa.gov.za/sites/default/files/media-releases/NPA_Annual_Report_2019-2020.pdf*
[103] Ibid at 73.
[104] Ibid at 75.
[105] Husak op cit note 22 at 22, with reference to Rachel E. Barkow 'Separation of Powers and the Criminal Law' (2006) 58 *Stanford Law Review* 989, 1047 n.310.
[106] Murombo & Munyuki 'The Effectiveness of Plea and Sentence Agreements in Environmental Enforcement in South Africa' (2019) *PER / PELJ* 22 at 5.

There may be many benefits to entering into s 105A agreements. The accused may have more control over the outcome because it is negotiated with the prosecutor. At a trial, the presiding officer decides on the verdict and sentence. A benefit of such an agreement is that the accused has certainty over the conviction and sentence. Another benefit is that where juristic and natural persons are charged with crimes, the parties often negotiate that the juristic entity pleads guilty and is convicted, preventing natural persons from obtaining criminal records. Based on the researcher's experience and cases considered, it appears that often natural persons are cited as co-accused but are not pursued when considering the concluded agreement. Thus, citing individuals seems to be used to encourage s 105A negotiations. In negotiations, the accused can select the charges to which it is willing to plead guilty, thereby achieving a compromise.

A benefit for the prosecution is that these cases concern complex matters and laws with which prosecutors and magistrates have limited experience. As a result, it may be difficult for the prosecution to achieve a conviction on all charges in any event. This process could result in a quicker case resolution, which would otherwise involve a protracted trial, requiring time and resources. These benefits are often listed as mitigating circumstances within the s 105A agreements. It could also result in the transgressor's quicker attendance to the environmental impacts requiring remediation or authorisation.

When reading the facts and circumstances in the s 105A agreements, culpability/fault is not always apparent. Often the charges relate to negligent as opposed to intentional offences. The s 105A agreements often contain lengthy explanations of the accused's reasonable measures to avoid environmental harm or offences. Of course, the accused takes a 'best foot forward' approach in explaining the circumstances that led to the alleged contravention. However, this makes it difficult to assess the level of culpability thoroughly. Because not many of the cases considered have ended in a successful trial with available detailed records, it was also challenging to assess the level of culpability or how the court may decide on a matter.

4.3 Total convictions – indicative of overcriminalization?

It is not possible to definitively state that the number of convictions (52 out of 53) or the number of s 105A agreements (26) is, at face value, an indication of overcriminalization. A more detailed assessment of the evidence in each case is required, which is not possible because such evidence is not public and unavailable.

4.4 Conviction of natural persons

Limited information is available for most cases where natural persons were convicted (17 out of 26) (excluding those with a s 105A agreement or written judgment). For most of these cases, two pages of documents were obtained, consisting of a SAP 69 form (the form that records the accused's conviction) and a short annexure indicating the sentence. Often, the information lacks the complete charges the accused faced. It is impossible to assess each individual's culpability or the just and appropriate sentence with such limited information. Consequently, although the number of individuals convicted and sentenced appears high in the context of industrial-type activities, it cannot be determined if this, in itself, is an indication of overcriminalization.

4.5 Percentage comparison of sentences imposed versus potential maximum statutory penalties

The proportionality of sentences is a consideration in determining overcriminalization.[107] Table 4.3 above summarizes the percentages of the sentences imposed compared to the maximum prescribed penalty for the charge(s) the accused faced and whether it was comparatively high or low (as detailed in Annexure A). Again, for this assessment, the limited readily available information is restrictive. Of the 53 cases considered, the sentence is outstanding for one case.[108] The comparison for three cases is indeterminable because of missing information about the charges the accused faced.[109]

Nevertheless, five of the cases resulted in comparatively high sentences, i.e., sentences above 50 per cent of the potential maximum statutory penalty that could have been imposed.[110] Notably, three of these cases were concluded through s 105A agreements – as illustrated in Table 4.4 below. The other two were concluded through a trial or guilty plea.

[107] Duff et al *The Boundaries of the Criminal Law* 1 ed (2010) 164.
[108] *Uzani Environmental Advocacy v BPSA* 2019 (5) SA 275 (GP)
[109] *S v Arbac Services CC and others,* 2011 Germiston Magistrates Court (unreported) unknown case number, *S v Hanste (Pty) Ltd*, 2014 Pretoria North Regional Court (unreported) case number SH2/172/11, *S v Harrismith Galvanizing and Steel (Pty) Ltd and 4 others*, 2015 Harrismith Regional Court (unreported) case number HSH91/12.
[110] On the assumptions that the base data for the calculations are correct, although there may be variables that are not apparent from the information obtained.

Table 4.4: Comparative high percentage between prescribed penalties and sentences in s 105A agreements			
Case Name	**Prescribed maximum penalties faced**	**Sentence agreed**	**Comparative percentage**
S v Acker, 2005[111]	R100 000	R105 000	105% (although here the sentence was postponed - a bursary was payable)
S v Samancor Chrome Ltd, 2014[112]	R200 000	R2 million	1 000%
S v Arcelor-Mittal South Africa Limited, 2020[113]	R5 million	R 3 640 000	72,8%

This information is notable because the sentences were comparatively low for the remaining 23 cases where s 105A agreements were concluded. The accused may have agreed to a high fine to keep evidence of its culpability out of the public domain to limit reputational risk. Because a s 105A agreement was concluded, underlying evidence would not be presented in open court and may limit public attention. Without considering the underlying evidence, the basis for agreeing to such a high sentence is speculative.

The remaining 43 cases resulted in comparatively low sentences, i.e., sentences which are below 50 per cent of the potential maximum statutory penalty that could have been imposed. Two of these cases resulted in a sentence which was 49 per cent of the potential maximum statutory penalty imposed; these were: *S v Vunene Mining*[114] and *S v Golfview Mining*.[115] The other 40 cases resulted in fines less than 20 per cent (most less than 5 per cent) compared to the potential maximum statutory penalty. Eleven of these resulted in a 0 per cent fine; the reasons for this could include that the accused did not have the financial means to pay a fine, and the court may have considered a conviction and criminal record a sufficient punishment. In other instances, remediation costs might have been paid/payable. One accused was sentenced to serve three years of correctional supervision and undertake community service.[116]

No cases resulted in imprisonment being imposed as a sentence, which indicates that these are not the type of offences for which incarceration is sought or imposed. This indication may

[111] Hermanus Regional Court (unreported) case number ECH 100/05.
[112] Lydenburg Regional Court (unreported) case number SHL 472/2012, matter concluded in 2014.
[113] Vereeniging Regional Court (unreported) case number SH118/19, matter concluded 2020.
[114] Ermelo Regional Court (unreported) case number 94/11/2010, matter concluded 2011.
[115] Ermelo Regional Court (unreported) case number ESH 82/11, matter concluded 2013.
[116] *S v T Mosekidi,* 2011, presumably because the accused could not afford to pay a fine and the court may have deemed a wholly suspended sentence insufficient punishment.

support an argument that overcriminalization has not occurred for environmental law transgressions because it does not result in incarceration.

Fourteen cases involving the conviction and sentencing of a natural person (excluding where a s 105A agreement was concluded or in the case of *S v Frylinck*[117]) resulted in a comparatively extremely low sentence, equal to or below one per cent. This figure may indicate that when the court's discretion is exercised in sentencing, the sentences considered appropriate are at the lower end. However, it could then be argued that when considering all the comparative sentences, the statutory penalties are at the extreme high end and could be considered disproportionate for most of the cases. This disproportionality may not indicate overcriminalization *per se* because the court's discretion tempers the maximum prescribed sentences.

4.6 Listed activity treatment - Splitting of charges, duplication of convictions and multiplicity of sentencing

The treatment of activities requiring approvals has been dealt with inconsistently in some cases. Activities that require approval have either been dealt with as separate or consolidated criminal charges. In other words, where an accused undertook an activity that triggered several NEMA listed activities or water uses under the National Water Act, sometimes the prosecution dealt with each listed activity or water use as a separate charge. In contrast, in other cases these were consolidated into one charge. An illustration of these cases appears in Table 4.5 below.

Table 4.5: Illustration of different treatment of activities requiring approval

Separate criminal charges		**Consolidated charge**	
Case	**Description**	**Case**	**Description**
S v Nkomati Anthracite, 2013[118] (s 105A)	Four listed activities and four water uses were listed as separate criminal charges.	*S v Vunene Mining*, 2011[119] (s 105A)	Five Listed activity contraventions were treated as a consolidated charge; similarly, five water uses were treated as a consolidated charge
S v UNICA Iron Steel (Pty) Ltd, 2014[120] (s 105A)	Three listed activities were each listed as separate criminal charges.	*S v Golfview Mining,* 2013[121] (s 105A)	Two Listed activity contraventions were treated as a consolidated charge; similarly, two water uses were treated as a consolidated charge.

[117] Pretoria Regional Court (unreported) case number 14/1740/2010, matter concluded in 2011.
[118] Nelspruit Regional Court (unreported) case number SH 412/13.
[119] Ermelo Regional Court (unreported) case number 94/11/2010, matter concluded 2011.
[120] Temba Regional Court (unreported) case number E01/14, s 105A agreement dated 2013.
[121] Ermelo Regional Court (unreported) case number ESH 82/11, matter concluded in 2013.

Table 4.5: Illustration of different treatment of activities requiring approval			
Separate criminal charges		**Consolidated charge**	
Case	**Description**	**Case**	**Description**
S v Groenrivier Eiendomme (Pty) Ltd and Pieterse, 2017[122] (s 105A)	Two listed activities were each listed as separate criminal charges.	*S v Oil Separation Services,* 2017[123] (Trial)	The Magistrate consolidated two charges of separate listed activities requiring a waste management licence.
S v Middleground Trading, and others, 2017[124] (trial and acquittal)	Three listed activities were each listed as separate criminal charges.		
S v Rodeo Solve CC, 2018[125] (s 105A)	Four waste management activities were each listed as separate criminal charges.		
S v SAM Marie Consulting CC T/A Biotech SA (Pty) Ltd, 2019[126] (s 105A)	Two listed activities were each listed as separate criminal charges.		
S v RR Govender, 2020[127] (s 105A)	Two listed activities were each listed as separate criminal charges		

The cases listed in Table 4.5 above, whether the listed activities or water uses were treated separately or consolidated, resulted in sentences proportionally low (below 50 per cent) compared to the maximum prescribed penalties. Its treatment (whether separate or consolidated charges) may thus not have resulted in disproportionality.

Based on the phrasing in s 24F of NEMA, each contravention of undertaking a listed activity (singular) without an environmental authorisation is a contravention and a criminal offence.[128] Similar provisions appear in the Waste Act[129] and National Water Act.[130] Thus, the correct position appears to be the separate listing of each activity or water use as a separate contravention and charge. There is no immediately apparent reason or trend explaining the different approaches (nor was this discernible from the research interviews discussed in the next chapter).

[122] Worcester Regional Court (unreported) case number WSH 47/2017.
[123] Mokopane Regional Court (unreported) case numbers SH64/16 & 751/17.
[124] Potchefstroom Regional Court (unreported) case number RC66/2016, matter concluded in 2017.
[125] Camperdown Regional Court (unreported) case number RC04/18.
[126] Pinetown Regional Court (unreported) unknown case number.
[127] Durban Regional Court (unreported) case number 41/470/18, matter concluded in 2020.
[128] NEMA ss 24F(1) and 49A(1)(a).
[129] Waste Act ss 20 and 67(1)(a).
[130] National Water Act ss 22 and 151(1)(a).

When an accused is charged with all possible/multiple charges, even if they relate to the same facts or the same unlawful act on the same date, it is called 'to split charges'.[131] Section 83 of the CPA provides that an accused may be charged with all possible offences where it is unclear what offence they committed. However, according to s 336, an accused should not receive more than one punishment for the same crime.[132] It has been said that the provisions 'allowing for the splitting of charges are convenient procedural tools at the disposal of the prosecution'.[133] Therefore, it is not necessarily prejudicial to the accused to charge them with more than one overlapping offence related to the same offence because s 336 safeguards that the accused should not be punished more than once for the same crime.

However, duplicating convictions is prejudicial to an accused, which the defence should raise and argue.[134] An accused may object to the splitting of charges and the multiplication of punishment at the plea stage.[135] Roberts argues that charge splitting or multiplication is objectional on both procedural and substantive grounds.[136] The substantive objection is that injustice arises 'when punishment is imposed more than once for the same conduct'.[137] Reported judgments have not dealt with the tests to be used in determining duplication of convictions.[138] Some of the tests employed in this determination are the 'single intent' and 'single evidence' tests.[139] Where offences are committed with the same intent or supported by the same evidence may indicate overlapping charges.[140] Other cases suggest a 'common sense'

[131] Murdoch Watney 'Duplication of convictions in respect of simultaneous multiple robberies: *S v Toubie* 2004 (1) SACR 530 (W)' (2005) 4 *TSAR* 891 and 892.
[132] CPA s 336 provides that '[w]here an act or omission constitutes an offence under two or more statutory provisions or is an offence against a statutory provision and the common law, the person guilty of such act or omission shall, unless the contrary intention appears, be liable to be prosecuted and punished under either statutory provision or, as the case may be, under the statutory provision or the common law, but shall not be liable to more than one punishment for the act or omission constituting the offence.' (emphasis added)
[133] Watney op cit note 131 at 892.
[134] Watney ibid.
[135] Watney ibid.
[136] Scott Roberts 'No double-dipping: Rethinking the tests for duplication of convictions' 2019 *SALJ* 489, 490.
[137] Roberts ibid.
[138] Roberts ibid.
[139] Watney op cit note 131 at 892; and Roberts op cit note 136 at 492, with reference to *R v Johannes* 1925 TPD 782.
[140] This test was discussed in *Maseti v S* [2014] 1 All SA 420 (SCA) para 3; and *S v Whitehead & others* 2008 (1) SACR 431 (SCA) at 439B; and Ed Couzens, Adrian Bellengère; Meda Couzens, & Devarasi Bellengère 'The baboon behaved impeccably': animal rights and welfare in South Africa, some recent foreign judgments, and the case of *Macrae v State* [SCA, 2014]' (2016) 22 SAJELP 239, 243 where it was stated that '*The Court noted that, as all three of the charges 'depended on the failure to hand over the baboon', there had been an 'improper splitting of charges and an improper duplication of convictions'*

approach.[141] Roberts argues that the duplication of convictions is a moral concern because an accused should only be convicted once for a single punishable act.[142]

Because the tests mentioned do not always guarantee a clear outcome but are a 'practical guide',[143] Roberts develops a possible framework to contribute to the theory of duplication of convictions,[144] establishing a 'Unique Interest Violation scheme'. This scheme involves three steps in determining if there is a duplication of a conviction. Step 1 involves 'identifying the nature of the interest(s) violated or threatened by the crime'. Step 2 requires counting 'the number of interest holders whose interests were violated'. Finally, step 3 entails asking 'whether there has been a chronological break between two interest violations, such that they may now be considered two unique interests violations'.[145] This method is helpful for the cases considered and supplements the 'single intent' and 'single evidence' tests.

In employing these methods, it appears that the accused were convicted of potentially overlapping charges in some of the cases considered. Where s 105A agreements were concluded, the accused was represented and may have been advised of the duplication of convictions. In some cases, the accused pleaded guilty to undertaking an act without approval and also causing a detrimental impact on the environment, yet these may overlap. If the accused had approval, any detrimental impact would be authorised. In other words, there is a duplication if there is a charge for failing to obtain approval and another charge for causing a detrimental impact on the environment. However, if the accused's act exceeded the bounds of any approval, then the elements of the crime for both contraventions might be present.

Table 4.6 below illustrates some examples where the available factual information, including the alleged dates of contravention and underlying activities, may have resulted in a duplication of convictions.

Table 4.6: Examples where duplication of convictions may have occurred

No	Case Name	Description
1.	*S v Ganter Scrapmetals*	The accused pleaded guilty to three charges, which appear to relate to the same unlawful waste disposal act during the same period.[147]

[141] The following cases are examples of such cases listed by Roberts op cit note 136, in footnote 7: *R v Kuzwayo* 1960 (1) SA 340 (A) at 344B; *S v Grobler en 'n ander* 1966 (1) SA 507 (A) at 523F; *S v Whitehead* & others 2008 (1) SACR 431 (SCA)at 443D–E.
[142] Roberts op cit note 136 at 501.
[143] Roberts op cit note 136 at 492, with reference to *R v Kuzwayo* 1960 (1) SA 340 (A) at 344B.
[144] Roberts op cit note 136 at 505.
[145] Roberts op cit note 136 at 509.
[147] And which resulted in contraventions of ss 20(b), and 26(1)(a) and (b) of the Waste Act.

Table 4.6: Examples where duplication of convictions may have occurred		
No	**Case Name**	**Description**
	CC and others[146]	
2.	*S v UNICA Iron Steel (Pty) Ltd*[148]	Two of the counts (to which the accused pleaded guilty) relate to unlawful waste activities and potentially the same facts, although this is unclear.
3.	*S v Rob Fonto*[149]	The accused pleaded guilty to five charges. Counts 2 - 4 appear to relate to waste disposal, which required a licence and reasonable measures to ensure lawfulness. It also resulted in using waste for an unauthorised purpose. These appear to relate to the same criminal act, at the same time, with the same environmental impacts.
4.	*S v Die Straat Trust*[150]	The accused pleaded guilty to four charges relating to unlawful water use, failure to register and impacts on a water resource. Counts 1, 3 and 4 may relate to the same unlawful water use, undertaken at the same time, with the same impact.
5.	*S v Deva Kishorelal*[151]	Both counts of unlawful waste disposal may relate to the same criminal act, undertaken at the same time and with the same impact, but limited information is available.
6.	*S v Rodeo Solve CC*[152]	The accused pleaded guilty to twelve charges. Five charges appear to relate to the same unlawful storage of coal ash.
7.	*S v SA Demolishers CC*[153]	The accused pleaded guilty to three charges relating to the unlawful disposal of waste during August 2010, which appear to relate to the same acts or series of acts in the same timeframe, and with the same impact.
8.	*S v D Groenewald*[154]	The accused pleaded guilty to two charges relating to (1) the unlawful disposal of health care risk waste on land without a permit and (2) which was not disposed of soundly on 30 Match 2017, the same act at the same time.
9.	*S v Emporium Base Minerals (Pty) Ltd*[155]	The accused pleaded guilty to three counts relating to the unlawful disposal of hazardous waste between November 2011 to May 2014.
10.	*S v E Adams*[156]	The accused pleaded guilty to 22 charges. Counts 1 - 5 appear to relate to the unlawful disposal of waste, failing to take specific disposal measures, which may cause pollution during the same timeframe, or as a series of the same act.
11.	*S v RR Govender*[157]	The accused pleaded guilty to thirteen charges. The charges appear to all relate to the same two acts (1) illegal sand mining on four properties during the same timeframe or as a series of the same act, and (2) unlawful sand mining activities on four further properties, during the same timeframe or as a series of the same act.
12.	*S v Moosa Ali and JNR Joubert*[158]	The accused pleaded not guilty but were convicted after a trial. The charges appear to all relate to the same two acts, i.e., disposing of contaminated liquid

[146] East London District Court (unreported) case number A1562/2013.
[148] Temba Regional Court (unreported) case number E01/14, s 105A agreement dated 2013.
[149] Vereeniging Regional Court (unreported) case number RC40/15, concluded in 2016.
[150] Worcester Regional Court (unreported) case number 3WRC2/2017.
[151] Bronkhorstspruit Regional Court (unreported) case number SH105/17, concluded in 2018.
[152] Camperdown Regional Court (unreported) case number RC04/18.
[153] Verulam Regional Court (unreported) case number 1009/11/2010, concluded in 2018.
[154] Pretoria Regional Court (unreported) case number 14/493/2018.
[155] Germiston Regional Court (unreported) case number 4SH100/17.
[156] Bloemfontein Regional Court (unreported) case number 18/174/18.
[157] Durban Regional Court (unreported) case number 41/470/18.
[158] Durban Regional Court (unreported) case number RC201/18.

Table 4.6: Examples where duplication of convictions may have occurred		
No	**Case Name**	**Description**
		or disposal of waste committed between 2014 and October 2017; thus, there could be duplication.

Generally, in the cases considered, all counts were taken together for sentencing. Thus, there may not be a multiplicity of sentencing, which negates prejudice suffered by the accused. However, the duplication of convictions in these matters appears to have remained. In other words, their criminal records will reflect each charge to which they were convicted, even if there was overlap. This multiplicity of convictions based on the same underlying acts, facts and evidence may result in overcriminalization.

In addition, the duplication of convictions raises the issue of the accuracy of the comparative analysis of the sentences imposed compared to the maximum potential statutory penalty. Arguably, in matters where there is a splitting of charges objected to by the defence, there should not be a duplication of convictions, and consequently, the potential maximum sentences that could be imposed will be less.

4.7 Section 34 of NEMA

As explained in Chapter Three, NEMA s 34 creates different forms of criminal liability or additional burdens when a person is convicted of NEMA Schedule 3 offences. These forms of liability include personal liability, where an offence mainly benefits an employer. As mentioned above, natural persons were convicted in 26 of the 53 cases. In three of these 26, natural persons were convicted together with juristic entities.[159]

Section 34 was also used in seventeen of the 53 cases to secure payment directly to environmental authorities. Usually, a sentence comprising of a fine is paid at the Magistrate's Court and goes to the National Treasury. In some instances, s 34(4) was used to recover the reasonable costs incurred by the public prosecutor and the organ of state concerned. In other instances, damages were ordered in terms of s 34. Table 4.7 below lists case examples where additional fines were payable directly to environmental authorities or organisations, thereby preventing payment into the general state coffers.

[159] *S v Ganter Scrapmetals CC and others,* 2013, *S v D Groenewald,* 2019, and *S v SS Ngcobo and others,* 2020.

Table 4.7: Examples where NEMA s 34 was used to impose additional penalties		
No	**Case Name**	**Description**
1.	*S v Vunene Mining*[160]	A portion of the R3 million fine imposed, i.e., R750 000, was payable to the Environmental Protection Agency, in terms of NEMA s 34B, which provides that a court may order that a fourth of the fine to be paid can be paid to an informant whose evidence led to the conviction or who assisted in bringing the offender to justice could.
2.	*S v Golfview Mining*[161]	The NEMA s 34(3)(b) payments ordered comprised of: R1 million payable to the Water Research Council, R1 million payable to the provincial enforcement authority, and R1 million to the Mpumalanga Tourism and Parks Agency.
3.	*S v Nkomati Anthracite*[162]	The accused had to pay a fine of R4 million to DFFE for the execution of EMI functions.
4.	*S v Samancor Chrome*[163]	The accused agreed to pay R200 000 to the clerk as penalty for its offences, an additional R1,78 million to DFFE, (R700 000 earmarked for initiatives for the Steelpoort Primary School, R1 million to the EMIs to execute their duties), and R100 000 for prosecution costs. Thus, a total fine of R2 million.
5.	*S v Rodeo Solve CC*[164]	The accused had to pay R50 000 to the new tenant for costs incurred for remediation; and R30 000 to DFFE for investigation costs.
6.	*S v D Groenewald*[165]	The accused was ordered to pay R28 152.66 to the City of Tshwane for costs for removal and safe disposal of waste.
7.	*S v SAM Marie Consulting CC*[166]	The accused was ordered to pay additional compensation of R50 000 to the DFFE for the EMIs for the performance of their functions and duties.
8.	*S v EnviroServ Waste Management Ltd*[167]	The accused agreed to pay a R1,2 million fine to the DFFE and R1,2 to Upper Highway Air NPC.

Imposing such additional sentences or penalties may also raise questions regarding just desert and proportionality. However, the above cases were concluded through s 105A agreements where the accused agreed to these additional sentences. Therefore, it would be difficult to argue that these additional sentences/penalties amount to overcriminalization, absent a trial and judgment.

4.8 Similar offences for less serious contraventions

As argued in the previous chapter, subjecting serious and less serious offences to similar high penalties could lead to disproportionality. In turn, imposing disproportional sentences could result in overcriminalization. In a prosecution, the prosecutor should seek a just penalty. The

[160] Ermelo Regional Court (unreported) case number 94/11/2010, matter concluded 2011.
[161] Ermelo Regional Court (unreported) case number ESH 82/11, matter concluded in 2013.
[162] Nelspruit Regional Court (unreported) case number SH 412/13.
[163] Lydenburg Regional Court (unreported) case number SHL 472/2012, matter concluded in 2014.
[164] Camperdown Regional Court (unreported) case number RC04/18.
[165] Pretoria Regional Court (unreported) case number 14/493/2018.
[166] Pinetown Regional Court (unreported) unknown case number.
[167] Durban Regional Court (unreported) case number 41/540/20.

presiding officer will consider relevant evidence before imposing a sentence to ensure a just outcome.[168] As illustrated in Chapter Three, such factors do not appear to receive adequate consideration when laws are drafted or enacted. Penalties for serious or less serious crimes could be similar, as illustrated in the following three cases.

In *S v Die Straat Trust,*[169] the accused was charged with (1) conducting an unlawful water use; (2) failing to register a water use; (3 and 4) detrimentally affecting a water resource by excavating soil and constructing a road during February 2015. Counts 1-4 are all subject to a similar maximum penalty of R200 000. Undertaking a water use without a licence or polluting or detrimentally impacting a water resource (charges, 1, 3 and 4) appear *prima facie* more severe than the failure to register a water use (charge 2).[170] Subjecting the failure to register to a potentially similar penalty as an actual impact on a water resource appears disproportionate. The accused pleaded guilty to the charges and concluded a s 105A agreement with the prosecution. Nevertheless, in this case, the counts were taken together for sentencing, a R150,000 fine was wholly suspended subject to the accused undertaking rehabilitation.

In *S v E Adams*,[171] the accused pleaded guilty to 22 charges all related to waste management activities, the failure to comply with licence conditions and compliance notices; and norms and standards requirements (regarding access control, signage, failure to store waste in covered containers, or exceeding capacity requirements). The maximum potential statutory penalties under the Waste Act for fourteen of the charges[172] is R10 million. The maximum statutory penalty for the other eight charges[173] is R5 million. Similarly, it appears that three of the charges related to contraventions with less or no direct environmental impacts. For example, a failure to comply with norms and standards requiring access control or signage. In comparison, the other offences have the potential to have severe environmental impacts. Nevertheless, the statutory prescribed maximum sentences are all the same.

In *S v Samancor Manganese*, [174] the accused was charged with seventeen charges regarding the failure to comply with seventeen conditions across three waste management licences and failing to comply with a condition of its atmospheric emissions licence. The contravention of

[168] CPA s 274.
[169] Worcester Regional Court (unreported) case number 3WRC2/2017
[170] Regulation 13 of the Regulations requiring that a water use be registered, published in GN R1352 of 12 November 1999.
[171] Bloemfontein Regional Court (unreported) case number 18/174/18.
[172] Counts 1, 2, 21, 22, 10-19 - See case number 46 in Annexure A.
[173] Counts 3, 4, 5, 9, 20 and 6-8 - See case number 46 in Annexure A.
[174] Vereeniging Regional Court case number RC217/15.

each different licence condition constitutes separate criminal acts undertaken at separate times, but the impact of each should be considered as these could rather be administrative non-compliances and not transgressions with direct environmental impacts. For example, not informing the authorities of changes in contact or other administrative details is unlikely to have environmental impacts.

As a complex and technical area of law, environmental law should be distinct in terms of the different acts it seeks to punish. It should prescribe just and proportional punishments depending on the nature of the accused and the nature of the transgression. It should distinguish between serious and less serious offences with different environmental impacts or varying degrees of impact. To prescribe the same potential maximum penalty for all offences is disproportional. It cannot be, and therefore it may result in overcriminalization.

5. CONCLUSION

From the case information gathered (of the 53 concluded environmental prosecutions), as assessed in this chapter (and Annexure A to this thesis), it was illustrated that the conviction rate was high (at 98 per cent); about half of the cases were concluded through a s 105A agreement and about half resulted in natural persons convicted. A majority of cases (81 per cent) resulted in comparatively low sentences/fines, nine per cent (five) resulted in comparatively high sentences/fines;[175] for the remaining ten, the data was insufficient to make this determination.

The high conviction rate (98 per cent) does not necessarily indicate overcriminalization as it could be explained by careful case selection; in other words, the NPA selects strong cases for prosecution. There does not appear to be a general trend to conclude criminal cases through s 105A agreements in South Africa.[176] However, that nearly half of the environmental prosecutions considered are concluded through s 105A agreements may indicate such a trend for environmental crimes.

The lack of a publicly accessible database with detailed case information is restrictive. For the reasons posited in this chapter, the benefits of such a database include that it would lead to improved knowledge and understanding of environmental prosecutions, adjudication, and

[175] On the assumptions that the base data for the calculations are correct, although there may be variables that are not apparent from the information obtained.
[176] National Prosecuting Authority *Annual Report* op cit note 102 at 75.

application of complex environmental laws. In turn, this may improve legislative drafting that ensures practical and accurate laws. Such a database will benefit many key role players and, in turn, the environment. Increased knowledge of successful prosecutions may result in increased deterrence. Justice would be more visible to the general public and would be 'seen to be done'.[177]

Consequences of limited data include that it impairs a determination of overcriminalization for several themes considered in this chapter, namely,

1) Total convictions: the number of convictions (52 out of 53) or s 105A agreements (26) is not necessarily an indication of overcriminalization; a more detailed assessment of the evidence would be required but is not possible without it being available;
2) Conviction of natural persons: Although the number of individuals convicted and sentenced (26) appears high, limited information is available for most of these cases (17 of 26).
3) Percentage comparison of prescribed fines versus imposed fines: Five of the cases considered resulted in comparatively high sentences. Three of these were concluded through s 105A agreements, but there may be factual bases for these sentences that are not apparent from the information obtained. Most of the cases (43) resulted in comparatively low sentences, and no cases resulted in imprisonment being imposed as a sentence. Fourteen cases involving the conviction and sentencing of a natural person resulted in a comparatively extremely low sentence, equal to or below one per cent, indicating that courts' discretion may temper disproportionality as they do not impose fines commensurate with the maximum prescribed penalties.

Based on available information, determining overcriminalization may be more straightforward for the following themes:

1) Listed activities treatment: In principle, each transgression of a statutory provision may be a separate criminal charge. Separate National Water Act water uses and NEMA listed activities have been treated differently in some cases, either as consolidated or separate criminal charges. In principle, an accused should not receive more than one punishment for the same crime.[178] Without procedural or substantive safeguards, the

[177] S Terblanche *The Guide to Sentencing in South Africa* 3ed (2016) 142.
[178] CPA s 336.

splitting of charges, duplication of convictions, and multiplicity of sentencing could lead to overcriminalization – dependent on the facts of each case. The cases considered generally resulted in all criminal counts/charges being taken together for sentencing, thus, not necessarily raising concerns regarding a multiplicity of sentencing. However, duplication/multiplicity of convictions, where each separate charge is reflected in the accused's criminal record and is based on the same underlying acts, facts and evidence, may result in overcriminalization.

2) Additional sanctions and NEMA s 34: Imposing such additional sentences or penalties may raise questions regarding just desert and proportionality. However, the cases where s 34 was employed were concluded through s 105A agreements where the accused agreed to such additional sentences, likely foiling any argument regarding overcriminalization.
3) Similar offences for less serious contraventions: In three cases charges were pursued where similar penalties were prescribed for transgressions with severe environmental impacts and those with minimal or no environmental impact, which may indicate disproportionality. However, these cases were also concluded through s 105A agreements.

Following on from the case analysis in this chapter, insights were gained from key role-players, many of whom were involved with some of the cases discussed. The results of that contained qualitative empirical inquiry are presented in Chapter Five.

CHAPTER 5: PARTICIPANT PERSPECTIVES ON THE USE OF THE CRIMINAL SANCTION FOR ENVIRONMENTAL LAW TRANSGRESSIONS

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1. INTRODUCTION

This chapter presents the results of a contained qualitative empirical inquiry into the perspectives of role-players in key stakeholder groupings in the environmental criminal justice sector. It reflects the role-players' perspectives on the design, use, and impact of environmental criminal sanctions in the context of industrial facilities. The aim is to draw from these expert/insider views in answering the research question of whether overcriminalization occurs. The University's Human Research Ethics Committee (Non-Medical) granted ethics clearance for this research as it involves human participants.[1]

As explained in Chapter One, role-players were selected as research participants based on their experience applying or implementing the four environmental laws discussed in this thesis. This chapter analyzes and synthesizes interviews with 32 research participants who fall within five key participant categories, all with different forms of involvement in the practical implementation of South African environmental laws. The key participant categories are (1) employees of industrial operations involved in environmental management and compliance or industry participants (IPs); (2) environmental enforcement and other government officials, including EMIs or officials who support or oversee EMIs; (3) prosecutors involved in environmental crime prosecutions; (4) magistrates who have adjudicated such prosecutions; and (5) defence counsel who have defended industry clients in environmental crime prosecutions.

The number of research participants represented an almost equal number of government and private sector participants. Seventeen public sector/government employees participated in the research comprising ten environmental enforcement and other government officials, five prosecutors, and two magistrates. The fifteen private-sector research participants comprised twelve IPs and three defence counsel.

Because of the different roles of the research participants within each participant category, the interview sheets (used to guide the interview discussions) were tailored to suit the context of that participant category. For example, a prosecutor focuses on criminal prosecutions, while an EMI conducts a criminal investigation. As IPs are tasked with ensuring compliance with the laws to avoid criminal prosecution, their view of, or approach to, the subject matter is different. The perspectives of defence counsel or magistrates may also differ because of the different

[1] Human Research Ethics Committee (Non-Medical) Clearance Certificate with protocol Number: H18/11/31 issued to M Strydom issued on 16 November 2018 with expiry date 28 November 2021.

positions they occupy, the subject matter they consider, advise on, or adjudicate. Thus, varying questions were required to capture each role's nuances and obtain participants' insights into the research topic.

During the interviews, the researcher asked wide-ranging questions to establish the context, the participants' level of experience, their highest qualification, area of qualification, legal training, and experience within their particular organization. These discussion topics are not directly relevant to answer the research questions but provide beneficial contextual information and confirmed that the research participants were appropriately selected.

Although the discussion topics in the prepared interview sheets were tailored for the context of a key participant category, they ultimately converged to address the research questions and aims. The relevant themes emanating from the interviews are:

1) Determining if the criminal sanction is used as a last resort mechanism;
2) Certainty and practicality of the law as it is enacted and amended;
3) The deterrent effect of criminal sanctions in environmental law;
4) Consistency in the application of criminal law sanctions;
5) The practicalities and everyday challenges in criminal enforcement

Research participant views were considered with reference to the above themes. If an aspect, perspective, or challenge (within these themes) was raised by multiple participants it may carry more weight in the analysis. Singular comments are also recorded where pertinent to these themes, but may carry more limited weight in the analysis.

The mentioned themes are discussed in Parts Three to Seven below, with reference to the views expressed by participants. Part 2 provides background information regarding the research participants within each participant category. Summaries (in a bar graph or table form) have been added to the themes below in instances where it is possible to indicate yes or no responses to specific questions. Where specific questions are indicated as being unanswered by a particular participant, it could be due to: the participant not having specific experience with or a view on the question; the participant having answered in a way that a clear answer was not apparent; or the discussion evolved into a different topic, and the question was not returned to, for various reasons, including the participant's time constraints.

2. PARTICIPANT CATEGORY BACKGROUND

2.1. Participant Category 1: Industry

The twelve IPs interviewed are tasked with ensuring environmental compliance within their respective organizations, most having experience with both compliance and enforcement action. Participants in this category are familiar with the relevant laws and the four laws considered in this study. They are all graduated and qualified professionals with many years of experience. Most hold senior positions within their respective organizational structures. Some of the IPs, who are employed by the same organization, chose to be interviewed together.[2]

IPs provided their perspectives on the practicalities of complying with ever-changing environmental laws, particularly when faced with administrative or criminal enforcement action.

2.2. Participant Category 2: Defence Counsel

For this research, defence counsel means legal counsel involved in defending environmental enforcement action, including advocates or attorneys, and are referred to generally as 'Counsel' to ensure anonymity. Three participants in this category were interviewed. Two have more than 30, and one has more than ten years of experience. Counsel 1 and 2 have extensive experience in defending clients in environmental prosecutions. Counsel 3 has prosecutorial experience and experience in environmental law but has not been involved in defending environmental prosecutions; thus, their additional contributions were limited.[3]

As legal experts, counsel were asked about their views of the frequently changing environmental laws, the design, use, and impact of environmental criminal sanctions, its deterrent effect, challenges in prosecutions, and the criminal sanction as a 'last resort' mechanism.

2.3. Participant Category 3: EMIs

EMIs are central role-players in investigating environmental crimes and referring matters for prosecution to the NPA. The relevant statutory provisions which regulate the functions of EMIs

[2] Interview Transcript ('IT') for IP 4 and IP 5, 29 Jan 2019 and [2] IT for IP 8, IP 9 and IP 10, 8 Feb 2019.
[3] Interview notes - Counsel 3, 16 Jan 2019, p2. Counsel 3's comments mostly aligned or confirmed the contributions of other participants. Because of Counsel 3's limited experience, contributions were manually noted on an interview sheet and not recorded or transcribed.

are discussed in Chapter Four, Part 3.1. The EMIs also derive their powers to investigate environmental crime from a standard operating procedure ('SOP') between the DFFE[4] and the South African Police Service.[5] The SOP provides that environmental crimes reported at SAPS stations (so-called 'green dockets') may be investigated by EMIs.[6]

This participant category comprised ten research participants, consisting of two EMIs that focus on criminal investigations, two who focus on administrative enforcement mechanisms such as compliance notices and directives, one who monitors compliance, three who occupy managerial roles and oversee broader mandates (not only criminal investigations but also administrative action or compliance monitoring), and two officials supporting or overseeing EMIs. To maintain anonymity, all the participants in this category are referred to as 'EMIs'.

Most of the EMIs interviewed have more than ten years of experience, with one having more than twenty years of experience. Their qualifications range from investigation backgrounds within the SAPS to scientific or legal qualifications. Generally, EMIs are tasked with distinct and specific roles, such as compliance monitoring, administrative enforcement, or criminal enforcement. These roles are distinct because the experience, qualifications, daily tasks, and the nature of the information received in exercising these roles differ.

EMIs who focus on compliance monitoring generally have scientific qualifications, as they analyse technical or scientific information to determine compliance.[7] They need to understand sampling and analysis reports and consider compliance with technical requirements.[8] Ordinarily, their mandate would not involve issuing administrative enforcement notices or criminal investigations, but these functions may overlap (or there may be coordination between these functionaries) where administrative enforcers refer transgressions to criminal enforcers. EMIs tasked with administrative enforcement generally issue administrative notices, requiring knowledge of the law and drafting skills, for which an environmental management, scientific or legal background may be sufficient. In comparison, criminal investigators generally have SAPS experience and sometimes law degrees. The managerial level EMIs have qualifications in law or a combination of science, conservation and law.

[4] As it is currently known.
[5] IT - EMI 2, 23 Jan 2019, p8.
[6] Ibid.
[7] ITs - EMI 6, 25 Jan 2019, p2; EMI 7, 8 Jan 2019, p2.
[8] ITs - EMI 1, 23 Jan 2019, p3; EMI 3, 23 Jan 2019, p2.

Compliance, administrative and criminal enforcement roles can also be distinguished based on the nature of the information or evidence gathered, which is either used for civil or criminal enforcement. As explained in Chapter Four, Part 3.1, information gathered from compliance monitoring activities cannot be used in criminal proceedings unless the evidence is admissible and constitutionally obtained.[9] The failure to adhere to procedural and constitutional safeguards and evidentiary requirements would render the evidence inadmissible in criminal proceedings.[10] Thus, EMIs who conduct criminal investigations require a specific skill set and knowledge of these requirements.

