

Corporate self-regulation and environmental protection

by

Imraan Kaka

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Preface

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List of abbreviations

AMD	Acid Mine Drainage
APRM	African Peer Review Mechanism
JAL	Journal of African Law
LALR	Los Angeles Law Review
MPRDA	Mineral and Petroleum Resources Development Act 49 of 2008
NEMA	National Environmental Management Act 107 of 1998
NEM:AQA	National Environmental Management: Air Quality Act 34 of 2004
NEM:BA	National Environmental Management: Biodiversity Act 10 of 2004
NWA	National Water Act 36 of 1998
OECD	Organisation for Economic Co-operation and Development
SAJELP	South African Journal on Environmental Law and Policy
SAJHR	South African Journal on Human Rights
UNDP	United Nations Developmental Goals

Chapter 1

1. Introduction

1.1 Introduction and problem statement

It can be noticed from incidents, both locally and internationally, that companies cause the most serious environmental harm.¹ Two examples illustrate this. The first example is the recent devastating oil leak in the Gulf of Mexico on an oil rig owned by the British Petroleum Company (BP) which had a detrimental effect on the environment.² The second example is the problem of Acid Mine Drainage (hereafter AMD) in South Africa, caused by the mining industry.³

The Gulf of Mexico oil spill was triggered by an explosion on the Deepwater Horizon oil rig on 20 April 2010. For over three months it seemed practically impossible to stop the oil leak and as a result of this catastrophe, more than four million barrels of crude oil were released into the Gulf of Mexico. The Gulf Coast states of Florida, Louisiana, Texas, Mississippi and Alabama were all seriously affected. Following the spill, hundreds of kilometres along the Gulf Coast became polluted and many species of birds and water dwelling animals became threatened. The oil spill also affected important Gulf Coast industries including commercial fishing, shrimping, oyster farming, tourism and recreation.⁴

In South Africa AMD poses a serious problem to the environment, and has received considerable media coverage over the past few years. Acid Mine Drainage is the flow of polluted water from old mining areas, containing toxic heavy metals and radioactive particles which are dangerous to people's health, as well as to plants and animals and the environment in general.⁵

1 Kidd "Liability of corporate officers for environmental offences" 2003 *SA Public Law* 1.

2 Rubin 2010 <http://www.greenstudent.com>.

3 Anon 2011 <http://www.ngopulse.org/article/acid-mine-drainage-prolific-threat-south-africa-s-environment-and-mining-industry>.

4 Anon date unknown <http://www.oil-rig-spills.com/>.

5 Anon 2009 <http://www.earthlife.org.za/wordpress/wp-content/uploads/2009/08/pdf16-Aug09draft-AMD-Fact-sheet-no1.pdf>.

AMD on the Witwatersrand is a major problem which has been building up over many years and which has reached crisis point.⁶ The Witwatersrand Mining Basin⁷ is the area into which AMD has been flowing for many years, which water ultimately flows into the Vaal and Limpopo Rivers.⁸ The extreme variations in pH along with high toxic metal content and high toxic volumes of sulphates in the water makes for a river of death, which affects vegetation, aquatic life, bird life, animal life, and farmers and low income communities downstream who rely on the water for everyday living.⁹

Section 24 of the *Constitution of the Republic of South Africa, 1996* (hereafter the Constitution) provides that everyone has the right to an environment that is not harmful to their health or well-being and to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures, that prevent pollution, promote conservation and secure ecological sustainable development.

In South Africa the predominant mechanism of enforcing environmental law is through the use of command and control measures, such as criminal sanctions, that are imposed for failure to comply with the provisions of environmental legislation.¹⁰ The reliance on using criminal sanctions to enforce environmental law is problematic taking into consideration the inherent weaknesses within the criminal justice system, which include issues such as the burden of time and costs,¹¹ the reactive nature of criminal law, problems of proof,¹² and

6 Anon date unknown <http://www.earthlife.org.za/page-ID=584>.

7 The Witwatersrand Mining Basin consists of the Far East Basin, the West Rand Basin, the Far East Basin, KOSH (Klerksdorp, Orkney, Stilfontein and Hartbeesfontein) and the Free State gold mines. See in this regard Smit 2010 <http://www.carinsmit.co.za/blog/environmental-issues/acid-mine-drainage>.

8 Anon 2010 Acid Mine Drainage <http://www.environment.cp.za/acid-mine-drainage-amd/page-9.html>.

9 Smit 2010 <http://www.carinsmit.co.za/blog/environmental-issues/acid-mine-drainage>.

10 For a discussion of environmental legislation which creates offences and penalties see chapter 4.

11 *Feedmill Developments (Pty) Ltd v Attorney General, KwaZulu-Natal* 1998 4 ALL SA 34.

12 Kidd 2011 *Environmental Law* 271.

inexperience on the part of prosecutors to deal with aspects of environmental law.¹³

There has been considerable debate with regard to the issue of whether environmental law should be enforced through command and control measures such as criminal sanctions or whether it should be enforced through alternative civil measures such as self-regulation.¹⁴ According to Kidd,¹⁵ regard should be given to alternative measures of enforcing environmental law as opposed to using command and control mechanisms. A suitable alternative to criminal sanctions is self-regulation,¹⁶ as this alternative regulatory approach has numerous advantages, such as cost benefits, greater incentives for innovation and less responsibility on government.¹⁷

Self-regulation is the regulation of the conduct of individual organisations or groups of organisations by themselves, and entails that companies impose their own regulatory structure without any direct coercion from the relevant regulator in the particular community.¹⁸ The regulatory rules are self-specified, that means conduct is self-monitored and the rules are self-enforced, implying no external involvement or control in the regulation process and the conduct of the regulated organization.¹⁹

The main question which this research attempts to answer is whether the concept of self-regulation is a better alternative to using criminal sanctions to enforce environmental law in South Africa.