Because of the complexity of environmental law, the relevance of various scientific fields and law subjects, varied competencies are required for successful compliance and enforcement action and successful criminal investigations and prosecutions. This experience includes criminal investigation experience, knowledge of criminal procedural requirements, knowledge of environmental law, and some understanding of the scientific and technical parameters that apply within environmental law. A single person cannot be an expert in all of these areas, and often EMIs work in teams with members with separate skill sets.[11]

Participants in this category were thus able to provide practical insights into the workings of EMIs and, consequently, the use of criminal sanctions for environmental transgressions.

2.4. Participant Category 4: Prosecutors

Five prosecutors were interviewed, of whom three are specialist environmental prosecutors, who predominantly prosecute environmental crime. The other two prosecute a varied range of crimes, including common law or other statutory crimes. The interviewed prosecutors have extensive experience, ranging from 20 to upwards of 30 years with the NPA. Most have more than ten years of experience in environmental law prosecutions.

Increasingly, prosecutors are becoming more specialised in environmental cases, especially those at the NDPP offices who focus more on environmental, pollution, and waste related cases. Although situated in provincial NDPP offices, they prosecute cases in various (primarily Magistrates') courts. Such cases may be more daunting for regional court prosecutors who have a full caseload consisting of common-law crimes. Often, environmental cases require a lot of

[9] The Constitution s 35(5); CPA Chapter 25; PJ Schwikkard & SE van der Merwe *Principles of Evidence* 3 ed (2018) 49; Adrian Bellengère et al *The Law of Evidence in South Africa – Basic Principles* (2013) 25.
[10] Ibid.
[11] IT - EMI 1, 23 Jan 2019, p3.

evidence and documentation; sometimes, a docket could consist of boxes of files.[12] The accused could also be represented by a senior or specialized defence counsel team, which could be intimidating,[13] particularly to regional court prosecutors who may be junior, with full caseloads and limited specialist environmental law knowledge. Prosecutors rely on the EMIs as the lead investigators gathering the evidence to prove a crime. Often prosecutors do not conduct site visits (where an alleged environmental crime occurred) and would not have knowledge or experience in complex industrial processes.[14] They rely on the knowledge of the EMI. EMIs support prosecutors as specialists in environmental law and often assist with or even draft the charges in a charge sheet.

The prosecutors provided insights on the practicalities and challenges in prosecuting environmental crimes and the design and use of criminal sanctions.

2.5. Participant Category 5: Magistrates

The magistrates were identified based on their involvement in environmental prosecutions that proceeded to trial. They are senior magistrates with more than 30 years of experience. They have considered environmental laws applicable to cases they have heard, pronounced on the evidence presented, and decided on the accused's guilt. They were able to identify shortcomings and challenges they observed in the environmental prosecutions before them and environmental law in general.

3. DETERMINING IF THE CRIMINAL SANCTION IS USED AS A LAST RESORT MECHANISM

As discussed in Chapter Two, many writers argue that the criminal sanction should be used as a last resort because it is the state's most condemnatory response to behaviour that society (as a whole) denounces. Too much criminal law encumbers criminal enforcement, unnecessarily burdens state resources, and leads to unequal enforcement or the unequal exercise of enforcement discretion. In turn, the deterrent value of criminal sanctions is reduced. In particular, regulatory/statutory offences may make criminals of otherwise law-abiding citizens.

[12] IT - EMI 2, 23 Jan 2019, p7.
[13] Ibid.
[14] IT - Prosecutor 2, 10 July 2020, p9.

Research participants were asked their views on whether the criminal sanction for environmental law transgressions should be used as a last resort.

3.1. Industry Participants

Most IPs believe that the criminal sanction should be a last resort, with one dissenting view saying that it is 'a good stick' to ensure compliance within their organization. A few IPs did not share a specific view.

According to IP 1, criminal prosecution is a last resort because-'we would shut our plants down instead of facing prosecution. That is what it means to this company'.[15] IP 2 agreed that it is a last resort and expressed the view that the penalties should be correlated to the transgressor, such as a percentage of profit fine or the benefit gained.[16]

IP 4 thought administrative processes must be followed first before criminal processes ensue. They believe an administrative penalty system, as an alternative mechanism, could encourage or discourage people from rectifying unlawfulness, depending on affordability or whether people want to avoid paying fines. However, it could make a positive contribution. IP 5 added that administrative fines based on proportionality (the penalty that is deserved) might be more effective.[17] IP 7 said that criminal sanctions should be a last resort, emphasising that it is necessary, but thought that-

> The law should be written so that the significant impacts and damage have sanctions but not insignificant ones. The latter should require alternative processes.[18]

IP 11 also thought it should be a last resort, and companies should be allowed an opportunity to 'get resources in place' because they 'are not here just to destroy everything'.[19]

IP 6 shared a different view and explained that the threat of criminal prosecution is a useful 'stick' to convince and motivate compliance measures to be taken (within an organisation) and to receive the attention (and funding) it deserves. A different method, such as an administrative mechanism, may detract from the much-needed focus environmental compliance matters require. The mechanism 'needs to shake them to their core that they nearly have to close down'. An administrative penalty would have to be carefully considered so as not to take the focus

[15] IT - IP 1, 3 Dec 2018, p12.
[16] IT - IP 2, 15 Jan 2019, p10.
[17] IT - IP 4 and IP 5, 29 Jan 2019, p14.
[18] IT - IP 7, 5 Feb 2019, p13.
[19] IT - IP 11, 18 Feb 2019, p9.

away by offering a watered-down approach.[20] IP 6 said that they do not favour a situation where only an administrative fine is issued; it should be combined with a directive to fix the problem. An administrative fine cannot result in operations budgeting for fines; it must be sufficiently threatening. If the fine is not paid, or there is a repeat offence, there should be a prosecution. They added that-

> Prosecution as a last resort is not always a good thing unless you have a better replacement where you actually can utilise the money for the corrective action. The money is the deterrent – that is one of the biggest reasons people do not comply is because of the finances. If they are forced to set the money aside, then it would also be a deterrent.[21]

Although some participants shared that they favoured an administrative penalty system as an alternative mechanism, IP 6 did not agree. Management of operations may prefer such a system so that it does not involve an acknowledgement of guilt-

> In Europe, it is possible, but the problem is then they will budget for it. They will start budgeting for administrative fines. The point of consistent compliance in a company is not achieved, but crisis management is instead done. An administrative fine without any criminal threat or effect, or a financial implication, [would be problematic].[22]

IP 6 suggested a combined approach that will still 'scare' industry:

> Like a huge fine or something that will impact the business, which can close the business combined with something like the money going into a trust fund. A compliance notice combined with an administrative fine.[23]

IP 7 also did not favour administrative penalties and would instead follow a criminal route, 'if something is serious, it requires immediate action'. They added that a notice should be issued for trivial transgressions and an opportunity granted to remedy the situation. If the issue is not remedied or the practice is repeated, then prosecution should follow.[24]

3.2. Counsel

Counsel shared their belief that the criminal sanction should be a last resort mechanism. According to Counsel 1, authorities seem intent on following a prosecution route even where it may be inappropriate, where administrative measures are still pending, and where a matter

[20] IT - IP 6, 31 Jan 2019, p9.
[21] IT - IP 6, 31 Jan 2019, p10.
[22] IT - IP 6, 31 Jan 2019, p3.
[23] IT - IP 6, 31 Jan 2019, p5.
[24] IT - IP 7, 5 Feb 2019, p13.

ultimately may end in an acquittal. Counsel 1 believed that criminal law should be the last resort, 'we should not criminalize when it is not necessary. Environmental offences are different from common-law crimes like murder and rape.'[25] Whilst acknowledging that serious transgression may justify criminal prosecution, Counsel 1 stated that the administrative mechanisms should be exhausted first. There should be an administrative fine system outside of the criminal law.[26]

Counsel 2 said that 'the true impact on the environment must be part of the equation of determining the correct action', and sometimes enforcement should be progressive.[27] In other words, administrative enforcement should precede criminal enforcement. Counsel 2 did not accept the general proposition that the criminal investigation should run concurrently to preserve evidence; and said this could not be so in all cases. Many cases are about whether there was an approval or not; that is a factual determination and should not be difficult to prove even in a year or two. The impression they have been left with is that-

> There is a personal vendetta. The matter is driven by the EMI's ego and nothing else or no other factors other than how good the EMI would look if they prosecuted a big company. There is a tiny ego with too much power, no bigger picture thinking in the interest of the economy or the environment.[28]

Counsel 2 argued that it does not make sense to go the criminal route for transgression, which authorities deem not severe enough to shut the facility down. They wondered-

> If an administrative fine would not require less capacity than a specialist criminal court. Why don't they hit industries where it hurts without killing them? … prosecuting people where it is not really in the environment's interest, [sends] the wrong message.[29]

They shared that it is critical to consider an administrative penalty system.[30] The appropriate penalty or enforcement mechanism must be 'one [that] hits the hardest, is more sustainable and easier to [impose] and which will change behaviour for the better.' They added-

> The criminal sanction is difficult because it has an onerous burden of proof, it is system intensive, it is hugely reactive, and it presents someone with the possibility of 'getting out of

[25] IT - Counsel 1, 21 Jan 2019, p3, 4, and 6.
[26] IT - Counsel 1, 21 Jan 2019, p4.
[27] IT - Counsel 2, 11 Feb 2019, p3.
[28] IT - Counsel 2, 11 Feb 2019, p4.
[29] IT - Counsel 2, 11 Feb 2019, p6.
[30] IT - Counsel 2, 11 Feb 2019, p11.

> it'. An administrative fine can be smaller, more regularly imposed, with a lower burden of proof, by removing fault. People must feel it on their balance sheet, which would [get a shareholder's attention]. It is just a shorter process. … if [a small operator] can dodge environmental compliance and save them money, they will.[31]

It becomes counterproductive to prosecute productive members of society-

> You want to incentivise people to comply. Keep it small enough to keep operating, but big enough that they do not do it again. … There are two categories of people: criminals and evil people vs economic drivers (people who generate money and create employment). The latter's entire motivational driver is what a country runs on, so we need it and do not want to criminalize those people. … If we criminalize, a licence to operate and reputation is at risk.[32]

Counsel 2 thought that the structural problems and the approach to criminal prosecutions could be based on a narrow perspective or narrative that 'industry is bad' and that narrative has to change in order to find the appropriate ways of ensuring compliance -

> If you have an incremental fines system, it should reduce the administrative burden on the state and incentivises compliance in a way that is immediately apparent to the business who is principally driven but small enough not to kill [the business]. We need to find that system. If someone is so stupid that that system still makes him continue to violate, then he becomes a criminal and can go to jail.[33]

There is no reason why people would not react to such a system unless-

> (1) It is not being implemented – then it is a state problem, or (2) the transgressor is an absolute [schmuck] who does not care about his shareholders. In the latter case, the benefit to society is lost; they might as well be thrown in jail.[34]

Still, Counsel 2 said there is value in prosecution at the right time- 'a prosecution at the right time is a good thing. There is no seriousness or attention given to some things until the CEO or the company is in [criminal] trouble.'[35]

[31] IT - Counsel 2, 11 Feb 2019, p7 and 8.
[32] IT - Counsel 2, 11 Feb 2019, p8.
[33] Ibid.
[34] Ibid.
[35] IT - Counsel 2, 11 Feb 2019, p4.

3.3. EMIs

Most EMIs (six out of ten) said that using criminal sanctions for environmental offences should not be the last resort, and the law allows it to be undertaken concurrently with administrative enforcement action. Many said that the approach taken depends on the seriousness of the offence or if it involves a repeat offender. Others said that the circumstances and the best mechanism to address or resolve environmental pollution or degradation should determine if the criminal sanction is used. Some EMIs provided a qualified view, with neither a direct yes nor no answer. Only one considered it a last resort mechanism. The differing views illustrate inconsistency in the approach of enforcers and the policy that should underlie criminal enforcement. This inconsistency may be caused by EMIs being situated in different departments (e.g., national vs provincial) or influenced by differing experience levels.

According to EMI 1, criminal law should be the first resort for repeat offenders - 'criminal matters are not taken lightly. We carefully consider matters before we pursue that avenue'.[36] According to EMI 5, 'most of the time, the criminal process is last within the departmental process.'[37]

EMI 2 thought that while criminal law may be a last resort mechanism theoretically, it depends on the seriousness of the environmental impact or transgression. The need to collect evidence without delay may justify conducting a criminal investigation parallel with administrative enforcement measures.[38] They explained that it may be too late to prove a criminal case if criminal investigations are reserved for when other mechanisms have failed. Years may have passed, witnesses may disappear or forget, and evidence may no longer exist or might have gone missing. For example, sampling for pollution at a later stage may no longer prove pollution as it may have dissipated.[39] Moreover, evidence collection in criminal matters is different from evidence collection in compliance monitoring matters, as explained in Chapter Four (Part 3.1). EMI 2 explained that the factors relevant to sentencing, e.g., the nature of the crime, the offender, and society's interests,[40] are considered at the sentencing stage and do not play a role when authorities decide to conduct a criminal investigation.[41] In other words, if (at

[36] IT - EMI 1, 23 Jan 2019, p9.
[37] IT - EMI 5, 25 Jan 2019, p2.
[38] IT - EMI 2, 23 Jan 2019, p10.
[39] IT - EMI 2, 23 Jan 2019, p10 and 11.
[40] Referring to *S v Zinn* 1969 (2) SA 537 (A) at 540G.
[41] IT - EMI 2, 23 Jan 2019, p12.

face value) a crime has been committed, it should be criminally investigated regardless of the nature of the crime, the offender's circumstances or society's interest.

EMI 3 shared the view that the criminal sanction's place within the spectrum of enforcement measures depends on the nature and significance of a transgression.[42] EMIs 4 and 6 had similar views. However, in some instances, they said, it cannot be the last resort; if there is a significant environmental impact resulting from a contravention, compliance officers may, whilst on site, call enforcement officials to come and investigate.[43]

EMI 9 said it is not a last resort mechanism, but they consider the merits of a case. If there is 'significant harm or the real blatant disregard of the law, then we would follow the criminal route at the same time as the administrative route'. They consider revoking an approval as the last resort mechanism in environmental law.[44] They believe that the criminal route must be followed in 'instances where there is significant harm, where you can clearly see there is knowledge of what needed to be done and blatant disregard of the law.' That is where they would follow their Enforcement Guideline, which contains these main principles.[45]

In contrast, EMI 7 explained that their office tries to use it as a last resort,

> We try to look at it holistically. At the end of the day, when we take the criminal route, it means that we have exhausted everything else possible. We have talked, met, issued a pre-compliance notice and compliance notice.[46]

3.4. Prosecutors

Four out of the five prosecutors think that using criminal sanctions for environmental offences should not be the last resort.

Prosecutor 1 said that when a contravention is committed, a criminal investigation must be conducted immediately. The administrative process could divert the accused away from the criminal justice system. In other words, conducting both administrative and criminal processes simultaneously could render a favourable outcome or response to the administrative sanctions. Accused persons are likely to comply much quicker once a criminal process is started. Following this approach could 'strengthen the authorities' hand. Prosecutor 1 explained that it

[42] IT - EMI 3, 23 Jan 2019, p9.
[43] IT - EMI 6, 25 Jan 2019, p8.
[44] IT - EMI 9 and 10, 12 Feb 2021, p12.
[45] IT - EMI 9 and 10, 12 Feb 2021, p12.
[46] IT - EMI 7, 8 Jan 2019, p6 and 8.

appears to them that the authorities adopted a different policy to resolve matters through administrative means because they want everybody to come under the regulatory framework's umbrella. They said that, since it has been more than twenty years since the commencement of NEMA, people have had more than enough time to become compliant.[47]

Prosecutor 2 stated that-

> It shouldn't be a last resort. If the accused is not complying … or the notices issued by [DFFE] to the company or the accused are not complied with, it means it will be easy to manage and deal with these matters.[48]

According to Prosecutor 4, 'it should be the first resort', which urgently requires restorative justice programmes 'to protect the environment more effectively'.[49] Prosecutor 3 had a similar view that- 'criminal offences must be investigated and referred to the NPA for consideration and a decision'.[50] The fact that trivial matters may be elevated to criminal sanctions in laws or regulations is within the legislators' purview. Once an offence provision is created and a contravention occurs, it must be criminally investigated and referred for prosecution. For authorities to have a different policy will create grey areas and inconsistent approaches.[51]

Prosecutor 5 shared an opposing view; that prosecution should be a last resort.[52] They said that authorities do not want to close a facility down but want to institute criminal proceedings, but that cannot be reconciled with the principle that crimes are the state's most condemnatory response. In other words, environmental transgressions are serious enough for criminal sanctions but not severe enough for the facilities to be closed down.

3.5. Magistrates

Both Magistrates 1 and 2 think criminal prosecution should not necessarily be the last resort. It depends on the circumstances of a case, according to Magistrate 1-

> It is not a one-size-fits-all, and the legislature tries to apply a one-size-fits-all, and it does not work. By grouping all offences (whether significant or not), it creates a discretion that opens

[47] IT - Prosecutor 1, 7 July 2020, p3.
[48] IT - Prosecutor 2, 10 July 2020, p12.
[49] Written response from Prosecutor 4 on 29 October 2020, p2.
[50] IT - Prosecutor 3, 25 Aug 2020, p12.
[51] IT - Prosecutor 3, 25 Aug 2020, p11.
[52] IT - Prosecutor 5, 9 Nov 2020, p10.

> the door to corruption. They should rather distinguish between administrative offences and actual criminal transgressions. Make the distinction. One size does not fit all.[53]

Magistrate 2 said that using criminal sanctions should be determined by the seriousness of the crime- 'if it is not serious, an administrative sanction should rather be imposed, and the matter should be kept out of the criminal court', but serious cases should go to court. There must be a distinction between serious offences (that should go to court because offenders can face jail time) and administrative sanctions (where it is unnecessary to involve the criminal justice system). They said that an administrative fine would be less of a burden on the criminal justice system. People may be willing to pay administrative fines because appearing in criminal court requires time and costs, e.g., waiting to testify, testifying, and appointing attorneys. They reiterated that in serious cases, a prosecution should not be the last resort.[54]

3.6. Conclusion: Criminal law as last resort

From the interviews, it appeared that participants all agree that criminal sanctions are a necessary tool to ensure environmental compliance. However, participants diverge on when the criminal sanction should be used or where it fits within the spectrum of enforcement action. The bar graph below summarises participant views on whether or not the criminal sanction is a last resort. Twelve (out of 32) participants said that the criminal sanction should be a last resort, whereas eleven disagreed. There is a clear split between the views of public vs private sector participants, in that ten private sector participants said the criminal sanction should be a last resort (with one dissenting voice). The public sector participants disagreed, with ten saying it should not be a last resort mechanism (with two dissents).

Serious crimes may justify using the criminal sanction as a first resort. What is problematic is that the law does not differentiate between serious and trivial crimes; instead, it creates criminal offences with similar prescribed penalties for serious and less serious crimes, creating unnecessary discretion and inconsistent approaches in prosecuting environmental crime.

Some authority participants consider revoking an approval as a more significant mechanism than criminal sanctions [55] and the 'worst thing' that could happen to a company.[56] A facility

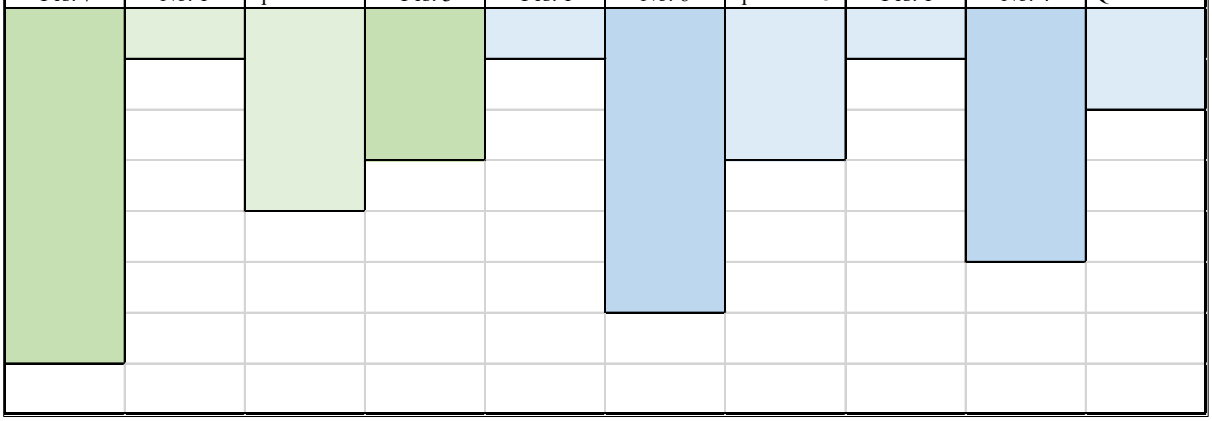
[53] IT - Magistrate 1, 5 Feb 2021, p10.
[54] IT - Magistrate 2, 11 Feb 2021, p11.
[55] IT - EMI 9 and 10, 12 Feb 2021, p12.
[56] IT - Magistrate 1, 5 Feb 2021, p8.

cannot simply be shut down because jobs will be lost, and lives will be affected.[57] Some say repeat offenders should have their licences revoked.[58] Consequently, revoking an approval is the last resort mechanism in environmental law and the state's most condemnatory response in the context of industrial facilities because it will result in the business being shut down.

Others considered it 'warped logic' that someone can have a criminal record for non-compliance but could still operate because of the employment and economic benefit they create through those same activities.[59] An IP said they would rather shut their plants down than face prosecution because of the reputational risk;[60] to another, shutting down would be catastrophic.[61] Another said that a conviction would result in them shutting down because they will lose their credibility with their customers.[62] Thus, from a corporate risk perspective, a more condemnatory response by the state would be to withdraw a permit or licence.

Graph 5.1: Summary of views on the criminal sanction as a last resort mechanism

Private sector participants				Public sector participants					
IPs			Counsel	EMI			Prosecutors		Magistrates
Yes: 7	No: 1	Unclear/ qualified: 4	Yes: 3	Yes: 1	No: 6	Unclear/ qualified: 3	Yes: 1	No: 4	Qualified: 2



4. CERTAINTY AND PRACTICALITY OF THE LAW AS ENACTED AND AMENDED

As explained in Chapter Two, Part 4.6, 'introducing such frequent changes in the rules that the subject cannot orient his action by them' is one of the ways a legal system can miscarry.[63] Continuous changes to laws put legal certainty at risk and inhibit effective compliance and

[57] IT - EMI 7, 8 Jan 2019, p6.
[58] IT - EMI 5, 25 Jan 2019, p8.
[59] IT - Counsel 2, 11 Feb 2021, p11.
[60] IT - IP 1, 3 Dec 2018, p12.
[61] IT - IP 4, 29 Jan 2019, p6.
[62] IT - IP 2, 15 Jan 2019, p9.
[63] Lon L Fuller *The Morality of Law* (1969) 39.

enforcement. Uncertainty is particularly problematic in a criminal law context, where statutes should/would ordinarily be given the least restricting meaning favouring liberty in the event of uncertainty.[64]

Research participants were asked their views on the certainty of environmental laws and if the frequent changes are considered problematic and impede compliance.

4.1. Industry Participants

Nine (out of twelve) IPs agreed that it would be easier to comply with environmental laws if the requirements were precise and consistent. One differed and said that technological advances might justify and require changes to the law (similar views were expressed by EMIs 1 and 2). IP 1 gave a qualified response; and expressed more concern with the practicality (or suitability) of legislation than its frequent change, as not all requirements speak to the real intention of not causing environmental damage. Being a compliance officer, IP 1 is inherently involved and concerned with improving the environment-

> But we have to work with the legislation. We want to improve our environmental impact, but do not come to us with ridiculous requirements. … most industries are the same, from engagements with [industry groups], they genuinely want to do something about the environment. We fight for this regularly, but it is not easy with the backdrop of compliance costs, particularly to justify a 'going green programme' in the context where hundreds of millions of Rands are already spent to ensure compliance.[65]

IP 1 added that the law is onerous; although they agreed with its intent, it keeps changing. They are required to comply with current requirements that could change at any time – 'even if we do not know [new regulations are] coming, we still need to spend the money, even if the regulations are ridiculous,'[66] i.e., unreasonable, arbitrary, impractical or requiring implementation within unfair or arbitrary timeframes.

IPs 2, 3, 6, 7, 8, 9, 10, 11 and 12, affirmed that constant changes to the law are problematic. IP 2 explained that considering the legislative changes and discerning those relevant to their business 'is very time-consuming because they [legislature/authorities] change many of the regulations a lot of the time'.[67] To IP 2, it would, 'without a doubt,' be easier to comply with

[64] LM Du Plessis 'Statute Law and Interpretation' in J A Faris (ed) *The Law of South Africa* Vol 25(1) 2 ed (2011) para 334(c).
[65] IT - IP 1, 3 Dec 2018, p12.
[66] IT - IP 1, 3 Dec 2018, p12.
[67] IT - IP 2, 15 Jan 2019, p5 and 6.

the environmental laws if the requirements are clear and consistent. Because of the magnitude of legislation, some facilities have been able to circumvent enforcement action.[68]

In response to the question, IP 3 asked 'Is that a trick question? We can comply with knowns; we cannot comply with unknowns and uncertainty'.[69] According to IP 7, without a doubt, it would be easier to comply if there is more consistency in the law - the 'regular changes make that you do not know where you are, like the listing notices. It is frustrating and a nightmare'.[70]

An operating company has many pressures from many sides, including authorities or NGOs, said IP 6. Clearer legislation would go a long way to support compliance-

> It is very frustrating because what the law states and what reality is, is very different. There is a big gap between what happens on the ground and what happens in court and with the law. … the guys writing the law do not understand the [industrial/technical/chemical] processes. NGOs who want to enforce the strictest emissions standards regardless of the realities and who are irrational and with whom we cannot reason with, but they put pressure on the people writing the legislation. This is problematic.[71]

IP 6 added that by regulating specific industries or technologies, the legislature creates gaps by, for example, being too specific and, in turn, may completely omit other activities or facilities from regulation. Overregulation is problematic; the legislature does not need to regulate at the current level of detail. The law should not be such that people have to reason or debate for countless hours whether a listed activity is triggered or not, or whether more than one approval is required-

> For example, there is a long process consulting with an air quality officer before being issued a licence. After the fact, another air quality officer may come and allege that one activity is not authorised, even though all the information was given to the previous air quality officer. Then they want to accuse us of not having an [Atmospheric Emissions Licence]. It is a very inconsistent and uncertain process. Even if we have an authorisation, we never know what is next or if a requirement might change again. That is also difficult, the transition from one requirement to another; it gets so overly complicated that people start becoming disheartened.[72]

[68] IT - IP 2, 15 Jan 2019, p9 and 10.
[69] IT - IP 3, 22 Jan 2019, p9.
[70] IT - IP 7, 5 Feb 2019, p12.
[71] IT - IP 6, 31 Jan 2019, p6 and 7.
[72] IT - IP 6, 31 Jan 2019, p9.

Even global organisations that apply higher standards than those imposed locally consider the environmental laws in South Africa as complex. IP 8 (with IPs 9 and 10 concurring) explained that-

> It is complicated because there are so many laws that change often. It makes it difficult to keep up. Although with our [operations], it is not that we have difficulty meeting the requirements at this point, but still being aware of it, keeping track of it, that is why we insist on being involved with various forums, getting as much as possible information.[73]

IP 11 added that a more logical application of the law is also required. For example, if authorities were to apply 'a risk-based thinking to implementation', it would make a huge difference.[74]

In contrast to most category participants, IP 4 argued that, although it is challenging to keep on top of the changing legislation, regulations may need to change with technological advancement. However, they said that the changes to the NEMA listed activities are 'complicated for the poor consultants that have to figure out what applies. One [activity] is relevant [at one point in time], and then it becomes irrelevant.'[75]

4.2. Counsel

Counsel 1 and 2 both agreed with the proposition that it would be easier for the industry to comply with environmental laws if the requirements were precise and consistent. Counsel 1 added that it could also be simplified, and Counsel 2 shared their belief that there is overregulation in environmental law.[76] Counsel 3 gave a more qualified response - that it depends on the purpose of the change and if it is necessary.[77]

4.3. EMIs

Five of the ten EMIs affirmatively stated that it would be easier for people to comply with the laws if they remained consistent. Three gave qualified views, one disagreed somewhat, and one did not answer the question.

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[73] IT - IP 8, 9 and IP 10, 8 Feb 2019, p8.
[74] IT - IP 11, 18 Feb 2019, p8.
[75] IT - IP 4 and 5, 29 Jan 2019, p10 and 13.
[76] ITs - Counsel 1, 21 Jan 2019, p7; Counsel 2, 11 Feb 2019, p4 and 9.
[77] Interview notes - Counsel 3, 16 Jan 2019, p2. Counsel 3's comments mostly aligned or confirmed the contributions of other participants. Because of Counsel 3's limited experience, contributions were manually noted on an interview sheet and not recorded or transcribed.

EMIs enforce the laws but do not draft them; they are apprised of environmental law changes through loose-leaf services and internal communications.[78] Although EMIs comment on proposed amendments or new laws, the researcher understands that the practical concerns raised by EMIs are not always afforded the appropriate weight or given adequate consideration. EMIs are at the forefront of implementing these laws; they understand the practicalities and complexities (especially the criminal burden of proof), so any comments they make in a legislative process should have more influence.[79] One EMI commented that it is impossible to enforce all of the provisions because of limited capacity and the limited number of appointed EMIs.[80]

EMIs 1, 3 and 4 gave qualified responses, acknowledging that frequent changes may result in compliance and enforcement challenges but simultaneously stating that change may be necessary. EMI 1 explained that the environment changes because of human impact, so the law sometimes needs to change-

> It may have to become more relaxed over time or stricter; with technological advancement, things could improve. For industries that keep abreast with technological advances, compliance should remain consistent, but without efforts from industry, we need to be stricter because the environmental impacts continue to increase.[81]

EMI 1 expressed concern that enforcers are not always consulted or cannot engage with proposed changes due to capacity constraints. Moreover, they simply cannot apply the laws across the country, and it is impossible to enforce all of the provisions.[82] EMI 2 shared the view that as technology improves or as environmental problems arise, the law should adapt.[83]

According to EMI 4, regulatory priorities (i.e., aspects that require regulation) may change; however, it is 'unbelievable' how much and how frequent environmental law has changed over the last ten years. It changes so much that, as enforcers, they do not know what to expect. Whereas, in their view, other areas of law are more consistent. They added that if the government wants to regulate a particular aspect, it should also consider the availability of technological solutions-

[78] IT - EMI 1, 23 Jan 2019, p4.
[79] Ibid.
[80] Ibid.
[81] IT - EMI 1, 23 Jan 2019, p4 and 10.
[82] IT - EMI 1, 23 Jan 2019, p4 and 10.
[83] IT - EMI 2, 23 Jan 2019, p9.

> The government tells the industry to monitor emissions, and it is included in their licence. However, it might be possible that in specific circumstances, there is not much equipment that can perform such monitoring. So, the government imposes requirements, but there might not be easily accessible technology. They should first make sure there is a solution to the problem.[84]

EMIs 2, 5, 7, 9 and 10 affirmed that frequent changes in the law make compliance and enforcement difficult. EMI 2 said that it 'absolutely' would be easier to comply if the laws remain consistent and added that the continuous changes of the listed activities are frustrating.[85] EMI 2 explained that often the changes do not cater to old technology or provide sufficient transition to new technology, making it idealistic and unrealistic, which is a significant gap in how the law is enacted. They sometimes try to oppose the continuous changing of the listed activities, but this often falls on deaf ears. They said that it would be a good outcome of this research if there is a recommendation that environmental laws are amended less.[86] EMI 5 echoed that frequent legislative changes make compliance more difficult. The court looks at the law at the time when the offence was committed, and during sentencing, it will be argued that the law has changed. It would not necessarily affect an investigation, but it may disturb the criminal justice process.[87] Certainty of the law is essential for citizens, and keeping up with the changes is difficult, said EMI 7.[88]

EMI 9 recognised that it would probably be easier to comply; although bigger industries may have more capacity to ensure compliance, smaller businesses may not. They also affirmed that it would be easier for authorities to enforce the law and conduct successful prosecutions if the law remained consistent.[89] Nevertheless, EMI 10 recognised that sometimes the law needs to change, to adapt to changing circumstances, but-

> There is this tendency to realise there might be a gap or a loophole and try to close it immediately with a legislative amendment rather than just taking a deep breath, implementing what we have for the next few years. If we are taken to court, and there is litigation, we will have judicial guidance on interpreting it. There is a bit of a knee-jerk reaction to keep amending the law.[90]

[84] IT - EMI 4, 23 Jan 2019, p6 and 8.
[85] IT - EMI 2, 23 Jan 2019, p11.
[86] IT - EMI 1, 23 Jan 2019, p11 and 13.
[87] IT - EMI 5, 25 Jan 2019, p9.
[88] IT - EMI 7, 8 Jan 2019, p8.
[89] IT - EMIs 9 and 10, 12 Feb 2021, p10.
[90] Ibid.

Conversely, EMI 6 did not think legislative changes are an issue for industry because 'they have the capacity to understand, and they should have systems in place so that they have checks [safeguards] in place before they start something.' However, this EMI acknowledged that smaller industries do not have 'money or legal people' and 'it is difficult for small businesses to operate in this environment.' Perplexingly, this same EMI identified changes in legislation as the main challenge they face in performing their tasks,[91] after having stated earlier that industry could not use this as an excuse in achieving compliance.

4.4. Prosecutors

All the prosecutors agreed that it would be easier for industry to comply with the environmental laws if the requirements are certain, remain consistent, and if enforcement is consistent.[92]

Prosecutor 1 said that 'it looks like environmental affairs get amendments too easily', there seems to be the intention (albeit impossible) to legislate for every scenario. For this Prosecutor, the solution lies in 'taking away most of these politicians' powers because politicians want to legislate for every individual circumstance to keep their constituents happy. Ministers seem to acquiesce to pressure from non-government or non-profit organizations by continuously publishing new regulations or laws. This Prosecutor said that predictability is essential, with fewer changes '[m]aybe then we will have more predictability of environmental law.'[93]

Agreeing with this position, Prosecutor 2 added that '[industry] would only comply if there is monitoring. If they are not monitored, they will contravene the regulations.'[94]

4.5. Magistrates

The Magistrates were split in their answers to this question. Magistrate 1 said it is challenging to work with laws that constantly change, ultimately influencing the sentence imposed.[95] In contrast, Magistrate 2 said that they do not have an issue with the amendment of the laws, but what could be confusing is listing regulated species that could change from one day to the next. They did not think there are so many amendments in a year that results in confusion, and it

[91] IT - EMI 6, 25 Jan 2019, p7.
[92] ITs - Prosecutor 1, 7 July 2020, p13; Prosecutor 2, 10 July 2020, p12; Prosecutor 3, 25 Aug 2020, p13; Prosecutor 5, 9 Nov 2020, p10; and Written response from Prosecutor 4 on 29 October 2020, p2.
[93] IT - Prosecutor 1, 7 July 2020, p11 and 13.
[94] IT - Prosecutor 2, 10 July 2020, p12.
[95] ITs - Magistrate 1, 5 Feb 2021, p3.

should not confuse a jurist. However, they qualified this statement to say that they do not deal with environmental matters regularly and have only had 'glimpses' into select topics.[96]

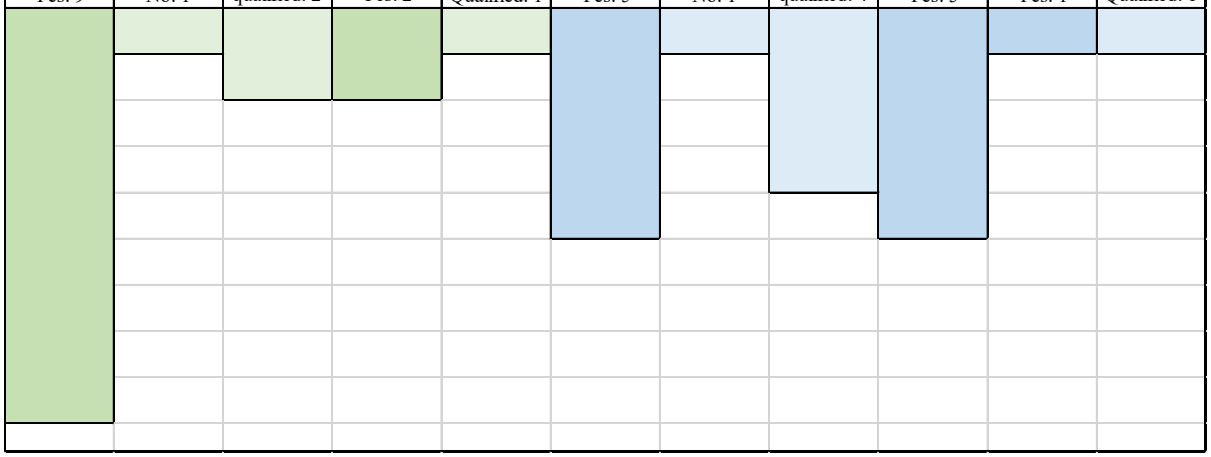
4.6. Conclusion: Certainty and practicality of the law as enacted and amended

The law's certainty and practicality are critical, particularly in a criminal context. There should be some degree of constancy in environmental law to ensure legal certainty, fairness, increased compliance, and effective enforcement. Moreover, regulatory certainty, predictability, and logical and consistent application are essential for economic development and investment.[97]

As illustrated in the bar graph below, the majority of participants (68.75 per cent, 22 of 32) expressed concern about frequent and constantly changing laws. They affirmed that compliance would be easier if the environmental laws remained clear and consistent. Three participants disagreed, and seven provided qualified or no answers to this question.

Graph 5.2: Summary of views: Is constant and frequent change to the law problematic?

Private sector participants					Public sector participants					
IPs			Counsel		EMI			Prosecutors	Magistrates	
Yes: 9	No: 1	Unclear/ qualified: 2	Yes: 2	Qualified: 1	Yes: 5	No: 1	Unclear/ qualified: 4	Yes: 5	Yes: 1	Qualified: 1



[96] ITs - Magistrate 2, 11 Feb 2021, p8.

[97] OECD *Policy Framework for Investment* (2006) at 23, 27, 50 and 56 where it is stated that 'Nothing contributes more to investor confidence about regulation than regulatory predictability and the recognition that rules achieve their objectives'. Accessible at: *https://www.oecd.org/daf/inv/investment-policy/36671400.pdf* See also USCIB *Good Governance & the Rule of Law* (2015) 4, accessible at: *https://www.uscib.org/docs/Governance%20and%20the%20Rule%20of%20Law.pdf* 'Business needs predictability in the development of rules based on reason and science, in the enforcement of rules based on fairness, and in resolution of disputes based on justice. Business thrives and is free to innovate when it understands the current rules and standards and has a sense of what changes may occur in the future…Legal frameworks must be accessible and clear'.

5. THE DETERRENT EFFECT OF CRIMINAL SANCTIONS IN ENVIRONMENTAL LAW

Chapter Two explains that South African courts regard 'deterrence as the predominant and most widely acknowledged purpose of punishment'.[98] According to deterrence theory, punishment only has a deterrent effect if there is certainty that the offender will be caught, that prosecution will be successful, and that the offender will serve his sentence and will not escape or get early parole.[99] If the offender's risk of being caught is low or the sentence imposed is low, a criminal may consider that the advantages of committing the crime outweigh the possible disadvantages. Based on this evaluation (weighing up the benefits against the drawbacks), a criminal may decide to commit a crime, rendering this theory of punishment ineffective.[100]

During the interviews, participants were asked if environmental criminal sanctions offer such deterrence, either based on concluded prosecutions or if the mere existence of the statutory sanctions may be a deterrent. As set out below, there appear to be differing views on whether the criminal sanctions in environmental laws have a deterrent effect.

5.1. Industry Participants

Six of the twelve IPs affirmed that criminal sanctions in and of themselves are a deterrent. Four IPs did not answer the question, as this had never been a concern because the global company they work for applies stricter requirements than those in South African environmental laws. Two IPs provided a qualified view similar to the views of legal practitioners in that there has to be a real risk in the sanction materialising for it to have deterrent value.