13 See chapter 4 hereunder.

14 See chapter 5 hereunder.

15 Kidd "Alternatives to the criminal sanction in the enforcement of environmental law" 2009 *SAJELP* 21.

16 See chapter 5 hereunder.

17 See chapter 5 hereunder.

18 Bartle and Vass "Self-regulation and the regulatory state a survey of policy and practice" 2005 CRI Research Report 19.

19 See chapter 5 hereunder.

1.2 Framework

Apart from this chapter, this dissertation consists of five chapters. Chapter 2 focuses on the obligation of the state to protect the environment. In this chapter the state's obligations to protect the environment are discussed in depth with reference to section 24 of the Constitution. The state's obligation to protect the environment in terms of international law will also be discussed in this chapter. Chapter 3 explains the terms "enforcement" and "compliance" in the context of environmental law. This chapter also deals with the various measures that are available to enforce environmental law.

Chapter 4 deals with the use of criminal sanctions to enforce environmental law. The use and purpose of criminal sanctions, and also the various pieces of environmental legislation that creates offences and prescribes penalties to be imposed for failure to comply with the provisions of legislation, are discussed. The advantages and disadvantages of criminal sanctions are also considered.

Chapter 5 focuses on voluntary compliance measures, in particular self-regulation. In this chapter the history of voluntary compliance measures and self-regulation is discussed. Types of voluntary compliance measures and the advantages and disadvantages of self-regulation are considered. Chapter 6 contains the final conclusion of the research.

1.3 Research method

The research method used in this study is a literature study of various sources of the law. This includes a study of books, journal articles, applicable environmental legislation, case law and internet sources.

Chapter 2

2. Obligation of the state to protect the environment

2.1 Introduction

In this chapter the state's obligation to protect the environment is discussed extensively. Firstly, the right to an environment not harmful to a person's health and well-being, as contemplated in section 24 of the Constitution, is considered. A few South African cases are discussed where the importance of environmental rights and the duty to protect the environment are dealt with. Finally, international obligations for the protection of the environment are briefly dealt with.

2.2 Constitutional obligation

The Bill of Rights is contained in chapter 2 of the Constitution. For the purpose of this research the most important is the right to an environment which is not harmful to a person's health and well-being.

The Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom.²⁰ The State is obliged to promote and protect these rights.²¹ The Bill of Rights instructs the State to use the power granted by the Constitution in a manner which does not violate any fundamental rights. All government action, as well as individual conduct and legislation which have an impact on the environment, must comply with the constitutional obligation to a healthy environment.²² Should the State violate any of these rights it would act unconstitutionally and unlawfully.²³

20 S 7(1) Constitution, 1996.

21 S 7(2) Constitution, 1996.

22 Currie and De Waal 2005 *Bill of Rights* 522.

23 Currie and De Waal 2005 *Bill of Rights* 23.

The Bill of Rights is applicable to all and binds the legislature, the executive and the judiciary.²⁴ The Bill of Rights has horizontal application which means that the enshrined rights operate horizontally between legal subjects as well as vertically between the State and individuals.²⁵

The adoption of the Constitution and the inclusion of the right to an environment not harmful to the health and well-being of individuals have brought environmental concerns to the fore. Environmental considerations are now granted appropriate recognition and respect in the administrative processes in the country.²⁶

2.2.1 Right to an environment which is not harmful

The right to an environment which is not harmful to health and well-being is protected in section 24 of the Constitution that provides:

Everyone has the right-

- (a) to an environment that is not harmful to the health or wellbeing;
- (b) and to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measure 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.

When section 24 is read with section 7(2) of the Constitution that provides that the State must respect, promote and fulfil the rights of the Bill of Rights, it becomes clear that, while everyone in South Africa must respect this right, the State has an additional duty to take positive action towards its fulfilment.

Section 24 that states that "everyone shall have a right to an environment that is not harmful to the health or wellbeing" indicates that individuals are the bearers of this right. The right to an environment which is not harmful to a person's

24 S 8(1) Constitution, 1996.

25 Currie and De Waal 2005 *Bill of Rights* 50.

26 *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 2 SA 709 (SCA) para 20.

health or well-being falls into the category of third-generation rights.²⁷ These rights are generally collective in nature and cannot be exercised by individuals, but rather by a group.²⁸

Section 24(a) contains an individual right to an environment which is not harmful to health and well-being. The right in section 24(a) is characterised by its negative phrasing, meaning that the right is to an environment which is not harmful, rather than a positive right to a healthy environment. This characterises the right as being an orthodox negative right, meaning that it enshrines a certain minimum standard and does not grant a positive right of indeterminate extent.²⁹

Section 24(b) imposes a duty on the State to take steps to protect the environment, and grants individuals a right to prevent the State from taking retrogressive measures in relation to the protection of the environment, or measures which are harmful to the environment. Section 24(b) further lists a number of positive obligations on the State, such as the duty to prevent pollution and ecological degradation. Although this section is less ambiguous than section 24(a) it does not provide any explanation regarding what these other measures are to secure ecological sustainable development.

Section 24(b) places a duty on the State to protect the environment for the benefit of present and future generations, which is to be achieved through legislation and administrative measures. The question arises whether the State also has an obligation in terms of section 24(b) to ensure that environmental law is properly enforced in South Africa, thereby granting environmental protection.

In *Government of South Africa v Grootboom*,³⁰ the court explained the meaning of the phrase "reasonable legislative and other measures" in the context of

27 These rights are also referred to as "people's rights" and include environmental rights, the right to development and the right to peace, which are normally exercised as group rights.