IP 1 said that the criminal sanctions are 'a huge deterrent' and that 'directors would rather shut down the plant then face prosecution' and that-

> Compliance is top of mind, top of risks, top of everything, every board meeting. We do not want to be seen as non-compliant. Our reputation relating to compliance matters is critical. We have put many resources into our strategy to ensure we have a sound compliance system to help the businesses manage compliance.[101]

[98] Albert Kruger *Hiemstra's Criminal Procedure* (2018) at 28-4.
[99] CR Snyman *Criminal Law* 6 ed (2014) 16, 18-19.
[100] CR Snyman *Strafreg* 4 ed (1999) at 19 and Snyman (2014) op cit note 99 at 16 para 7.
[101] IT - IP 1, 3 Dec 2018, p12 and 13.

The impact of the sanctions, according to IP 2, is that 'it is an additional cost'. For example, they must consider the need for additional insurance policies. IP 2 questioned why the Department feels 'it is necessary to shoot from the waist so much so that we feel so at risk that it is necessary to insure against it?' Any conviction would bring their 'fit and proper' status (contemplated in legislation, particularly the Waste Act and Air Quality Act) into question. Even if the authorities do not want to shut the facility down, a conviction will result in it being shut down because they 'would lose all credibility with any multinational customers'. It would damage the business's reputation – 'we would be seen as something evil.'[102]

According to IP 6, the benefit of threatened prosecution is that it focuses the board's mind and priorities and people become much more aware of the importance of environmental compliance.[103] The threat of criminal sanctions 'helps a lot to shake the guys up if there is a threat that they can go to jail' said IP 6-

> Everyone is scared, if the board is accused of certain offences, they cannot be Board members, so they are cautious. Nobody wants to have a criminal record; it is about the record because it has an extremely negative implication.[104]

Criminal sanctions can be a helpful tool provided it is applied correctly. IP 6 said they use legislated criminal sanctions as threats to motivate compliance, and therein lies the potential deterrence. As soon as the threat materialises, even in a draft charge sheet, then 'everyone starts to scramble'. IP 6 added that-

> A charge sheet on the Boardroom table changes the whole story because everyone wants to prevent having to go to court. … people start asking what we need to do to get out of this situation. We do not need a guilty verdict to see the effect.[105]

However, the same participant said that receiving different versions of a charge sheet over a protracted period undermines its deterrent value because the company might think that the matter might go away with the lapse of time.[106]

[102] IT - IP 2, 15 Jan 2019, p9.
[103] IT - IP 6, 31 Jan 2019, p7 and 9.
[104] IT - IP 6, 31 Jan 2019, p3.
[105] IT - IP 6, 31 Jan 2019, p4.
[106] IT - IP 6, 31 Jan 2019, p7.

IP 10 thought that the intention behind all the criminal sanctions was to use them as a 'scare tactic'.[107] According to IP 11, the threat of possible criminal sanctions, including director liability, is enough within their organization to scare colleagues into compliance.[108]

In contrast, IP 5 shared that corporates look at the probability of the risk when evaluating the deterrent value of criminal sanctions. If there is a low probability of receiving a significant fine because it has not occurred in the past (e.g., in the last fifteen or twenty years), history shows it does not happen, people will continue to contravene the law.[109] IP 5 said there are not enough examples in recent history to encourage a culture shift, adding that the criminal sanctions should be used in a more 'targeted way'.[110]

5.2. Counsel

Knowing criminal law theory, Counsel recognized that there must be successful detection and prosecution for a criminal sanction to have a real deterrent effect. According to Counsel 1-

> A very high fine must always have a deterrent effect. However, the real deterrent is mostly within the detection and not the fine itself, i.e., the certainty of detection that a person will be caught and prosecuted successfully. Deterrence lies in a 'good chance the person would be caught, prosecuted and convicted.[111]

Counsel 1 added that 'there are way too many sanctions, it is difficult for people to comply, and companies need to spend increasingly more (appointing experts) to understand the requirements. There is no uniform approach.' Counsel 2 said that 'if you look at the maximum penalties, people are genuinely concerned',[112] but the deterrent effect depends on whether people are caught and brought to justice. Counsel 2 added that 'we cannot prosecute everyone because criminal enforcement and the justice system are generally broken,' deterrence requires a working criminal justice system. Counsel 2 explained that-

> Because we cannot prosecute, we take the risk and make the fines higher. The transgressor's risk analysis may show that the chances of being prosecuted are exceptionally low. However,

[107] IT - IP 8, IP 9 and IP 10, 8 Feb 2019, p11.
[108] IT - IP 11, 18 Feb 2019, p8 and 9.
[109] IT - IP 4 and IP 5, 29 Jan 2019, p13.
[110] IT - IP 4 and IP 5, 29 Jan 2019, p14.
[111] IT - Counsel 1, 21 Jan 2019, p5 and 6.
[112] IT - Counsel 2, 11 Feb 2019, p3.

> the fines are so enormous that it might be a deterrent, but it is a deterrent for all the wrong reasons.[113]

5.3. EMIs

Most EMIs (six out of ten) viewed environmental law criminal sanctions as having a deterrent effect. Some answers were based on the effect of concluded cases, but others are also based on the high prescribed maximum penalties in environmental laws. Three EMIs did not believe criminal sanctions were a deterrence. One EMI did not directly answer the question.

EMI 1 stated that criminal sanctions 'definitely' have a deterrent effect based on some of their department's successes.[114] EMIs 4, 5 and 10 agreed that it has a deterrent effect; EMI 4 explained this by comparing it 'to the previous regime where the offences and penalties were much lower.'[115] EMI 7 had a similar explanation-

> Yes, they do [have a deterrent effect], now they do. Not previously, like with the APPA, there was a R500 fine at that time, but now it is major, so now it [has a deterrent effect] when the fines are included in the compliance notices. It also helps when we plea bargain.[116]

EMIs 9 and 10 thought that the possibility of imprisonment is probably a deterrent for big companies, although the fine amounts may be 'a drop in the ocean'. However, the fine amounts would deter small businesses.[117]

In contrast, EMI 2 said that the criminal sanctions in environmental laws do not have a deterrent effect, and criminal enforcement does not or has not, in their view, changed behaviour. Large corporations are likely more concerned with the potential for reputational risk, or the risk of operations being shut down.[118] EMI 3 said-

> No, it does not have a deterrent effect. If the courts imposed the maximum or higher penalties, then maybe. At this point, if the accused are individuals, the court looks at affordability. The highest fine we have gotten for a company was R8,5 million, maybe two years ago. The maximum penalties have not been imposed and no imprisonment.[119]

[113] IT - Counsel 2, 11 Feb 2019, p5.
[114] IT - EMI 1, 23 Jan 2019, p10.
[115] ITs - EMI 4, 23 Jan 2019, p6; EMI 5, 25 Jan 2019, p8.
[116] IT - EMI 7, 8 Jan 2019, p7.
[117] IT - EMIs 9 and 10, 12 Feb 2021, p13.
[118] IT - EMI 2, 23 Jan 2019, p9.
[119] IT - EMI 3, 23 Jan 2019, p9.

EMI 6 also believes that criminal sanctions do not have a deterrent effect 'because, besides the people who are unaware, even those who are aware still have the same non-compliances; when we follow-up, we still find the same non-compliance.'[120]

5.4. Prosecutors

None of the prosecutors believes that environmental offence and penalty provisions have a deterrent effect. Most expressed qualified views in answering the question.

Prosecutor 1 said that 'it should have' although this question should be directed to IPs as the prosecutor has not considered it thoroughly. Nevertheless, they believed that only a few people are aware of the penalty provisions.[121] According to Prosecutor 4, it 'will only have a deterrent effect if accused are successfully prosecuted and convicted in their personal capacity' and if the maximum fines are imposed on companies; and companies are required to implement rehabilitation programmes that are adequately observed and monitored.[122]

Prosecutor 3 said that the criminal sanctions are supposed to have a deterrent effect, 'but it does not because we do not apply it correctly'. Referring to the Constitutional Court Judgment in *S v Makwanyane,*[123] the prosecutor said that 'it is not the penalty which has the deterrent effect but the likelihood of a person being caught. As long as people feel they can get away with it, they will contravene the law'.[124]

According to Prosecutor 5-

> I think if it is reported in the media, it might have [a deterrent effect]. The media does not always report it. It is not like when we read about rapists who are convicted. Companies will sometimes take another chance. They might get away with a small fine the first time and then take another chance… If it is not reported, then people would not know. The public perception seems to be that these people are not prosecuted, but there are indeed people being prosecuted. ...If we do not pursue the smaller transgressions, then ordinary people will not realise the importance…The investigators zoom in on companies who can pay fines, but we also need to enforce the smaller matters - in principle. The ordinary member of the public does not necessarily associate with the big companies; they associate with similar people.[125]

[120] IT - EMI 6, 25 Jan 2019, p6.
[121] IT - Prosecutor 1, 7 July 2020, p12.
[122] Written response from Prosecutor 4 on 29 October 2020, p2.
[123] 1995 (3) SA 391 (CC), se paras 122, 127, 183 and 184.
[124] IT - Prosecutor 3, 25 Aug 2020, p9.
[125] IT - Prosecutor 5, 9 Nov 2020, p10.

Thus, prosecutors offered more qualified or nuanced responses because based on deterrence theory, it depends on whether offenders are caught, prosecuted, and sufficient sentences are imposed for criminal sanctions to have a real deterrent effect.

5.5. Magistrates

Both Magistrates 1 and 2 did not think the sanctions in environmental laws have much of a deterrent effect. One of the reasons Magistrate 1 provided for this view is that courts are unlikely to impose the maximum prescribed penalties-

> If you look at the principles or aims of sentencing – rehabilitation, retribution, prevention, deterrence. I do not think these sentences fulfil any of these or have much of a deterrent effect. There is nothing rehabilitative about it and not much preventative. Maybe a little bit retributive, but also, I do not know to what degree.[126]

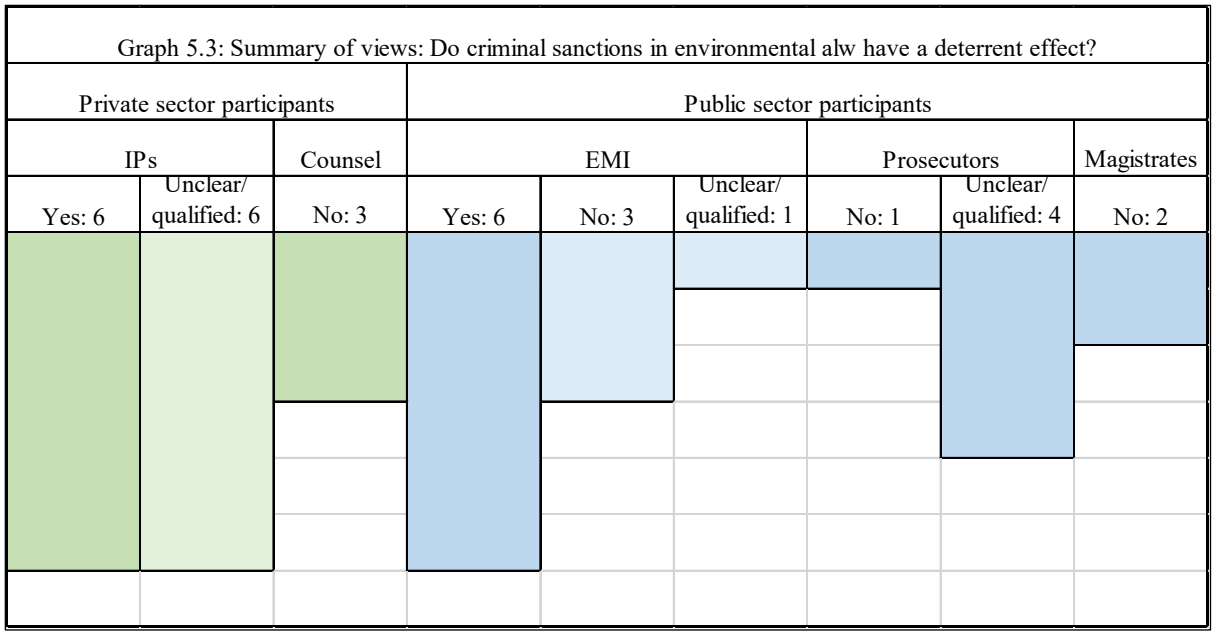
Magistrate 2 said that the outcome of prosecutions or knowledge of the sanctions do not come to everyone's attention 'unless you are a big company'. They added that the application of these laws and imposition of fines is inconsistent, 'so people will take a chance'; it does not have enough of a deterrent effect.[127]

5.6. Conclusion: The deterrent effect of criminal sanctions in environmental law

Twelve of the 32 participants (37,5 per cent) affirmed that the criminal sanctions (in and of themselves) have a deterrent effect. Nine participants differed (28.1 per cent). The remaining eleven did not directly answer the question or had qualified views (34.4 per cent). The split between private and public sector participants is less clear in this theme, as illustrated in the graph below.

The consensus seems to be that how criminal sanctions are used impacts its deterrent effect. In turn, if a criminal sanction does not offer deterrence, it brings into question whether it is used effectively or designed in a way that it can be used effectively.

[126] IT - Magistrate 1, 5 Feb 2021, p8.
[127] IT - Magistrate 2, 11 Feb 2021, p10.



6. CONSISTENCY IN THE APPLICATION OF CRIMINAL LAW SANCTIONS

As argued in Chapter Two, environmental law's effectiveness can be undermined by inconsistent enforcement or approaches by enforcers.[128] The standards set by enforcement authorities must be uniform, known by the regulated community, and enforced consistently against those who do not comply.[129] When there are too many criminal offence provisions, fair enforcement deteriorates. Enforcement becomes selective and discretionary, placing a few people at a disadvantage because the law is only enforced against them.[130] Moreover, statutes must prescribe proportionate punishment and not be 'more extensive than necessary to achieve its purpose'.[131]

This part does not involve collecting yes or no answers to a particular question; instead, it discusses perceived problems in applying criminal sanctions, as conveyed by research participants. Some of these application problems, in turn, may point to problems in the design of the laws. The main themes that arise include enforcement discretion, inconsistent application

[128] Angus Nurse *An Introduction to Green Criminology and Environmental Justice*s (2016) 48 with reference to Nurse *Policing Wildlife: Perspectives on the enforcement of wildlife legislation* (2015) and Nurse 'Repainting the thin green line: the enforcement of UK wildlife law' October (2012) *Internet Journal on Criminology* 1.
[129] Nurse ibid at 150 with reference to Bundy, R., Devaney, E., Dowd, E., and Solow, S., 'Deterrence: a strong environmental crime program leads to industry compliance and a cleaner environment' (1999) US Attorneys' *Bulletin: Enforcement Issues* 47(5) Washington Department of Justice at 1-2.
[130] Douglas Husak *Overcriminalization, The Limits of the Criminal Law* (2008) at 118.
[131] Erik Luna 'The Overcriminalization Phenomenon' (2005) 54 *American University Law Review* 703 at 717.

of laws, and proportionality of sanctions (in terms of being a balanced response and potentially resulting in deserving punishment).

6.1. Industry Participants

IPs shared concerns that environmental sanctions are enforced inconsistently or disproportionate to the actual environmental impact. As a supplemental issue, it was expressed that there is overregulation in environmental law.

6.1.1 Inconsistency and impossibility leading to unequal enforcement

IP 2 considered the suite of criminal sanctions perhaps 'a bit onerous and difficult to enforce' because of the authorities' credibility issues. They said that environmental inspectors require appropriate competence, and there must be enough of them to go and enforce this massive amount of legislation.[132] In IP 4's view, fines should be high for serious environmental transgressions, but 'it does not make a difference if they are not applied.'[133] IP 5 said that the criminal sanctions must be significant enough 'to mean something to an organization; otherwise, people will budget for fines'.[134]

IP 7 shared that a government facing widespread corruption and mismanagement has minimal moral standing. It is unacceptable for it to prosecute a small industrial business that has failed to, for example, install expensive equipment where the government itself does not comply or where socio-economic circumstances have been ignored.[135] Adding to their frustration is that authorities do not understand the laws they are tasked to implement.[136] According to IP 11, consistent application of the law between departments is lacking.[137] There is also inconsistency between the criminal sanctions in the different laws.[138]

6.1.2 Proportionality

IP 7 opined that criminal sanction amounts in legislation should be proportional to the offence's impact and believed it ridiculous when trivial offences have maximum prescribed penalties similar to serious offences (implicating both forms of proportionality as a balanced response

[132] IT - IP 2, 15 Jan 2019, p9 and 10.
[133] IT - IP 4 and IP 5, 29 Jan 2019, p13.
[134] Ibid.
[135] IT - IP 7, 5 Feb 2019, p7.
[136] IT - IP 7, 5 Feb 2019, p12.
[137] IT - IP 11, 18 Feb 2019, p5.
[138] IT - IP 11, 18 Feb 2019, p9.

or punishment that is not deserved). IP 7 explained that when new regulations are published requiring administration, such as registration, the relevant authorities are often incapable of accepting applications and administering these processes. Nevertheless, it creates criminal offences if the regulated community fails to comply.[139]

6.1.3 Overregulation

According to IPs 2 and 6, overregulation is problematic. IP 2 explained that more regulation is not what is required but that better enforcement is needed. Adding that '[i]nstead of having a massive group that sits and writes legislation … rather just send more people out as EMIs to check what is actually going on.'[140] IP 6 said that-

> The legislation is unbelievably complicated. Medium-sized or small operations become discouraged/despondent because it is so complicated that they get to a point where they do not even know if they are coming or going. We cannot blame them; sometimes, the authorisations are so substantive that we need to appoint a person only for that one authorisation, to ensure compliance. … It is a huge operation; it is not just a matter of obtaining our authorisation, and there we go, those things need consistent compliance and monitoring.[141]

6.2. Counsel

Counsel 1 shared concern about the proportionality of penalties, particularly where they are the same for transgressions relating to registrations or regulations, instead of fines being determined based on 'deserving value'. Their impression is also that DFFE tries hard to apply NEMA s 34; it is abused, i.e., 'they stretch something into a new period so that s 34 applies.'[142]

Counsel 2 said that the 'indiscriminate amounts of the sanction' have caused some industries to avoid coming into compliance because of the affordability of the administrative fines imposed in either NEMA s 24G or the Air Quality Act s 22. Where a small operating business faces such potential fines, there is no guarantee of them receiving approval, and there is a possibility of prosecution. Counsel 2 asked - 'how do we convince such a person to bring a rectification application? In their mind, the risk to their business is immense'.[143]

[139] IT - IP 7, 5 Feb 2019, p9.
[140] IT - IP 2, 15 Jan 2019, p9.
[141] IT - IP 6, 31 Jan 2019, p5.
[142] IT - Counsel 1, 21 Jan 2019, p5.
[143] IT - Counsel 2, 11 Feb 2019, p3.

Counsel 2 thinks we overregulate, and there is no proper determination regarding penalty amounts. Most penalties (whether serious or not) carry the same possible maximum fine.[144]

6.3. EMIs

EMIs expressed their views on enforcement discretion, inconsistent approaches between enforcement authorities, and concern regarding the disproportionality of prescribed sanctions.

6.3.1 Exercise of discretion varies and results in inconsistent enforcement

Within a criminal enforcement context, participants expressed diverging views and perceptions regarding the discretion enforcers may exercise. Based on the discussions with several participating EMIs, it is understood that the discretion of whether or not to conduct a criminal investigation will not fall on the shoulders of a single EMI. The main principle is that a criminal investigation must follow if a crime has been alleged. However, because many statutory requirements and sanctions exist (ranging from minor to significant), many non-compliances occur, not all of which justify criminal prosecution (particularly minor or trivial ones). Criminal investigations may not always be necessary or a proportionate response. Thus, enforcement discretion exists.[145] EMI 2 said that-

> We are investigators (policemen); we do not have discretion. If the law says it is criminal, we must investigate because that is what is expected of us…We can make a recommendation to the prosecutor…The prosecutor decides to prosecute.[146]

EMI 6 explained that they have to be very careful and 'have been warned that [they] do not have the powers to distinguish between what [they] think may be small or major'. Within the enforcement line function, the decision to proceed with criminal investigations is made collectively and by senior officials.[147]

DFFE has an Internal Operating Manual, which is not publicly available because it is an internal policy document. The researcher was only allowed to view it and not make a copy. As such, references to it are only illustrative and not specific. Chapter Six of that Operating Manual contains Enforcement Guidelines, including principles to assess and determine the appropriate enforcement mechanism. By way of example only, criminal action should be taken in

[144] IT - Counsel 2, 11 Feb 2019, p4.
[145] IT - EMI 1, 23 Jan 2019, p10; EMI 7, 8 Jan 2019, p4; EMI 8, 4 April 2019, p4; EMIs 9 and 10, 12 Feb 2021, p5.
[146] IT - EMI 2, 23 Jan 2019, p11 and 12.
[147] IT - EMI 6, 25 Jan 2019, p4.

circumstances where knowledge of the requirements and intention to contravene the law is evident or where there is gross negligence. Other examples that may justify criminal action include serious environmental harm (or the potential for it), unlawfully conducting activities, failure to comply with authority notices or directives, or persistent wrongdoing.[148] Unfortunately, this guideline does not appear to be consistently applied across departments (national or provincial) with their separate mandates or constitutional functional areas.

EMI 9 commented that discretion results in inconsistency, but they have tried to ensure uniformity at a national level through the mentioned operating manual. However, the concurrent constitutional powers mean that provinces could approach matters differently, which may undermine consistency.[149]

EMI 7 said that some provinces also have a guideline document to ensure consistent approaches to EMI activities,[150] but the province's approach appears different from that of the national department. Provincial officials' position regarding discretion appears somewhat different, as a 'stronger approach' only follows after engagement fails.[151] It also appears that inconsistent approaches exist between national departments or national and provincial departments. The inconsistent approaches in criminal investigations across Departments (particularly the DMRE and the DWS) are problematic. One EMI said that-

> [Mineral Resources] need to start doing their jobs; we will advise or suggest that they do certain things within an investigation; they will jump on our bandwagon but sit back and do nothing, and we must give feedback only for them to report the success.[152]

6.3.2 Inconsistency and impossibility leading to unequal enforcement

Based on the views expressed by EMIs, it seems that the magnitude of laws, requirements, and sanctions make equal application impossible. EMI 2 said, 'we have seriously nice [environmental] laws', but the consistent application is problematic. They asked, 'must all behaviour be criminalized? Must there be a criminal sanction for everything?' EMI 2 added that-

[148] DFFE's Internal Operating Manual was viewed at its offices on 4 February 2021.
[149] IT - EMIs 9 and 10, 12 Feb 2021, p5.
[150] IT - EMI 7, 8 Jan 2019, p4.
[151] IT - EMI 7, 8 Jan 2019, p4.
[152] IT - EMI 3, 23 Jan 2019, p7.

> We do not want to send every recycler to jail, the jails are full, and we do not want to prevent a recycler from getting a tender. He could be a good guy, but he just did something wrong, and he, simply, might not have known. So, we want to help him, but our laws criminalize everything. If we know of a company that is not registered, and someone (like in some provinces) says we must prosecute that transgression, we have to do the investigation.[153]

According to EMI 3, it is impossible to enforce all laws equally, and transgressors are not treated equally because of capacity constraints. It is impossible even to identify every transgressor- '… we probably do not even get to half of what is happening. At the moment, we work on complaints coming in.'[154]

6.3.3 Proportionality

EMI 7 explained that some offences amount to 'using a sledgehammer to kill a fly'. For example, the penalty for failing to register under the National Atmospheric Emissions Reporting Regulations is a maximum prescribed penalty of R5 million or five years imprisonment for a first conviction.[155] The participant said that instead of prosecuting everyone, 'we will rather get people to register, that should be the focus, we should find another way to get them to register.' [156] EMI 6 also said that they cannot refer minor issues for criminal investigation because some issues can be remedied through an administrative notice.[157] This again implicates both forms of proportionality (1) in that certain crimes are not a balanced response in seeking to protect certain interests or (2) and may potentially result in more punishment than what may be deserved.

6.4. Prosecutors

Prosecutors 1, 2 and 3 raised concerns regarding the consistency in environmental laws and prosecutions. Prosecutor 1 explained that in some provinces, provincial laws apply, which have higher penalties than national laws. They said that the different functions across government departments (i.e., national and provincial) impede consistency. To illustrate this, they explained that sanctions in the National Water Act are the lowest, notwithstanding water being a scarce resource.[158]

[153] IT - EMI 2, 23 Jan 2019, p11 and 12.
[154] IT - EMI 3, 23 Jan 2019, p4.
[155] Published in GN R283 *GG* 38633 of 2 April 2015.
[156] IT - EMI 7, 8 Jan 2019, p8.
[157] IT - EMI 6, 25 Jan 2019, p4.
[158] IT - Prosecutor 1, 7 July 2020, p12.

According to Prosecutor 2, prosecutors' limited experience may also be a reason for inconsistent approaches, for example, different approaches in dealing with listed activities as separate or consolidated charges.[159] Prosecutor 3 cautioned against selective prosecution and said that when faced with similar transgressions by different operations, both must be prosecuted. In their experience, this does not happen because of investigative capacity constraints.[160]

Prosecutor 5 believed there are too many environmental criminal sanctions, some of the fines are disproportionate to the offence, and some non-compliances could be better dealt with through warnings.[161]

6.5. Magistrates

Magistrate 1 was concerned about the discretion the law creates; grouping all offences (whether significant or not) creates a discretion that 'opens the door to corruption.'[162] Magistrate 1 was also concerned that convicting a business could mean nothing; some businesses could pay a R1 million fine 'with a smile'. If the business no longer exists, there is nothing further to be done post a conviction. There are no other real consequences, accountability, or ways to ensure remediation. They questioned the point of the criminal sanction and considered it wholly inadequate.[163] They also thought that criminalizing *de minimis* contraventions and not distinguishing between serious and non-serious transgression is 'ridiculous'.[164]

Magistrate 2 said that the statutory penalties might be well below the actual damage caused to the environment depending on the environmental impact. They explained that the problem with the high penalty amounts is that 'because magistrates may not be aware of the serious nature [of these crimes] they might not reconcile the seriousness with the prescribed sentence'. This magistrate does not think that the fines imposed in court 'are necessarily related to the maximum statutory penalty' but might be aligned with the 'nature of the offences'.[165]

[159] IT - Prosecutor 2, 10 July 2020, p13.
[160] IT - Prosecutor 3, 25 Aug 2020, p5.
[161] ITs - Prosecutor 5, 9 Nov 2020, p10.
[162] IT - Magistrate 1, 5 Feb 2021, p10.
[163] Ibid.
[164] IT - Magistrate 1, 5 Feb 2021, p7.
[165] IT - Magistrate 2, 11 Feb 2021, p9.

6.6. Conclusion: Consistency in the application of criminal law sanctions

Based on the input from participants, several problems in the application of environmental sanctions emerge. First, creating so many statutory offences and grouping them all together (whether significant or not) creates a discretion that 'opens the door to corruption'. Second, the exercise of discretion varies between departments and results in inconsistent enforcement. Third, inconsistency in law and its enforcement and the impossibility to enforce all of its leads to unequal enforcement. Fourth, the prescribed maximum penalties do not cater to the offences' varying degrees of seriousness and are often disproportional to their actual environmental impacts. Fifth, an additional concern, is that sentencing a company to pay a fine may be an ineffective use of the law; there must be other real consequences, accountability, or ways to ensure remediation. Sixth, two IPs and one Counsel believe there is overregulation, and capacity should be moved from those drafting the law (because we have enough) to those who need to enforce it.

These concerns appear to point to problems in the design of criminal sanctions within environmental laws.

7. PRACTICALITIES AND EVERYDAY CHALLENGES IN CRIMINAL ENFORCEMENT

This part conveys what participants believe to be observed practical challenges in the context of criminal enforcement. This part does not convey yes or no answers to a particular question but identifies what each participant believes to be the main challenges in using criminal sanctions. The context for IPs is different from that of enforcers. IPs cannot necessarily comment on challenges in using the criminal sanction, as they are not the key role player utilising the sanction but is on its receiving end. IPs have shared their views on what they believe the main challenge is to ensure compliance. Thus, this part contains limited comments from IPs on enforcement challenges.

EMIs, Prosecutors, and Counsel shared their views on the challenges in prosecutions and using the criminal sanctions. The Magistrates provided exceptionally detailed and practical comments regarding their perceived challenges in environmental prosecutions.

7.1. Industry Participants

Only three (out of twelve) IPs have been directly involved in prosecutions. Thus, this part is divided into what IPs perceive as the main challenges to prosecutions and the main challenges in ensuring compliance.

7.1.1 Main challenges in enforcing environmental law through prosecutions

Only IPs 2, 3 and 6 commented on this theme. IP 2 said prosecutions are cumbersome and tricky, and 'authorities do not make it easier for themselves, for example, by imposing vague licensing conditions'.[166] According to IP 6, the criminal sanction is misused, where the wrong individuals are cited as accused. They explained that this could occur when compliance officers are cited as accused, although these are the employees in the business that drive compliance behaviour and are often ignored by the business/those who write the cheques. The compliance officer can lose their job, and the business would not be closer to compliance.

Further concerns for IP 6 included that (1) authorities' failure to act swiftly creates empty threats, and (2) delays affect the potential success of prosecutions.[167] For example, at a board level, the compliance officers use the possibility of criminal prosecution as a threat to motivate the necessary budgetary provisions for compliance projects. However, if the threats are empty, it is of no use-

> What often happens is that there are situations where you keep telling the company [enforcement action] will happen, you can get a compliance notice, and they will lock you up, but then nothing happens, and the [EMIs] do not act. Then management tells us that we are paranoid and getting hysterical for nothing because clearly nothing is going to happen. [Management] then continue because they believe they can get away with murder.[168]

IP 3 echoed that time delays in pursuing criminal investigations and prosecutions affect the potential success of such prosecutions.[169]

7.1.2 Main challenges to ensure compliance

[166] IT - IP 2, 15 Jan 2019, p11.
[167] IT - IP 6, 31 Jan 2019, p3.
[168] Ibid.
[169] IT - IP 3, 22 Jan 2019, p11.

According to the IPs, challenges to ensure compliance range from authority constraints (IP 4, 6, 8, 9, 10 and 11) and frequently changing and complex laws (IP 1, 2 and 3) to financial resources and economic constraints (IPs 6 and 7).

7.1.2.1. Authority constraints

Similar to IP 6's view regarding inaction by authorities in criminal action (mentioned in the preceding part), IP 4 said that the authorities do not take action when they should. Their investigations often go nowhere. Consequently, businesses may not take the threats of compliance officers seriously.[170] IP 8, 9 and 10 raised government department capacity and competence as primary challenges. IP 8 said that Department officials often do not respond to compliance-related queries, misunderstand the issue, or provide untrustworthy information.[171] According to IP 10, '[o]ften, the authorities do not provide reliable or consistent information. The information often differs from one person to the next.'[172] IP 9 added that authority response time is problematic.[173]

IP 11 expressed that licensing delays for water use licences are a significant challenge. However, authorities want to take enforcement action even when applications are pending, expressing that authorities 'are often unreasonable'. The enforcement arm of the authority does not know what the licensing arm does, which leads to unnecessary enforcement action and authorities wasting their time. The water authorities, in particular, do not seem to take a reasonable approach.[174] Another problem is that the time delay between authority inspections and receiving compliance notices often exceeds six months.[175] This delay suggests that the issues considered, and which form part of the compliance notices have not been deemed serious enough by the authorities to act fast, yet the industry must act without delay or be prosecuted.

7.1.2.2. Impractical legislation and frequent changes

IP 1 expressed the view that impractical legislation or regulations that do not speak to the legislation's intent (i.e., to prevent environmental damage) are difficulties in ensuring compliance. For example, certain ambient emissions are impractical because there may be no impact on a surrounding community or environment. Another example is that their impact on

[170] IT - IP 4 & 5, 29 Jan 2019, p13.
[171] IT - IP 8, 9 & 10, 8 Feb 2019, p9.
[172] Ibid.
[173] Ibid.
[174] IT - IP 11, 18 Feb 2019, p3 to 5 and 8.
[175] IT - IP 11, 18 Feb 2019, p4.

a water resource is minimal, but 'the whole river is a big sewer' due to poor regulation upstream.[176]

According to IP 2, the number of legislative changes and the rate at which they change- 'we start complying with one thing, and then they move the goalpost again', they added-

> We [do not] need an increase in regulation [we] need to enforce it better. Instead of having a massive group that sits and writes legislation and changes and lobbies … rather just send more people out as EMIs, check what is going on and make decisions before putting information out. … It just seems like it becomes overregulation and overburdening a structure.[177]

IP 3's main challenge in ensuring compliance is 'that the law changes so frequently, keeping up is the biggest issue.'[178] IP 3 said, 'we need to begin with the legislation, it must be written so that most people can understand and interpret it. Some authorities even interpret it differently.' IP 3 wondered if officials are not being measured against the wrong performance indicators, 'they might be driving wrong behaviour, are people chasing a bonus or are they making a difference for environmental legislation?' IP 3s impression is that there is always a flood of legislation or amendments in the last six months of the year. It should be determined if officials' performance indicators are linked to the number of annual publications, as that is the impression created.[179]

For IP 3, another problem is unrealistic or incorrect licence conditions, illustrating that authorities incorrectly interpret requirements or 'in many cases copy and paste conditions which are not specific to the site.' When amended conditions are eventually received, authorities still record non-compliances for the preceding period notwithstanding the submission of amendment applications, which IP 3 described as senseless and frustrating. IP 3 expressed the hope that a prosecutor reviews such findings and sense prevails.[180]

7.1.2.3. Financial resources and economic constraints

IP 6 said that the availability of financial resources is a significant challenge, the business might say they do not have resources, but money is found when a charge sheet comes.[181] To a similar

[176] IT - IP 1, 3 Dec 2018, p11.
[177] IT - IP 2, 15 Jan 2019, p9.
[178] IT - IP 3, 22 Jan 2019, p5.
[179] IT - IP 3, 22 Jan 2019, p11.
[180] IT - IP 3, 22 Jan 2019, p5.
[181] IT - IP 6, 31 Jan 2019, p8.

extent, IP 7 said that challenging economic circumstances significantly constrains compliance.[182]

7.2. Counsel

According to Counsel 1 and 3, the main challenge to successful prosecutions is the need for adequately trained prosecutors, as their knowledge and experience of environmental law appear limited.[183] Counsel 1 explained that, in their experience, the parties (the state and the accused) often sit around 'the same table' in the sense that they all understand that there may have been a transgression. However, it may have been impossible for the accused to prevent it, and it may be difficult for the prosecution to prove. They clarified that even where, technically, there is a transgression, e.g., exceedances of emissions standards, it is not only about proving intention but may be about proving negligence. In the latter instance, the prosecution has to show that the accused did not take 'reasonable precautions'. What constitutes 'reasonable precautions' could be construed widely. Instead of going the route of having to prove that 'without exception, we find that big companies will pay the fine to resolve the issue'. Selecting the criminal route results in significant time and cost, but also in 'both parties climbing into their shells to fight, there no longer is any possibility of reconciliation, and often the chance to have any environmental damage remediated reduces'. Counsel's impression is that authorities and prosecutors do not interrogate the reasonableness of the precautions taken by the accused when pursuing some prosecutions.[184]

7.3. EMIs

EMIs perceived main challenges in environmental law prosecutions range from (1) limits in prosecutor capacity, limited specialist environmental prosecutors, and restrictive regional prosecutor workloads (EMI 1, 2, 4, 5, 7, and 9), (2) frequently changing and unenforceable environmental laws (EMI 2, 3 and 6) (3) magistrate understanding and application of environmental laws (EMI 5 and 8) (4) enforcement capacity, i.e., not enough law enforcers (EMI 2 and 3) (5) general challenges in the criminal justice system, such as delays or the strength of defence teams (EMI 7 and 9), (6) low SAPS support or lack of priority (EMI 1, 2,

[182] IT - IP 7, 5 Feb 2019, p11.
[183] IT - Counsel 1, 21 Jan 2019, p5 and 7; Interview notes - Counsel 3, 16 Jan 2019, p2.
[184] IT - Counsel 1, 21 Jan 2019, p3, 4 and 7.

7 and 9), (7) general societal culture of non-compliance (EMI 2 and 9), to (8) intra-departmental challenges (EMI 3 and 5).

7.3.1 Limitations regarding prosecutor capacity

Six of the ten EMIs identified prosecutor capacity as a challenge. EMI 1 said that some prosecutors might prefer to work on matters where they are more familiar with the subject matter.[185] According to EMI 2, few good prosecutors are willing and interested in environmental cases.[186] EMIs 5 and 9 said that prosecutors rely heavily on EMIs to investigate, have in-depth knowledge of the evidence and docket, and draft criminal charges.[187] EMI 5 added that prosecutors do not always have the capacity to apply their minds to a case 100 per cent.[188] According to EMI 7, many prosecutors do not really understand environmental law. There are also competing criminal issues; prosecutors may ask, 'why should I go after industry when there is a murderer out there'.[189] EMI 4 explained that prosecutor workloads are restrictive, and counsel may have more specialised knowledge because an accused may be willing to pay for the best representation available.[190]

7.3.2 Environmental laws

Three EMIs raised concerns with environmental laws being impediments to successful prosecutions. EMI 2 questioned whether all behaviour should be criminalized– and asked '[m]ust there be a criminal sanction for everything?'. EMI 2 explained that although South Africa is a developing country, it has good environmental laws but questioned whether they are enforceable.[191] According to EMI 6, changes to legislation are a primary concern because keeping up to date with all of the applicable changes is difficult.[192]

7.3.3 Magistrate understanding

Three participants raised constraints concerning magistrate's understanding and application of environmental laws. Magistrates may not necessarily understand technical points because of the complex nature of environmental prosecutions, said EMI 3.[193] EMI 5 stated that our courts

[185] IT - EMI 1, 23 Jan 2019, p11.
[186] IT - EMI 3, 23 Jan 2019, p9.
[187] IT - EMI 9, 12 Feb 2021, p4, 7 and 11.
[188] IT - EMI 5, 25 Jan 2019, p9.
[189] IT - EMI 7, 8 Jan 2019, p6 and 8.
[190] IT - EMI 4, 23 Jan 2019, p6 and 8.
[191] IT - EMI 2, 23 Jan 2019, p11.
[192] IT - EMI 6, 25 Jan 2019, p7.
[193] IT - EMI 3, 23 Jan 2019, p4, 6 and 10.

do not yet understand or appreciate the impact of environmental offences when they punish the accused, even though they are trying to improve.[194] According to EMI 8, they now exert much effort to ensure the magistrate understands the issues because of past experience.[195]

7.3.4 Enforcement capacity

Two EMIs raised enforcement capacity as a general concern. EMI 2 said there are simply not enough people to enforce the law and 'not enough policemen'.[196] EMI 3 had a similar view stating that the limited capacity of EMIs is restrictive.[197]

7.3.5 The criminal justice process, the strength of defence teams and delay

Two prosecutors raised defence tactics and the general delays within the criminal justice system as limiting. EMI 9 explained that the main challenges to successful prosecutions include that (1) the accused usually employs the best, highly skilled counsel, whereas the State has to use prosecutors who often has a caseload of 400 other cases, (2) the defence often cause delays through side applications, and (3) there is no restriction on the number of representations the accused can make to the prosecution for the withdrawal of charges, and this also causes delays and a long process.[198] EMI 7 said the delay factor is a challenge; sometimes, obtaining witness or other statements takes long; in particular, suspects try to avoid giving statements and give investigators the run-around.[199]

7.3.6 Insufficient SAPS support or lack of priority

Two EMIs raised SAPS knowledge, capacity, and support in investigating environmental crime as challenges to prosecutions. EMI 1 said that they struggle to register dockets with SAPS because they lack knowledge of environmental offences.[200] According to EMI 2, there are simply not enough enforcers.[201] EMI 7 expressed similar concerns.[202] EMI 9 explained that SAPS does not consider crime in the 'brown' subsector a priority like the 'green' subsector because the latter are considered matters with national security risks.[203]

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[194] IT - EMI 5, 25 Jan 2019, p9.
[195] IT - EMI 8, 5 April 2019, p9.
[196] IT - EMI 2, 23 Jan 2019, p10.
[197] IT - EMI 3, 23 Jan 2019, p4.
[198] IT - EMIs 9 and 10, 12 Feb 2021, p12.
[199] IT - EMI 7, 8 Jan 2019, p8.
[200] IT - EMI 1, 23 Jan 2019, p10.
[201] IT - EMI 2, 23 Jan 2019, p10.
[202] IT - EMI 7, 8 Jan 2019, p6.
[203] IT - EMI 9, 12 Feb 2021, p7.