28 Glazewski "The environment, human rights and a new South African Constitution" 1991 SAJHR 167 and 172.

29 Glazewski "Environmental provisions in a new South African Bill of Right" 1993 JAL 177 and 180.

30 *Government of South Africa v Grootboom* 2001 1 SA 46 (CC).

section 26 of the Constitution and stated that mere legislative measures were not likely to constitute constitutional compliance. The court held that the State is obliged to achieve the intended result.³¹

In *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation and Land Affairs*,³² the court confirmed that environmental authorities had a constitutional duty to give effect to section 24. This duty included taking reasonable legislative and other measures and the application of decision-making guidelines.³³ The court emphasised that, besides being reasonable, these measures also must contribute to the progressive realisation of the right concerned.³⁴

In *Fuel Retailers Association of South Africa (Pty) Ltd v Director General of Environmental Management Mpumalanga*,³⁵ the environmental authorities' obligation to consider social, economic and environmental impacts of the proposed establishment of a petrol filling station was also dealt with. The Constitutional Court confirmed that the need to protect the environment and the need for social and economic development, as well as their impact on decisions affecting the environmental authorities in this regard, are important constitutional questions.³⁶ The court further stated that the role of the courts is important in the context of protecting the environment and giving effect to the principle of sustainable development, as its protection is vital to the enjoyment of other rights contained in the Bill of Rights.³⁷

31 *Government of South Africa v Grootboom* para 42 b.

32 *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation and Land Affairs* 2004 5 SA 124 (W).

33 *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation and Land Affairs* para 143 B–C/D.

34 *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation and Land Affairs* para 160 G.

35 *Fuel Retailers Association of South Africa (Pty) Ltd v Director General of Environmental Management Mpumalanga* 2007 10 BCLR 1059 (CC).

36 *Fuel Retailers Association of South Africa (Pty) Ltd v Director General of Environmental Management Mpumalanga* para 41.

37 *Fuel Retailers Association of South Africa (Pty) Ltd v Director General of Environmental Management Mpumalanga* para 102.

In *Director: Mineral Development, Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environment*,³⁸ the court stated that our Constitution, by including environmental rights, by necessary implication, requires that environmental considerations be granted adequate respect and recognition in the administrative processes of our country. With the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns.³⁹

In the case of *Khabisi v Aquarella Investment 83 (Pty) Ltd*,⁴⁰ the Constitutional Court, referring to section 24(b), stated that the term "other measures" as contained in the section includes those aimed at ensuring environmental compliance and enforcement. The court held further that there is a clear and onerous obligation on environmental departments to conserve and to protect the environment.⁴¹

2.3 Obligations in terms of international law

2.3.1 Introduction

Section 231(1) of the Constitution provides that the negotiating and signing of all international agreements is the responsibility of the National Executive. An international agreement binds the Republic after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement of a technical administrative or executive nature.⁴² This means that a treaty becomes law in the Republic only when it is enacted into law by national legislation; therefore an international treaty or convention is not binding in South Africa unless it has been enacted into municipal law.⁴³

38 *Director: Mineral Development, Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environment* 1999 2 SA 709 (SCA).

39 *Director: Mineral Development, Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environment* para 719 C-D.

40 *Khabisi v Aquarella Investment 83 (Pty) Ltd* 2008 4 SA 195 (T).

41 *Khabisi v Aquarella Investment 83 (Pty) Ltd* para C-D.

42 S 231(2) Constitution 1996.

43 Kidd 2011 *Environmental Law* 48.

Section 39(2) of the Constitution provides that when interpreting the Bill of Rights a court, tribunal or forum *inter alia* must consider international law. The Constitution further provides that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation which is consistent with international law over any alternative interpretation which is inconsistent with international law.⁴⁴

South Africa is party to over 50 international conventions which are directly or indirectly relevant to the environment and which strives to protect it.⁴⁵ Some of the most important of these international law treaties and conventions are highlighted below.

The *African Charter on Humans and Peoples Rights*,⁴⁶ is an international human rights instrument intended to promote and protect human rights and the freedom of people on the African continent.⁴⁷ In terms of article 1 of the Charter member states of the Organisation of African Unity — parties to the present charter — shall recognise the rights, duties and freedoms enshrined in this chapter and shall undertake to adopt legislative or other measures to give effect to them. Article 24 of the Charter provides that all persons shall have a right to a generally satisfactory environment favourable to their development.

The United Nations Conference on Environment and Development was held in 1992 in Rio de Janeiro to mark the 20th anniversary of the Stockholm Conference and to address the North–South environment development split. The *Rio Declaration on Environment and Development* strives to establish a global partnership through creating co-operation amongst states, and working towards international agreements which respect the interests of all and protects the integrity of global environment and the development system.⁴⁸ Principle 1 of

44 S 233 Constitution, 1996.

45 Feris and Van der Linde 2010 *Compendium of SA Environmental Legislation* 678.

46 *African Charter on Humans and Peoples Rights* 1981 available at <http://www.africaunion.org>.

47 Preamble to *African Charter on Humans and Peoples Rights*.

48 *Rio Declaration on Environment and Development* 1992 available at www.unep.org.

the Declaration states that human beings are at the centre of concern for sustainable development. They are entitled to a healthy and productive life in harmony with nature. In accordance with the Charter of the United Nations and principles of international law states have the sovereign right to explore their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction.

The United Nations Developmental Goals (UNDP) is a pledge made by 189 states including South Africa in 2000. This pledge became the eight Millennium Development Goals that strives to alleviate people from abject poverty and multiple deprivations.⁴⁹ The UNDP contains eight goals which address various issues. Goal 7 deals with environmental sustainability and provides that states should ensure environmental sustainability by integrating the principles of sustainable development into country policies and programmes and reverse the loss of environmental resources.

The *African Peer Review Mechanism* (APRM) was initiated in 2002 and was established in 2003 by the African Union. The main objectives of the APRM are to foster the adoption of policies, standards and practices which lead to political stability, high economic growth, sustainable development and accelerated sub-regional and continental economic integration through experience sharing and reinforcement of successful and best practice, including identification of deficiencies and assessment of requirements for capacity building.⁵⁰ The APRM is a mutually agreed programme, voluntarily adopted by the member states of the African Union. This self-monitoring programme strives to promote and re-enforce high standards of governance.

49 *The Millennium Development Goals 8 Goals for 2015* available at <http://www.undp.org>.

50 *African Peer Review Mechanism 2002* available at <http://aprm-au.org/about-aprm>.

2.4 Conclusion

The State has an obligation in terms of section 24 of the Constitution to protect the environment, as individuals have a right to an environment not harmful to their health or well-being. On numerous occasions South African courts have stressed the importance of protecting the environment.

The State also has an obligation in terms of international law to protect the environment. This obligation arises from section 39(2) of the Constitution as well as from the various treaties and conventions which strive to protect the environment and to which South Africa is a signatory.

The State further should take measures that ensure that environmental law is properly enforced and that individuals, companies and industry comply with environmental law. In the next chapter the enforcement and compliance of environmental law is discussed.

Chapter 3

3. Enforcement and compliance of environmental law in South Africa

3.1 Introduction

South Africa has a plethora of environmental legislation and statutory provisions in place.⁵¹ Despite this volume of environmental legislation environmental issues are not adequately addressed.⁵² The one question which arises is why environmental damage still takes place, despite such a large number of legislation. The answer to this question is very logical and clearly shows that there is a problem in the enforcement and compliance of environmental legislation. If there are environmental laws in place, and the State ensures that such legislation is properly enforced and complied with, the environment would be protected.

In this chapter enforcement and compliance of environmental law is discussed. The meaning of the terms "enforcement" and "compliance" in the context of environmental law is explained. This chapter also briefly discusses some measures available to enforce environmental law.

3.2 Compliance

The terms "compliance" and "enforcement" has not been defined in any of our environmental legislation in South Africa. The word "compliance" can be defined as "obedience to a request or command".⁵³ From a legal and regulatory point of view "compliance" describes an ideal situation in which all members of a legal community adhere to the legal rules and requirements applicable to the activities of that community.⁵⁴

51 See chapter 4 hereunder.

52 Glazewski 2005 *Environmental Law in SA* 117.

53 The Compact Oxford English Dictionary of Current English (2008).

54 Paterson and Kotze (eds) 2009 *Environmental Compliance and Enforcement in SA* 41.

With regard to compliance there are two theories, namely, the rationalist theory and the normative theory. According to the rationalist theory of compliance, the regulated community is regarded as rational actors that act to maximise their economic self-interest.⁵⁵ This simply means that the law is only obeyed to promote economic interest, and the only purpose the law achieves is to act as a deterrent. According to the "optimal penalty" theory, when members of a regulated community contemplate breaking the law, their resultant actions are influenced by the likelihood of being caught, coupled with the risk of severe punishment.⁵⁶

The normative theory of compliance focuses on the logic of appropriateness. This theory is based on the presumption that the regulated community generally will seek to comply with the law. However there may be a range of objective factors which undermine its ability to comply with the law, such as absence of appropriate incentives, lack of awareness or expertise and a shortage of resources.⁵⁷ Here the term "compliance" denotes a strategy that "seeks to prevent a harm rather than punish an evil". This requires a conciliatory style that "relies on bargaining to attain conformity" in contrast to sanctioning strategies concerned with punishment or violating a rule and doing harm.⁵⁸ This theory focuses more on providing assistance and facilitating compliance than punishment in the event of non-compliance.

3.3 Enforcement

The term "enforcement" refers to the actions the government takes to achieve compliance within the regulated community to prevent situations where compliance does not take place.⁵⁹ Enforcement takes place through coercion

55 Zaelke 2005 *Making Law Work: Environmental Compliance and Sustainable Development* 45.

56 Paterson and Kotze (eds) 2009 *Environmental Compliance and Enforcement in SA* 43.

57 Paterson and Kotze (eds) 2009 *Environmental Compliance and Enforcement in SA* 43.

58 Hawkins 1984 *Environment and Enforcement* 4.

59 *International Network for Environmental Compliance and Enforcement Principles of Environmental Enforcement* 2005 available at <http://www.inece.org/principis/ch1.pdf>.

and compulsion or by promise or conciliation and the strategy which is adopted is determined by the regulator.⁶⁰

3.4 Enforcement and compliance with environmental law in South Africa

South Africa's current environmental regime contains elements of both the rationalist and normative theories of compliance. Historically wildlife and conservation authorities adopted a rationalist approach relying on the deterrence theory, with enforcement being implemented through arrest and criminal prosecution. On the other hand the industrial sector, perhaps under the influence of large corporations, has focused more on the normative theory by adopting a far more conciliatory approach to enforcement and compliance.⁶¹

Recently this historical approach to environmental compliance and enforcement appears to have changed, as there is a new trend in the conservation sector to entrench a more normative approach focusing on co-operation and community-based participation.⁶²

3.5 Environmental enforcement and compliance tools

There are various enforcement and compliance mechanisms in place to ensure compliance with environmental laws. These include command and control mechanisms such as criminal sanctions, administrative measures, alternative mechanisms, civil-based measures, economic instruments, agreements, conflict management, and dispute settlement. Each of these instruments will be discussed briefly in the discussion that follows.