7.3.7 Culture of non-compliance

EMIs 2 and 9[204] recognised that the culture of a non-compliant society impacts the efficiency of criminal sanctions because there is too much crime to combat. EMI 2 said that environmental law compliance is the same as other sectors or common-law crimes - generally, crime rates are high and compliance low, 'we have a culture of non-compliance in South Africa; unfortunately, that is how it is'. There are not enough enforcers to police compliance.[205]

7.3.8 A lack of widely available precedents

EMI 1 considered the lack of readily accessible precedents or court judgments as restrictive.[206] It is challenging to convince a court where environmental matters are technical, both scientifically and legally. An existing database of such judgments would contribute to developing knowledge and awareness regarding the subject matter.

7.3.9 Intra-departmental concerns

EMIs 3 and 5 raised intra-departmental concerns as challenges to prosecutions. EMI 3 explained that one of their biggest challenges is going through procurement processes when they require expert witnesses to testify. The government procurement and supply chain processes are 'an absolute nightmare'. Without the necessary expert evidence, the matter cannot be prosecuted.[207] EMI 5's challenge is working within a department that does not understand the work EMIs do or its importance. There is a lack of patience and understanding regarding the drawn-out nature of the criminal justice process.[208]

7.4. Prosecutors

Prosecutors perceive several aspects as challenges in environmental prosecutions, including (1) prosecutorial or investigative capacity (Prosecutors 1, 2 and 3) (2) that more practical prosecutor and magistrate training and more reference material are needed (Prosecutor 4) (3) environmental prosecutions require knowledge of other areas of laws (Prosecutor 2), (4) only offences that warrant the attention of criminal courts should be prosecuted (Prosecutor 5), (5) inconsistent departmental approaches (Prosecutor 1), (6) complexities in environmental law,

[204] IT - EMI 9, 12 Feb 2021, p11.
[205] IT - EMI 2, 23 Jan 2019, p6 and 10.
[206] IT - EMI 1, 23 Jan 2019, p10.
[207] IT - EMI 3, 23 Jan 2019, p9.
[208] IT - EMI 5, 25 Jan 2019, p9.

evidence collection and presentation (Prosecutor 1 and 5), (7) magistrates' understanding of pollution-related offences (Prosecutor 2), and (8) the issues in dispute should be clear before it goes to a prosecutor (Prosecutor 4).

Prosecutors 1, 2 and 3 identified prosecutorial or investigative capacity constraints as primary challenges to successful prosecutions. Prosecutor 2 said that knowledge of business enterprises and company law is also required to prosecute juristic entities successfully.[209] According to Prosecutor 4, there should be more detailed practical training for magistrates and prosecutors.[210] Prosecutor 5 shared that before environmental matters reach prosecution, the authorities should have exhausted all compliance and remediation possibilities. Only those offences that warrant the attention of criminal courts should be brought to prosecution to save state resources.[211]

Prosecutor 3 added that inconsistent approaches in investigating and pursuing environmental crimes between different national (with different functional areas, e.g., environment, water, minerals) or provincial departments is problematic.[212] Prosecutor 1 shared a similar concern, adding that other obstacles to successful prosecutions include (1) the technical nature of environmental law and how evidence is collected (e.g., water sampling and the importance of the locality of sampling); (2) differentiating between compliance monitoring information and evidence collected for use in criminal matters; and (3) the frequent changes in the law and keeping up to date.[213]

Prosecutor 2 shared that magistrates' understanding of pollution-related offences and their environmental impacts are a perceived obstacle, as these may not be considered as serious as rhino-poaching or conservation offences.[214] For Prosecutor 3, the lack of specialist investigators and inadequate evidence gathering impede prosecution success.[215]

According to Prosecutor 4, obstacles include the availability of-

> Training and accessible reference material regarding legislation. Many of the laws' provisions are very technical and difficult to apply to a certain set of facts. Regulations are referenced, industrial facilities and the components thereof are referenced, but the prosecutor can either not

[209] IT - Prosecutor 2, 10 Jul 2021, p12.
[210] Written response from Prosecutor 4 on 29 Oct 2020, p2.
[211] IT - Prosecutor 5 on 9 Nov 2020, p10.
[212] IT - Prosecutor 3, 25 Aug 2021, p12.
[213] IT - Prosecutor 1, 7 July 2020, p9.
[214] IT - Prosecutor 2, 10 July 2020, p8.
[215] IT - Prosecutor 3, 25 Aug 2020, p7.

> find the regulations or know/understand what the law refers to when, for example, reference is made to a specific part of a plant within the factory. The definitions given for these are incomprehensible.[216]

Prosecutor 4 explained that senior counsel usually represents the accused and, together with the volumes of relevant documents and correspondence, tend to overwhelm prosecutors, deterring regional court prosecutors from pursuing such matters. The solution they suggest is that EMIs first consult with the accused's representatives before approaching the prosecution to clarify and simplify the disputed issues and prevent 'trial by ambush'.[217] According to Prosecutor 5, environmental prosecutions are complex and take longer than other criminal cases. Witness testimony is often not concluded in a day, often the magistrate does not understand. 'it is not a matter of, for example, a witness testifying that he saw a man shooting a firearm. These matters require step-by-step testimony.' They added that the chain of custody is more complex as scientific 'samples and objects must be dealt with carefully.'[218]

7.5. Magistrates

Both Magistrates raised several practical challenges that impact the success of prosecutions. According to Magistrate 1, first, there is a disjunct in how green and brown offences are dealt with – 'with green, you find better cooperation between nature conservation and the police, with brown that does not happen'. Second, 'brown can be very technical'.[219] Third, prosecutors often prefer to plea bargain in these cases, which means prosecutors do not get much experience taking such matters on trial. It is rare for this kind of matter to end in a trial, and when it does, even the specialist prosecutors struggle to prove their case. Fourth, prosecutors who do not regularly appear in trials tend to make technical errors in presenting a case.[220] Fifth, inconsistency between the sanction amounts in provincial and national laws is also problematic. Sixth, it is problematic that no criminal record is kept where companies or juristic entities are convicted, different from when a natural person is convicted (their fingerprints are taken, and there is a SAP69). Companies can simply change their name, ownership, or the directors, and no one will know their prior convictions.[221] Seven, changes from older to more recent legislation and the changing of competent authorities make it challenging to prove criminal

[216] Written response from Prosecutor 4 on 29 October 2020, p1.
[217] Written response from Prosecutor 4 on 29 October 2020, p2.
[218] IT - Prosecutor 5, 9 Nov 2020, p6.
[219] IT - Magistrate 1, 5 Feb 2021, p2.
[220] IT - Magistrate 1, 5 Feb 2021, p2.
[221] IT - Magistrate 1, 5 Feb 2021, p8.

charges, mainly where there is no evidence presented on crimes allegedly committed many years ago.[222] Lastly, persons are often cited as accused in their personal capacity, but no proof of personal criminal liability is provided.[223]

Magistrate 2 said that the biggest challenge with prosecuting environmental law offences is knowledge of the laws because magistrates do not work with it daily, although they conduct extensive research on the laws referenced in the charge sheet.[224] Magistrate 2 added, as a second challenge, the complexity of environmental matters because (for example) there could be many contributors to pollution in a broader area, particularly upstream water users.[225] Third, prosecuting a company that holds permits under specific historical laws may also be challenging, requiring sufficient technical evidence to prove illegality. Fourth, the state must prove knowledge of unlawfulness, which can be problematic where complex laws have changed over time and where the state does not prove why/how legal provisions apply to the accused (i.e., through old permits or more recent legal provisions).[226] Fifth, the state tends to phrase criminal charges too broadly, covering timeframes that were not subject to the EMI inspections or where there is no evidence because no past monitoring exists.[227] Sixth, cases could also be unsuccessful if the incorrect accused is before the court.[228] Seventh, legal certainty requires that citizens know what is expected of them 'if you have a law that is amended every two or three years, then people might not be able to keep track of it.'[229] They also believe that-

> An aspect that needs more attention is to move away from a criminal sanction and move to administrative sanctions where the department can impose fines outside of court. The problem is that these cases are delayed in court. A murder case can be extended to a two-year-long affair. ... With environmental cases, if there is a problem now and there is pollution, you cannot fix it two years later after the accused is convicted and a remediation order issued. It has to be remedied now.[230]

[222] IT - Magistrate 1, 5 Feb 2021, p3.
[223] IT - Magistrate 1, 5 Feb 2021, p4.
[224] IT - Magistrate 2, 11 Feb 2021, p12.
[225] IT - Magistrate 2, 11 Feb 2021, p2.
[226] IT - Magistrate 2, 11 Feb 2021, p3.
[227] IT - Magistrate 2, 11 Feb 2021, p4 and 11.
[228] IT - Magistrate 2, 11 Feb 2021, p3.
[229] IT - Magistrate 2, 11 Feb 2021, p9.
[230] IT - Magistrate 2, 11 Feb 2021, p7.

Lesser offences should be in the realm of administrative sanctions because, in a court, they may result in a warning and discharge, which will create a worse precedent.[231] Lastly, more specialized training for prosecutors and magistrates is required.[232]

7.6. Conclusion: Practicalities and everyday challenges in criminal enforcement

Each participant category provided wide-ranging practical challenges to successful prosecutions. The table below groups these together within main emerging themes, being concerns regarding- role-player capacity, environmental laws and requirements, the criminal justice system and practical aspects regarding the conduct of prosecutions. From this table, it appears that the most significant challenge in enforcing environmental law through prosecutions is the capacity constraints of role-players, including authorities, investigators, prosecutors and magistrates. The secondary challenge seems to be the complexities surrounding environmental laws and requirements, changes, and evidence collection and presentation. Additional challenges include aspects surrounding the criminal justice system generally and practicalities surrounding the conduct of prosecutions.

Table 5.1: Main challenges/themes to prosecutions

Main challenge	Description	Participants with this /similar view
Capacity of role-players	Limits in prosecutor capacity, limited specialist environmental prosecutors and restrictive regional prosecutor workloads. Not enough law enforcers. Insufficient prosecutorial and investigative capacity.	EMIs 1, 2, 3, 4, 5, 7, 9 Counsel 1 and 3 Prosecutors 1, 2 and 3 IPs 4, 6, 8, 9, 10 and 11
	Insufficient SAPS support or lack of priority.	EMIs 1, 2, 7 and 9 Magistrate 1
	Magistrate understanding and application of environmental laws, particularly pollution-related offences	EMIs 5 and 8 Prosecutor 2
	More practical, specialized prosecutor and magistrate training and more reference material are needed.	Prosecutor 4 Magistrate 2
	The trend of plea agreements results in limited trial experience of specialist prosecutors and precedents/reference material.	Magistrate 1 Prosecutor 4
	Intra-departmental challenges.	EMIs 3 and 5
	Inconsistent departmental approaches	Prosecutor 3

[231] IT - Magistrate 2, 11 Feb 2021, p10.
[232] IT - Magistrate 2, 11 Feb 2021, p11.

Table 5.1: Main challenges/themes to prosecutions		
Main challenge	**Description**	**Participants with this /similar view**
Environmental laws/requirements	Frequently changing and unenforceable environmental laws, unclear conditions, changes between different authorities. Legal certainty.	EMIs 2, 3 and 6 Magistrates 1 and 2 IPs 1, 2 and 3
	Knowledge of complex laws if you do not work with them daily.	Magistrate 2
	Complexities in environmental law and evidence collection and presentation.	Prosecutors 1 and 5 Magistrates 1 and 2
	Sanction amounts are inconsistent in national and provincial laws.	Magistrate 1
The Criminal Justice System	General challenges in the criminal justice system, such as delays or the strength of defence teams.	EMIs 7 and 9 IPs 3 and 6
	Companies do not obtain criminal records; they can evade records by deregistering a business, creating a new business and appointing different directors.	Magistrate 1
Practical conduct of prosecutions	Criminal charges should not be phrased too broadly.	Magistrate 2
	The correct accused should be before the court.	Magistrate 2 IP 6
	Insufficient evidence to prove guilt, or personal criminal liability, or difficulty proving negligence.	Magistrate 1 Counsel 1

8. CONCLUSION

Participants agreed that criminal sanctions are a necessary tool to ensure environmental compliance. South Africa's environmental law provides that criminal and administrative enforcement mechanisms can be used in parallel. Participants diverged on when the criminal sanction should be used and if it is a 'last resort' mechanism within the spectrum of enforcement action. Twelve (out of 32) participants said that the criminal sanction should be a last resort, whereas ten disagreed, and nine gave qualified or unclear answers. Serious crimes may justify using the criminal sanction as a first resort. What is problematic is that the law does not provide differentiation between serious and trivial environmental offences. Instead, the law creates criminal offences for serious and less serious crimes (with similar penalties), creating unnecessary discretion and inconsistent approaches in prosecuting environmental crime.

Some participants (in the EMI, magistrate and IP participant categories) raised that revoking an approval would be the most severe consequence on a business.[233] From a corporate risk perspective, a more condemnatory response by the state (than the criminal sanction) would be to withdraw a permit or licence. In the context of environmental law, the criminal sanction would not be the state's most condemnatory response.

A majority of participants (22 of 32) expressed concern about frequent and constantly changing laws. They affirmed that compliance and enforcement would be easier if the environmental laws remained clear and consistent. Three participants disagreed, five provided qualified views, and two did not provide answers.

The consensus among participants appears to be that how criminal sanctions are used impacts its deterrent effect. In turn, if a criminal sanction does not offer deterrence, it brings into question whether it is used effectively or constructed to be used effectively. In this regard, twelve (of the 32) participants affirmed that the criminal sanctions (in and of themselves) have a deterrent effect. Nine participants differed; eleven did not directly answer the question or expressed qualified views.

The most significant challenge in enforcing environmental law through prosecutions, emerging from participant views, is the capacity constraints of role-players, including authorities, investigators, prosecutors, and magistrates. The secondary challenge seems to be the complexities surrounding environmental laws and requirements, changes, evidence collection and presentation. Additional challenges to successful prosecutions include aspects surrounding the criminal justice system generally and practicalities surrounding the conduct of prosecutions.

The concerns expressed by participants seem to suggest design flaws in the drafting of the laws, specifically criminal sanctions. There are too many statutory offences, making it impossible to enforce, creating too much discretion, which is exercised inconsistently. These issues lead to unequal enforcement. The prescribed maximum penalties are often disproportional to the transgression. The fact that there is too much and frequently changing environmental law, which is unenforceable, suggests that there should be more enforcers and fewer law drafters.

[233] IT - EMI 9 and 10, 12 Feb 2021, p12; EMI 7, 8 Jan 2019, p6; Magistrate 1, 5 Feb 2021, p8; IP 4, 29 Jan 2019, p6.

Following on from the consideration of insights gained from key role-players in this chapter, Chapter Six examines the outcomes and themes in Chapters Three to Five against the normative framework (proposed in Chapter Two) for determining overcriminalization.

CHAPTER 6: ANALYSIS - USE OF THE CRIMINAL LAW SANCTION FOR ENVIRONMENTAL LAW TRANSGRESSIONS

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1. INTRODUCTION

This chapter analyzes the findings of the three preceding chapters against the normative framework for criminalization proposed in Chapter Two with a view to determining (a) if overcriminalization occurs in South African environmental law; and (b) when the criminal sanction is used appropriately and effectively.

Chapter Three highlights the complexity of navigating and applying the four environmental laws because of the frequency of their amendment. It posits that such frequent amendments and goalpost-shifting put legal certainty at risk. In such circumstances, it is questionable whether the criminal sanction is the most appropriate response. This chapter also presents the inconsistencies in the design of offence provisions and the factors prescribed for determining the appropriate penalties. With the exception of the National Water Act, the maximum prescribed penalties have significantly increased over time in the other three laws (NEMA, the Waste Act, and the Air Quality Act). That there is no distinction or gradation of penalties based on the significance or environmental impact of the offences appears problematic. Criminalizing trivial offences in the same way as serious offences points to a tendency to overcriminalize. Considering such criminal sanctions against the normative frame may elucidate and clarify this claim.

Chapter Four analysed 53 environmental prosecutions under the four laws finding that: Almost all cases resulted in convictions (about half concluded by way of s 105A agreements); about half resulted in the conviction of natural persons; 81 per cent resulted in comparatively low sentences/fines;[1] a third resulted in additional NEMA fines or payment directly to DFFE; and in twelve cases listed activities or water uses received different treatment as either combined or separate charges. However, because there is no central, accessible database with case information, detailed underlying case information that could assist in determining overcriminalization is lacking. This chapter nevertheless assesses aspects of the case outcomes against the overcriminalization normative framework presented in Chapter 2. The theme most pertinent to the discussion in this chapter is the use of similar offences and penalties for both serious and trivial contraventions.

[1] Nine per cent resulted in comparatively high sentences/fines. The comparative percentage for the remaining 10 per cent is unknown because of limited underlying information. On the assumptions that the base data for the calculations are correct, although there may be variables that are not apparent from the information obtained. In addition, 43 per cent (23) cases did not have sufficient information for this assessment.

Chapter Five presents the results of a qualitative empirical inquiry into the perspectives of research participants on the design, use, and impact of environmental criminal sanctions. Research participants shared insights regarding the criminal sanction as a last resort mechanism, its deterrent effect, the certainty and practicality of the law, the consistency in applying criminal law sanctions, practicalities and application challenges in criminal enforcement. These insights are brought within the scope of the overcriminalization normative frame.

The proposed normative frame against which the outcomes mentioned above are assessed comprises eight categories of norms or requirements for criminalizing behaviour:

1) The particular nature of criminal law, the legislature's burden, and the substantial state interest to justify state control;

2) Crimes should be a last resort mechanism when no alternative means to achieve the intended state purpose exists;

3) The particular nature of environmental criminal law, attainability, and flux;

4) The crime must excite moral disapproval, wrongfulness, be condemn-worthy, and deserving of criminal punishment;

5) Culpability, knowledge, and triviality;

6) Proportionality, fairness, and consistency;

7) Practicality, efficacy, and enforceability;

8) Certainty and precision of environmental crimes.

These categories are employed below to assess the phenomenon of overcriminalization in South African environmental law relevant to industrial facilities.

2. THE PARTICULAR NATURE OF CRIMINAL LAW, THE LEGISLATURE'S BURDEN, AND THE SUBSTANTIAL STATE INTEREST TO JUSTIFY STATE CONTROL

As the state's most condemnatory response, the particular nature of criminal law should be a core consideration for criminalizing behaviour.[2] The creation of environmental crimes must be considered in the context of the constitutionally protected right to an environment that is not harmful to health or well-being.[3] This right informs the substantial state interest and how the legislature should fulfil its burden in creating environmental crimes.

The constitutional right includes having the environment protected 'for the benefit of present and future generations, through reasonable legislative and other measures' that '(i) prevent pollution and ecological degradation; (ii) promote conservation, and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'.[4] Although the ambit of such 'reasonable legislative measures' in an environmental law context may not have received detailed consideration, it would have to advance the three categories above.[5] If a criminal sanction does not advance any of those three aspects, it may extend beyond the ambit of s 24.

The apex court has considered 'reasonable legislative measures'[6] to include a 'coherent program directed towards the realization of the right in the bill of rights'.[7] The aim of s 24 may be missed when the law imposes significant maximum penalties for both serious and trivial transgressions. However, courts may interpret the provisions widely and employ a purposive interpretation.[8] Even if trivial transgressions do not directly achieve the s 24 aims, courts may find that (even trivial) legislative requirements and related offences may be necessary for pursuing the constitutional objectives, and may pay judicial deference to the functions and expertise of different branches of government.[9] The researcher is unaware of any constitutional challenge of specific environmental crimes on these bases. There may not yet have been enough

[2] R.A. Duff et al *The Boundaries of the Criminal Law* 1 ed (2010) 261.
[3] The Constitution s 24.
[4] The Constitution s 24(b).
[5] Ibid.
[6] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).
[7] *Grootboom* op cit 235, para 41.
[8] LM Du Plessis 'Statute Law and Interpretation' in J A Faris (ed) *The Law of South Africa* vol 25(1) (2 ed) (2011) para 323.
[9] Cora Hoexter *Administrative law in South Africa* 2 ed (2012) at 152 - 153 with reference to *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 48.

prosecutions for this to occur, or robust matters may have been selected for prosecution, weeding out cases involving unclear, vague, or trivial offences.

Constitutional rights, e.g., the right to freedom and security of the person or to be presumed innocent,[10] may only be limited within the parameters in s 36.[11] When considering the constitutionality of a statutory provision that may violate a constitutional right, courts will consider the relevant factors in s 36.[12] Thus, the obligation for 'reasonable legislative measures' in s 24 must also be balanced against other rights and adhere to the Constitution's foundational principles. The principle of legality is implicit in South Africa's Constitution and an element of the rule of law that includes requirements such as the authority to act and acting rationally.[13] Original legislation is subject to the rule against vagueness.[14] The absence of a definition of what may be considered 'significant' pollution or degradation (as contemplated in NEMA s 49A(1)(e)) or the uncertainty of what NEMA s 49A(1)(f) contemplates (as further discussed in part 6 below) may be problematic in a criminal context considering vagueness.

In the context of a criminal justice system in crisis,[15] a purposive interpretation (and deference to legislators) may undermine the principles of criminalization and the collective authority requiring a rethink of criminal law. Legislators should consider the following propositions/questions before enacting criminal sanctions because enacting too many 'threatens the justice system with collapse':[16] (1) those who favour criminal legislation should carry a burden of proof and make a properly considered case for enacting a criminal law or offence provision. If such a case cannot be made, then an offence provision should not be enacted; (2) creating a criminal sanction, which interferes with the liberty of members of civilized society should be a mode of state control that would be considered lawful, rational, reasonable, and justifiable in the circumstances; (3) there must be a substantial risk being guarded against or a substantial interest being protected that can only be addressed through a

[10] The Constitution ss 12 and 35(3)(h).
[11] IM Rautenbach 'Introduction to the Bill of Rights' in *Bill of Rights Compendium* (2018) para 1A43.
[12] Rautenbach ibid para 1A43 with reference to *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* 2009 7 BCLR 673 (CC), 2009 4 SA 222 (CC) par [41]; also, *Johncom Media Investments Ltd v M* 2009 8 BCLR 751 (CC), 2009 4 SA 7 (CC) par [25]: '[T]he right infringed must be identified, and its nature as well as the importance in a particular context must be considered. The purpose of the limitation must be pin pointed, together with its extent, to determine the relation between the limitation and the purpose it is designed to achieve. It should be considered whether the purpose could be achieved by less restrictive means'.
[13] Hoexter op cit note 9 at 254, 255 and 122-123.
[14] Hoexter ibid at 356.
[15] Edwin Cameron 'The Crisis of the Criminal Justice System' (2020) *SALJ* 32.
[16] Skeen, A St Q updated by Hoctor, S 'Criminal Law' in J A Faris (ed) *The Law of South Africa* 3 ed (2017) volume 11 para 9.

criminal sanction, and that sanction must advance such interest (i.e. the imposition of the sanction should reduce the risk); and (4) does the proposed criminal sanction pass the 'laugh test'? These propositions/questions are used below in considering the statutory provisions, cases studied, and research participant insights.

Assessing two contrasting examples from Chapter Two against the questions necessary to discharge the legislature's burden illustrates the application of this normative principle. The *first example* is the general pollution or degradation offences, in which regard the questions could be answered as follows: first, it should not be difficult to make out a considered case for enacting a criminal sanction and penalty for pollution and degradation offences (or alongside the duty of care provisions in NEMA or the National Water Act).[17] Such a case would be supported by the constitutional right to an environment that is not harmful to health or well-being and NEMA's purpose of addressing environmentally harmful practices. It is also supported by the NEMA s 2 principles, which underscore environmental management, and provide that those responsible for environmental harm must pay for its remediation (i.e., 'the polluter pays' principle).[18]

Second, the 'duty of care' provisions require the prevention, minimisation or rectification of environmental harms, i.e., significant pollution or environmental degradation or water resource pollution. The criminal sanctions for pollution or degradation offences stipulate the elements of the crimes as: (1) unlawfully and intentionally or negligently committing any act or omission which causes or is likely to cause significant pollution or degradation of the environment, and (2) unlawfully and intentionally or negligently committing any act or omission which pollutes or is likely to pollute a water resource.[19] Creating a criminal sanction for these failures is a justifiable mode of state control. It may be difficult (at face value) to argue against the legality of these provisions.

Third, environmental pollution and degradation are substantial risks being guarded against, and the environment is a substantial interest being protected. However, in most cases, criminal sanctions arise once the environmental harm has already occurred (being more reactive, than proactive) but the substantial risk should be capable of being addressed through a criminal response, either in terms of future prevention (and deterrence) or specific remediation

[17] NEMA s 28 and National Water Act s 19 - a SEMA to which the NEMA principles would apply.
[18] NEMA s 2(4)(p).
[19] NEMA s 49A(1)(e) and National Water Act s 151(1)(i).

obligations as part of sentencing. Although there is no threshold for 'significant', the threshold is not necessarily high.[20] Conversely, where the risk is insubstantial, i.e., the environmental pollution or degradation is negligible (dependent on specific facts and expert assessment), a criminal sanction may not necessarily be justifiable or advance the state's interest. Another method, for example, directives,[21] may sufficiently address the concern - but the law does not specify this, thereby creating wide authority or prosecutorial discretion.

Fourth, significant environmental pollution or degradation is no laughing matter. Twelve cases (as assessed in Annexure A) related to pollution and degradation offences – an example of a substantial state interest being advanced through a criminal sanction. Other case examples (of possible substantial state interests being advanced) include waste management, collection, storage and disposal transgression in eighteen cases. Thirty-four cases dealt with the failure to obtain approvals – where the substantial state interest is to regulate activities resulting in environmental degradation.

The *second example* is when legislatures prescribe similar penalties for both trivial and serious transgressions, without gradation based on severity or which may not necessarily invoke the provisions of s 24(b) of the Constitution. Examples of these could include requirements of an administrative nature in approval conditions or regulations that do not directly impact the environment (e.g., relating to registrations, documents, and report submissions to the authorities). Failing to register under some regulations[22] could be easily rectified and has no direct environmental impact. Nevertheless, significant penalties (a potential maximum of R5 million or five years imprisonment (or both)) are prescribed for these offences, similar to the penalties for serious offences.

The responses to the four questions above for this *second example* are: first; it may be more difficult for the legislator to make a good case for enacting blanket criminal sanctions because transgressions could occur on a spectrum with different levels of severity. All four laws provide

[20] *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd T/A Pelts Products, and others* 2004 (2) SA 393 (E) at 414 (paras I & J) and 415.
[21] NEMA s 28(4) of National Water Act s19(3).
[22] For example, the National Atmospheric Emission Reporting Regulations, 2015, published under the Air Quality Act in GN R283 on 2 April 2015, specifically regulation 5, 13(b) and 14. The National Greenhouse Gas Emissions Reporting Regulations, 2016, published under the Air Quality Act in GN R275 on 3 April 2017. See regulation 5 read with 16(b) and 1, also provide that the failure to register within 30 days is subject to a similar penalty, i.e., R5 million.

criminal offences and penalties for non-compliance with approval conditions,[23] but it would not necessarily result in criminal enforcement because authorities or prosecutors may exercise their wide discretion and not pursue trivial offences. Similarly, where the failure to register is easily rectified, the authorities would not pursue a criminal matter as the first response, which begs the question, why does the law create a criminal offence with a significant prescribed maximum penalty in the first place? No reasoning or rationale is apparent for the related offences and why there is no differentiation between serious and non-serious transgressions, graded according to severity.

Second, statutorily prescribing criminal sanctions where enforcement officials (or prosecutors) would not pursue it (because of triviality) or where their capacity is constrained (requiring them to instead focus on serious transgressions) are two reasons why criminal sanctions as a mode of state control may not be justifiable. Here the legality could be challenged, subject to the specific facts and circumstances (which exceed the scope of this study).

Third, in the 2018/19 reporting year, the authorities used alternative means to address non-compliance with registration/reporting requirements by issuing 792 warning letters,[24] notwithstanding that substantial criminal sanctions were prescribed. The 'warning letter' approach reinforces that there is no substantial risk being guarded against or a substantial interest being protected that can only be addressed through a criminal sanction. Prescribing a criminal sanction (or a high penalty) in the first instance for such transgressions is not only excessive but could overburden the criminal justice system. Enforcement officials acknowledged that these matters should remain outside of criminal court.

Fourth, prescribing criminal sanctions for requirements with no substantial environmental risk and which can be addressed through much simpler means are unlikely to pass the 'laugh test', particularly if it can be easily rectified through a mechanism outside of the criminal justice system. In three of the considered cases, the accused faced charges that may relate to 'serious' and 'less serious' crimes, with similar prescribed penalties.[25] The criminal charges were generally taken together for sentencing. Thus, the penalties for each charge were not

[23] In terms of, for example, NEMA s 44, Waste Act s 69, Air Quality Act s 53, and National Water Act s 26. Empowered by, for example, Air Quality Act ss 55(2), Waste Act s 71(2), National Water Act s 69(2) and NEMA ss 24(5)(g), 25(3)(g) and 44(3).
[24] DFFE *NECER* 2018/19, available at:
https://www.environment.gov.za/sites/default/files/reports/necer2019report.pdf 51.
[25] *S v Die Straat Trust, S v E Adams,* and *S v Samancor Manganese and others.*

determined. Two of these cases were concluded through a s 105A agreement, and one was a guilty plea, so the court did not have a real opportunity to hear evidence and adjudicate possible triviality.

IPs shared that sometimes enacted regulations are ridiculous,[26] especially when trivial offences have maximum prescribed penalties similar to serious offences. New regulations often require administration by authorities, but immediately after promulgation, the authorities themselves are incapable of managing these processes. Nevertheless, criminal offences are created if the regulated community fails to comply.[27] Participants disapproved of the criminalization of trivial conduct and the law's failure to distinguish between serious and non-serious transgressions.[28] Too many criminal sanctions create authority and prosecutorial discretion,[29] meaning that certain offences and criminal sanctions may not be pursued. The issuing of the mentioned 792 warning letters in 2018/19, requiring prescribed reporting,[30] illustrates the exercise of such discretion in the face of a prescribed criminal sanction and the absurdity of enacting an offence in the first place. If something is too trivial to pursue criminally in the first instance, then the law should not provide a criminal sanction with a significant prescribed maximum penalty.

Prescribing high penalties (for all contraventions) as a possible deterrent may illustrate misplaced reasoning because deterrence lies in actually being caught and successfully prosecuted. Only a minority of participants affirmed that the criminal sanctions (in and of themselves) have a deterrent effect. It is not the penalty that has the deterrent effect but the likelihood of a person being caught.[31] Because it is impossible to prosecute all environmental offenders, the legislators think high prescribed penalties will offer deterrence. However, 'the transgressor's risk analysis may show that the chances of being prosecuted are exceptionally low.'[32] Some IPs use prescribed criminal sanctions to motivate compliance; a draft charge sheet may force more resources being made available for compliance, and a guilty verdict is not necessarily needed.[33] However, the protracted delays with enforcement action diminish its

[26] IT - IP 1, 3 Dec 2018, p12.
[27] IT - IP 7, 5 Feb 2019, p9.
[28] IT - Magistrate 1, 5 Feb 2021, p7.
[29] IT - EMIs 9 & 10, 12 Feb 2021, p5; EMI 7, 8 Jan 2019, p4; Magistrate 1, 5 Feb 2021, p10; EMI 7, 8 Jan 2019, p4; and Prosecutor 5, 9 Nov 2020, p10.
[30] DFFE *NECER* 2018/19 at 51.
[31] IT - Prosecutor 3, 25 Aug 2020, p9.
[32] IT - Counsel 2, 11 Feb 2019, p5.
[33] IT - IP 6, 31 Jan 2019, p4.

deterrent value.[34] Moreover, lower penalties are usually imposed in practice, and no imprisonment has been ordered.[35]

The first example above (significant pollution and environmental degradation offence and penalties) may meet this criterion, except for non-trivial offences, but the law omits this exception, thereby creating wide authority and prosecutorial discretion. The criterion is not fulfilled where criminal sanctions are prescribed for requirements with no substantial environmental risk (as in the second example), particularly where (1) the authorities themselves may be incapable of implementation, (2) EMIs are unlikely to investigate criminally in the first instance where it can be corrected through much simpler means, or (3) prosecutors are unlikely to prosecute.

In light of the particular nature of criminal law, a criminal offence should not be enacted if a properly considered case cannot be made. It is unlikely that legislatures or legislative drafters could show good cause for enacting criminal sanctions as a first response for trivial offences. There appears to be no substantial state interest that justifies such a mode of state control. The deterrent value of prescribing high penalties for all environmental offences is seemingly marginal or low and can also not offer sufficient justification. If there is no substantial risk being avoided or interest being protected that can only be addressed through a criminal sanction), then such a sanction (in the first instance) is not the appropriate response.

3. CRIMES SHOULD BE A LAST RESORT MECHANISM WHEN NO ALTERNATIVE MEANS TO ACHIEVE THE INTENDED STATE PURPOSE EXISTS

As discussed and concluded in Chapter Two, many criminal and environmental law theorists agree that the criminal sanction should be a last resort because it is the state's most condemnatory response. Yet, it is 'by far the most widely prescribed sanction for contraventions of legal and administrative provisions'.[36] There is no requirement in South African environmental law to exhaust other (civil or administrative) mechanisms before conducting criminal investigations. The use of administrative compliance and enforcement

[34] IT - IP 6, 31 Jan 2019, p7.
[35] IT - EMI 3, 23 Jan 2019, p9.
[36] Michael Kidd *Environmental Law* 2 ed (2011) at 269 with reference to MA Rabie et al 'Implementation of environmental law' in RF Fuggle & MA Rabie *Environmental Management in South Africa* (1992) at 128 and (2018) at 235, and Michael Kidd 'The protection of the environment through the use of criminal sanctions: A comparative analysis with specific reference to South Africa' (unpublished PhD thesis, University of Natal, 2002).

mechanisms is often pursued concurrently with criminal measures.[37] Thus, the criminal sanction is not designed as a 'last resort' mechanism. Whether the state objective can be achieved by non-criminal modes of control or less-restrictive means is relevant in determining where criminal sanctions fall on the spectrum of enforcement measures.

Using the same two examples discussed in the preceding part, in some instances, the state objective could be achieved by non-criminal modes of control or less-restrictive means, such as warning letters. Directives[38] also offer another mechanism to correct behaviour. However, significant pollution or environmental degradation may justify a criminal law response because of the seriousness of significant environmental impacts. Other relevant factors may also justify such a response, including condemnatory conduct or culpability, that merits punishment (as discussed in parts five and six of this chapter). The state objective may not only involve environmental rehabilitation or remediation but, because of the severity of the offence, may require retribution - punishing the offender with a criminal sanction.

In contrast, it may be more difficult to justify a retributive response for trivial transgressions (that could be corrected through other means). For example, some regulations do not necessarily involve direct environmental impacts but may require reporting by the regulated community[39] so that the state may gather the information that may inform its policy response or fulfil its international reporting obligations. A non-criminal mode would achieve the state objective. However, persistent non-compliance or the failure to adhere to a reasonable authority request or warning may justify a criminal law response. As another example, to ensure compliance with administrative-type approval conditions, the state objective could be achieved through issuing compliance notices,[40] which may not justify criminal action in the first instance if there is no environmental impact or related threat. The failure to comply with a compliance notice is an offence[41] and may justify a criminal response because the recipient has received notice of what is required and an opportunity to correct their behaviour.

As highlighted in part 2 above, three cases involved charges that could be considered less serious because of their administrative nature, e.g., registration or notification requirements,

[37] Strydom M, *Environmental Enforcement Trends in South Africa: Insights from our experience*, *http://www.bowmanslaw.com/insights/environmental-enforcement-trends-south-africa-insights-experience/*
[38] NEMA s 28(4) or National Water Act s 19(3).
[39] For example, in the National Atmospheric Emission Reporting Regulations, 2015, published under the Air Quality Act in GN R283 on 2 April 2015, specifically regulation 5, 13(b) and 14.
[40] Issued in terms of NEMA s 31L.
[41] NEMA ss 49A(1)(k) and 49B(2).

access control or signage related licence conditions and lack of environmental impact. Because the criminal charges were generally taken together for sentencing and these cases did not result in trials, the court did not hear evidence and adjudicate possible triviality.

As concluded in Chapter Four, about a third of participants thought that the criminal sanction should be a last resort, with approximately the same number having disagreed. The need to collect evidence without delay (as evidence of pollution could dissipate whilst waiting for the conclusion of administrative mechanisms) was offered as justification for conducting a criminal investigation concurrently with administrative mechanisms.[42]

Some participants considered the revocation of approvals a more severe response[43] and the 'worst thing' that could happen to a company;[44] allowing a business to operate after being convicted (so that it can still employ people and contribute to the economy) is 'warped logic'.[45] Businesses may rather shut their plants down than face prosecution because of the reputational risk.[46] A conviction could result in a business shutting down because it may lose credibility with its customers.[47] Although it seems counter-intuitive to allow a convict to continue with the same activities that lead to them committing an offence in the first place, the socio-economic benefits that an operating business offers society appears to be the main justification for this approach.[48] A business could still operate even after a criminal conviction, as evidenced in the cases considered. Some of the businesses convicted still appear to operate. A conviction alone is thus unlikely to cause a business to lose its approvals. In an environmental law and business context, a more condemnatory response by the state towards a business would be to withdraw its approval to operate because that will result in the business being shut down. The last resort and the state's most condemnatory response is not the criminal sanction but the withdrawal of approvals.

[42] IT - EMI 2, 23 Jan 2019, p10.
[43] IT - EMI 9 and 10, 12 Feb 2021, p12.
[44] IT - Magistrate 1, 5 Feb 2021, p8; EMI 7, 8 Jan 2019, p6.
[45] IT - Counsel 2, 11 Feb 2021, p11.
[46] IT - IP 1, 3 Dec 2018, p12.
[47] IT - IP 2, 15 Jan 2019, p9.
[48] IT - EMI 7, 8 Jan 2019, p6.

4. THE PARTICULAR NATURE OF ENVIRONMENTAL CRIMINAL LAW, ATTAINABILITY, AND FLUX

Environmental law aims to protect shared resources and condemns conduct that violates or threatens such resources; its contravention could significantly impact human health or livelihoods[49] resulting in more significant impacts than individual instances of common law crimes. Environmental crimes may also be behaviour society finds objectionable and should perhaps fall under the same umbrella as mainstream or 'core' crimes.

Environmental law crimes are complex, technical, and often involve frequent amendments. Very few matters end in a trial, meaning that prosecutors and courts do not regularly deal with the substantive aspects of environmental prosecutions. Environmental scholars describe environmental laws as aspirational, seeking radical change in human behaviour,[50] and posing 'exceptionally difficult notice problems for the average person'.[51] The aspirational nature and unpredictability of environmental law bring into question the appropriateness and fairness of criminal enforcement.[52] Brickey posits that the distinctive features of environmental law should be used to determine its bounds.[53] The following sub-questions assist in understanding the bounds of using criminal sanctions in environmental law: (1) does the crime relate to aspirational, unattainable, and unrealistic goals or requirements? and (2) does the frequency of environmental requirement amendments result in a state of flux where legal requirements are unpredictable and compromise knowledge (of unlawfulness)? There should be some degree of consistency in environmental law, particularly criminal sanctions, to ensure legal certainty, fairness, increased compliance, and effective enforcement.