3.5.1 Command and control mechanisms

Command and control mechanisms refer to a system of strict monitoring by authorities with regard to whether the law is being followed; and where

60 Hawkins 1984 *Environment and Enforcement* 3.

61 Paterson and Kotze (eds) 2009 *Environmental Compliance and Enforcement in SA* 45.

62 Paterson and Kotze (eds) 2009 *Environmental Compliance and Enforcement in SA* 45.

offenders are prosecuted using criminal law.⁶³ Traditionally the command and control approach to achieving compliance involves two processes. The first is the prescription of legal requirements and obligations (the command) and the second is compelling compliance where non-compliance is detected through the use of the various measures.⁶⁴

Criminal measures are designed to enforce compliance in cases where non-compliance has been detected, and to punish those that contravene the legal requirements or standards and to deter future non-compliance. Criminal measures punish persons for causing environmental harm or disregarding the law, while administrative and civil measures compel persons to cease activities which cause harm to the environment, or take measures to prevent, to remediate or to mitigate harm to the environment.⁶⁵

3.5.2 Administrative measures

Administrative measures are playing an increasingly important role in promoting environmental compliance and enforcement in South Africa. They are generally used to halt current or future illegal or harmful activities, to ensure compliance with prescribed statutory requirements and permitting conditions, and to compel persons to take corrective action when their activities harm the environment.⁶⁶ In South Africa administrative measures take on numerous forms. The most prevalent measures within the environmental regime include compliance notices,⁶⁷ directives,⁶⁸ abatement notices, and the suspension and withdrawal of an environmental authorisation.⁶⁹ Administrative measures consist of a notice, which identifies the illegal or harmful activity, issued by the environmental authority. Failure to comply with an administrative measure can lead to the

63 Kidd 2011 *Environmental Law* 269.

64 Paterson and Kotze (eds) 2009 *Environmental Compliance and Enforcement in SA* 51.

65 Paterson and Kotze (eds) 2009 *Environmental Compliance and Enforcement in SA* 55.

66 Paterson and Kotze (eds) 2009 *Environmental Compliance and Enforcement in SA* 55.

67 S 31L NEMA.

68 S 31A NEMA.

69 S 34C NEMA.

withdrawal of an environmental authorisation and in certain circumstances can constitute an offence.⁷⁰

Administrative measures are implemented by relevant environmental authorities and not through the judicial system, as with criminal proceedings. The jurisdictional facts which need to be present before issuing the relevant administrative notice are generally far less tedious to establish than the onus of proof in criminal proceedings.⁷¹

3.5.3 Civil measures

Environmental compliance and enforcement also may be complemented by the various common-law remedies to prevent or to restrain certain types of conduct from occurring or recurring. Common law remedies include interdicts, compensation for damages, *locus standi* and judicial review.⁷²

Interdicts are available where use or possession has been disturbed or where an imminent danger of such an infringement exists. The interdict can be in one of two forms, namely, prohibitory and mandatory. The former prohibits the wrongdoer from committing a wrongful act, while the latter requires positive conduct on the part of the wrongdoer to terminate the continuing wrongfulness of an act which already has been committed.⁷³ In South Africa interdicts have remained a valuable tool and have been successfully used by environmental authorities and by the public to stop harmful environmental or illegal action and to order the wrongdoer to repair damages caused.⁷⁴

70 Paterson and Kotze (eds) 2009 *Environmental Compliance and Enforcement* in 56.

71 For example, an Environmental Management Inspectorate can issue a compliance notice in terms of section 3L of NEMA if there are reasonable grounds for believing that a person has not complied with applicable legislation and permits. This is a lighter onus of proof compared to proof beyond reasonable doubt as in criminal law.

72 Paterson and Kotze (eds) 2009 *Environmental Compliance and Enforcement in SA* 258.

73 Neethling, Potgieter and Visser 2010 *Law of Delict* 254.

74 Regarding cases where interdicts were used to stop environmental damage, see *Khabisi v Aquarella Investment 83 (Pty) Ltd* 2008 4 SA 195 (T), *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd* 2004 2 SA 393 (E) and *Minister of Health and Welfare v Woodcarb (Pty) Ltd* 1996 3 SA 155 (N).

Compensation for damages using the common law, which is a civil measures, can also be used. However, compensation for damages in the environmental context is difficult to prove, as very often it is not easy to establish the identity of the perpetrator.

The *Constitution* extends *locus standi* to any of the persons listed in section 38 that may approach a court alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief. The persons that may approach a court are anyone acting in their own interests;⁷⁵ anyone acting on behalf of another person who cannot act in his own name;⁷⁶ anyone acting as a member of or in a group or class of persons;⁷⁷ anyone acting in the public interests⁷⁸ and an association acting in the interests of its members.⁷⁹ Section 32 and section 38(2) of NEMA also make provision for persons to approach a court.

Judicial review is also a civil remedy relevant to environmental compliance and enforcement owing to the prevalence of administrative measures in South Africa's environmental law regime.⁸⁰ Numerous matters have been brought before the court in which parties have sought to challenge the validity of administrative enforcement measures.⁸¹ This has compelled authorities to ensure that they comply with all procedural and substantive requirements before using these administrative measures.

3.5.4 Alternative measures

Alternative measures can be divided into incentive-based measures and voluntary measures. Incentive-based measures are more efficient and effective

75 S 38(a) Constitution, 1996.

76 S 38(b) Constitution, 1996.

77 S 38(c) Constitution, 1996.

78 S 38(d) Constitution, 1996.

79 S 38(e) Constitution, 1996.

80 Paterson and Kotze (eds) 2009 *Environmental Compliance and Enforcement in SA*.

81 In this regard see *HTF Developers v Minister of Environmental Affairs and Tourism* 2006 5 SA 512 (T), 2007 5 SA 438 (SCA) and *MEC: Department of Agriculture, Conservation and Environment v HTF Developers (Pty) Ltd* 2008 2 SA 319 (CC).

to encourage and reward desired behaviour than to punish non-compliance. These measures are not always positive as they include disincentives which are aimed at discouraging certain forms of behaviour. They are diverse and include market-based instruments, regulatory instruments and information-based instruments.⁸² These measures encourage persons to go beyond compliance.⁸³

Voluntary compliance measures are an important tool that can be used to enforce environmental law.⁸⁴

3.6 Conclusion

This chapter has explained what the terms "enforcement" and "compliance" mean. What these two concepts mean are easy to understand. However, they are extremely important concepts that need to be understood in the context of environmental law and particularly for the purposes of this research.

In South Africa, compliance and enforcement of environmental law is a major problem. The main reason why there is a problem with regard to the enforcement and compliance of environmental legislation is a heavy reliance on command and control approaches — such as criminal sanctions — to enforce environmental law.

There are numerous other mechanisms besides command and control. These other mechanisms include administrative measures, civil-based measures and alternative measures, such as self-regulation, that can be used to enforce environmental law.

One of the measures discussed in this chapter includes alternative measures such as self-regulation. The use of self-regulation should be considered as an alternative to ensure the compliance and enforcement of environmental law. This would be discussed in more detail in chapter 5. The following chapter

82 Paterson and Kotze (eds) 2009 *Environmental Compliance and Enforcement in SA* 58.

83 Kidd 2011 *Environmental Law* 278.

84 See chapter 5 hereunder.

addresses criminal sanctions which are a command and control measure to enforce environmental law

Chapter 4

4. Criminal sanctions

4.1 Introduction

Criminal sanctions are a command and control mechanism used to enforce and to protect the environment. Criminal sanctions are the most widely prescribed sanction for contraventions of legal and administrative provisions.⁸⁵ Most environmental legislation in South Africa creates criminal offences and prescribes penalties to be imposed upon conviction. Despite the extensive provisions for criminal sanctions in South African environmental legislation, there have not been many successful prosecutions in the environmental sphere.⁸⁶ Prosecutions have been limited to certain areas such as abalone poaching.⁸⁷

This chapter aims to evaluate the effectiveness of the use of criminal sanctions, and the purpose it achieves. The advantages and disadvantages of using criminal law to enforce environmental law are also being discussed.

4.2 Use and purpose of criminal sanctions

Criminal sanctions can be imposed in two ways, either as a primary or as a supporting sanction.⁸⁸ A primary sanction is applied in a case of a contravention of a provision which directly outlaws certain behaviour.⁸⁹ For example, in terms

85 Strydom and King (eds) 2009 *Fuggle and Rabie's Environmental Management in South Africa* 128.

86 Kidd 2011 *Environmental Law* 269.

87 Hoctor and Kidd "Punishing perlemoen poaching developments both recent and possibly future" 2005 *Obiter* 398.

88 Strydom and King (eds) 2009 *Fuggle and Rabie's Environmental Management in South Africa* 128.

89 Kidd 2011 *Environmental Law* 269.

of section 151(1)(i) of the *National Water Act*,⁹⁰ should any person unlawfully and intentionally or negligently commit any act or omission which pollutes or is likely to pollute a water resource, such person shall in terms of section 151(2) be guilty of an offence and liable, on the first conviction, to a fine or imprisonment not exceeding five years, or to both a fine and imprisonment, and in the case of a second or subsequent conviction, to a fine or imprisonment for a period not exceeding ten years or to both a fine and imprisonment.

In the case of a subsidiary sanction, compliance with legislation is sought to be secured primarily by means of administrative controls such as permits. Criminal sanctions are imposed only where the administrative controls fail. For example, in terms of section 57 of the *National Environmental Management: Biodiversity Act*,⁹¹ there are various restricted activities which cannot lawfully be carried out without a permit. An offence of this type involving the lack of a permit or authorization would be easier to prove than in the case of a primary sanction, which would require evidence to be led.

Criminal sanctions are identified by the following salient features: It stigmatises certain forms of behaviour; it attracts the condemnation of the community; it involves punishment; and it is the only measure whereby an offender can be subject to imprisonment.⁹²

The question might arise as to why punishment is imposed. There are two main reasons justifying punishment; retribution and deterrence. Retribution involves the idea that criminal punishment is an instrument where society's condemnation of the offender's actions is imposed on the offender. Deterrence involves individual deterrence⁹³ and general deterrence.⁹⁴ In addition there are

90 S 151(1) of the *National Water Act* 36 of 1998

91 *National Environmental Management: Biodiversity Act* 10 of 2004.

92 Paterson and Kotze (eds) 2009 *Environmental Compliance and Enforcement in SA* 241.

93 The offender is deterred from repeating the same offence in future.

94 By punishing one offender, other offenders are deterred.

also other aims of punishment such as the preventative theory and the reformatory theory.⁹⁵

According to Lazarus criminal sanctions should be reserved for most culpable division of offences and should not solely be used for their ability to deter.⁹⁶ According to Kidd⁹⁷ criminal sanctions should be reserved for cases where there is either intentional unlawful activity — for example in cases of "midnight dumping" by companies — or where there are persistent offences, for instance when a company repeatedly fails to comply with emission standards when past infractions have been pointed out.