An example of aspirational, unattainable, or unrealistic goals mentioned in Chapter Three (albeit controversial and debatable) may be the initially stipulated sulphur dioxide emission limits, which were doubled by the Minister in 2020,[54] ten years after they were put in place

[49] Angus Nurse *An Introduction to Green Criminology and Environmental Justice*s (2016) at 5-6 with reference to Lynch, M., & Stretesky, P., *Exploring Green Criminology: Toward a Green Criminological Revolution* (2014) 8.
[50] Kathleen F. Brickey *Environmental Crime, Law, Policy, Prosecution* (2008) at 9.
[51] Paul J. Larkin, Jr. 'Regulation, prohibition, and overcriminalization: the proper and improper uses of the criminal law' (2014) 42, 3 *Hofstra Law Review* 745 at 751.
[52] Brickey op cit note 50 at 11.
[53] Brickey ibid.
[54] GN 421 *GG* 43174 of 27 March 2020.

(making South Africa's sulphur dioxide laxer than other BRIC countries).[55] This change may not necessarily involve 'attainability' because it has been a stipulation from 2010, which was only changed years later due to pressure from industry. Regarding realistic goal setting, an EMI explained that the changes to the law often do not cater to old technology or provide sufficient transition to new technology, making it idealistic and unrealistic, which may be a significant gap in how the law is enacted.[56]

As illustrated in Chapter Three, the frequency of change may be overwhelming because determining the applicable legal requirements becomes a specialist undertaking. The general public, entrepreneurs, small businesses, or small legal practices may have difficulty orienting themselves regarding the applicable requirements at particular points in time without subscribing to costly legislative databases. Without knowledge or experience of environmental law, it may be challenging to find relevant notices. In particular, this difficulty exists in determining the various approval triggers and requirements at any given time.

Most research participants in this study were concerned about the frequency of amendments, affirming that compliance and enforcement would be easier if the environmental laws remained clear and consistent. An IP shared a concern that there is a constant transition from one requirement or regime to another.[57] The predictability of law is essential and fewer changes to environmental law will improve certainty.[58] Unrealistic or incorrect licence conditions may indicate authorities' incorrect interpretation of legislative requirements or failure to impose site-specific conditions,[59] resulting in unattainable goal setting. Officials may be measured against inappropriate performance targets, i.e., achieving a particular number of gazetted publications in a year[60] exacerbating the problem of frequent amendments (as previously stated, such performance targets may require further research, considering the inconsistency of changes and development across different environmental laws). There should be some degree of consistency in environmental law to ensure legal certainty, fairness, increased compliance and effective enforcement. Thus, more controlled and structured review

[55] CER 'Minister Creecy weakens sulphur dioxide pollution standards' 27 March 2020 accessible at: *https://cer.org.za/virtual-library/whats-new/minister-creecy-weakens-sulphur-dioxide-pollution-standards* and Paul Burkhardt 'Government doubles emission limits for sulphur dioxide' *BusinessDay* 30 March 2020 accessible at: *https://www.businesslive.co.za/bd/national/2020-03-30-government-doubles-emission-limits-for-sulphur-dioxide/*
[56] IT - EMI 1, 23 Jan 2019, p11 and 13.
[57] IT - IP 6, 31 Jan 2019, p9.
[58] IT - Prosecutor 1, 7 July 2020, p11 and 13.
[59] IT - IP 3, 22 Jan 2019, p5.
[60] IT - IP 3, 22 Jan 2019, p11.

methods at determined intervals may curtail authorities' tendency to enact amendments with select and isolated changes, as the tables in Chapter 3 illustrate.

The issue of unattainable goals has not emerged from the considered cases, but this may again be due to the strategic selection of strong cases for prosecution. Nevertheless, a central, accessible public database of the charges, information, and outcomes of environmental prosecutions would improve accessibility to case information. In turn, this would contribute to improved knowledge of how the criminal sanction is used to enforce environmental law. This knowledge would lead to more efficient use of the criminal sanction and more predictability.

Thus, when new environmental crimes are proposed, legislators should ensure that the requirement is attainable with realistic transitional periods to allow industry players to orientate themselves to new legal requirements. More weight and consideration should be given to the importance of legal certainty and predictability. Changes should occur more strategically at specific review intervals and not only to incorporate select and isolated changes. There should be some degree of consistency in environmental law, particularly criminal sanctions, to ensure legal certainty, fairness, increased compliance and effective enforcement.

5. THE CRIME MUST EXCITE MORAL DISAPPROVAL, WRONGFULNESS, BE CONDEMN-WORTHY, AND DESERVING OF CRIMINAL PUNISHMENT.

Criminal sanctions must align with criminal law's condemnatory role in 'manifesting forbidden conduct' and 'scandalizing prohibited conduct'.[61] Criminal acts must excite moral disapproval, be considered wrongful by society at large, and be wrongful in a way that merits formal condemnation.[62] Punishment and being labelled a 'criminal' must be justly deserved.[63] The following sub-questions assist in this analysis: (1) does the act being criminalized excite moral disapproval because it aims to prevent environmental harm, i.e., is it considered wrongful by society at large? Phrased differently, it could be asked if the act is wrongful in a way that merits formal condemnation through a criminal sanction. This considers if punishment through the criminal law and being labelled a 'criminal' is justly deserved in the circumstances of the intended sanction.

[61] Duff op cit note 2 at 243.
[62] Duff ibid at 94.
[63] Douglas Husak *Overcriminalization, The Limits of the Criminal Law* (2008) at 55, 82 and 94.

As noted above, the Bill of Rights incorporates a constitutional right to an environment that is not harmful to health or well-being. To cause significant environmental pollution or degradation[64] would be considered morally wrong/wrongful by society (exciting moral disapproval) because of impacts on the environment and people's health and well-being, thereby contradicting the values enshrined in the Constitution. Thus, formal condemnation through a criminal sanction would be merited. Depending on the facts and circumstances of an offence (particularly the severity of the environmental impact), punishment through the criminal law and being labelled a criminal could be justly deserved. This position is supported in that twelve of the considered cases involved pollution or degradation offences, with most (ten) resulting in convictions. Most research participants considered that a criminal response could be justified for contraventions resulting in significant environmental impacts.

Approval requirements are aimed at regulating acts that impact the environment,[65] and the state's control to manage or minimize environmental harm through approval requirements could be justifiable. Failing to obtain such approval may excite moral disapproval and be considered wrongful by society at large because of the impact of such activities on the environment (which may, in turn, impact health, well-being and the rights of future generations).[66] Although this position seems supported by the number of successful prosecutions for failure to obtain approvals - thirty-four cases involved charges for failing to obtain approvals. Failing to comply with approval conditions, which also involve environmental impacts, may similarly be condemned - five cases included charges for the failure to comply with approval conditions. Research participants did not share a specific view on the moral disapproval for failure to obtain approvals but generally expressed concern with the frequent changes to the approval requirements and imposition of wrong approval conditions. The moral or societal disapproval may be more limited in a developing country where other basic human needs are not being met or where awareness is limited due to impacts not being observable or known, unless such needs are directly implicated (for example, water).

[64] The NEMA and National Water Act 'duty of care' requirements and the offences in NEMA s49A(1)(e) and (f) and s151(1)(i) and (j) of the National Water Act.
[65] NEMA s 24.
[66] A recent example may be the public outcry regarding the failure to obtain approvals before a fire at an agricultural products warehouse and resultant significant pollution, see the Open Letter 'The Cornubia chemical plant fire: Aftermath of the riots should not leave behind a toxic legacy' *Daily Maverick* 26 July 2021 accessible at: *https://www.iol.co.za/news/politics/opinion/the-cornubia-chemical-plant-fire-aftermath-of-the-riots-should-not-leave-behind-a-toxic-legacy-bee0c375-be21-49de-8cfc-63de1636933e*

Non-compliance with trivial administrative requirements that do not result in environmental impacts may not result in the same moral disapproval, may not merit formal condemnation through a criminal sanction, or justify being labelled a 'criminal'. As mentioned, only three cases seemed to include trivial contraventions, but because they were not concluded through trials, the aspect of triviality did not receive judicial consideration. It can be deduced that criminal enforcement was only pursued for strong cases involving serious transgressions. Research participants viewed it as problematic that the law does not differentiate between serious and trivial environmental offences, revealing that creating crimes for trivial matters does not excite the same moral disapproval, involve the same wrongfulness, or deserve criminal punishment.

Creating criminal sanctions for trivial matters is within the legislators' purview, but once enacted, transgressions must be investigated and referred to the NPA.[67] The concerns expressed by participants seem to suggest design flaws in the drafting of criminal sanction provisions. There are too many statutory offences that cannot conceivably be enforced. Many of these may not warrant a criminal response in the first instance because it does not excite moral disapproval, be considered wrongful and condemn-worthy to the extent that it justifies criminal punishment.

Consequently, contravening duty of care requirements (in a non-trivial way), approval requirements, or requirements relating to actual environmental impacts may be considered wrongful and condemn-worthy by society because such requirements aim to prevent environmental harm (and related human impacts). In such instances, it merits condemnation through a criminal sanction, punishment, and being labelled a 'criminal' may be justly deserved. But, failing to adhere to trivial requirements does not excite the same level of moral disapproval because it can easily be remedied through non-criminal mechanisms. Being labelled a 'criminal' cannot be justly deserved in such circumstances, particularly where criminal investigators or prosecutors would not pursue such matters.

6. CULPABILITY/FAULT, KNOWLEDGE, HARM AND TRIVIALITY

As outlined in Chapter Two, several authors posit that *fault* should be required for criminalization. South African criminal law's general rule is that fault is an element of all

[67] IT - Prosecutor 3, 25 Aug 2020, p12.

crime, and strict (no-fault) liability is an exception.[68] Strict liability may be 'constitutionally questionable' because it implicates the constitutional rights to freedom and security of the person and a fair trial.[69] As argued by Luna, overextending culpability is an indicator of overcriminalization.[70] Criminal legislation must not be over-inclusive but focussed on culpable or blameworthy conduct,[71] and 'without proof of culpable wrongdoing' the conduct 'could be dealt with by non-criminal modes of control'.[72] Excluding fault as a requirement may indicate overcriminalization.

To have intention, the accused must have *knowledge of unlawfulness*,[73] and a 'genuine ignorance of the law may be an excuse'.[74] The ignorance defence could potentially be raised in light of the frequent changes and complexity of environmental laws. However, such a defence is subject to the qualification that 'a person who works in a particular sphere of activity ought to know the law relating to that activity'.[75] Whether these arguments hold water would depend on the specific facts. Sole proprietors and entrepreneurs who run small operations without separate divisions with legal advisors or specialists could argue (fact and circumstance dependent) that they did not know of a particular requirement. It could be unrealistic, unreasonable, or impractical to expect ordinary citizens to know or have access to the collection of frequently changing and complex environmental law requirements.

If an act does not result in *actual harm* (the harm to be prevented by the statutory provision), it should not be criminalized.[76] As argued throughout this research, only acts that merit criminal condemnation should be subject to criminal law; thus, trivial actions should not be criminalized. The following four sub-questions assist in this assessment: (1) Crimes should require proof of culpable wrongdoing (with fault), including knowledge of unlawfulness. Does the sanction overextend or overstretch culpability? (2) Does the crime relate to significant environmental harm, where one considers: the presence of actual harm or the threat of significant harm to the environment or human health? (3) Does the action merit criminal

[68] Jonathan Burchell *Principles of Criminal Law* 5ed (2016) 60 and 341 with reference to *S v Coetzee* 1997 (3) SA 527 (CC), and CR Snyman *Criminal Law* 6 ed (2014) 319.
[69] Burchell ibid at 396 and 438 and Snyman (2014) ibid at 238 with reference to ss 35(3) and 12(1) of the Constitution.
[70] Erik Luna 'The Overcriminalization Phenomenon' (2005) 54 *American University Law Review* 703 at 717.
[71] Husak op cit note 63 at 168.
[72] Duff op cit note 2 at 106.
[73] Burchell op cit note 68 at 348.
[74] Burchell ibid at 61.
[75] Burchell ibid at 389 with reference to *De Blom* 1977 (3) SA 513 (A) [141].
[76] John Gray & G.W. Smith (eds) *J.S Mill On Liberty* (1991) 30.

condemnation, or is it too trivial to justify the attention of the criminal law? (4) Does the crime relate to culpable conduct measured by a history of repeated violations, deliberate misconduct resulting in violation and concealment of misconduct or falsification of required records?

The NEMA pollution and degradation offence specifies fault as a requirement by stipulating that a person is guilty of an offence if that person-

> '*unlawfully and intentionally or negligently* commits any act or omission which causes significant pollution or degradation of the environment or is likely to cause significant pollution or degradation of the environment'.[77]

NEMA s 49A(1) contains only one other offence, with similar qualifiers, being to-

> '*unlawfully and intentionally or negligently* commit any act or omission which detrimentally affects or is likely to detrimentally affect the environment'.[78]

It is unclear what the offence in NEMA s 49A(1)(f) contemplates because 'detrimental impacts' to the environment are not defined or linked to specific statutory provisions. Generally, activities that detrimentally affect the environment are subject to approval requirements, and if those requirements are not met, separate criminal sanctions exist. A similar offence exists in s 151(1)(j) of the National Water Act. These offences seem to create a lower threshold, 'catch-all' transgression that may overstretch culpability because 'detrimentally affect' is not a defined concept, can be construed widely, and may already be catered for in the offence regarding the failure to obtain approvals.

It is odd that the requirements 'unlawfully and intentionally or negligently' only precede two of the seventeen NEMA s 49A offences. The offence for failing to obtain approval for activities that may detrimentally impact the environment also omits the stipulations 'unlawfully and intentionally or negligently'.[79] Only three of the thirteen National Water Act s 151 offences contain these requirements,[80] with one offence only requiring intention.[81] The Waste Act only

[77] NEMA s 49A(1)(e).
[78] NEMA s 49A(1)(f).
[79] NEMA s 24F read with s 49A(1)(a).
[80] National Water Act s 151(1)(e): 'unlawfully and intentionally or negligently tamper or interfere with any waterwork or any seal or measuring device attached to a waterwork',
s 151(1)(i): 'unlawfully and intentionally or negligently commit any act or omission which pollutes or is likely to pollute a water resource'
s 151(1)(j): 'unlawfully and intentionally or negligently commit any act or omission which detrimentally affects or is likely to affect a water resource'
[81] National Water Act s 151(1)(h): 'intentionally refuse to perform a duty, or obstruct any other person in the exercise of any power or performance of any of that person's duties in terms of this Act'.

contains the prerequisite 'intentionally or negligently' for one of its eighteen listed offences.[82] None of the Air Quality Act offences stipulates 'intention or negligence' as requirements. There appear to be no 'clear and convincing' indications why those offences would not require fault. Omitting fault from those offences is questionable, as it implicates, at least, the constitutional rights to freedom and security of the person[83] and the right to be presumed innocent.[84] As stated earlier, there is a presumption that fault is an element of statutory offences.[85] The omission of these stipulations cannot mean that strict liability is created. Our courts have held that 'people who are not at fault should not be deprived of their freedom by the State'.[86] Where 'clear and convincing indications' that prescribe no-fault liability are absent for the enactment it 'is presumed to have intended that violations of statutory prohibitions would not be punishable in the absence of *mens rea* in some degree or other'.[87] Omitting fault requirements from the offence provisions contradict the presumption that fault is an element of statutory offences.[88]

The NEMA pollution and degradation offence refers to significant environmental harm, and the degree of that harm should also impact the use of the criminal sanction (as it should not be used for trivial matters). Causing significant environmental pollution or degradation may amount to deliberate misconduct; although it may not necessarily implicate a history of repeated violations, concealment or falsifying information, its significance in itself may still justify the retributive purpose of criminal sanctions. Repeated violations may be illustrated where the accused failed to comply with authority compliance notices, with more evident culpability.

Accused have been charged[89] or convicted[90] for the falsification of information. Fault would also have to be proven in these instances. These statutory crimes imply some form of defrauding authorities, and similar to the common law crime it could be seen as condemn-worthy.

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[82] Waste Act s 67(2)(b), 'to cause spillage or littering from the vehicle'.
[83] The Constitution s 12 and Burchell ibid at 31.
[84] The Constitution s 35(3)(h), Burchelle ibid at 31 with reference to A Paizes 'A Closer look at the Presumption of Innocence in our Constitution: What is an Accused Presumed to be Innocent of?' (1998) 11 *SACJ* 409 at 413.
[85] Burchell op cit note 68 at 396.
[86] *S v Coetzee and Others* 1997 (3) SA 527 (CC) para 176.
[87] *S v Arenstein* 1967 (3) SA 366 (A) at 381D–E as referenced in *S v Coetzee and Others* 1997 (3) SA 527 (CC) para 165.
[88] Burchell op cit note 68 at 396.
[89] *S v EnviroServ Waste Management Ltd and 4 others.*
[90] *Mostert v The State.*

Because not many of the cases considered ended in a successful trial with available detailed records, it was challenging to assess culpability or how courts would apply the fault requirement. The accused's fault would have had to be proven during the trial, or at least, the position regarding fault would have been argued or adjudicated, especially if the state alleged a 'no-fault' crime. Complete transcripts, judgments, or evidence in all cases are not available, particularly for those concluded in the Magistrates' Court. The facts and circumstances described in the s 105A agreements do not always stipulate the presence of fault. Often the charges appear to relate to negligent (as opposed to intentional) offences - the s 105A agreements contain lengthy explanations of the accused's reasonable measures to avoid environmental harm. Thus, the ability to assess the courts' considerations regarding fault for environmental offences is limited. In the *Uzani* case,[91] NEMA s 24F (in the context of a 24G application) was interpreted as a strict liability offence with no interrogation of fault, nor was fault sufficiently proved. It is a basic conception of South African law that fault is required for criminal liability unless a statute specifically provides for no-fault or strict liability.[92] Arguably, neither NEMA s 24F nor s 24G provides for strict liability, but the court interpreted it in this way, by not interrogating or considering the position regarding fault. [93] To interpret criminal sanctions so widely without considering the fault requirement may point to overcriminalization.

The impression created from interviewing research participants, mainly those trained in the law (i.e., counsel, prosecutors, and magistrates) is that fault is required in statutory offences. No-fault liability and the specific elements of different environmental crimes were not discussed in detail during the interviews, as the focus was to obtain insight from participants regarding the use of criminal sanctions. However, an administrative penalty system was suggested as an alternative to criminal sanctions, where administrative fines could be imposed for 'less serious' transgressions that are not worthy of criminal court. In such instances, a lower burden of proof 'removing' fault could be applied.[94]

[91] *Uzani Environmental Advocacy v BPSA* 2019 (5) SA 275 (GP).
[92] Michael Kidd 'Criminal measures' in Paterson & Kotze (eds) *Environmental Compliance and Enforcement in South Africa Legal Perspectives* (2009) at 248 with reference to S v Qumbella 1966 (4) SA 356 (A); Michael Kidd 'The use of strict liability in the prosecution of environmental crimes' (2002) 15 SACJ 23 at 25.
[93] See Melissa Strydom 'A critique on privately prosecuting the holder of 'after the fact' environmental authorisations: *Uzani Environmental Advocacy CC v BP Southern 'Africa (Pty) Ltd'* (2021) 138 *SALJ* 617 at 621, 622, 633, 639.
[94] IT - Counsel 2, 11 Feb 2019, p7 and 8.

As discussed above, the fault position appears unclear and possibly contradictory in the offence provisions of the four laws. Culpability/fault must be a requirement unless there are 'clear and convincing indications' prescribing no-fault liability.[95] No such clear and convincing indications appear from the laws considered. Thus, crimes should require proof of fault, including knowledge of unlawfulness; otherwise, it may exceed the reasonable bounds of criminalizing behaviour. Creating criminal sanctions for transgressing duty of care requirements, requirements involving the prevention of environmental harm, or approval requirements is justified because of the related environmental impacts. This approach is reinforced by the prosecutions where convictions for these offences were obtained and by participant views. Similarly, crimes that involve deliberate misconduct (e.g., failing to comply with non-trivial approval conditions or reasonable authority instructions or concealing or falsifying information) may not overextend culpability and attract condemnation. But non-trivial crimes may not involve the same culpability or condemnation that justifies the attention of the criminal law because it does not involve actual environmental impacts.

7. PROPORTIONALITY, FAIRNESS, AND CONSISTENCY

A criminal response must be proportionate[96] in that the punishment must correspond with the offence and the harm that may result from that offence.[97] Indicators of overcriminalization, according to Luna, include grossly disproportionate punishments and excessive enforcement of minor violations.[98] Husak argues that the 'combination of overcriminalization and discretion erodes the rule of law and undermines the principle of proportionality'.[99] Thus, proportionality lies in the criminal sanction being an appropriate response when the interests being protected and those being restricted are weighed up, and proportionality must mandate punishment that is deserved.

The determination of a proportional penalty should not only lie with the courts but also be prescribed in the law; otherwise, it may result in the inconsistent imposition of penalties. A criminal court may receive any evidence it deems fit to inform itself regarding the proper sentence[100] and will take into account- (1) the seriousness of the crime and the harm it caused,

[95] *S v Arenstein* 1967 (3) SA 366 (A) at 381D–E as referenced in *S v Coetzee and Others* 1997 (3) SA 527 (CC) para 165.
[96] Duff op cit note 2 at 164.
[97] Snyman (2014) op cit note 68 at 13 para 4(d).
[98] Luna op cit 70 at 717.
[99] Husak op cit note 63 at 28.
[100] CPA s 274(1).

(2) the criminal's personal circumstances and prospects of reform, (3) society's interests and protecting the community against a dangerous offender, deterring others,[101] and the interest of the victim.[102] However, because the wide-ranging criminal sanctions in the environmental laws create such extensive authority and prosecutor discretion, not all matters are subject to criminal investigation or adjudication, implicating the fairness and consistency at which the prescribed maximum fines are pursued and ultimately imposed.

The unpredictability of the law and legal requirements may bring into question the fairness of criminal enforcement.[103] It is unfair for an accused person not to know what conduct is criminal.[104] Section 35 of the Constitution provides for fair trial rights, including the rights to be presumed innocent and to the benefit of the least severe of the prescribed punishment. Fairness is also an element of the right in s 35(5)- that evidence must be obtained in a manner that does not render the trial unfair or be detrimental to the administration of justice.

The danger of inconsistent enforcement of environmental laws is high. Justice requires consistency[105] and the lack thereof is a potential indicator of overcriminalization. The following questions assist in the analysis of these considerations: (1) Is the criminal sanction a proportional response considering the objective of this mode of control? That is, is the statute no more extensive than necessary to achieve its purpose, (2) Is the prescribed punishment just and fair? Should there be a gradation of sanctions linked to the severity of the offence? and (3) can the intended sanction be enforced consistently, i.e., will all offenders be prosecuted equally?

A criminal response in law where one is not justified or a criminal penalty disproportionate to the offence may indicate overcriminalization. Statute law must be rational, and where there is no rational connection between the transgression and a criminal sanction or where the prescribed sanction is disproportional, it may implicate its rationality. In turn, irrational laws (including unwarranted criminal responses) may affect the regulated community's respect for the law.

[101] CR Snyman *Strafreg* 4 ed (1999) with reference to several cases including *S v Zinn* 1969 2 SA 537 (A); *S v Khumalo* 1973 3 SA 697 (A) 698; *S v Roux* 1975 3 SA 190 (A) 197; *S v Rabie* 1975 4 SA 855 (A) 861-863; *S v Khumalo* 1984 3 SA 327 (A) 330, 1997 2 SACR 171 (T) 183; *Cassiem* 2001 1 SACR 489 (SCA) 494
[102] Snyman (2014) op cit note 68 with reference to *S v Matyityi* 2011 1 SACR 40 (SCA) par 16-17.
[103] Brickey op cit note 50 at 11.
[104] Husak op cit note 63 at 11-12.
[105] Burchell op cit note 68 at 38-35, with reference to Von Mollendorf 1987 (1) SA 135 (T) 169f-g.

As discussed in Chapter Three, there have generally been significant increases in the maximum prescribed penalties for ECA, NEMA, Waste Act, APPA and Air Quality Act offences (R5 million or R10 million). Such increases may be proportional for some offences – i.e., serious offences – because of the condemnatory nature of the transgressions and the need to protect the environment. Although most of these laws have reached a somewhat consistent maximum penalty amount for offences, the Water Act potential maximum penalty amount is significantly lower (i.e., R200,000 compared to the R5 million or R10 million in the other Acts), indicating disparity and disproportionality.

Proportionality is also compromised where the same maximum penalties are generally prescribed for serious and less serious offences. Logically, proportionality requires that offences and prescribed penalties be graded according to the severity and harm of the offence, or it may justify a non-criminal response in the first instance. Creating a crime for a trivial transgression (that could be dealt with through non-criminal modes) or prescribing penalties disproportionate to the offence, and not subject to a form of gradation, may also undermine society's notion of fairness and justice upon which the legal 'system is thought to be based'.[106]

The 53 prosecuted cases mainly concerned serious transgressions for which a criminal response may be proportionate. Most of the cases (43) resulted in comparatively low sentences, and no cases resulted in the imposition of imprisonment, indicating that incarceration is not sought for these types of offences; in turn, this may also illustrate proportionality. Five cases resulted in comparatively high sentences compared to the maximum prescribed penalties the accused faced. Fourteen cases (involving the conviction and sentencing of natural persons) resulted in a comparatively low sentence, equal to or below one per cent, indicating that courts' discretion may temper disproportionality as they do not impose fines that correspond with the maximum prescribed penalties.

The upper extreme of statutory penalties does not appear to be imposed by the courts, thus supporting an argument that overcriminalization may not occur considering the penalties actually imposed and the factors courts take into account during sentencing. Echoing Holmes' assertion that the law consists of 'prophecies of what the courts will do … and nothing more pretentious,'[107] if courts do not impose such high penalties, it may indicate that the statutory

[106] Du Plessis op cit note 8 para 291.
[107] Douglas Husak *Overcriminalization: The Limits of the Criminal Law* (2008) 27 with reference to Oliver W. Holmes, Jr 'The Path of the Law' X *Harvard Law Review* (1897) 457.

penalties are inapt or disproportionate. Similarly, the considerably lower penalties imposed for natural persons may indicate that prescribing the same penalties for natural and juristic persons is a disproportionate response. In the mentioned cases containing charges where significant penalties are prescribed even for trivial offences, the cases were also concluded through s 105A agreements. Thus, any argument regarding proportionality would have had to be raised in its negotiation.

The further possible additional liability consequences in NEMA s 34 may also imply a disproportionate response. In seventeen of the 53 cases, NEMA s 34 was used to secure additional penalties, including reasonable costs incurred or damages. These cases were concluded through s 105A agreements where the accused agreed to these additional sentences. Therefore, it may be challenging to argue disproportionality. The CPA contains some measure of cost recovery for unreasonable delays in trials.[108] A criminal conviction does not bar civil action for damage.[109] A court may award compensation where the offence caused damage or loss of property.[110] These measures are similar to the provisions in NEMA ss 34(1) to (4), which provide for an award for loss or damage or costs for rehabilitation on conviction of a NEMA Schedule 3 offence and reasonable prosecution costs. A court may 'enquire into and assess the monetary value of any advantage gained or likely to be gained' and award damages or compensation or that the convicted person undertake remedial measures.[111] This mechanism could be likened to forfeiture of the proceeds of crime as provided for in other statutes[112] and may not necessarily constitute a multiplicity of sentencing because it encompasses different aspects, regarding prosecution costs, damages, environmental remediation, and proceeds of crime, distinct from the retributive penalty imposed and supported by jurisprudence in many countries.[113] Nevertheless, the nature of the underlying transgression and its prescribed penalty must justify the criminal response mechanism used, failing which disproportionality could result.

Chapter Five concluded that the prescribed maximum penalties do not cater to the offences' varying degrees of seriousness and are often disproportionate to their actual environmental

[108] CPA s 342A(3)(e).
[109] CPA s 342.
[110] CPA s 300.
[111] NEMA s 34(3).
[112] Including the Prevention of Organised Crime Act 121 of 1998. See also Michael Kidd 'Criminal Measures' in Alexander Paterson & Louis Kotze (eds) *Environmental Compliance and Enforcement in South Africa Legal Perspectives* (2009) 262.
[113] Paterson & Kotze ibid.

impacts. It also concluded that too many statutory offences make it impossible to enforce, creating too much discretion, which is exercised inconsistently, leading to unequal enforcement and undermining fairness. Several IPs believed that environmental sanctions might be disproportionate to the actual environmental impact, some describing it as 'ridiculous' when trivial offences have maximum prescribed penalties similar to serious offences.[114] Prescribed penalties may not be proportional to the offence and not determined based on 'deserving value', particularly where high penalties are prescribed for transgression relating to registrations or regulations.[115] Administrative fines based on proportionality were suggested as an alternative and effective enforcement mechanism.[116] Criminal investigations may not always be necessary or a proportionate response, as a sledgehammer should not be used to kill a fly.[117] Minor issues that can be remedied through an administrative notice should not be referred for criminal investigation.[118] Thus, wide enforcement discretion exists.[119] A participant was concerned that EMIs are driven by ego and a personal crusade to prosecute a big company could misuse such broad discretion.[120]

IPs shared concerns that environmental sanctions are enforced inconsistently. They pointed out that consistent application of the law between departments is lacking, and there is also inconsistency between the criminal sanctions in the different laws.[121] Authorities have tried to address the inconsistent exercise of criminal investigative discretion at a national level through the DFFE's Internal Operating Manual. However, the approach of provincial or other national authorities may not align with DFFE's approach, undermining consistency.[122] Provincial officials' position regarding discretion appears somewhat different, as a criminal response may only follow after other engagement fails.[123] An EMI and prosecutor were concerned about the inconsistent approaches in criminal investigations across Departments, particularly the DMRE and DWS.[124] Prosecutors' limited experience may also lead to inconsistent approaches.[125] Magistrate 2 said that the application of these laws and imposition of fines is inconsistent,

[114] IT - IP 7, 5 Feb 2019, p9.
[115] IT - Counsel 1, 21 Jan 2019, p5.
[116] IT - IP 4 and IP 5, 29 Jan 2019, p14.
[117] IT - EMI 7, 8 Jan 2019, p8.
[118] IT - EMI 6, 25 Jan 2019, p4; Prosecutor 5, 9 Nov 2020, p10.
[119] IT - EMI 1, 23 Jan 2019, p10; EMI 7, 8 Jan 2019, p4; EMI 8, 4 April 2019, p4; EMIs 9 and 10, 12 Feb 2021, p5.
[120] IT - Counsel 2, 11 Feb 2019, p4.
[121] IT - IP 11, 18 Feb 2019, p5 and 9.
[122] IT - EMIs 9 and 10, 12 Feb 2021, p5; and EMI 7, 8 Jan 2019, p4
[123] IT - EMI 7, 8 Jan 2019, p4.
[124] IT - EMI 3, 23 Jan 2019, p7 and Prosecutor 3, 25 Aug 2021, p12.
[125] IT - Prosecutor 2, 10 July 2020, p13.

undermining its deterrent effect.[126] Moreover, as mentioned, none of the cases considered involved the prosecution of organs of state, their employees or decision-makers, despite organs of state being some of the largest polluters in South Africa.[127] This points to inconsistent and unfair application of the criminal sanctions as it is used predominantly against the private sector whereas the public sector is seemingly not held to the same standards.

The criminal sanction is not always a proportionate response, and some sanctions are more extensive than necessary to achieve a statute's purpose. Where a non-criminal response in the first instance may resolve the transgression if it does not have a serious environmental impact and where it is unlikely to be pursued in criminal court – prescribing a criminal punishment may not be just and fair. There should be a gradation of sanctions linked to the severity of the offence. The abundant criminal sanctions cannot possibly be enforced consistently, and all offenders are not prosecuted equally.

8. PRACTICALITY, EFFICACY, AND ENFORCEABILITY

Practical concerns should be central considerations in determining the efficacy and enforceability of environmental law. There is little point in enacting laws or imposing requirements that are impractical. Impracticality impacts the efficacy of statutes; if the regulated community cannot orient themselves as to the requirements it may result in disrespect for the law. Environmental law's technical and complex nature poses additional practical challenges to effectively using a criminal sanction.[128] The over-breadth of criminal laws threatens its efficacy and enforceability and produces unfettered official discretion. These shortfalls threaten the rule of law and undermine these laws' legitimacy in the public's eyes.[129]

In this regard, relevant considerations include: (1) the crime created should be something an enforcer, prosecutor, and a court would enforce; and its enactment should not overstrain the process of law enforcement; (2) it should be determined if it is more important to ensure that the harm is repaired or paid for or to hold those responsible publicly and criminally accountable; (3) the transgressor's cooperation, complete disclosures and remediation of its

[126] IT - Magistrate 2, 11 Feb 2021, p10.
[127] Friedo J.W. Herbig 'Talking dirty - effluent and sewage irreverence in South Africa: A conservation crime perspective' (2019) 5:1 Cogent Social Sciences 1 at 14, 15; Mushtak Parker 'Deadly air: South African court gives polluters one year to clean up act' *NewAfrican* 12 May 2022; Van Wyk, Andre 'South Africa: Is Africa's Biggest Polluter Capable of Transformation?' *AllAfrica* 4 June 2021; CER 'Deadly Air: Eskom is now the world's most polluting power company' 6 October 2021.
[128] Brickey op cit note 50 at 11-12.
[129] Duff op cit note 2 at 27.

wrongdoing are relevant factors; and (4) the best available and most efficient mechanism (in terms of time and costs) to avoid, punish, remedy, or prevent the harm and achieve the desired result, should be utilised.

As argued earlier, serious crimes that detrimentally affect the environment are more likely to be pursued by authorities and prosecutors. This position is confirmed by the cases considered, many of which related to causing pollution or degradation (twelve cases), obtain approvals (34 cases) or cases with waste-related impacts (eighteen). It is arguably essential to ensure that any harm is repaired or paid for, and that the offender is punished for statutory offences resulting in significant environmental impacts or which involve repeated violations, or where the offender does not cooperate or act in good faith. However, the environmental laws do not provide for scenarios where transgressors fully cooperate, make complete disclosures, and thoroughly and promptly remedy their wrongdoing.

Based on participant views, the most significant practical challenge in enforcing environmental law through prosecutions is the capacity constraints of role-players, including authorities, investigators, prosecutors and magistrates. Additional challenges include the general constraints of the criminal justice system and the practicalities surrounding the conduct of prosecutions. Participant concerns include that there are too many statutory offences, making it impossible to enforce, creating too much discretion, which is exercised inconsistently and leads to unequal enforcement. Not all the legal requirements necessarily speak to the real intention of not causing environmental damage, and often statutory provisions are not formulated to cater for the realities in which it must be implemented.[130] The number of legislative changes and the rate they change amounts to frequently shifting the goalposts. Although EMIs may share practical challenges with legislative drafters in commenting on new publications, their comments are often not afforded the appropriate weight or given adequate consideration.[131] An EMI commented that it is impossible to enforce all the legal requirements because of limited capacity and the limited number of EMIs;[132] this is a significant indicator of the impracticality of assigning a criminal response to each legal requirement. More enforcement capacity is required instead of legislative drafting capacity; the latter creates overregulation that overburdens the enforcement structure.[133]

[130] IT - IP 1, 3 Dec 2018, p12.
[131] IT - EMI 1, 23 Jan 2019, p4.
[132] IT - EMI 1, 23 Jan 2019, p4.
[133] IT - IP 2, 15 Jan 2019, p9.

Creating many crimes without the equivalent level of enforcement capacity could result in selective and discretionary enforcement, making it impossible for enforcers, prosecutors, and magistrates to obtain practical experience in each requirement. It was suggested that more detailed practical training should be offered to magistrates and prosecutors.[134] Every statutory requirement does not necessarily require a related criminal offence and sanction provision because it adds to general unenforceability.[135] There must be a distinction between serious offences that should go to court because offenders can face jail time and administrative sanctions where it is unnecessary to involve the criminal justice system; as 'an administrative fine would be less of a burden on the criminal justice system'.[136]

It seems that many statutorily created crimes are not something that enforcers, prosecutors, and courts would enforce, nor do they have the capacity to do so. Increasing enactments overstrains the process of law enforcement. Lack of cooperation with compliance or enforcement officials could result in a harder stance by officials, including citing directors as co-accused.[137] An offender's good faith cooperation and remediation may result in the matter being settled.[138] Nevertheless, there must be an investigation, and the matter referred to the NPA where a crime is committed.[139]

Based on participant responses, the severity of offences should determine criminal accountability. Offences should be graded based on severity and have a corresponding statutory response. A broader spectrum of remedies could alleviate the enforcement burden. Better methods exist to address trivial transgressions outside of a criminal context (as a first response) and could be used where fault or knowledge is lacking. Administrative processes, including compliance notices, warning letters, or administrative penalties, could be more efficient mechanisms (the latter is not contained in the laws) and could avoid, remedy, or prevent the harm and achieve the desired result more effectively and efficiently. It will also save time and costs and possibly lessen the load on an already burdened criminal justice system.

[134] IT- Magistrate 2, 11 Feb 2021, p11 and written response from Prosecutor 4 on 29 Oct 2020, p2.
[135] IT - EMI 2, 23 Jan 2019, p11.
[136] IT - Magistrate 2, 11 Feb 2021, p11.
[137] IT - EMI 3, 23 Jan 2019, p13.
[138] IT - Prosecutor 5, 9 Nov 2020, p4.
[139] IT - Prosecutor 1, 7 July 2020, p2.

9. CERTAINTY AND PRECISION OF ENVIRONMENTAL CRIMES

As explained in Chapter Two, the importance of clear language and certainty of the law cannot be overstated. The *ius certum* principle requires that crimes cannot be formulated vaguely.[140] Justice requires certainty and consistency, and people should know in advance what conduct is considered criminal.[141] Environmental law's complexity and frequent amendments inhibit its certainty, precision, and effective compliance and enforcement. The following sub-questions may assist in applying these normative principles: (1) is the purpose and wording of the legal requirement clear, sound, and defensible based on the principles of legality, and will it survive a narrow interpretation? (2) are the elements of the crime clear? and (3) does the provision create too much discretion? If so, how can it be limited?

Chapter Three illustrates many amendments under the four laws and that environmental law requirements may be challenging to understand and navigate without specialist legal advice. The underlying rationale for these changes is not apparent. The unsystematic and unstructured manner in which changes to the approval/listed activity requirements under the laws are effected appears to be driven by what authorities may deem necessary at any point in time. Such drivers may not necessarily be objectively determined based on environmental impacts but may be determined by authorities' knowledge, experience, and beliefs, which may change in future. Examples include changing or increasing approval triggers or later relegating activities requiring approvals to norms and standards compliance. The frequent changes keep shifting the goalposts by which the regulated community must orient themselves, thereby diminishing certainty.

It becomes increasingly difficult to navigate the law's real purpose if it keeps changing, especially where the rationale for such changes is not immediately apparent. For example, activities requiring approval one day (under one legal regime) but not the next (under a new or amended regime) or *vice versa* raises doubt regarding the defensibility and soundness of such requirements or changes. Another example illustrating the lack of precision of environmental crime formulation is the inconsistency in which fault requirements are stipulated in the offence provisions, as discussed in Part 6 above. There is a disparity in offence provisions as only some

[140] Rita Mare '*Criminal Law and the Bill of Rights'* in Bill of Rights Compendium LexisNexis Commentary (1997), accessed 7 February 2019, with reference to Snyman CR *Criminal Law* 3ed (1995) 34ff; Rabie MA, Strauss SA & Maré MC *Punishment: Introduction to Principles* 5ed (1994) 69ff; Burchell J & Milton J *Principles of Criminal Law* 2ed (1997) 57ff; Joubert JJ, 'Die legaliteitsbeginsel in die Strafprosesreg', LLD Unisa, 1995, at 108ff; Labuschagne JMT 'Die sekerheidsbasis van die strafreg' 1988 *SACJ* 52.
[141] Burchell op cit note 68 at 39, with reference to *Von Mollendorf* 1987 91) SA 135 (T) 169f-g.

offences require to be committed 'unlawfully and intentionally or negligently', but this cannot mean that all other offences are strict (no-fault) liability offences. Such an interpretation would go against foundational principles of criminal law and statutory interpretation. As argued in this thesis, the lack of classifying offences according to their severity and prescribing associated penalties results in too much discretion and the laws provide no parameters for such discretion to be exercised consistently.

The majority of participants expressed concern about frequent and constantly changing laws. Some expressed frustration with unclear legal requirements, stating that more precise legislation would go a long way to support compliance. It was said that there is a significant disparity between the law, practice, and what happens in court, suggesting that law drafters do not seem to understand the industrial/technical/chemical processes. External pressure on legislatures may result in the enactment of unreasonable requirements, and gaps in regulation are inadvertently created by being too specific.[142] Another said that the legislature does not need to regulate at the current level of detail, as it results in overregulation. The law should not be such that people have to reason or debate for countless hours whether a listed activity is triggered or not, or whether more than one authorisation or licence is required and the 'transition from one requirement to another' is overly complicated.[143] A magistrate said that the provisions create too much discretion, particularly by grouping all offences (whether significant or not) together, and such discretion opens the door to corruption.[144] Discretion results in inconsistency, and attempts to ensure uniformity through an operating manual are undermined by the different approaches of other departments.[145]

In the context of frequently changing environmental law requirements, requirements that often lack precision or practical insight/applicability, and where the position regarding fault is not exact, it is difficult to conclusively say that legal requirements are clear, sound, and defensible. Such provisions may not survive a narrow interpretation. The broad discretions created by excessively criminalizing behaviour are problematic because it results in inconsistent and unequal enforcement.

[142] IT - IP 6, 31 Jan 2019, p6, 7 and 9.
[143] IT - IP 6, 31 Jan 2019, p9.
[144] IT - Magistrate 1, 5 Feb 2021, p10.
[145] IT - EMIs 9 and 10, 12 Feb 2021, p5.

10. CONCLUSION

The different nature of criminal law, the legislature's burden, and the substantial state interest to justify state control require that criminal offences not be enacted if a properly considered case cannot be made for such enactment. Criminalizing trivial conduct which (1) the authorities themselves may be incapable of implementing, (2) EMIs are unlikely to investigate criminally in the first instance and for which another mechanism could be used, or (3) prosecutors are unlikely to prosecute, would not satisfy this criterion. It would be difficult for legislatures or legislative drafters to show good cause for enacting criminal sanctions as a first response for trivial offences because there seems to be no clear substantial state interest that justifies state control and prescribing a criminal sanction in these instances.

A criminal law response is not necessarily a *last resort* mechanism for environmental offences, as serious crimes may justify using the criminal sanction as a first resort. This position may not indicate overcriminalization – dependent on the severity of the offence and the presence of other normative factors. It is problematic that the law does not differentiate between serious and trivial crimes, as the latter may justify a non-criminal response in the first instance.

The *different nature of environmental criminal law* requires attainable and realistic requirements with adequate transitional periods. More weight and consideration should be given to the importance of legal certainty and predictability. Changes should occur more strategically at specific review intervals and not only to incorporate select and isolated changes as frequent changes over-complicate an already specialised area of law.

Crimes must *excite moral disapproval, wrongfulness, be condemn-worthy, and deserving of criminal punishment*, as may be the case for contraventions of serious (non-trivial) nature such as those causing pollution or degradation, approval requirements, or requirements relating to actual environmental impacts. In contrast, failing to adhere to less serious requirements may not excite the same level of moral disapproval if it can be remedied by non-criminal mechanisms and where criminal investigators or prosecutors are unlikely to pursue such matters.

Culpability/fault must be required unless there are clear and convincing indications to the contrary, which do not appear from the laws considered. Crimes should require proof of fault, including *knowledge of unlawfulness*; otherwise, it may exceed the reasonable bounds of criminalizing behaviour and result in overcriminalization. The fault position appears unclear and possibly contradictory in the offence provisions of the four laws.

The criminal sanction is not always a *proportional* response, and some statutory requirements are more extensive than necessary to achieve its purpose (resulting in imbalance). A gradation of sanctions linked to the severity of the offence may provide more proportional and *fair* responses (in terms of deserved punishment) more capable of *consistent* enforcement.

The enactment of criminal offences for every transgression is *impractical* because it inevitably overstrains the process of law enforcement and leads to *unequal enforcement*. More efficient mechanisms could address trivial matters to divert matters away from and alleviate the burden of criminal investigations and prosecutions, and corresponding sanctions should be prescribed for such trivial matters. Frequently changing environmental law requirements that lack *precision or practicality* undermine its clarity and soundness.

Currently, how the laws are designed does not distinguish between matters that are genuinely worthy of a criminal court's attention and those that are not, nor is the fault position clear. Trivial offences do not have the same moral reprehensibility as actual pollution or environmental degradation offences. If a transgression can be easily rectified, it is unlikely something the authorities would pursue criminally, and which will unlikely result in a successful prosecution. Thus, criminalizing trivial transgressions in the same way as serious offences may indicate overcriminalization. Additionally, creating no-fault offences without clear justification may result in overcriminalization.

CHAPTER 7: CONCLUSIONS AND RECOMMENDATIONS

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1. INTRODUCTION

This study considered criminalization theory to establish a normative framework to determine when behaviour regulated by environmental law should be criminalized, avoiding overcriminalization. It analyzed changes to the four laws and selected offence categories and considered concluded prosecutions relating to such offences. It reflected the perspectives of 32 participants involved with environmental compliance and enforcement, gauging their opinions on themes including criminal law as a last resort, certainty and practicality of the law and its frequent changes, the deterrent effect of criminal sanctions, and challenges in criminal enforcement. These aspects were considered to answer the overarching research question- whether the use of criminal sanctions for environmental transgressions in industrial facilities in South Africa has led to overcriminalization and when the use of the criminal sanction is appropriate and effective.

In concluding this thesis, this Chapter comments on the adequacy of the normative framework (established in Chapter Two) and its use to determine when to criminalize behaviour and what may indicate overcriminalization - through the analyses of the laws, cases and participant perspectives (in Chapters Three to Six). This Chapter contains recommendations for legislators and policymakers based on the analysis outcome. It also identifies further avenues of research that could advance environmental criminal law knowledge in South Africa.

2. ADEQUACY AND USE OF THE NORMATIVE FRAMEWORK

This part considers whether the proposed normative framework is sufficiently robust for use by policymakers and legislators, commenting on its adequacy and comprehensiveness in light of the three-pronged inquiry (i.e., consideration of the laws, cases, and participant views). It also considers if parts of the frame may be more salient or less important.

Chapter Two proposes a basic normative framework for criminalization, which includes eight main categories with sub-questions/considerations to determine when behaviour should be criminalized; and to avoid overcriminalization. The main categories of the normative frame are:

1) The particular nature of criminal law, the legislature's burden, and the substantial state interest to justify state control;

2) Crimes should be a last resort mechanism when no alternative means to achieve the intended state purpose exists;

3) The particular nature of environmental criminal law, attainability, and flux;

4) The crime must excite moral disapproval, wrongfulness, be condemn-worthy, and deserving of criminal punishment;

5) Culpability, knowledge, and triviality;

6) Proportionality, fairness, and consistency;

7) Practicality, efficacy, and enforceability;

8) Certainty and precision of environmental crimes.

This frame is based on and draws from the work of many authors in criminalization and overcriminalization theory, borrowing from their various theories and tests, grouping main themes or considerations together succinctly. The normative framework is not intended to be a finite list of considerations and can undoubtedly be improved. The aim was to ensure a comprehensive but succinct and practical frame. Although the focus was environmental law, other specialised regulated sectors could also use these as basic principles.

The proposed normative frame was generally helpful for this study as each category contributed to clarifying when specific requirements/behaviour should be criminalized or not. Nonetheless, in retrospect, some critiques on the frame may include that the consolidation and grouping of different concepts into single categories may detract from the importance of specific concepts or norms within the frame. For example, category five includes 'culpability/fault, knowledge, harm and triviality', each being essential considerations in criminalization or criminal liability. Grouping these concepts may detract from their individual value - amalgamating items that should be subject to distinct consideration. The approach was to keep the frame succinct and group related items together, but care should be taken not to overlook any of the individual norms/concepts.

Another critique may be that some overlap appears between different categories. For example, although knowledge of unlawfulness is one of the primary considerations in category five, it is also a salient feature (sub-consideration) in category three (the different nature of environmental criminal law, attainability, and flux) where frequent amendments may

compromise knowledge and certainty of environmental law. Knowledge of unlawfulness (notwithstanding complex laws and their frequent amendment) is also a salient feature of category seven as it may affect the practicality, efficacy, and enforceability of laws.

On further review, category one (the different nature of criminal law, the legislature's burden, and the substantial state interest to justify state control) and category two (crimes should be a last resort mechanism when no alternative means to achieve the intended state purpose exists) could potentially form part of the same norm/category because they both concern the criminal sanction as a justified mechanism of state control to achieve a state purpose. Thus, the considerations in category two could be subordinate to category one.

The enhancement of the normative frame considering the unique traits of environmental law culminated in two added categories, namely category three: the different nature of environmental criminal law, attainability, and flux and category seven: certainty and precision of environmental crimes. Category three intended to highlight the added complexities of environmental law but could also be subordinate to category one. There is also some overlap of themes in categories three and seven as they both reference the problem of flux (through frequent legislative changes) and the importance of legal certainty.

In some instances, the cases considered did not elucidate specific normative categories because very few ended in a trial where legal principles were adjudicated, and for many, detailed records were unavailable. It was not possible to obtain insight into how courts may consider culpability, knowledge, harm or triviality. This gap does not necessarily point to a flaw in the normative frame but rather indicates a gap in the availability of information.

The normative frame may not be a definitive list of considerations before criminalizing behaviour but may offer a helpful and succinct starting point that legislators can use in discerning when conduct should or should not be criminalized.

3. INCIDENCE OF OVERCRIMINALIZATION

This thesis set out to determine whether there is overcriminalization in South African environmental law. It considers whether overcriminalization occurs through punishment imposed by courts or if the creation of offences (i.e., the design of the offences themselves) may result in overcriminalization. Specific sanctions, cases, and participant views were considered for this purpose.

The majority of concluded prosecutions resulted in low penalties, and no imprisonment has been imposed, indicating that overcriminalization may not be occurring in the implementation of environmental laws in South Africa. The factors courts take into account during sentencing may mitigate against possible overcriminalization. Moreover, it seems that most concluded prosecutions concerned mainly crimes that could be considered serious (such as pollution or degradation transgressions, environmental impacts and the failure to obtain approval for such impacts). But there may be instances where individuals pleaded guilty to charges that may not have satisfied all categories within the normative frame, such as knowledge of unlawfulness or fault. In such instances, there may be overcriminalization, but it has not been possible to assess because of the limited available information for such cases.

However, there may be indicators of overcriminalization in the application or design of environmental laws where: (1) laws and criminal provisions are not applied correctly because of their complexity; (2) where laws fail to distinguish between offence and penalties for serious and trivial crimes; (3) where laws do not distinguish between the nature of the offender, whether a natural or juristic person; or (4) where laws are designed and applied in a way to over-extend criminal liability.

First, as illustrated in Chapter Three, the laws considered in this thesis have been amended many times and are complex to navigate. It is imperative to interpret and apply the law to activities undertaken at a particular time, as a person can only be criminally liable for any act or omission that was unlawful when it was committed (the *nullem crimen sine lege* principle). To extend criminal liability beyond this principle is not only an improper application of the law but would also amount to overcriminalization.

Second, the laws' failure to distinguish between serious and trivial offences and its failure to grade offences (and related penalties) according to the severity of the offence and prescribing significant penalties in all instances indicates a tendency to overcriminalize. Offences with limited or no environmental impacts should not be criminalized in the same way as offences that may result in pollution or degradation because less serious offences do not have the same level of moral reprehensibility, could be easily rectified, and constitute transgressions that the authorities would not necessarily pursue criminally. A successful prosecution would be unlikely for trivial transgressions that have been rectified and which have no environmental impact. Trivial matters do not seem to reach the courts because of wide authority and prosecutor discretion (but could amount to overcriminalization if they did). The wide discretion is

problematic because it results in inconsistent and unequal enforcement. In addition to the overcriminalization problem subjecting all environmental law requirements to similar high penalties and inconsistent enforcement because of wide discretion may create disrespect for the law. Inconsistency is also evident in the fact that none of the considered cases related to polluters in the public sector, which are said to be some of South Africa's biggest polluters. It appears that the private sector is held to higher standards than the public sector, which implicates fairness in the use of criminal sanctions.

Third, the laws' failure to distinguish between environmental crimes by natural persons and those by juristic persons may also lead to overcriminalization. Natural persons obtain criminal records whereas corporate entities do not; the latter could potentially establish a new entity to conduct the same business. The impact of criminal records on individuals is more severe (in addition to the financial penalty that may be imposed), implicating proportionality (in terms of punishment beyond what is deserved). Such disproportionality may be an indicator of overcriminalization.

Fourth, the further liability consequences in NEMA s 34, which could culminate in additional sanctions (including employee, manager, or director liability, liability for costs, compensation for damages, damages for advantage gained), may also imply a disproportionate response. Such further liability must be justified and proportionate, considering the nature of the underlying transgression. In other words, extending criminal liability for trivial transgressions could also point to overcriminalization. In addition, the multiplicity of convictions, where the same underlying acts, facts, and evidence are used for different charges (e.g., different listed activities or environmental degradation offences triggered by the same underlying facts), may result in overcriminalization, particularly where each separate charge is reflected in an accused's (natural person's) criminal record.

Recommendations to limit overcriminalization and to address the problems identified in this research follow.

4. RECOMMENDATIONS FOR LEGISLATORS AND POLICY-MAKERS

4.1. Recommendation 1: Legislators, law drafters, and policymakers could exercise restraint in that laws should not be amended too frequently and should not prescribe high criminal sanctions for every transgression without gradation based on severity

As argued in this thesis and supported by participant views, continuous changes to the applicable legislation put legal certainty at risk and inhibit effective compliance and enforcement. The magnitude of changes illustrated in this research cannot be said to advance legal certainty. Such frequent changes inevitably complicate proving criminal liability.

Too many statutory offences make it impossible to enforce and create too much discretion, which is exercised inconsistently and leads to unequal enforcement. In a South African context, where the criminal justice system is in crisis, it is impractical, if not impossible, to require prosecutors to pursue every criminal case. Inevitably some discretion is exercised based on a prosecutor's judgment of a case in terms of its potential success or whether it is worth pursuing. Not all the legal requirements necessarily speak to the real intention of preventing environmental damage, and often it disregards the realities surrounding practical implementation.

When considering enacting or proposing environmental crimes, legislators should ensure that the requirement is attainable with realistic transitional periods to which industry can be held. More weight and consideration should be given to the importance of legal certainty and predictability and comments by those tasked to enforce the law. Changes should occur more strategically at specific review intervals and not only to incorporate select and isolated changes. There should be some degree of consistency in environmental law, particularly criminal sanctions, to ensure legal certainty, fairness, increased compliance and effective enforcement. More controlled and structured review methods at determined intervals should be implemented to curtail this tendency to amend legal requirements frequently or to impose high-prescribed penalties for most requirements. Penalties should be subject to gradation based on the severity of the offence as well as the nature of the offender (whether a natural or juristic person). The courts do not impose the high prescribed penalties, indicating that such penalties may be inapt or disproportionate.

Fundamental rights should guide the legislator to conserve criminal law as a scarce resource.[1] Legislators should view every offence as a restriction of fundamental rights and thus require proper justification.[2] Each sanction must be assessed and judged by constitutional considerations, including if it advances the aims of s 24. Judicial deference (to the functions of

[1] R.A. Duff et al *The Boundaries of the Criminal Law* 1 ed (2010) 253.
[2] Duff ibid.

legislators) underscores why it is essential that the legislators' powers and functions are exercised with more scrutiny.

All sanctions need not be criminal sanctions.[3] Criminal law authors say that 'the criminal law of the future may be predominantly administrative law, reserving punishment for a *persistent* flouting of regulatory controls'.[4] Administrative sanctions could substitute criminal sanctions in certain instances to avoid overcriminalization, would unburden the justice system, and still punish offenders.[5]

Thus, strategic, planned, and structured law reform (with sufficient constraint) to remove criminal sanctions and penalties that may amount to overcriminalization, to provide for gradation of offences and penalties based on severity is recommended, together with more limited amendments to create more legal certainty. Combining a more judicious approach in deciding when/how to enact criminal sanctions together with increased enforcement capacity (as proposed below) will strengthen the efficacy of environmental law sanctions, and, in turn, lead to increased environmental protection.

4.2. Recommendation 2: The fault position should be clear

As discussed in Chapter Six, the fault position appears unclear and possibly contradictory in the offence provisions of the four laws. Culpability/fault must be a requirement unless there are 'clear and convincing indications' prescribing no-fault liability,[6] and no such indications appear from the laws considered. Crimes require proof of fault, including knowledge of unlawfulness; otherwise, it may exceed the reasonable bounds of criminalizing behaviour. Ideally, the law should be clear in this regard. In any event, a court should interpret it following the general principle that fault ('the guilty mind') is an element of statutory offences; strict (no-fault) liability being an exception that is constitutionally questionable that must be clearly and convincingly stipulated.[7]

[3] AJ Middleton 'Road Traffic and Abuse of the criminal sanction' (1974) *THRHR* 159.
[4] Norval Morris & Julius Kreeger 'The Overreach of the Criminal Law' (1975) *Acta Juridica* 40 at 43
[5] Melissa Fourie 'How civil and administrative penalties can change the face of environmental compliance in South Africa' (2009) 16 *SAJELP* 93.
[6] *S v Arenstein* 1967 (3) SA 366 (A) at 381D–E as referenced in *S v Coetzee and Others* 1997 (3) SA 527 (CC) para 165.
[7] Jonathan Burchell *Principles of Criminal Law* 5ed (2016) 29, 31, 60 and 341 with reference to *S v Coetzee* 1997 (3) SA 527 (CC), and Snyman (2014) CR Snyman *Criminal Law* 6 ed (2014) 238.

In addition, doctrines relevant to knowledge, including wilful blindness, 'conscious avoidance' or 'collective knowledge', may require more consideration particularly where offenders are juristic entities.[8] This does not appear in South African environmental law but may be relevant to serious offences. Conscious avoidance could include certain personnel within an organisation turning a blind eye to unlawfulness.[9] The collective knowledge within an organization may also point to forms of knowledge of unlawfulness.[10] There is room for applying and developing these doctrines of wilful blindness, conscious avoidance and collective knowledge in South Africa.

4.3. Recommendation 3: Increasing enforcement capacity by reconsidering the number of enforcers and additional training

Based on participant views (as illustrated in Chapter Five, Part 7), the most significant challenge in enforcing environmental law through prosecutions is the capacity constraints of role-players, including authorities, investigators, prosecutors, and magistrates. It is impossible for enforcers to enforce all the legal requirements because of limited capacity and the limited number of enforcers - a significant indicator of the impracticality of assigning a criminal response to each legal requirement. More enforcement capacity is required instead of legislative drafting capacity, as participants indicated that too many law drafters create overregulation that overburdens the enforcement structure.[11]

Creating many crimes without the equivalent level of enforcement capacity could result in selective and discretionary enforcement, making it impossible for enforcers, prosecutors, and magistrates to obtain practical experience with critical requirements (i.e., those that advance the aims of s 24). It was also suggested that more detailed practical training should be offered to magistrates and prosecutors.

Thus, to increase the efficacy of environmental criminal sanctions a combined approach, consisting of increasing enforcement capacity and more judicious considerations of when/how to enact criminal sanctions, is proposed.

[8] Kathleen F. Brickey *Environmental Crime, Law, Policy, Prosecution* (2008) 48 with reference to *United States v Hopkins* 53 F.3d 533 (2nd Cir. 1995).
[9] Brickey ibid.
[10] Brickey ibid at 49.
[11] IT - IP 2, 15 Jan 2019, p9.

4.4. Recommendation 4: A consolidated case database would have extensive benefits

As mentioned in this thesis, the lack of a readily accessible database containing environmental prosecutions' case information (as they mainly occur in Magistrate's courts) restricts knowledge in this area, which impacts the effective use of the criminal sanction. Such a database would improve knowledge and understanding of environmental prosecutions, adjudication, and application of complex environmental laws and enhance legislative drafting that ensures practical, accurate, and enforceable laws. It would benefit all key role players, the general public and, in turn, the environment. Increased knowledge of successful prosecutions may offer an increased deterrent effect.

A central, accessible public database of the charges, information, and outcomes of environmental prosecutions would improve accessibility to case information. In turn, this would contribute to improved knowledge of how the criminal sanction is used to enforce environmental law. This knowledge would lead to more efficient use of the criminal sanction and more predictability by which legal subjects can orient themselves.

5. FURTHER AVENUES FOR RESEARCH

Although 53 cases were considered for this research, it was only possible to summarise aspects of the cases (in Annexure A), especially where limited information was available. More detailed case information and in-depth analysis of prosecution outcomes would undoubtedly contribute to improved knowledge and more efficient use of criminal sanctions for environmental law transgressions.

As explained in the research methodology, participants from a wider range of government departments were not interviewed due to the study's limited scope, time, costs, and word limit constraints. DMRE and DWS are known to approach compliance and enforcement inconsistent with the approach of DFFE - as supported by research participant views (Chapter Five), case law, and the researcher's own experience. Officials responsible for legislative drafting also did not form part of the selected participants because of the study's focus. The legislative design issues that emerge from this research would nevertheless be relevant considerations for legislators or drafters of the law that also impact the effective use of criminal sanctions and avoiding overcriminalization. This thesis may form a basis for further research that gathers information from EMIs within the various government departments or structures, legislators, or legislative drafters. More extensive research programs across departments or officials with

different functions (including law drafters) may further contribute to environmental law reform, consistent and equal application of the law, and more effective enforcement and use of criminal sanctions.

Further research into the performance targets of legislators or key legislative development areas may also elucidate why certain aspects of environmental laws appear to be subject to many and frequent changes, but others are not.

Whether all people or groups of people assign the same level of moral or societal disapproval to environmental offences (as considered in this research), may require further research. Awareness and consequent societal disapproval may be more limited in a developing country, where other more basic human needs are not being met. This idea of moral disapproval within society at large may also influence the use of alternative punishment mechanisms.

Although this research did not consider alternative mechanisms (to criminal sanctions), for example, administrative penalties, criminalization concepts may also inform the appropriate use of such alternative measures within the spectrum of enforcement mechanisms. This is also an area of possible further research, and the conclusions emanating from this research, regarding the instances of possible overcriminalization, may be relevant considerations when legislators consider introducing alternative enforcement measures into law. The use of alternative measures to criminal sanctions (e.g., administrative penalties) should alleviate and not aggravate the problems and challenges observed in this research, including the possibility of overcriminalization. Decriminalization, i.e., removing offences that should not be crimes,[12] as a response to combat overcriminalization, in the context of South African environmental law has not formed part of the scope of this research, but is an aspect requiring further research.

Such further research may also assist in refining the normative frame for determining criminalization (avoiding overcriminalization) and ensuring the most effective design and use of criminal sanctions.

[12] Andre Rabie 'The need for decriminalization' (1977) *CILSA* 200 at 201 - 202.

Annexure A: Summary of available prosecutions and penalty comparison with the maximum statutory penalty

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
1.	*S v Acker,*[1] 1 Oct 2005, Hermanus ECH 100/05 Contravening: s 151(1)(i) of the National Water Act	Mr Acker was accused (in his individual capacity, and as the managing director and a shareholder of Whitby Distillers and Liquor Wholesalers (Pty) Ltd) of acting, or omitting to act, in a manner that caused the pollution or possible pollution of a water source, during May 2003. As a result, spent cooling water from the alcohol distilling process was discharged into the Klipdrift River due to a malfunction of pumps. Mr Acker failed to shut down the operations after being instructed to do so by an official from the Department of Water Affairs on 20 May 2003. The s 105A agreement explains the company's measures to rectify previous environmental non-compliances, including significant capital expenditure to improve environmental management and replace Mr Acker (held personally liable).	Outcome: s 105A agreement, i.e., guilty plea. Maximum statutory penalty: Fine or imprisonment not exceeding five years or both – for a first offender, amounting to a fine of R100 000.[2] Sentence: Postponement of a sentence for three years on certain conditions, including applying for a water use licence and sponsoring a deserving research student for three years in the sum of R35 000. After the three years, if the Court is satisfied that the conditions imposed have been complied with, he shall be discharged by the Court without it passing sentence, and such discharge shall have the effect of an acquittal, except that the conviction shall be recorded as a previous conviction.[3]	Natural person convicted. Comparatively: To the extent that the bursary is considered a fine, the amount of R105 000 appears comparable (105%) to the maximum statutory fine that could be imposed. Culpability: The fact that Mr Acker failed to shut down the operations after a visit from an official from the Department of Water Affairs indicates intentional wrongdoing, which can also be deduced from his guilty plea in the s 105A agreement. Discharge: A discharge after a conviction appears in s 297(1) of the CPA, although a conviction is recorded.

[1] Hermanus Regional Court case number ECH 100/05. Available at: *https://cer.org.za/virtual-library/judgments/magistrates-courts/s-v-acker-2*.

[2] he Adjustment of Fines Act s 1(1)(a) read with s 92(1)(b) of the Magistrates Court Act which provides that a district court (i.e., where the court is not the court of a regional division) can impose a sentence of a sentence of imprisonment for a period not exceeding three years, and a regional court can impose imprisonment not exceeding 15 years. GN no. 1411 of 30 October 1998 determines that the fine a court can impose is 'R60 000 where the court is not the court of a regional division, and R300 000 where the court is the court of a regional division'.

[3] See para 13 of the s 105A agreement.

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
2.	*Mostert v The State,*[4] 1 Dec 2009 (This was an appeal to the SCA from the North Gauteng High Court) Contravening: ss 151(1)(e) and (j) of the National Water Act and common law offences of theft and fraud.	Two farmers (a father and son) growing sugarcane in Baberton were accused of fraud by knowingly providing the complainant (the Lomati Irrigation Board) with false readings of the quantities of water they had abstracted from the river at pump station 46. They were accused of stealing an unknown quantity of water From 1998 to 2005. They allegedly tampered with a measuring device and unlawfully, intentionally or negligently committing an act detrimentally affecting a water resource by illegally abstracting water from the Lomati River from 1998 to 2005. The SCA held that common law crimes could overlap with statutory crimes; there is no bar in the NWA from being accused of common law crimes. The SCA also held a prima facie view that there could not be theft of water as res communes, but a conclusive view in this regard was not required as the state did not prove that the accused took more water than they were authorised to abstract.	Outcome: Trial/judgment/appeal: not guilty of theft – cannot steal res communes; guilty of fraud and contravening the National Water Act provisions. Maximum statutory penalty: On counts 3 and 4 (the statutory crimes) On the first conviction: a maximum of five years or a fine (R100 000) or both. (Counts 5 – 7 are not discussed in the SCA judgment) Sentence: on the fraud conviction: a fine of R20 000, or twelve months' imprisonment, wholly suspended for four years on conditions. On the National Water Act counts: each appellant (accused) had to pay a fine of R5 000 or face six months of imprisonment.	Natural person convicted. Comparatively: The fine to be paid by each accused, i.e., the R5 000 is 5% of the maximum of R100 000, and comparatively low, but this may be because they were individuals charged in their individual capacities, but the reasons for these sentence amounts are not apparent in the SCA judgment. Culpability: The farmers had a second unregistered borehole pump station for which they did not report water consumption - indicating intentional wrongdoing. Common law crimes: The farmers were prosecuted in their personal capacities. The accused were charged with statutory and common law offences and were convicted of fraud (incorrect reporting of water consumption) but acquitted of theft. The SCA held a prima facie view that there could not be theft in the case of res communes, i.e., water belonging to the public, but the state had not proved that the accused exceeded its permissible volumes of use. Limited information: Charges and details not apparent from appeal judgment.

[4] 2010 (2) SA 586 (SCA) (1 December 2009).

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
3.	*S v A Joubert,*[5] 14 April 2010, Paarl A223/10 Contravening: s 9(1)(a) of the APPA.	Ms A Joubert was charged with undertaking an activity requiring a s 9 APPA registration certificate from May 2007 to December 2008.	Outcome: uncertain, presumably trial, or guilty plea. Maximum statutory penalty: On a first conviction, the penalty in 1973 (amended in 2009) was a fine of R500 or six months imprisonment. Following the Adjustment of Fines Act in 2008, the equivalent monetary penalty for six months imprisonment was R10 000. Sentence: R10 000 fine or six months imprisonment suspended for five years provided she is not convicted of the same offence.	Natural person convicted. Comparatively: The accused received the exact amount (100%) of the statutory fine. The fine at the time was low; the APPA was amended in 2009, and the R500 fine was significantly increased to R5 million. Limited information: The documents received for this case are limited to a SAP 69 form and a sentencing annexure containing limited particulars of the offence and sentence.
4.	*S v Melville,*[6] 18 Oct 2010, Kirkwood, A513/09 Contravening: ss 24F(1)(a) and 31N of NEMA.	Mr Melville, a farm owner, was accused of one count of commencing a listed activity without an environmental authorisation from August 2008 to June 2010 (i.e., the clearance of vegetation) and three counts of failing to comply with a compliance notice.	Outcome: s 105A agreement, i.e., guilty plea. Maximum statutory penalty: Count 1, failing to obtain an environmental authorisation could result in a maximum fine of R5 million. Counts 2 to 4 could each result in a fine of R1 million. Sentence: Count 1: eighteen months imprisonment suspended for five years on condition that the accused is not convicted of a similar contravention and rectification and restoration (for which he paid an administrative fine of R 275 000). Count 2-4: R 30 000, or six months imprisonment of which R10 000, or two months imprisonment was suspended for five years	Natural person convicted. Comparatively: The R20 000 fine is 0.25% of the maximum of R8 million, which appears particularly low. It may have been agreed because he had paid an administrative fine of R275 000. The accused personal circumstances may have also been a factor. Culpability: The fact that the activities persisted after an intention to issue a compliance notice and a compliance notice was issued may indicate intentional wrongdoing. This can also be deduced from his guilty plea in the s 105A agreement.

[5] Paarl District Court case number A223/10.
[6] Kirkwood District Court case number A513/09. Available at *https://cer.org.za/virtual-library/judgments/magistrates-courts/s-v-mellville*.

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
			on condition that the accused is not convicted of the same offence.	
5.	*S v T Mosekidi,*[7] 2 March 2011, Vereeniging, SH152/09 Contravening: s 9(1)(a) of the APPA, ss 24F and 31N of NEMA, s 20 of ECA.	Ms T Mosekidi was charged in her personal capacity as a member of Creative Drums CC with six counts, including undertaking a listed activity under NEMA without authorisation, failing to comply with a compliance notice, undertaking a waste disposal facility without an ECA s 20 permit, and undertaking an activity requiring s 9 APPA registration certificate.	Outcome: uncertain, presumably trial, or guilty plea. Maximum statutory penalty: Each of the NEMA offences could result in a maximum fine of R5 million. The ECA offence carried a potential maximum fine of R100 000. The APPA offence could result in six months imprisonment or the equivalent fine (depending on the date of the offence, which is not apparent from the document). Sentence: The accused was sentenced to a R100 000 fine or three years imprisonment suspended for five years provided she is not convicted of the same offence. The accused was also sentenced to serve three years of correctional supervision and undertake community service.	Natural person convicted. Comparatively: As the accused was sentenced to correctional supervision and community service, it is presumed that the accused could not afford a fine, and this was the reasonable alternative in the circumstances. Culpability: The activities persisted after the authorities issued a compliance notice indicating intentional wrongdoing. Sentencing mechanism: In this matter, correctional supervision and community service were imposed as sentences. Limited information: The documents received for this case are limited to a sentencing document.
6.	*S v M de Scally,*[8] 21 July 2011, Pretoria North, SH2/216/10 Contravening: s 9(1)(a) of the APPA, s 20 of the Waste Act.	The accused was charged in his personal capacity for undertaking a scheduled process without an APPA registration certificate from January 2007 to July 2009 the accused (count 1) and a waste management activity without a licence (count 2).	Outcome: uncertain, presumably trial, or guilty plea. Maximum statutory penalty: The APPA offence could result in six months imprisonment or the equivalent fine of R 10 000. The Waste Act offence could result in a maximum fine of R 10 million.	Natural person convicted. Comparatively: The R10 000 fine imposed is comparatively extremely low compared to the maximum that could have been imposed, i.e., R10 010 000 (0.1%). Limited information: The documents received for this case are limited to a

[7] Vereeniging Regional Court case number SH152/09.
[8] Pretoria North Regional Court case number SH2/216/10.

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
			Sentence: The accused was fined R5 000 or six months in prison for count 1 and R5 000, or two years imprisonment for count 2.	SAP 69 form and a sentencing annexure containing limited particulars.
7.	*S v Aid Safe Waste (Pty) Ltd and 5 Others,*[9] 2010/11, Benoni, 182/09 Contravening: s 24F of NEMA, waste disposal provisions of ECA and Gauteng Health Care Risk Waste Regulations and Municipal By-laws and contravention of authorisation conditions.	Aid Safe, a waste incineration company, and four of its directors and one employee were charged with various contraventions of NEMA, the ECA, conditions of authorisations, the Gauteng Health Care Risk Waste Regulations and Municipal by-laws.[10] It appears that community complaints from neighbouring businesses in 2006 resulted in a site inspection by authorities. The authorities subsequently issued a pre-compliance notice and compliance notice in early 2007. However, further community complaints were received, and in April 2007, the Municipality discovered medical waste being dumped and burned on a deserted mine.[11]	Outcome: s 105A agreement, i.e., guilty plea. Maximum statutory penalty: It is not clear what all the criminal charges were. NEMA offences could result in a maximum of R5 million. The ECA offence carried a potential fine of R100 000 or ten years imprisonment. Sentence: Accused 1 (Aid Safe Waste (Pty) Ltd) was sentenced to a fine of R 2 million, half of which was suspended for five years. Accused 3 (Johan le Roux) was sentenced to a R100 000 fine, half suspended for three years.	Natural person also convicted. Comparatively: Comparing only the maximum statutory penalties in NEMA and ECA with the fines imposed, Aid Safe's R1 million fine is 20% of the maximum, and le Roux's R50 000 fine is about 1% - however, it is not clear exactly which charges they faced. Le Roux was sentenced in his personal capacity as a director. Culpability: Aid Safe appear to have had repeated violations or incidents that resulted in a criminal investigation being instituted in April 2007, after the compliance notice was issued. Repeated violations may indicate a lack of appreciation of environmental laws and the severity of the entity's non-compliance. Limited information: No documents were available for this case. The information in the NECER was used. There appeared to be 23 criminal charges. Because the available information is limited, it is unclear which charges the accused faced, and which provisions of the provincial

[9] Benoni Regional Court case number 182/09
[10] DFFE *NECER* 2010/2011 at 31-32.
[11] DFFE *NECER* 2010/2011 at 31.

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
				regulations or municipal by-laws were contravened. Thus, the penalties concerning these are uncertain.
8.	*S v KL Makhubo, DG Zungo, and KLM Drums Collectors CC,*[12] 11 Sept 2011, Vereeniging, RC204/11 Contravening: ss 16 and 20 of the Waste Act.	Three accused were charged with contravening the general duty regarding waste management and failing to obtain a licence for waste management activities. The details of the charges are unknown. Accused 1 and 2 were individuals cited personally, and presumably the members of Accused 3/the Close Corporation.	Outcome: uncertain, presumably trial, or guilty plea. Maximum statutory penalty: Each contravention is subject to a maximum possible fine of R10 million, or ten years imprisonment. Sentence: Count 1: Accused 1 and 3 were fined R 300 000, or eighteen months imprisonment, wholly suspended for five years provided the accused was not convicted of the same offence. In respect of Count 3: Accused 1 and 3 were fined R 200 000, or twelve months imprisonment wholly suspended for five years provided the accused was not convicted of the same offence. Count 2: Accused 2 was fined R 75 000, or six months imprisonment (payable in down payments).	Natural persons also convicted. Comparatively: The sentences for accused 1 and three were wholly suspended, which meant they did not have to pay any fine. Accused 2's fine of R75 000 is 0.375% of the possible R20 million that could have been imposed. As he was convicted and sentenced in his personal capacity, relevant factors in sentence mitigation would have been considered. Limited information: The documents received for this case are limited to a sentencing document.
9.	*S v Silicon Smelters (Rand Carbide),*[13] 15 Aug 2011, Pretoria, 14/01477/2011 Contravening: s 51(1)(a) of the Air Quality Act, s 28(14) of NEMA.	Silicon Smelters (Rand Carbide), a silicon metals producer in Witbank, were accused of illegally operating several of its metallurgical processes without Air Quality Act authorisations. They were accused of operating in a manner that resulted in or was likely to result in significant environmental pollution or degradation. In addition, they were	Outcome: Guilty plea/judgment on two counts (operating without a licence and causing significant pollution). Maximum statutory penalty: It is not clear when these offences were committed. For comparison purposes, it is assumed that the offences were committed before the amendment of the Air Quality Act and when the maximum APPA fine was R5 million.	Comparatively: The R1,5 million is 25% of the R6 million that could have been imposed. Limited information: The information for this case is limited to that reported in the 2011/12 NECER.

[12] Vereeniging Regional Court case number RC2014/11.
[13] Pretoria Regional Court with case numbers 14/01477/2011 see: *https://www.environment.gov.za/mediarelease/siliconsmelters_sentencing*

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
		accused of operating unlawfully and contrary to other legislative requirements in place from 1983. Dust emissions from the facility also measured as high as 1380 mg/Nm³ over the legislated limit of 100 mg/Nm³.[14]	The NEMA s 28(14) offence could result in a maximum fine of R1 million. Sentence: Silicon Smelters was fined R 2 million for operating without an air emissions licence and R 1 million for causing pollution; half was suspended for five years, i.e., they had to pay R 1,5 million. (Silicon Smelters also made improvements to their operation of up to approximately R 13 million).	
10.	*S v Richard Batson,*[15] 29 Aug 2011, George, G/SH187/10 Contravening: s 151(1)(a) of the NWA and s 24F of NEMA.	Based on the 2011/12 NECER, Mr Richard Batson, a 74-year-old retired civil engineer, planned to artificially increase water flow between the Swartvlei lake and the Swartvlei Estuary by creating a new point of entry for water, commencing on or about 5 July 2009. Mr Batson requested the DPP to withdraw the charges as he intended to request the court to suspend the proceedings and refer the dispute to a conciliator, as provided for in s 17(3) of NEMA. The DPP declined. He applied in terms of s 150 of the National Water Act to the Minister seeking to settle the dispute through mediation and negotiation. The Minister declined the request because she did not have the jurisdiction to withdraw criminal charges, and that provision operated in the context of civil matters.[16]	Outcome: Trial /Judgment Maximum statutory penalty: The NEMA offence could result in a maximum fine of R5 million. The National Water Act offence could result in a R100 000 fine or five years imprisonment. Sentence: Mr Batson, in his personal capacity, was sentenced to a R40 000 fine or ten months' imprisonment, suspended for three years, and to pay damages to SANParks in the amount of R20 000.[17]	Natural person convicted. Comparatively: The fine was wholly suspended, and damages payable to SANPARKs were R20 000. Arguably, a determination of damages is separate from the fines that can be imposed. In effect, the fine imposed is zero percent of what could have been imposed. This was probably influenced by mitigating factors. Attempts to resolve: The accused first sought to resolve the matter through other means. However, he unsuccessfully sought conciliation from the DPP and the Minister of Water Affairs. Limited information: The documents received for this case are limited to a

[14] DFFE *NECER* 2011/2012 at 29-30.
[15] George Regional Court case number G/SH187/10.
[16] DFFE *NECER* 2010/2011 at 31-32.
[17] Ibid.