Fuggle and Rabie⁹⁸ are also of the view that criminal sanctions should be reserved for cases where there is intentional unlawful activity, as in cases of deliberate killing of animals or gathering of plants and failure to comply with notices, directives or similar instructions by officials. Secondly, they are of the view that prosecution should be used in cases where there is continuous unlawful activity, which is indicative of the presence of *dolus eventualis*. Thirdly, it should be reserved for an offender who has caused serious harm to people or to the environment, as in the cases of the Exxon Valdez,⁹⁹ the Bhopal disaster¹⁰⁰ and Merriespruit,¹⁰¹ where there is *mens rea* and negligence on the part of the offender.

95 Snyman 2008 *Criminal Law* 10-21.

96 Lazarus "Assimilating environmental protection into legal rules and the problem with environmental crime" 1994 *LALR* 883.

97 Kidd 2011 *Environmental Law* 218.

98 Strydom and King (eds) 2009 *Fuggle & Rabie's Environmental Management in South Africa* 252.

99 The Exxon Valdez was considered as one of the worst marine environmental disasters, an oil tanker that ran aground in Alaska's Prince William Sound in March 1989, spilling 40,5 million litre of oil which eventually covered 28 000 km² of ocean. See in this regard http://www.environment.com/od/environmentalevents/p/exon_valdez.htm.

100 Bhopal in India was one of the world's worst industrial disasters, which took place in December 1984. A Union Carbide pesticide plant released 40 tons of methyl isocyanate, killing 3000 people immediately. See in this regard <http://www.britanica.com/ebchecked/topic/1257131/bhopal-disaster>.

101 In 1994 in Merriespruit in South Africa, a tailings dam burst and 1,2 million tons of tailings ended in the neighbouring town, killing 17 people and destroying many houses. See in this regard www.virginiasa.co.za.

4.3 Environmental legislation providing for criminal offences and penalties

There are numerous environmental legislation which creates criminal offences and which prescribe penalties on account of failing to comply with its provisions. A few of these would briefly be discussed below.

Offences and penalties are dealt with in chapter 7 of the *National Environmental Management: Air Quality Act*¹⁰² (NEM:AQA). Section 51 states that a person is guilty of an offence if such person contravenes any of the provisions listed in section 51(1)(a)–(h). This section provides further that a person operating a controlled emitter is guilty of an offence if the emissions from that controlled emitter do not comply with the standards established under section 24(1).¹⁰³ Section 51(3) states that a person performing a listed activity is guilty of an offence if the air pollutants at concentrations above the emission limits, specified in an atmospheric emission licence, are emitted as a result of that activity. Section 52 of the act prescribes penalties. Section 52(1) states that a person convicted of an offence referred to in section 51 is liable to a fine not exceeding five million rand, or to imprisonment for a period not exceeding five years. Section 52(1) states further that in the case of a second offence or conviction, a fine of ten million rand or imprisonment for a period not exceeding ten years or both a fine and such imprisonment can be imposed.

Section 151(1) of the NWA creates a list of offences. Some of the offences are: No person may use water other than as permitted under the act,¹⁰⁴ may fail to comply with any condition attached to a permitted water use under this act,¹⁰⁵ and unlawfully and intentionally or negligently may commit any act or omission which pollutes or is likely to pollute a water resource.¹⁰⁶ Section 151(2) states that any person that contravenes any provision of subsection 1 is guilty of an offence and liable, on the first conviction, to a fine or imprisonment for a period

102 *National Environmental Management: Air Quality Act* 34 of 2004.

103 S 51(2) NEM:AQA.

104 S 151(1)(a) NWA.

105 S 151(1)(c) NWA.

106 S 151(1)(i) NWA.

not exceeding five years, or to both a fine and imprisonment. In the case of a second or subsequent conviction, such person may be convicted to a fine or imprisonment for a period not exceeding ten years or to both a fine and such imprisonment.

Chapter 8 of the *National Environmental Management: Protected Areas Act*¹⁰⁷ creates certain offences and penalties. Section 89 states that a person is guilty of an offence if that person contravenes or fails to comply with any of the provisions listed in section 89(1)(a)–(d). The penalties to be imposed are provided for in section 89(2).

The other environmental legislation which makes provision for criminal sanction include: Chapter 9 of *National Environmental Management: Biodiversity Act*,¹⁰⁸ section 67 and section 68 of the *National Environmental Management: Waste Act*,¹⁰⁹ chapter 10 of the *National Environmental Management: Integrated Coastal Management Act*,¹¹⁰ and section 98 and section 99 of the *Mineral and Petroleum Resources Development Act*.¹¹¹

4.4 Advantages and disadvantages of criminal law

4.4.1 Advantages of criminal law

The use of criminal law to enforce and protect the environment has advantages and disadvantages. One of the main advantages of using criminal sanctions is that harsh sentences received by companies or individuals who violate environmental laws would deter other offenders in future. This would fulfil the deterrent theory of punishment.¹¹² Criminal sanctions, however, have numerous

107 *National Environmental Management: Protected Areas Act* 57 of 2003.

108 *National Environmental Management: Biodiversity Act* 10 of 2004.

109 *National Environmental Management: Waste Act* 59 of 2008.

110 *National Environmental Management: Integrated Coastal Management Act* 24 of 2008.

111 *Mineral and Petroleum Resources Development Act* 28 of 2002.

112 Snyman 2008 *Criminal Law* 16.

disadvantages. These can be categorized in inherent weaknesses and contingent weaknesses.¹¹³

4.4.2 Inherent weaknesses of criminal law

Inherent weaknesses are those weaknesses that are present in most if not all systems of criminal law.¹¹⁴ These weaknesses include burden of time and cost; reactive nature of criminal law; problems of proof; procedural safeguards; preparation of cases for prosecution; officials' attendance in court and moral aspects of criminal law. These weaknesses would be discussed below.