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
				one-page form (like the SAP 69 form containing little particulars of the offence) and a sentencing annexure. Culpability: although the information received for this case is limited, it may be questionable whether the accused had knowledge of the law or could have been expected to know.
11.	*S v Aesthetic Waste Services (Pty) Ltd,*[18] 2011/12, Butterworth Contravening: s 20 of ECA, s 35(2) of the Air Quality Act.	Aesthetic Waste Services was accused of unlawfully storing healthcare risk waste. In addition, it operated a waste disposal site. This came to the attention of the authorities through community complaints. It appears two criminal investigations were undertaken, the first after the first complaint in July 2009 and the second in January 2010 – this may indicate repeated violations.	Outcome: Guilty plea/judgment. Maximum statutory penalty: The ECA offence could result in a maximum fine of R100 000, and the Air Quality Act offence could result in a maximum fine of R5 million. Sentence: The company, represented by Mr Nakin (a director), pleaded guilty on both counts and was sentenced to a fine of R200 000 suspended for five years.[19]	Comparatively: As the fine was wholly suspended, it amounts to zero percent of the possible fine that could have been imposed, which was R5,1 million. Limited information: No documents were available for this case; the information in the NECER was used. Culpability: The repeated community complaints and separate criminal investigations appear indicative of repeated or persistent violations.
12.	*S v Arbac Services CC (Gauteng) and AA Costa and K Jones,*[20] 25 August 2011, Germiston Contravening: ss 20(1), 22, 29(4) and 30 of the ECA.	Arbac Services operated a waste disposal company and collected medical, hazardous, chemical, and other waste from various clients at its property in Germiston, with no permits. It operated without the required waste disposal site permit and environmental authorisation. The company was provisionally liquidated in March 2006. DEA authorised a containment clean-up at the cost of	Outcome: Trial /Judgment Maximum statutory penalty: each ECA offence could result in a maximum fine of R100 000. Sentence: The accused pleaded not guilty to all the charges, and after three years in court, the accused were convicted on both counts on 25 August 2011. It appears that the two members of the entity were also convicted in	Natural persons also convicted. Limited information: limited to that reported in the 2011/12 NECER. Comparatively: It is not possible to compare the sentence imposed to the maximum provided in the statute because this information is not available.

[18] Butterworth Regional Court unknown case number.
[19] DFFE *NECER* 2011/2012 at 30.
[20] Germiston Magistrates Court unknown case number.

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
		R 227 269.05. The new landowner had to undertake the remainder of the clean-up.	their capacity as members. The case was postponed for sentencing. The sentences were not reported in NECER and do not appear publicly available.[21]	Remediation: DEA authorised a containment clean-up costing R227 269.05, with the remainder of the clean-up to be undertaken by the new landowner.
13.	*S v Vunene Mining,*[22] 1 Jan 2011, Ermelo, 94/11/2010 Contravening: ss 24F and 28(14)(a) of NEMA, s 151(1)(a) of the National Water Act.	The accused, a mining company, during the period 26 February 2007 to 7 December 2012: committed acts which significantly affected the environment, including mining in a wetland, stripping soil, altering the land, removing vegetation, excavating etc. (Count 1); unlawfully used water, including water uses in ss 21(a), (b), (f), (g), (c) and (i) of the National Water Act (Count 2); and commenced with five listed activities (in GNR 386 and 387) without a NEMA authorisation (Count 3).	Outcome: s 105A agreement, i.e., guilty plea Maximum statutory penalty: Count 1 could result in a maximum fine of R1 million, Count 2 a maximum fine of R100 000,[23] and count 3 a maximum fine of R5 million. Sentence: The s 105A agreement oddly states that sentencing was postponed for five years subject to certain conditions including, that the accused pays R 750 000 to the Environmental Protection Agency in terms of s 34B of NEMA; R 250 000 to the Ermelo Animals Rescue Services; R 1.5 million to the Inspection, Compliance and Monitoring division of the Wildlife Protection Services office – Ermelo; R 500 000 to Working for Wetlands. After the expiry of five years (on 7 December 2017), the accused had to appear before the court to consider if he could be discharged.[24]	Comparatively: The amount the accused had to pay, i.e., R3 million, is 49% of the maximum of R6,1 million, which includes considering the fines in terms of s 34 of NEMA. Listed activities: Five Listed activity contraventions were treated as a consolidated charge. Similarly, five water uses were treated as a consolidated charge. Additional liability: The R3 million fine the accused had to pay was imposed in terms of NEMA s 34(3)(b). A portion of the fine, i.e., R750 000, was payable to the Environmental Protection Agency in terms of s 34B of NEMA. This section provides that a court may order that a fourth of the fine to be paid can be paid to an informant whose evidence lead to the conviction or who

[21] DFFE *NECER* 2011/2012 at 30-31.
[22] Ermelo Regional Court case number 94/11/2010. Available at*: https://cer.org.za/virtual-library/judgments/magistrates-courts/s-v-vunene-mining-pty-ltd*.
[23] The Adjustment of Fines Act s 1(1)(a) read with s 92(1)(b) of the Magistrates Court Act which provides that a district court (i.e., Where the court is not the court of a regional division) can impose a sentence of a sentence of imprisonment for a period not exceeding three years, and a regional court can impose imprisonment not exceeding 15 years. GN no. 1411 of 30 October 1998 determines that the fine a court can impose is 'R60,000 where the court is not the court of a regional division, and 300 000 where the court is the court of a regional division'.
[24] Ermelo Regional Court (unreported, undated, case number omitted) Ermelo CAS 94/11/2010. Available at: *https://cer.org.za/virtual-library/judgments/magistrates-courts/s-v-vunene-mining-pty-ltd.*

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
				assisted in bringing the offender to justice could. Culpability: guilty plea, no additional indications, or clarifications from s 105A agreement. Discharge: The s 105A agreement included a provision regarding a discharge in terms of s 297(1) of the CPA, i.e., a discharge if all the conditions are met. However, the accused still has a criminal conviction.
14.	*S v Frylinck and others*[25] April 2011, Pretoria, 14/1740/2010 Contravening: s 81(1)(a) of the EIA Regulations, 2006.	Mr Frylinck was appointed as the environmental assessment practitioner for the Pan African Parliament site. He was charged in his personal capacity with his consultancy contravening the EIA Regulations. He was also accused of fraud because he did not identify a wetland in the Basic Assessment Report, where a wetland was present based on expert testimony. The authorities requested a wetland delineation and hydrological study during the EIA process.	Outcome: Trial /Judgment – guilty of contravening the EIA Regulations but acquitted of fraud. Maximum statutory penalty: Count 1 could result in a maximum fine of two years imprisonment, or an amount prescribed by the Adjustment of Fines Act[26] (i.e., R40 000). Sentence: Both accused were fined R80 000 each (or two years imprisonment for Mr Frylinck), with R40 000 of each being suspended.[27]	Natural person convicted. Comparatively: The fine of R40 000 imposed appears the same as the maximum prescribed. Arguably they could not have been fined more. Culpability: The accused was found to have been negligent in his methods of determining the existence of a wetland. Although different expert witness testimony was led at the trial, the most convincing expert testimony concluded that there was a wetland. Considering the authorities questioned this aspect of the EIA, Mr Frylinck should have, at

[25] Pretoria Regional Court case number 14/1740/2010. Available at: *https://cer.org.za/virtual-library/judgments/magistrates-courts/s-v-stefan-frylinck*

[26] The Adjustment of Fines Act s 1(1)(a) tread with s 92(1)(b) of the Magistrates Court Act which provides that a district court (i.e., Where the court is not the court of a regional division) can impose a sentence of a sentence of imprisonment for a period not exceeding three years, and a regional court can impose imprisonment not exceeding 15 years. GN1411 of 30 October 1998 determines that the fine a court can impose is 'R60,000 where the court is not the court of a regional division, and 300 000 where the court is the court of a regional division'.

[27] 'Consultant fined over false wetland report' *fin24* 21 Apil 2011 at: *https://www.news24.com/fin24/Economy/South-Africa/Consultant-fined-over-false-wetland-report-20110421-2*

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
			Accused 1 was given the benefit of the doubt and acquitted of fraud.	the very least, appointed a wetland specialist during the EIA instead of making his own determination. Common law crimes: The accused was charged with statutory and common law offences but was acquitted of the fraud charge. Practitioner convicted: This is the only known case where an environmental assessment practitioner was prosecuted and convicted for the incorrect identification of listed activities to be authorised.
15.	*S v Anker Coal,*[28] 3 April 2012, Ermelo, ESH 8/11 Contravening: s 28(14) of NEMA, ss 98(a) and (b) of the Mineral and Petroleum Resources Development Act 28 of 2002 ('the MPRDA').	From January 2009 and April 2020, Anker Coal caused environmental degradation, including drilling prospecting holes within riverbanks, a riverbed, and a wetland (Count 1). In addition, the accused failed to comply with a notice issued by the Regional Manager Mpumalanga on 2 December 2009 in terms of s 931(B)(1) of the MPRDA (Count 2) requiring remediation; and submitted inaccurate or incorrect information required under the MPRDA (Count 3).	Outcome: s 105A agreement, i.e., guilty plea. Maximum statutory penalty: Count 1 could result in a maximum fine of R1 million, count 2: a maximum fine of R10 000, and count 3: a fine or imprisonment not exceeding six months or both (i.e., R10 000). Sentence: Count 1: A fine of R150 000 wholly suspended for five years on certain conditions, including that an amount of R80 000 is paid to the Mpumalanga Tourism and Parks Agency – Lydenburg. On Count 2: A fine of R10 000 and on Count 3: a fine of R10 000 wholly suspended for five years on condition that the accused is not convicted of similar charges. The farm owner is to be compensated for damages in the amount of R144 000.	Comparatively: The fine of R80 000 is 7.8% of the potential maximum penalty of R1,02 million. In addition, damages were awarded to the farm owner in the amount of R144 000. Culpability: The accused admitted to committing the offences negligently in that it employed an independent contractor with instructions to ensure compliance with the relevant laws. Listed activities: This case did not include a charge for failure to obtain an environmental authorisation for activities within watercourses.

[28] Ermelo Regional Court case number ESH 8/11. Available publicly at *https://cer.org.za/virtual-library/judgments/magistrates-courts/s-v-anker-coal-and-mineral-holdings-s-a-pty-ltd.*

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
				Damages: were paid to the farm owner, R144 000, as CPA s 300(1) compensation.
16.	*S v GM Mkhulise and TR Lepota,*[29] 27 July 2012, Benoni, SH431/12 Contravening: s 26(1)(a) of the Waste Act, s 22A(5)(d) of the Medicines and Related Substances Control Act 101 of 1965 ('the Medicines Act') (among others).	Only a sentence annexure was provided for this case; the full details of the charges are unknown. However, the accused appears to have been charged with seven counts of unlawful acts in their personal capacity. According to the Judgment and Sentence Annexure, Counts 1 to 4 and 6 were withdrawn. Count 5 relates to the unlawful disposal of hazardous waste. Count 7 relates to the dispensing of medicine without a licence.	Outcome: Uncertain, according to the Judgment and Sentence Annexure, the accused were found guilty, presumably either in trial or in terms of a guilty plea. Maximum statutory penalty: The Waste Act offence could result in a maximum fine of R10 million or ten years imprisonment. Sentence: In respect of Count 5, Accused 1 was fined R200 000, or six years imprisonment, half suspended for five years on condition that the accused is not convicted of a similar contravention. Accused 2 was fined R20 000, or five years imprisonment wholly suspended for five years on condition that he is not convicted of a similar contravention. Count 7: Accused 1 was fined R50 000, or five years imprisonment, half suspended for five years on condition that he is not convicted of contravening s 22A(5)(d) of the Medicines Act.	Natural persons convicted. Comparatively: the fine imposed concerning the unlawful disposal of waste, i.e., R100 000, is 1% of the R10 million that could have been imposed. Limited information: only a sentence annexure was provided for this case.
17.	*S v JLH Serfontein (2nd accused) and City Square Trading 323 (Pty) Ltd (3rd accused),*[30] 2012, Potchefstroom Contravening: s 2 of the Animals Protection Act 71 of	Only a 'Proposed Sentence' document was provided for this case; the full details of the charges are unknown. Presumably, the charges against accused 1 (unknown) were withdrawn as accused 1 does not appear in the 'Proposed Sentence' document. Accused 2 appears to have	Outcome: Uncertain, it is assumed that the accused pleaded guilty, and the prosecution proposed a sentence. Maximum statutory penalty: The Waste Act offence could result in a maximum fine of	Comparatively: Accused 2's sentences were wholly suspended on certain conditions, and he did not need to pay a fine. The fine imposed on Accused 3, concerning the environmental law offences, i.e., R40 000, is 0.267% of the

[29] Benoni Regional Court case number SH431/12.
[30] Potchefstroom Regional unknown Court case number.

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
	1962, s 26(1) of the Waste Act, s 24F(1) of NEMA.	been prosecuted personally or possibly as a director or employee of Accused 3. Based on the 'Proposed Sentence' document, the accused were charged with contravening the Animals Protection Act 71 of 1962, s 26 of the Waste Act and s 24F of NEMA. Five other charges were withdrawn.	R10 million. The NEMA offence at the time could result in a fine of R5 million. Sentence: The proposed sentence contains the following: Count 1: Accused 3 is sentenced for contravening s 2 of the Animal Protection Act to a fine of R1 million, suspended for three years. Accused 3 was ordered to pay R5 000 to the SPCA. Count 2: Accused 3 was sentenced to a R80 000 fine, R40 000 was suspended for three years on the condition that the accused is not convicted for a similar offence. Count 3: Accused 3 was sentenced to a fine of R10 000 suspended for three years on the condition that the accused is not convicted for a similar offence.	R15 million that could have been imposed. Limited information: only a 'proposed sentence' document was provided.
18.	*S v Golfview Mining,*[31] 3 May 2013, Ermelo, 462/04/2009 // ESH 82/11 Contravening: ss 28(14) and 24F of NEMA, s 151 of the National Water Act.	Golfview Mining was accused of wrongfully and negligently committing acts or omissions that significantly affect the environment. It was accused of mining in a wetland and diverting a watercourse with inadequate pollution control from March 2009 to August 2010 (Count 1). It was also accused of wrongfully and negligently using water otherwise than as permitted under the National Water Act (Count 2). In addition, it undertook two listed activities under NEMA without an environmental authorisation (Count 3).	Outcome: s 105A agreement, i.e., guilty plea. Maximum statutory penalty: The NEMA offences at the time could result in a maximum fine of R1 million for the s 28(14) offence in count 1, or R5 million for commencing with a listed activity without authorisation (count 3). The National Water Act offence could result in a maximum fine of R100 000.[32] Sentence: Counts 1 – 3 were taken together for purposes of the sentence. The accused was sentenced to a R 1 million fine,	Comparatively: The fine of R3 million is 49% of the maximum potential fine of R6,1 million. Culpability: The accused admitted to committing the offences negligently in that it employed an independent contractor with instructions to ensure compliance with the relevant laws. Listed activities: Two Listed activity contraventions were treated as a consolidated charge. Similarly, two

[31] Ermelo Regional Court case number ESH 82/11 available at: *https://cer.org.za/virtual-library/judgments/magistrates-courts/s-v-golfview-mining-pty-ltd*.

[32] The Adjustment of Fines Act s 1(1)(a) tread with s 92(1)(b) of the Magistrates Court Act which provides that a district court (i.e., Where the court is not the court of a regional division) can impose a sentence of a sentence of imprisonment for a period not exceeding three years, and a regional court can impose imprisonment not exceeding 15 years. GN no. 1411 of 30 October 1998 determines that the fine a court can impose is 'R60,000 where the court is not the court of a regional division, and 300 000 where the court is the court of a regional division'.

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
			suspended for five years provided the accused was not convicted of similar offences. In addition, a specialist rehabilitation report was required to which the accused had to comply. Furthermore, the following payments had to be made in terms of s 34(3)(b) of NEMA: R 1 million be paid towards the Water Research Council (a research institution), R 1 million be paid towards the Environmental Empowerment Services of MDEDET', and R 1 million be paid toward the Mpumalanga Tourism and Parks Agency – Lydenburg Aquatic Services.	water uses were treated as a consolidated charge. Additional liability: The R3 million fine the accused had to pay was imposed in terms of NEMA s 34(3)(b).
19.	*S v Nkomati Anthracite,*[33] 28 Aug 2013, Nelspruit, SH 412/13 Contravening: s 24F of NEMA and s 151(1)(a) of the National Water Act.	Nkomati Anthracite was accused of undertaking several activities unlawfully from 2010 to May 2011. It was accused of dredging, excavating, infilling, and removing soil, sand or rock exceeding five cubic metres from a stream (Count 1). It was also accused of removing indigenous vegetation on three hectares (Count 2). It also constructed a road wider than four metres (Count 3). It constructed facilities that require a permit or licence in terms of waste laws (Count 4). It diverted the flow of water in a watercourse (Count 5). It disposed of waste in a manner that may detrimentally impact a water resource (Count 6). It altered the characteristics of	Outcome: s 105A agreement, i.e., guilty plea. Maximum statutory penalty: The NEMA offences could result in a potential maximum fine of R5 million for commencing with a listed activity without authorisation. The National Water Act offences could each result in a penalty of R 100 000.[34] Sentence: Counts 1 – 8 were taken together. The accused was ordered to pay a R1 million fine, suspended on the condition that the same offences are not committed again. The accused had to pay a fine of R4 million (in terms of s 34 of NEMA) payable to three different institutions and was ordered to conduct rehabilitation. In mitigation, it was	Comparatively: the fine to be paid was R4 million, which is 19.6% of the maximum of R20,4 million. Listed activities: Four listed activities and four water uses were each listed as separate criminal charges. Additional liability: The R3 million fine the accused had to pay was imposed in terms of NEMA s 34(3)(b). Culpability: guilty plea.

[33] Nelspruit Regional Court case number SH 412/13 available at: *https://cer.org.za/virtual-library/judgments/magistrates-courts/s-v-nkomati-anthracite-pty-ltd*

[34] The Adjustment of Fines Act s 1(1)(a) tread with s 92(1)(b) of the Magistrates Court Act which provides that a district court (i.e., Where the court is not the court of a regional division) can impose a sentence of a sentence of imprisonment for a period not exceeding three years, and a regional court can impose imprisonment not exceeding 15 years. GN no. 1411 of 30 October 1998 determines that the fine a court can impose is 'R60,000 where the court is not the court of a regional division, and 300 000 where the court is the court of a regional division'.

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
		a watercourse (Count 7) and stored water without approval (Count 8).	raised that mining operations were conducted from the 1980s. There was new facility ownership in 2007, and an exceptionally low anticipated rectification s 24G fine of R1 000 appears to have been payable.	
20.	*S v Ganter Scrapmetals CC, PE Bellinghan & JPH J van Vuuren,*[35] 2013, East London, A1562/2013 Contravening: ss 26(1)(a), 26(1)(b) and 20(b) of the Waste Act.	The three accused, an entity and its two members, were charged with contraventions of the Waste Act. They conducted a scrap metal business without authorisation; hazardous wastes were unlawfully stored on the premises and caused pollution. It appears that the business was conducted from 2005 and that authorities visited the property in March 2011 after receiving complaints. The charges relate to unlawful conduct between July 2009 to November 2011.	Outcome: s 105A agreement, i.e., guilty plea. Maximum statutory penalty: R10 million for each of the three charges. Sentence: Accused one was fined R50 000 wholly suspended for five years on certain conditions, including remediation. Accused 2 and 3 each received a suspended fine of R40 000 on the same conditions as for Accused 1.	Natural persons were also convicted. Comparatively: The monetary penalties were suspended because of the accused's financial position. Thus a 0% of the potential maximum statutory fine. They were ordered to remedy the pollution. Culpability: All three accused pleaded guilty. Splitting of charges and duplication of conviction: All three charges related to the same waste disposal act, during the same period, which were not authorised (ss 20(b) and 26(1)(a)), and which caused environmental damage (s 26(1)(b)). A single sentence was imposed for all three charges. Charges: the s 105A agreement states that charge 3 against the accused was that they did not have a Waste Management Licence (required under the Waste Act) from 1 July 2009. However, it appears as if they conducted the business before that, which raises whether it was not a transgression under ECA. It is also

[35] East London District Court case number A1562/2013.

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
				unclear why the charge sheet did not list pollution and degradation-related offences, i.e., s 28 of NEMA.
21.	*S v NM Selby,*[36] 17 Oct 2013, Eerstehoek, SHL131/12 Contravening: s 24F(1) of NEMA.	The documents received for this case are limited to a one-page SAP69 form containing limited particulars of the offence and sentence. Full details are unknown, as the charge sheet was not provided. However, the contravention appears to have taken place on 14 September 2011. The accused appears to be an individual accused in his personal capacity. Before the criminal investigation, the accused received a compliance notice in terms of s 31N of NEMA. [37]	Outcome: the trial started with the accused pleading not guilty, but he later changed his plea to guilty.[38] Maximum statutory penalty: The NEMA offences could result in a maximum fine of R5 million or ten years imprisonment for commencing a listed activity without authorisation. Sentence: The accused was sentenced to undergo five years imprisonment wholly suspended for five years on condition that the accused is not convicted for contravening s 24F(1) of NEMA in that time.	Natural person convicted. Comparatively: The sentence did not contain any monetary fine (i.e., 0% of the possible maximum statutory penalty). Presumably, it was unaffordable for the accused. The imprisonment imposed was wholly suspended. Culpability: the accused appeared to have been warned by a pre-compliance notice. Persistent non-compliance may indicate culpability. Limited information: only a SAP69 form was provided.
22.	*S v UNICA Iron Steel (Pty) Ltd,*[39] Dec 2013, Temba, E01/14 Contravening: s 24F of NEMA; ss 20 and 26 of the Waste Act.	UNICA Steel commenced with listed activities in 2007 without an environmental authorisation. It allegedly undertook GNR 386 activity 25 of expanding existing facilities (Count 1). It also undertook GNR 386 activity 1(e) constructing facilities without emissions, pollution, effluent, or waste approval (Count 2). It constructed facilities for the handling, temporary storage or treatment of waste with a capacity of 50 tons or more	Outcome: s 105A agreement, i.e., guilty plea. Maximum statutory penalty: Counts 1-3 all have a potential maximum fine of R5 million. The two Waste Act offences could each result in a maximum fine of R10 million. Sentence: Counts 1 - 5 were taken together and the accused was sentenced to a fine of R5 million, of which half was suspended for five years on the condition that the accused	Comparatively: The total fine of R5,5 million is 15,7% of the maximum of R35 million (including the s 34 NEMA additional fine). If counts 4 and 5 were not split, this could potentially be 22%. Culpability: The accused was issued pre-compliance and compliance notices. Notwithstanding, it appeared that the activities persisted, indicating

[36] Eerstehoek Regional Court case number SHL131/2012.
[37] Based on verbal information received during a research interview with a prosecutor.
[38] Based on verbal information received during a research interview with a prosecutor.
[39] Temba Regional Court case number E01/14, available at: *https://cer.org.za/virtual-library/judgments/magistrates-courts/s-v-unica-iron-and-steel-pty-ltd*

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
		(activity 1(f) of GNR 386) (Count 3). It undertook a waste management activity without a licence contravening s 20 of the Waste Act (Count 4). It allowed unauthorised disposal of waste in contravention of s 26 of the Waste Act (Count 5).	was not convicted of similar offences. Part of the remedial measures the accused needed to undertake included paying R3 million to GDARD. The accused applied for rectification in terms of s 24G of NEMA and paid an administrative fine of R 300 000.	intentional wrongdoing, which can also be deduced from its own guilty plea in the s 105A agreement. Listed activities: Three listed activities were each listed as separate criminal charges. Splitting of charges and duplication of conviction: Counts 4 and 5 potentially relate to the same facts, although this is not clear from the s 105A agreement. A single sentence was imposed. Additional liability: The R3 million fine the accused had to pay was imposed in terms of NEMA s 34(3)(b). Section 24G fine: In the s 105A agreement, it stated, as a mitigating factor, that the accused paid a s 24G fine of R300 000. It does not state when the accused submitted a s 24G rectification application. However, presumably, this was after receiving a compliance notice on 29 May 2013. At that stage, however, it seems a criminal investigation had already commenced. The s 105A agreement was entered into on 13 December 2013. On the first court appearance on 6 January 2014, it was accepted. The accused was sentenced according to the agreement. At this point, a s 24G fine had already been paid. Usually, if criminal proceedings are pending, authorities will not process a s 24G application until the criminal matter has been

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
				concluded, as provided in s 24G of NEMA.
23.	*S v Hanste (Pty) Ltd,*[40] 31 March 2014, Pretoria North, SH2/172/11 Contravening: not apparent from the sentencing document.	Only a sentence document was provided. The full details of the charge are unknown.	Outcome: uncertain, presumably trial, or guilty plea. Maximum statutory penalty: cannot determine, charge not available. Sentence: According to the sentencing document provided, accused no 4 was sentenced to pay a fine of R1 million in instalments to DEA.	Comparatively: It is impossible to determine the fine in comparison to the maximum statutory penalty as the details of the criminal charge, including the provision contravened, are not available. Additional liability: It appears that the R1 million fine, payable to DEA, was imposed in terms of NEMA s 34(3)(b). Limited information: only a sentence document was provided.
24.	*S v York Timbers,*[41] 22 Aug 2014 / 4 April 2013, Nelspruit: SH 865/10, and 2015 (3) SA 122 (GP) Contravening: ss 20, 21 and 26 of ECA, s 24F of NEMA.	York Timbers owns pine plantations and operates a sawmill and plywood plant in Mpumalanga. It was charged with constructing a road without an environmental authorisation (during 27 June 2008 and August 2008) (Count 8) to transport timber from plantations and unlawfully disposing of wood ash at a facility without a permit (Count 3). York Timbers pleaded not guilty on count 3 and guilty on count 8. The remaining counts were withdrawn.	Outcome: Guilty plea on Count 8 / POCA confiscation proceedings / Appeal and review Maximum statutory penalty: Count 8: potential maximum penalty of a fine not exceeding R5 million. Sentence: A fine of R180 000 and POCA confiscation order including punitive costs. Both orders were appealed.[43] The confiscation order was set aside on 18 August 2014.[44]	Comparatively: The fine of R180 000 equates to 3,6% of the R5 million maximum prescribed penalty. POCA: A POCA confiscation order of R450 000 was later set aside on review. Challenges: The challenge regarding the comprehension of new and ever-changing environmental legislation by judicial officials is illustrated in this case. At the time, s 24G had been recently published and applied where a person admitted its unlawfulness. It is

[40] Pretoria North Regional Court case number SH2/172/11.
[41] Nelspruit Regional Court case number SH 865/2010 at *https://cer.org.za/virtual-library/judgments/high-courts/national-director-of-public-prosecutions-v-york-timbers-limited*
[43] See paras 12 and 13 on p16 and para 37 on p37 of the judgment in the POCA appeal proceedings under case number A626/2013 in the Gauteng Division, Pretoria.
[44] *York Timbers Proprietary Limited v National Director of Public Prosecutions* (A626/2013) [2014] ZAGPPHC 641; 2015 (1) SACR 384 (GP); 2015 (3) SA 122 (GP) (22 August 2014).

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
		The court acquitted the accused on Count 3 because '…Evidence before this court is that at the time when criminal actions were instituted, s 26 of Act 73 of 1989 was repealed by Act 59 of 2008'.[42]		understandable in the circumstances why York Timbers opted to follow the usual application route, at this time, although it was not available to it. There are no mechanisms for a person who has no intent to transgress the law and inadvertently commences with a listed activity without authorisation to rectify his actions without admitting criminal liability. The accused was acquitted on one count because of how the court interpreted the transition from the waste provisions of ECA to the Waste Act. The prosecutions should have sought leave to amend the charge to refer to the latter section as well. The offence did not cease to exist; a new law merely overtook it. This illustrates that the transitional or repeal provisions in environmental laws are not always clear and create difficulty for environmental prosecutions. Although sections of ECA may have been repealed, the offence was still an offence committed at the time s 20 was still in force, but which endured in law through s 20 of the Waste Act. The prosecutions should have sought leave to amend the charge to refer to the latter section as well. However, the offence did not cease to exist, a new law merely overtook it. This illustrates that the transitional or repeal provisions in environmental laws are not always clear and create

[42] See page 49 of the typed transcript for case number SH 865/10 at *https://cer.org.za/virtual-library/judgments/high-courts/national-director-of-public-prosecutions-v-york-timbers-limited*

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
				difficulty for environmental prosecutions. Culpability: In the sentencing proceedings, the defence raised various mitigating factors, including that there was no significant impact relating to the widening of an existing road, that the listed activity the accused was pleading guilty to was (after 2010) no longer listed, and the accused would not have required authorisation for that activity and would not in today's terms have been guilty of an offence. Upon realising the commencement of a listed activity, albeit due to the eagerness of a contractor, the accused stopped the activity and applied for authorisation. The accused's blameworthiness or culpability in the circumstances appears limited. Whether this case is the best demonstration of a successful prosecution is questionable, considering that the accused was only found guilty on a charge to which it pleaded guilty. Further, it is questionable, whether considering all the challenges faced by the prosecution in proving a case like this, the accused could have been convicted if the matter had gone to trial had the accused not pleaded guilty on count 8.

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
25.	*S v Samancor Chrome Ltd,*[45] 5 Nov 2014, Lydenburg, SHL72/2012 Contravening: ss 20(1)(a) and 20(6) of the ECA, s 151 of the National Water Act.	Samancor's Tubatse Mine/Steelpoort Ferrochrome Plant was charged with unlawfully operating and establishing a waste disposal site from Aug 1997 to March 2008 (Count 1); and disposing of dust from its baghouse at a site without a permit, from August 1997 to February 2005 (Count 2). (Count 3 related to an act which pollutes or is likely to pollute a water resource, s 151(1)(i) of the National Water Act (count 3 was withdrawn).	Outcome: s 105A agreement, i.e., guilty plea. Maximum statutory penalty: Count 1 and 2 were both transgressions of s 20 of ECA, and offences in terms of s 29(4), at the time, which between 9 June 1989 and 18 September 2009, could result in a maximum penalty under ECA of R100 000.[46] Sentence: Counts 1 and 2 were taken together for purposes of the sentence, and the accused was sentenced to a fine of R200 000. In terms of s 34(3), payment of R700 000 to the DEA to develop initiatives for the Steelpoort Primary School. An amount of R 1 million to the DEA EMIs for the execution of their duties. A further R100 000 was incurred for costs incurred for the prosecution to the DEA.	Comparatively: The maximum penalty under the ECA when the offences were committed was R200 000, which was the fine amount agreed to in the s 105A agreement. The additional amounts agreed to total R1,8 million. Section 34(3)(a) of NEMA (which commenced on 29 January 1999) was invoked in terms of which, when a person convicted of a Schedule 3 offence, can incur further criminal liability.[47] The accused appears to have paid ten times what they should have. If counts 1 and 2 were combined, the maximum penalty would have been less. Additional liability: The accused agreed to pay a total fine of R2 million (R1,7 million to DEA in terms of NEMA s 34(3), R200 000 to the clerk for the offences, and R100 000 to the NPA for prosecution costs in terms of s 34(4). Culpability: guilty plea. It appears that the unlawful activities were undertaken or mandated by previous owners of the business but continued under the new ownership. Splitting of charges and duplication of conviction: Counts 1 and 2 relate to the operation of a waste disposal site

[45] Lydenburg Regional Court case number SHL 472/2012, at:
https://www.environment.gov.za/sites/default/files/docs/pleaandsentenceagreement_samancortubatsi.pdf
[46] Section 29(4) of ECA.
[47] Section 34(3) of NEMA.

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
				without a permit and disposing of waste at that site. Arguably, this is the activity of operating the site and disposing of waste, where the same criminal act is undertaken simultaneously and likely has the same effect/ impact. These counts were taken together for sentencing.
26.	*S v Blue Platinum Ventures 16 (Pty) Ltd and others,*[48] 21 Nov 2014/ 19 Aug 2015, Lenyenye RN 126/13, and Gauteng Pretoria High Court Review Case No: 260/15 Contravening: s 24F of NEMA.	The documents considered for this case are limited to a transcript of the proceedings in the Magistrates court. Blue Platinum Ventures, a mining entity that manufactured and sold clay bricks, and other accused persons (directors of Blue Platinum), including Mr MS Maponya, were accused of conducting mining activities without approval. They faced fourteen charges. The precise charges are not apparent from the sentencing transcript. There appear to be other offences as the mining permit issued by DMR also seemed to have lapsed, and it is not apparent if the accused had a water use entitlement. Mr MS Maponya (the director of Blue Platinum) pleaded guilty to count 14, failure to comply with s 24F of NEMA. The prosecution withdrew the other charges.	Outcome: Guilty plea on one of fourteen charges /Judgment/ POCA/ Automatic Review. Maximum statutory penalty: The 14 charges are not apparent from the sentencing transcript. The transcript of the sentencing proceeding refers to a maximum sentence of R5 million for commencing listed activities without a NEMA environmental authorisation. Sentence: Five years imprisonment suspended for five years provided that the accused does not commit a similar offence, and on condition that the accused rehabilitates all the areas which were damaged by these mining activities to wit 1) Brickyard area, 2) Kghoshi mining pit, 3) Hilltop mining pit, 4) Hilltop mining pit 2, 5) Hilltop above the brickworks. The rehabilitation process must have been completed on or before 30 April 2014. A confiscation order was also sought and granted by the court on 21 November 2014.	Natural persons convicted. Comparatively: The accused was not ordered to pay any fine (i.e., 0% of the maximum fine of R5 million) due to the factors considered by the court in the sentencing proceedings but was ordered to rehabilitate the affected areas. Culpability: The accused had experts who applied for licences and authorisations, so he would have known he could not commence without these,[49] which may indicate intentional wrongdoing. POCA: A POCA confiscation order was granted, and the accused were ordered to pay R200 000 to the DEA EMIs in terms of s 30 of POCA. Listed activities: Fourteen charges are not apparent from the transcript, only one conviction of NEMA s 24F

[48] Lenyenye Regional Court case number: RN 126/13 at: *https://cer.org.za/virtual-library/judgments/magistrates-courts/s-v-blue-platinum-ventures-16-pty-ltd-and-others*
[49] Ibid p 5 of the transcript.

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
			The accused (defendants) were ordered to pay R 200 000 to DEA in terms of s 30 of the Prevention of Organised Crime Act 121 of 1998 ('POCA'). In the Automatic Review to the High Court, the issue of accused no 1 (Blue Platinum's) sentence was clarified (as this was not clear in the judgment by the Regional Magistrate) as only Mr Maponya was sentenced. The matter was remitted back to the regional court for the correction to be made. In the automatic review judgment, it was noted that Mr Maponya had not complied with the requirements of the suspended sentence.	Limited information: the transcript does not include the charges and details thereof.
27.	*S v Harrismith Galvanizing and Steel (Pty) Ltd and K Rupmarain, A Rupmarain, R Sewdass, K Rupmarain,*[50] 30 Jan 2015, Harrismith Contravening: NEMA (section unknown).	The documents received for this case are limited to a one-page SAP 69 form for each of the accused containing limited particulars of the offence and sentence and a one-page sentence annexure. From 2005 to 2010, the accused contravened a provision of NEMA.	Outcome: uncertain, presumably trial, or guilty plea. Maximum statutory penalty: unknown due to limited information. Sentence: Accused 1 (presumably the business entity) was sentenced to a fine of R100 000 wholly suspended for three years on condition that it does not contravene any provisions of NEMA or any applicable environmental law. Accused 2 to 5 were fined (on all counts taken together) to R20 000 each or one year imprisonment. A further fine of R300 000 or five years imprisonment was imposed in terms of s 276(1)(b) of the CPA, wholly suspended for five years provided that each accused is	Natural persons convicted. Comparatively: unknown because of lack of information. It appears that four individuals were fined R20 000 each, which is a low fine compared to any of the potential maximum penalties in NEMA. Limited information: only a SAP69 form and sentence annexure were provided.

[50] Harrismith Regional Court case number HSH91/12.

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
			not convicted of contravening the NEMA or legislation relating to the environment.	
28.	*S v MJ Lourens*[51] 26 March 2015, SH36/12 Contravening: s 22 of ECA, s 20 of the Waste Act, s 24F of NEMA, s 151(1)(a) of the National Water Act.	The documents received for this case are limited to a sentence annexure, and details regarding the charges are unknown. The accused was charged with contravening s 22 of ECA (Count 1), s 20 of the Waste Act (Count 2 and 3), s 24F of NEMA (Count 4), s 151(1)(a) of the National Water Act (Count 5). The facts giving rise to these charges are unknown.	Outcome: uncertain, presumably trial, or guilty plea. Maximum statutory penalty: The time at which the offences were committed is not clear from the sentence annexure provided. The maximum potential fines under each of these laws could have been, based on the transgressions likely being committed pre-December 2013 (based on the date used in the case number SH36/12): ECA: R100 000; NEMA: R5 million; the Waste Act: R10 million and the National Water Act: R100 000. The potential total maximum penalty imposed could have totalled R15,2 million. Sentence: The accused was fined R100 000, or two months imprisonment (Count 1); R100 000, or two months imprisonment (on Counts 2 and 3); R3 million, or three years imprisonment suspended for five years (Count 4); R100 000, or two months imprisonment (Count 5). The accused's sentence was wholly suspended for five years on the condition that the accused is not convicted of a similar crime. In respect of Count 4, the accused was ordered to undertake rehabilitation.	Natural persons convicted. Comparatively: The accused was fined a total amount of R3,4 million, but it was wholly suspended. Limited information: only a sentence annexure was provided.

[51] Court unknown.

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
29.	*S v Bosveld Phosphates (Pty)*[52]*Ltd,* 28 July 2015, Phalaborwa, Cas 5/01/2014 Contravening: s 49A(1)(e) of NEMA and s 151(1)(a) of the National Water Act.	The documents received for this case are limited to an EMI affidavit in support of the s 105A agreement and information in the public domain, including a media statement of 6 Aug 2015. Between December 2013 and March 2014, the accused caused the release of water containing polluted substances into the Selati River.[53]	Outcome: s 105A agreement – guilty Maximum statutory penalty: For the NEMA offence, the maximum possible fine would have been between R5 million and R10 million. For the National Water Act offence, the maximum fine was R100 000. Sentence: The Accused was fined R1 million, for count 1, suspended for three years on condition that the accused is not convicted of contravening a similar crime; and R100 000, for count 2, also suspended for three years on condition that the accused is not convicted of a similar crime. In terms of NEMA s 34, the accused also had to pay a fine of R1,45 million to DEA.	Comparatively: The accused had to pay a fine of R1,45 million, 14% of R10,1 million. Additional liability: The accused agreed to pay R1,45 million to DEA in terms of NEMA s 34(3). Culpability: guilty plea, limited information available. Limited information: only an EMI affidavit was received for this matter. Charges: The accused's unlawful act appears to be an unlawful discharge into a water resource.
30.	*S v Rob Fonto*[54] 20 Jan 2016, Vereeniging, RC40/15 Contravening: s 20 of the ECA, ss 20(b), 26(1)(b), 16(1)(c) and 16(1)(f) of the Waste Act.	The Accused was charged with committing the following offences from 2008 to July 2009: burying containers containing waste chemicals, conducting a waste disposal site without a permit (count 1), disposing of waste on land without a licence (Count 2) not ensuring environmentally sound disposal; disposing of waste in a manner likely to cause pollution (Count 3); failure to take reasonable measures to ensure waste is treated and disposed of in a lawful manner (Count 4), and failing to prevent waste	Outcome: s 105A agreement, i.e., guilty plea to counts 1 to 4. Maximum statutory penalty: The maximum penalties for the four counts are stated in the charge sheet as being R10 million for the three Waste Act offences and R5 million for the ECA offence. Sentence: Counts 1 to 4 were joined for purposes of sentencing. The Accused was fined R400 000, or eighteen months imprisonment, half suspended for three years on the condition that the accused is not	Natural persons convicted. Comparatively: The fine imposed (including the NEMA s 34 portion) of R200 000 is 0.6% of the maximum statutory penalty of R35 million. Culpability: The accused was aware of the correct disposal method, which he utilised previously, and his acts were intentional.[55]

[52] Phalaborwa Regional Court case number 5/01/2014.
[53] DFFE 'Bosveld Phosphate (Pty) Ltd found guilty for polluting the Sepati River' 6 August 2015 available at: *https://www.environment.gov.za/mediarelease/bosveldphosphateptyltd_foundguilty*
[54] Vereeniging Regional Court case number RC40/15.
[55] Para 20 on p8 of the s 105A agreement.

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
		being used for unauthorised purposes (Count 5). The s 105A agreement was entered into for Counts 1 - 4.	convicted of s 20(1) of the Waste Act. In addition, in terms of s 34(3) of NEMA, the accused had to pay R200 000 to DEA.	Additional liability: The accused agreed to pay R200 000 to DEA in terms of NEMA s 34(3). Splitting of charges and duplication of conviction: Counts 2 - 4 appear to relate to the same disposal of waste yet resulted in charges relating to the failure to operate with a licence, to take reasonable measures to ensure lawfulness and using waste for an unauthorised purpose. Substantively, these are the same criminal activities undertaken simultaneously and with the same effect or impact. All counts were taken together for sentencing.
31.	*S v Samancor Manganese (Pty) Ltd, AD Marx, R Moodley, RJ Langford, R Govender*[56] July 2016 Vereeniging RC217/15 Contravening: s 67(1)(h) of the Waste Act, s 51(1)(e) of the Air Quality Act	Samancor was charged with various offences regarding the Metalloys processing plant in Meyerton, constructed in 1954- before the promulgation of many environmental laws. It was charged with seventeen charges regarding the failure to comply with conditions across three waste management licences. It was also charged with failing to comply with a condition of its atmospheric emissions licence. It appears that from a total of approximately 46 charges, the accused pleaded guilty to eighteen of them.	Outcome: s 105A agreement, i.e., guilty plea. Maximum statutory penalty: the failure to comply with waste management licence conditions could be subject to a maximum fine of R10 million for each transgression. The maximum penalty for failing to comply with the condition of an atmospheric emissions licence is R5 million. Sentence: Regarding the counts to which the accused pleaded guilty, it was sentenced to a fine of R2 million, of which R500 000 was suspended for five years on condition that the accused is not convicted of similar offences.	Comparability: Regarding the eighteen charges to which Samancor pleaded guilty, the potential maximum fine that could have been imposed is R175 million. However, considering the nature of these transgressions and that many of the conditions non-compliance would not result in a direct environmental impact, obtaining such a high fine appears highly unlikely and would be entirely disproportionate. The R3 million the accused agreed to pay is 1.7% of the total. Additional liability: A R1,5 million fine was payable to DEA DEA in terms of NEMA s 34(3).

[56] Vereeniging Regional Court case number RC217/15.

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
				Culpability: Samancor pleaded guilty. It is unclear whether it had rectified these contraventions and what environmental impact the specific contraventions had. Some of the offences in respect of which it pleaded to appear to be easily rectified and do not have direct environmental impacts. Splitting of charges and duplication of convictions: Arguably, the contravention of each different licence condition constitute separate criminal acts undertaken at separate times, but the impact of each must be considered. All the counts were taken together for sentencing.
32.	*S v Die Straat Trust*[57] 23 March 2017, Worcester, 3WRC2/2017 Contravening: s 151(1)(a), (j) of the National Water Act, Regulation 3(b)(i) of the Water Use Registration Regulations.	Die Straat Trust, and one of its Trustees was accused of: conducting unlawful water use in February 2015 by excavating soil from the Breederiver, which impeded and diverted the flow of water in a watercourse or altered its beds and banks (Count 1); failing to register a water use (Count 2); detrimentally affecting a water resource by excavating soil and constructing a road (Counts 3 and 4).	Outcome: s 105A agreement, i.e., guilty plea. The charges against Mr DPH Jordaan were withdrawn. Maximum statutory penalty: Counts 1-4 are subject to a similar maximum penalty of R 200 000. Sentence: Counts 1 to 4 were taken together. The accused was fined R 150 000, which was suspended for five years provided that the accused does not commit similar offences. In addition, the rehabilitation and rectification of the activities must be completed.	Comparatively: The fine to be paid was 0% of the maximum of R 800 000. The parties may have agreed to suspend the fine because the costs incurred for the rehabilitation to date were R 250 000, and more would likely be incurred for completion. Culpability: guilty plea and according to the s 105A agreement, the accused knew what he was doing was wrong. Disproportional penalties: Undertaking a water use without a licence or polluting or detrimentally impacting a water resource or water course appears

[57] Worcester Regional Court case number 3WRC2/2017 at: *https://cer.org.za/virtual-library/judgments/magistrates-courts/s-v-die-straat-trust-plea-and-sentence-agreement*

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
				prima facie more serious than the failure to register a water use.[58] Splitting of charges and duplication of convictions: Arguably, counts 1, 3 and 4 relate to the same criminal act, undertaken simultaneously and has the same impact/effect. All counts were taken together for sentencing.
33.	*S v Groenrivier Eiendomme (Pty) Ltd and Pieterse,*[59] 18 May 2017, Worcester, WSH 47/2017 Contravening: ss 28 and 24F of NEMA.	Groenrivier Eiendomme and JW Pieterse (as a director of the former) were accused of causing significant pollution or environmental degradation by clearing endangered vegetation in Sept 2014 (Count 1) and constructing a bridge within a watercourse without an environmental authorisation (Count 2).	Outcome: s 105A agreement, i.e., guilty plea and the charges against accused 2 were withdrawn. Maximum statutory penalty: both counts could have each resulted in a R10 million fine. Sentence: In respect of each count, the accused one was fined R200 000, suspended subject to the accused applying for rectification in terms of s 24G of NEMA.	Comparatively: The fine to be paid was 0% of the maximum of R20 million. The parties may have agreed to suspend the fine because the accused had to apply for rectification in terms of s 24G of NEMA and may still be ordered to pay an administrative fine. Listed activities: There are two charges for two separate listed activities (but no charges for related water use). Charges: If the accused constructed a bridge within close proximity to a watercourse, water use under the National Water Act is likely also applicable. It is unclear why this was not an additional charge in the plea and sentence agreement, but it may have been withdrawn. Culpability: guilty plea and according to the s 105A agreement, the accused knew what he was doing was wrong.

[58] Regulation 13 of the Regulations requiring that a water use be registered, published in GN R1352 of 12 November 1999.

[59] Worcester Regional Court case number WSH 47/2017. Available at: *https://cer.org.za/virtual-library/judgments/magistrates-courts/s-v-groenriviereiendomme-pty-ltd-and-pieterse-plea-and-sentence-agreement*

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
34.	*S v Middleground Trading, DJ Fourie, DW Whitehorn*[60] 2017, Potchefstroom, RC66/2016 Contravening: ss 24F, 28, 31N of NEMA and s 151(1)(1)(a) of the National Water Act.	This matter was referenced in the NECER Reports for 2011/12 and the outcome in the 2017/18 report. An undated copy of the judgment was received. Three accused were charged with undertaking listed activities related to peat extraction, from Aug 2005 to Nov 2011, without an environmental authorisation (Counts 1 and 2). They allegedly unlawfully committed acts/omissions causing significant pollution or degradation, from 27 May 2009 onwards (Counts 3 and 4). From November 2011 to date, they allegedly failed to comply with a compliance notice (Count 5). From August 2010 to 28 November 2011, extracting peat without an environmental authorisation (Count 6); and from August 2005 to November 2011, undertaking a water use without a licence (Count 7).[61]	Outcome: Trial /Judgment – acquittal The court found that the evidence presented by the state was insufficient for a conviction. The case was discharged in terms of s 174 of the CPA.[62] Maximum statutory penalty: At the time the offences were committed, Counts 1, 2, 3, 5 and 6 could result in a R5 million fine; Count 4 to a R10 million fine; and Count 7 to a maximum fine of R100 000.	Acquittal: The court found that the accused had a requisite licence under the Conservation of Agricultural Resources Act. The state failed to prove that the accused knew wrongfulness and the required criminal intent. The accused was undertaking the activities based on a contract with Stander Veen CC, who held the CARA permit. Listed activities: Three listed activities were each listed as separate criminal charges. This case illustrates the challenges in meeting the criminal burden of proof. Sections 174 and 332 of the CPA utilised (no personal liability of directors). There were inconsistencies in the property portion numbers where activities took place and in the listing of the accused compared to the compliance notice.
35.	*S v Deva Kishorelal,*[63] 5 Feb 2018, Bronkhorstspruit, SH105/17 Contravening: ss 16(1)(e) and 26(1)(a) of the Waste Act.	Only a SAP69 form was obtained. The accused was charged with two counts: (1) contravening s 26(1)(a) of the Waste Act in that he unlawfully disposed of waste; and (2) contravened s 26(1)(e) of the Waste Act in that he failed to prevent any employee or any person under his or her supervision from contravening. These	Outcome: uncertain, trial / guilty plea Maximum statutory penalty: R10 million in respect of each offence. Sentence: Both counts were taken together for sentencing. The accused was sentenced to three years imprisonment wholly suspended	Natural person convicted. Comparatively: The fine to be paid was 0% of the maximum of R20 million. Limited information: Only a SAP 69 form was provided for this matter.

[60] Potchefstroom Regional Court case number RC66/2016.
[61] DFFE *NECER* 2017/18 at 40.
[62] Para 18 of the Judgment.
[63] Bronkhorstspruit Regional Court case number SH105/17.

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
		contraventions allegedly took place between 27 February 2016 and 8 December 2017.	for five years provided that the accused is not convicted of a similar offence.	Splitting of charges and duplication of convictions: Both counts may relate to the same criminal act, undertaken at the same time with the same impact/effect, but limited information was obtained. Both counts were taken together for sentencing.
36.	*S v John Henry Deale*[64] 23 Feb 2018, Kroonstad SHP 95/2014 Contravening: ss 26(1)(a), 20, and 16(1)(c) of the Waste Act, s 31N of NEMA.	The Accused's facility had a pyrolysis oven used to burn waste and health care risk waste stored on his premises, without authorisations, from 29 October 2012 to 25 June 2013. A Compliance Notice was issued to facilitate clean-up. The Accused was found guilty on four counts, including non-compliance with the Compliance Notice. The documents received for this case are limited to a SAP 69 form, containing limited particulars of the offence and sentence and an annexure regarding sentencing.	Outcome: uncertain, presumably trial, or guilty plea Maximum statutory penalty: Counts 1-3 a maximum penalty of R10 million each and on Count 4 a maximum penalty of R5 million. Sentence: Count 1 to 3: R3 million, or three years imprisonment, wholly suspended for 5 years on condition that the accused is not convicted of contravening ss 26(1)(a), 20 or 16(1)(c) of the Waste Act. Count 4: R 1 million, or one-year imprisonment, of which R900 000 or six months is suspended for five years provided the accused is not convicted of contravening s 31N of NEMA and that the contaminated soil is removed to the satisfaction of DEA.[65]	Natural person convicted. Comparatively: The fine imposed of R100 000 is 0.29% of the maximum statutory penalty of R35 million. The accused was ordered to conduct remediation to the satisfaction of the DEA. Limited information: only a SAP69 form and sentence annexure was provided.
37.	*S v Oil Separation Services CC, JS Lombard and another,*[66] Mokopane SH64/16 & 751/17	Information relating to this matter is sourced from the 2017/18 NECER and the POCA order. Oil Separation Services and a member thereof were accused of operating a waste	Outcome: Trial/judgment/POCA proceedings. Accused 2 (the director) was acquitted as he acted in the interest of the business of Accused 1. The court found that the accused was authorised by s 24G	Comparatively: The fine imposed of R50 000 is 0.5% of the maximum statutory penalty of R10 million for count 2.

[64] Kroonstad Regional Court case number SHP95/14.
[65] DFFE *NECER* 2017/18 at 53-54.
[66] Mokopane Regional Court case numbers SH64/16 & 751/17.

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
	Contravening: s 20 of ECA, ss 20 and 26(1)(a) of the Waste Act.	disposal site from 1996 without a permit (Count 1). It allegedly stored hazardous waste without a licence (Count 2). It allegedly stored hazardous waste in a lagoon without a licence (Count 3). It allegedly disposed of hazardous waste in a manner that is likely to cause pollution: disposing into a stormwater outlet (Count 4). It also allegedly disposed of hazardous waste in a manner likely to cause pollution (Count 5). The accused applied for a s 24G rectification for the unlawful development of a waste transfer station which LEDET granted. However, it is not apparent what administrative fine was paid in terms of s 24G.	exemption issued to him by LEDET and acquitted the accused on count 1. The Court further indicated that both Counts 2 and 3 constitute one count as they both require a licence. On Counts 4 and 5: The Court said that the EMI failed to take samples to prove that the discharged waste was hazardous. Maximum statutory penalty: Count 1: R 100 000; Counts 2 - 5: R 10 million. Sentence: Accused 1 was found guilty on Count 2 and sentenced to a fine of R 200 000, of which R 150 000 was suspended for five years on condition that it does not commit similar offences.	POCA: On 26 March 2018, a POCA confiscation order of R850 000 was granted against the accused. Listed activities: The Magistrate consolidated two charges of separate listed activities requiring a waste management licence. Section 24G**:** The court found that the accused was authorised by s 24G exemption issued to him by LEDET and acquitted the accused on count 1. Director liability: The magistrate held that the Director conducted the business on behalf of the first Accused and was not liable in his personal capacity. Discharge: The information regarding the s 174 discharge application is unclear. Limited information: information sourced from the 2017/18 NECER and a POCA order.
38.	*S v Rodeo Solve CC*[67] 3 May 2018, Camperdown, RC04/18 Contravening: ss 20(b), 21(c), 26(1)(a), 26(1)(b) of the Waste Act, and 49A(1)(e) and 49A(1)(f) of NEMA.	The accused was charged with twelve contraventions, to which he pleaded guilty. He was charged with four counts of conducting a waste management activity without a licence (Counts 1 - 4); failing to take steps to ensure waste cannot be blown away (Count 5); unauthorised disposal of waste (Count 6); disposal of waste in a manner that can cause pollution (Count 7); and five counts of unlawfully and	Outcome: s 105A agreement, i.e., guilty plea. Maximum statutory penalty: Each of the seven counts under the Waste Act is subject to a penalty of R10 million. Each of the five NEMA pollution or degradation contraventions could result in a fine of R1 million. Sentence: The counts were taken together, and the accused was fined R200 000, half of	Comparatively: The fine of R180 000 is 0.24% of the potential maximum fine that could have been imposed, i.e., R75 million. Culpability: the accused pleaded guilty to all of the charges.

[67] Camperdown Regional Court case number RC04/18.

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
		intentionally or negligently commits any act or omission which causes significant pollution or degradation of the environment or is likely to cause significant pollution or degradation of the environment (Counts 7 - 12). These contraventions occurred at different intervals from April 2012 to July 2013. The business stopped operating in 2013, and some clean-up occurred at the site as new tenants took occupation.	which was suspended for five years on condition that the accused does not commit a similar offence. In terms of NEMA s 34(4), the accused had to pay R50 000 to the new tenant for costs incurred for remediation; and R30 000 to DEA for investigation costs.	Listed activities: Four waste management activities were each listed as separate criminal charges. Additional liability: R50 000 was payable to the new tenant for costs incurred for remediation, and R30 000 to DEA for investigation costs in terms of NEMA s 34(4). Splitting of charges and duplication of conviction: The factual basis for Counts 2, 5, 6, 7, 8, and 11 appear to relate to the same underlying criminal act regarding the disposal of coal ash between April 2012 and August 2012. The coal ash disposal was treated as an activity requiring a licence under s 20(b), unlawful under ss 21(c) 26(1)(a) and 26(1)(b) of the Waste Act, and as an activity which pollutes the environment under NEMA s 49A(1)(e). In other words, there are five charges relating to the unlawful storage of coal ash. All counts were taken together for sentencing.
39.	*S v G Vyacheslav,*[68] Cape Town 2018 Contravening: s 79(1)(d) of the National Environmental Management: Integrated Coastal Management Act 24 of 2008 ('ICMA').	Discharging sewage into South African coastal waters. The accused was charged in his personal capacity as the Master of the vessel 'More Sodruzhestva'. A part of a pipe was removed for repair, and the accused failed to give instructions to the relevant crew to check the isolation valve. The isolation	Outcome: s 105A agreement, i.e., guilty plea. Maximum statutory penalties: ICMA: R5 million, Marpol Act: R500 000. Sentence: A fine of R 300 000 or 24 months imprisonment, half suspended for five years on the condition that he is not convicted of contravening other environmental law	Comparatively: The R150 000 fine imposed is 3% of the R5 million maximum statutory penalty under ICMA. Culpability: Negligence present.

[68] Cape Town Regional Court case number H/63/2018.

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
		valve was meant to prevent discharge into the ocean but failed to do so. Waste was discharged into the ocean from 18 to 19 October 2018.	provisions. The South African Maritime Safety Authority also raised various Admissions of Contravention against both the Master and the Owners of the vessel, resulting in a total penalty of R 1.7 million. [69]	Expedience: The s 105A agreement was entered into and accepted by the court within a month of the incident.
40.	*S v SA Demolishers CC*[70] 20 Nov 2018, Verulam, 1009/11/2010 Contravening: ss 26(1)(a), 26(1)(b) and 16(1)(e) of the Waste Act.	The accused, a building demolition business, was charged with disposing of waste containing asbestos unlawfully during August 2010, specifically: disposal that is not authorised (Count 1); disposal that is likely to cause pollution of the environment or harm to health and well-being (Count 2); and failing to take reasonable measures to ensure employees do not contravene the Waste Act (Count 3).	Outcome: s 105A agreement, i.e., guilty plea. Maximum statutory penalties: R10 million for each count. Sentence: A fine of R1 million, of which R800 000 was suspended for five years provided the accused is not convicted of a similar offence; and the accused had to submit a rehabilitation plan and undertake remediation.	Comparatively: The R200 000 fine imposed is 0.67% of the R30 million maximum statutory penalty under the Waste Act, but 2% if the accused was only charged with one of these offences. Culpability: Limited facts in s 105A agreement. The accused pleaded guilty. Splitting of charges and duplication of conviction: Counts 1 - 3 relate to the unlawful disposal of waste that may cause pollution during the same timeframe or as a series of the same act. A single sentence was imposed for all three charges.
41.	*Uzani Environmental Advocacy v BPSA* 2019 (5) SA 275 (GP) Contravening: s 22 read with ss 21(1) and 29(4) of ECA	Uzani Environmental Advocacy was granted leave on 29 June 2017 to institute a private prosecution against BP Southern Africa where it charged BP with 21 Counts of constructing filling stations, between May 1998 and March 2002,	Outcome: Private prosecution/trial and BP was found guilty of 17 charges. Sentence: Proceedings pending. On 15 May 2020, the Judge ordered that an enquiry in terms of s 34(3) of NEMA be held into any environmental degradation which requires	Sentence pending. First private prosecution focussing on NEMA s 24G authorisations.[71]

[69] 'International Captain convicted for dumping sewage in SA waters' Infrastructure News 26 November 2918 at: *https://infrastructurenews.co.za/2018/11/26/international-captain-convicted-for-dumping-sewage-in-sa-waters/*

[70] Verulam Regional Court case number 1009/11/2010.

[71] See Melissa Strydom A critique on privately prosecuting the holder of 'after the fact' environmental authorisations: *Uzani Environmental Advocacy CC v BP Southern 'Africa (Pty) Ltd'* (2021) 138 *SALJ* 617

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
		without environmental authorisations under ECA and in which regard BP had followed and obtained s 24G rectification approvals. BP was also charged with 21 Counts of common law fraud, which Uzani withdrew on 11 Sept 2017.	remedial measures. After these proceedings, sentencing proceedings are still to take place.	
42.	*S v Tierhoek Boerdery*[72] Jun 2019, Clanwilliam Contravening: s 24F of NEMA and s 151(1)(a) of the National Water Act.	The Clanwilliam farmer of Tierhoek Boerdery faced 11 criminal charges - six related to water, five to environmental transgressions for developing infrastructure for the off-stream storage of water. Information regarding this case is limited to what is in the public domain.[73]	Outcome: uncertain, trial/judgment – guilty Maximum statutory penalty: NEMA charges each: R10 million, National Water Act charges each: R 200 000. Sentence: According to information in the press, the farmer was fined R 3.5 million fine for unlawful water activities, R 1,25 million to be paid to the Department of Water and Sanitation, R 1,25 million to be paid to the Provincial Department of Environmental Affairs and Development Planning, and R1 million to the NPA.[74] It is not clear if these were imposed in terms of s 34 of NEMA. According to information in the 2019/20 NECER, a R100 000/three-year sentence was imposed for the National Water Act offences and R1 million/ R 750 000 for the NEMA and EIA offences.[75]	Comparatively: The R3,5 is 0.7% of the total possible maximum fine of R 51,2 million. The farmer will likely incur further costs for the rectification and remediation. Additional liability: It appears that the R3,5 million fine was payable in terms of NEMA s 34. Limited information: Information sources from media reports and the 2019/20 NECER.

[72] Staff writer 'Water users warned to respect law after farmer is fined R3.5m' *IOL* 18 June 2019 at: *https://www.iol.co.za/capetimes/news/water-users-warned-to-respect-law-after-farmer-is-fined-r35m-26588200*
[73] Ibid and DFFE *NECER* (2019/2020) 67.
[74] Ibid.
[75] DFFE *NECER* 2019/2020 at 67.

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
43.	*S v D Groenewald,*[76] 30 May 2019, Pretoria, 14/493/2018 Contravening: ss 26(1)(a) and 16(1)(c) of the Waste Act.	The accused was the director of a company placed under liquidation. Presumably, the company conducted the activities, but because of its liquidation, the director was pursued. The accused was charged with unlawfully and intentionally disposing of health care risk waste on land without a permit (Count 1) and failing to take reasonable measures to ensure that healthcare risk waste was disposed of in an environmentally sound manner (Count 2) both on 30 Match 2017.	Outcome: s 105A agreement, i.e., guilty plea. Maximum statutory penalty: R10 million for each contravention. Sentence: Counts 1 and 2 were taken together for sentencing. The accused was sentenced to a R200 000 fine or two years imprisonment, half suspended for five years provided that the accused is not convicted of a similar offence. In terms of ss 34(1) and (2) of NEMA, the accused had to pay R28 152.66 to the City of Tshwane, which was the costs of the removal and safe disposal of the Waste.	Natural person convicted, as the juristic entity is in liquidation. Comparatively: The 128 152,66 is 0.64% of the possible maximum penalty that could have been payable, but 1.2% if the accused were only charged with one of these offences. Culpability: guilty plea in s 105A, isolated incident due to financial circumstances. Additional liability: The clean-up cost of R28 152.66 was payable in terms of NEMA s 34. Splitting of charges and duplication of conviction: Counts 1 - 2 relate to the unlawful disposal of waste that may cause pollution during the same timeframe or as a series of the same act. A single sentence was imposed for all three charges.
44.	*S v Emporium Base Minerals (Pty) Ltd*[77] 25 June 2019, Germiston, 4SH100/2017 Contravening: ss 26(1)(a), (b) and (e) of the Waste Act.	The accused was charged with unlawfully and intentionally disposing of hazardous waste (Count 1) in a manner likely to cause pollution (Count 2) and failed to take reasonable measures to ensure that employees contravene the Waste Act (Count 3). This all appears to relate to the same act or series of acts conducted between November 2011 to May 2014.	Outcome: s 112(2) CPA guilty plea. Maximum statutory penalty: Sentence: Counts 1, 2 and 3 were taken together for sentencing. Eight years imprisonment, wholly suspended for five years provided the accused does not commit a similar offence, and that remediation is undertaken within five years.	Comparatively: the sentence is 0% of the possible maximum of R30 million, but remediation must be undertaken; it is unknown at what cost. Culpability: guilty plea, admitting wrongful actions. Splitting of charges and duplication of conviction: Counts 1 - 3 relate to the unlawful disposal of waste that may

[76] Pretoria Regional Court case number 14/493/2018.
[77] Germiston Regional Court case number 4SH100/17.

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
				cause pollution during the same timeframe or as a series of the same act. A single sentence was imposed for all three charges.
45.	*S v SAM Marie Consulting CC T/A Biotech SA (Pty) Ltd*[78] November 2019, Pinetown Contravening: s 20(b) of the Waste Act and ss 1 and 8(1) of the eThekwini Scheduled Trades and Occupational by-laws, 1979.	The accused was charged with storing hazardous waste in lagoons without a licence (Count 1) and recycling hazardous waste which required a licence (Count 2). These contraventions occurred between August 2017 and 6 March 2018.	Outcome: s 105A agreement, i.e., guilty plea. Maximum statutory penalty: R10 million for the Waste Act contraventions Sentence: Counts 1 – 3 were taken together for purposes of sentencing. The accused was sentenced to a R200 000 fine wholly suspended for five years on condition that the accused is not convicted of similar offences; that the accused applies for the necessary licences and pays R50 000 'compensation' to DEA in terms of s 34(3)(b) of NEMA.	Comparatively: 0.25% of a possible maximum of R20 million in terms of the Waste Act only. Listed activities: Two listed activities were each listed as separate criminal charges. Culpability: The accused was advised in 2009 by the Department of Environmental Affairs that it did not require a licence. Additional liability: Compensation of R50 000 was payable in terms of NEMA s 34.
46.	*S v E Adams*[79] 10 Dec 2019, Bloemfontein, 18/174/18 Contravening: ss 16(1)(c), 16(1)(d), 21(a), 21(b), 21(e), 67(1)(h), 16(1)(d) and 16(1)(e) of the Waste Act, various regulations within the Norms and Standards for the Storage of Waste, 2013, s 31L of NEMA.	The accused pleaded guilty to 22 charges, all relating to waste management activities, the failure to comply with licence conditions and compliance notices. This included: Count 1: failing to take reasonable measures to ensure waste is treated and disposed of lawfully (s 16(1)(c); Count 2: failing to manage waste, so it does not endanger health, the environment, or cause a nuisance (s 16(1)(d)); Count 3: storing waste in	Outcome: s 105A agreement, i.e., guilty plea. Maximum statutory penalty: R10 million for Counts 1, 2, 21, 22, 10 – 19; and R5 million for Counts 3, 4, 5, 9, 20 and 6-8. Sentence: Counts 1 - 9 were taken together and the accused sentenced to R300 000, or three years imprisonment. In addition, the accused is sentenced to two years imprisonment suspended for five years on the condition that the accused does not commit similar offences. Counts 10 - 22 were taken together and the accused	Natural person convicted. Comparatively: The fine of R600 000 is 0.33% of the possible maximum of R180 million. Culpability: guilty plea. Additional liability: The R600 000 fine was payable to DEA in terms of NEMA s 34. Splitting of charges and duplication of conviction: Counts 1 - 5 appear to possibly relate to the unlawful disposal

[78] Pinetown Regional Court unknown case number.
[79] Bloemfontein Regional Court case number 18/174/18.

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
		containers not fit for purpose (s 21(a)); Count 4; failing to take reasonable measures to prevent spillage of waste (s 21(b); Count 5: failing to prevent pollution to the environment (s 21(e)). Counts 1 - 5 all relate to acts between 3 September 2015 and 6 November 2015. Counts 6 - 8 relate to different contraventions of the Norms and Standards for the Storage of Waste, 2013, requirements regarding access control, signage, exceeding design capacity, and failing to store waste in covered containers. These counts also relate to acts between 3 September 2015 and 6 November 2015. Counts 10 – 19 relate to the failure to comply with different licence conditions (s 67(1)(h)) at different times. Counts 9 and 20 relate to the failure to comply with compliance notices issued by the authorities (NEMA s 31L) at different times. Count 21: failure to take reasonable measures to ensure waste is managed not to cause a nuisance (s 16(1)(d)). Count 22: failing to take reasonable measures to ensure employees do not contravene the Waste Act (s 16(1)(e)). Counts 1 - 9 relate to activities unlawfully undertaken in the Free State, and Counts 10 - 22 relate to activities unlawfully undertaken in Gauteng.	sentenced to R300 000, or three years imprisonment. In addition, the accused is sentenced to two years imprisonment suspended for five years on the condition that the accused does not commit similar offences. The R600 000 fine was payable to DEA in terms of NEMA s 34.	of waste, failing to take specific measures regarding such disposal, and which may cause pollution during the same timeframe, or as a series of the same act - but this is not clear from the s 105A agreement. A single sentence was imposed for these together with Counts 6 - 9.

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
47.	*S v SS Ngcobo, ML Serite & Iseewaste (Pty) Ltd*[80] 22 Jan 2020, Kempton Park Contravening: s 24(b) of the Waste Act, regulation 15(2) of the Gauteng Health care Risk Waste Regulations, 2004.	From April 2016 to January 2018, the accused unlawfully and intentionally collected hazardous waste without authorisation (Count 1) and transported such waste without authorisation (Count 2).	Outcome: s 105A agreement, i.e., guilty plea. Maximum statutory penalty: R5 million for contravening s 24(b) of the Waste Act and R100 000, or ten years imprisonment (or both); and to a fine not exceeding three times the commercial value of anything in respect of which the offence was committed. In terms of the Adjustment of Sentence: On Count 1, the two natural persons, i.e., Accused 1 and 2, each received a R100 000 sentence, or five years imprisonment, R77 500 and three years of which were suspended for five years provided that the accused were not convicted of a similar offence. On Count 2, the Accused were sentenced to R10 000, or twelve months imprisonment, suspended for five years on condition that the accused do not commit a similar offence. The accused was sentenced as follows: on Count 1, R100 000; and R10 000 on Count 2, both suspended for five years provided that the accused does not commit a similar offence.	Natural persons were convicted as directors with the juristic entity of which they were directors. Comparatively: The R22 500 Accused 1 and 2 each had to pay 0.44% of the total possible maximum fine of R5,1 million. This seems low but may be considered high based on the personal circumstances of the accused. Culpability: The accused were aware that they require authorisations, as they previously employed an authorised contractor to undertake these activities, but which contractor ceased its services, but the accused were desperate to sustain their livelihoods, as they were required to perform under a government contract.
48.	*S v RR Govender*[81] 24 Jan 2020, Durban, 41/470/2018 Contravening: ss 28(14)(b) and 24F of NEMA, ss 151(1)(j), 151(1) and (2) of the National Water Act, regulation 10(1)(a)	The accused was charged and pleaded guilty to thirteen charges, including an act or omission that is likely to affect the environment negatively (Count 1). They were accused of unlawful commencement of activity without an authorisation (Count 2); an act or omission likely to have a detrimental effect on a watercourse (Count	Outcome: s 105A agreement, i.e., guilty plea. Maximum statutory penalty: At the time, the two NEMA pollution and degradation offences were subject to a penalty of R1 million each, and the three failures to obtain authorisations, to R5 million each. The six National Water Act and Regulation	Natural persons convicted. Comparatively: The R300 000 is approximately 1.7% of the possible maximum of R17,6 million potential maximum fine. Culpability: guilty plea

[80] Kempton Park Regional Court unknown case number.
[81] Durban Regional Court case number 41/470/18.

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
	and 10(2)(b) of the Regulations on the use of water for mining and related activities aimed at the protection of water resources, 1999.	3); contravening regulations regarding the winning of sand and alluvial minerals from a watercourse or estuary (Count 4), and contravening regulation 10(1)(a) and 10(2)(b) of the Regulations on the use of water for mining and related activities aimed at the protection of water resources, 1999 (Counts 5 and 6). These six counts related to activities undertaken by the accused from January 2013 to 26 February 2013. The accused was also charged with the following counts for activities undertaken from 7 June 2013 to 3 September 2013: an act or omission which is likely to have a detrimental effect on the environment (Count 7); unlawful commencement with listed activities without authorisations (Count 8 and 9); an activity requiring a water use licence (Count 10); an act or omission that is likely to have a detrimental effect on the environment (Count 11); and contravening regulation 10(1)(a) and 10(2)(b) of the Regulations on the use of water for mining and related activities aimed at the protection of water resources, 1999 (Counts 12 and 13).	offences were subject to a penalty of R100 000 each. Sentence: Counts 1 -13 were taken together for sentencing. The accused was sentenced to a fine of R1 million, or two years imprisonment, suspended for five years provided that the accused is not convicted of similar offences. The accused was ordered to pay R300 000 to the DEA in terms of NEMA s 34(3)(a).	Listed activities: Two listed activities were listed, each as separate charges. Splitting of charges and duplication of conviction: Counts 1 - 6 appear to relate to unlawful sand mining activities undertaken on four properties during the same timeframe or as a series of the same act. Counts 7 - 13 appear to relate to unlawful sand mining activities undertaken on a further four properties, during the same timeframe or as a series of the same act. A single sentence was imposed for these together with Counts 6 – 9. Additional liability: The R300 000 fine was payable to DEA in terms of NEMA s 34.
49.	*S v Nirove South Africa (Pty) Ltd*[82] 11 Feb 2020, Motherwell, RCMW31/20 Contravening: ss 26(1)(a) and (b), 16(1)(c), and (d) of the	Limited information received. It appears that the accused was charged with various offences but convicted of contravening s 49A(1)(e) of NEMA, i.e., unlawfully, and intentionally or negligently committing any act or omission which	Outcome: uncertain - guilty plea or trial. Maximum statutory penalty: R10 million for the NEMA s 49A(1)(e) offence. Sentence: R2,5 million suspended for five years provide the accused is not convicted of	Comparatively: The sentence imposed is 0% of the potential maximum statutory penalty. Limited information: only a sentencing annexure was received for this matter.

[82] Motherwell Regional Court case number RCMW31/20.

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
	Waste Act, and s 49A(1)(e) of NEMA.	causes or is likely to cause significant pollution or degradation of the environment.	a similar offence; provides a rehabilitation plan and undertake rehabilitation.	
50.	*S v Moosa Ali and JNR Joubert*[83] 6 March 2020, Kwa Dukuza, RC201/2018 Contravening: ss 16(1)(c), 16(1)(e), 26(1)(b) and 67(1)(h) of the Waste Act, s 151(1)(j) of the National Water Act, s 49A(1)(e) of NEMA.	The accused were charged with seven charges. However, the charge sheet only lists six, as there appears to be no Count 5. The charges included: disposing contaminated liquid into a water resource (Count 1); not disposing of waste in an environmentally sound manner (Count 2); instructing employees to dispose contaminated liquid into the environment (Count 3); contravening licence conditions (Count 4); disposing contaminated liquid into a water resource which detrimentally affects or is likely to affect the water resource (Count 6); disposing of waste into a water resource which is likely to cause pollution of the environment (Count 7). These contraventions are stated as being committed between 2014 and October 2017.	Outcome: Pleaded not guilty but convicted after trial. Maximum statutory penalty: The Waste Act offences are each subject to a potential maximum penalty of R10 million. The NEMA offence is subject to a potential maximum penalty of R10 million. The National Water Act offence is subject to a potential maximum penalty of R200 000. Sentence: All counts were taken together for sentencing. The accused were each fined R1 million, or four years imprisonment, wholly suspended for five years on condition that they are not convicted of a similar offence. In addition, both accused were fined R20 000 each.	Natural persons convicted. Comparatively: The fine of R20 000 is 0.04% of the total potential maximum penalty that could have been imposed, i.e., R50,2 million. Splitting of charges and duplication of conviction: The charges appear to relate to the same two activities, i.e., the activity of disposing of contaminated liquid or disposal of waste; most of the charges relate to the former. In other words, for discharging contaminated liquid, the accused is charged under the NEMA and National Water Act pollution and degradation offences and two provisions of s 16 of the Waste Act.
51.	*S v Arcelor-Mittal South Africa Limited*[84] *(Vanderbijlpark Works)* 10 June 2020, Vereeniging SH118/19 Contravening: s 51(1)(e) of the Air Quality Act.	ArcelorMittal's Vanderbijl works and J Hattingh (an Environmental Manager) were accused of contravening the conditions of the 1st accused's AEL, in that the minimum emission threshold for H_2S was exceeded during Jan to Dec 2016 (Count 3); from Nov 2013 conducting	Outcome: s 105A agreement, i.e., guilty plea on Count 3 and Counts 1 and 2 withdrawn and all counts against accused 2 withdrawn. Maximum statutory penalty: for count 3, the maximum statutory penalty is R5 million. Sentence: The accused was sentenced to a fine of R10 000 and to pay R3 630 000 to	Comparatively: The R 3 640 000 is 72,8% of the maximum fine. This may be because the accused had spent significant amounts constructing the gas cleaning plant (R 300 million), which did not reduce H_2S as required and led to exceedances. A further R 6,5 million was spent on reducing

[83] Durban Regional Court case number RC201/18.
[84] Vereeniging Regional Court case number SH118/19.

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
		activities without an atmospheric emissions licence (Counts 1 and 2).	DEA for air quality monitoring instruments for Sedibeng Municipality, in terms of s 34(3).	H_2S levels. A new gas plant will need to be constructed at the cost of about R 1,1 billion, which the accused committed to doing. The accused cooperated with the authorities. Culpability: The accused's negligence appears limited, based on the content of the s 105A agreement. Additional liability: A R10 000 fine was imposed regarding the charge to which the accused pleaded guilty. However, an R3,63 million fine was agreed, payable to DEA in terms of NEMA s 34(3)(b).
52.	*S v Amro Natal CC, MH Amm, RE Amm, D Olivier, SI Khanyile*[85] 10 July 2020, Pinetown, RC180/20 Contravening: s 26(1)(a), 20(b), 16(1)(e) of the Waste Act	The accused admitted to conducting the following on 11 September 2014: a waste management activity without a licence (Count 3 amended to be Count 2); failing to take reasonable measures to ensure an employee does not contravene the Waste Act, i.e., unlawfully dispose of waste (Count 4 amended to be Count 3).	Outcome: s 105A agreement, i.e., guilty plea on Counts 2 and 3 Maximum statutory penalty: R10 million for each count under the Waste Act Sentence: The accused was sentenced to a fine of R100 000, of which half was suspended for five years, provided the accused was not convicted of a similar offence. The accused also incurred R32 000 in clean-up costs.	Comparatively: The R50 000 is 0.25% of the potential total of R20 million. Culpability: guilty plea by Accused 1 the juristic entity, however in paragraph 22 of the S 105A agreement, it is stated that the accused's actions were not intentional, meaning they were negligent.
53.	*S v EnviroServ Waste Management Ltd and 4 others*[86] 2020 (Durban) Contravening: s 51(1)(a) of the Air Quality Act, s 49A(1)(o) of	Enviroserv and four of its employees/directors were charged with offences regarding its Shongweni landfill site.	Outcome: s 105A agreement, i.e., guilty plea on Count 1 by Accused 1. Maximum statutory penalties: R5 million for the Air Quality Act offence (Count 1), R10 million under the Waste Act (Counts 2	Comparatively: The R 4,4 million is about 14.61% of the maximum fine of 30,04 million. Culpability: Negligence appears limited, based on the content of the

[85] Pinetown Regional Court case number RC180/20.
[86] Durban Regional Court case number 41/540/20.

No	Case Name, Date, Court, no, charge	Summary	Outcome, maximum sentence that could have been imposed, sentence.	Comment / Notable aspects
	NEMA, s 67(1)(h) of the Waste Act, and s 49A(1)(k) of NEMA	Accused 1 (of five) pleaded guilty to one of the five counts, in that, from April 2016 to January 2017, it failed to prevent the emission of offensive odour caused by activities on its premises. The accused were also charged with: failing to manage waste in a manner that does not cause a nuisance (Count 2); failing to ensure effective access control to prevent entry to its landfill site from January 2015 to January 2017 (Count 3), failed to comply with a compliance notice issued on 21 October 2016 (Count 4) furnishing false and misleading information to the EMI from 2016 to 2017 (Count 5).	and 3), R5million under NEMA (Count 4), and R40 000 for Count 5.[87] Sentence: Accused 1 was sentenced to a fine of R4 million; half was suspended for three years provided the accused was not convicted of a similar offence. Accused 1 also had to pay R1,2 million to DEA in terms of s 34(3)(b).	s 105A agreement and the accused's explanation. Additional liability: A R2 million fine was imposed relating to the charge to which the accused pleaded guilty. A further R1,2 million fine was agreed, payable to DEA in terms of NEMA s 34(3)(b).

[87] The Adjustment of Fines Act s 1(1)(a) read with s 92(1)(b) of the Magistrates Court Act read with GN 217 *GG* 37477 of 27 March 2014.

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