The first disadvantage of criminal law is that criminal prosecutions involve considerable costs to the State. There is often a long delay from the moment the offence was committed up to the conclusion of the trial.¹¹⁵ The delay is even lengthier when environmental crimes are prosecuted owing to the need of using expert evidence in most trials, and witnesses and other people involved in the prosecutions are inconvenienced by delays and postponements.¹¹⁶

The second disadvantage of criminal law is that it is designed to react to offences that have already been committed, which might be too late to prevent damage to the environment. The purpose of environmental law is to ensure that the environment is conserved and protected. Criminal law does not achieve the objective of conserving and protecting; it only fulfils its objective of being a deterrent.¹¹⁷

The third disadvantage of criminal law is the stringent standard of proof that has to be satisfied. The onus of proof in criminal law rests upon the state that needs

113 Kidd 2011 *Environmental Law* 270.

114 Paterson and Kotze (eds) 2009 *Environmental Compliance and Enforcement in SA* 242.

115 Kidd 2011 *Environmental Law* 270.

116 Strydom and King (eds) 2009 *Fuggle and Rabie's Environmental Management in South Africa* 245.

117 Strydom and King (eds) 2009 *Fuggle and Rabie's Environmental Management in South Africa* 245.

to prove its case beyond all reasonable doubt.¹¹⁸ This is more difficult to prove compared to proving on a balance of probabilities in terms of the law of civil procedure. The other problems with regard to proof include evidential problems, such as identification of the offender, the requirement to obtain sufficient evidence to provide proof beyond reasonable doubt, and the difficulty in establishing *mens rea* in cases where the offence is not a strict liability offence.¹¹⁹

The fourth disadvantage of criminal law is the preparation of cases for prosecution, which may drain the resources of an enforcement agency significantly and may constitute a powerful disincentive to embark on a criminal prosecution, particularly where the possible penalty is light.¹²⁰

Enforcement officials are frequently required to appear in court as prosecution witnesses, and thus valuable time is lost which could be used to carry out enforcement activities.¹²¹ Punishment under criminal law is frequently seen as involving a moral judgment being made on the offender. Criminal law is seen as a device to be used on criminals, which are viewed as being disreputable, whereas environmental offenders do not conform to that stereotype.¹²²

4.4.3 *Contingent weaknesses*

In addition to the inherent weaknesses of criminal sanctions as discussed, there are also contingent weaknesses in the use of criminal sanctions. Contingent weaknesses are faults which are present in a particular country owing to prevailing attitudes or resource constraints.¹²³ Contingent weaknesses which face South Africa include inadequate policing; lack of public awareness;

118 Zeffert 2003 *Law of Evidence* 50.

119 Robinson, Watchmen and Barker 1990 *Crime and Regulation* 256.

120 Robinson, Watchmen and Barker 1990 *Crime and Regulation* 262.

121 Kidd 2011 *Environmental Law* 272.

122 Strydom and King (eds) 2009 *Fuggie and Rabie's Environmental Management in South Africa* 247.

123 Kidd "Environmental crime time for a rethink in South Africa" 1998 *SAJELP* 181.

difficulties of investigation; lack of expertise of court officials and inadequate policies.¹²⁴

Inadequate policing is a major problem facing South Africa as well as other countries with strained government resources, and this situation is not likely to improve. The administration of numerous pieces of environmental legislation has been assigned to provinces that are spending most of their budgets on matters which are granted more importance, such as education, health and welfare.¹²⁵

The lack of public awareness with regard to threats to the environment and to what is prohibited impairs the effectiveness of criminal law. People that are aware of wrongful and prohibited conduct may be of assistance to officials in bringing offences to their notice.¹²⁶

Difficulties of investigating also present a challenge for criminal law. Many officials require not only special scientific and technical expertise but also must possess proficiency in the rules of evidence and criminal procedure. The need for training is important but this is also undermined by the lack of resources.¹²⁷

A further problem relates to lack of expertise of court officials. Many prosecutors in South Africa are not experienced in environmental law. There are not many environmental prosecutions which take place, and when prosecutions do take place magistrates and prosecutors can become intimidated by the intricacies of the scientific evidence and fall into requiring proof beyond any doubt, rather than reasonable doubt.¹²⁸

124 Kidd 2011 *Environmental Law* 272.

125 Strydom and King (eds) 2009 *Fuggle and Rabie's Environmental Management in South Africa* 248.

126 Kidd 2011 *Environmental Law* 273.

127 Kidd 2011 *Environmental Law* 273.

128 Strydom and King (eds) 2009 *Fuggle and Rabie's Environmental Management in South Africa* 248.

Much of the criticism against the enforcement of environmental law in South Africa is levelled at the inadequate penalties provided for by legislation.¹²⁹ Despite these perceptions, most penalties seem to correspond with the seriousness of the offence in question.¹³⁰

4.5 Conclusion

South Africa has a plethora of environmental legislation in place. Most of this environmental legislation creates criminal offences for failing to comply with its provisions. Despite this large volume of environmental legislation which creates strict offences, corporate companies and individuals continue to violate environmental laws. This then points in only one direction; the use of criminal sanctions to protect the environment is not the most effective tool that can be used to protect the environment. If the use of criminal sanctions was effective then we would not find widespread violations of environmental law by companies.

Despite the numerous disadvantages of using criminal law to enforce and protect the environment, criminal law does have certain positive aspects. One of the main advantages of using criminal law is it being a strong deterrent to other corporate companies and individuals, particularly in cases where the court harshly sentences corporate entities or individuals. Criminal law should be used in those cases where there is negligent, reckless or deliberate conduct on the part of the perpetrator.

From the above discussion it is clear that the use of criminal sanctions is inadequate to enforce environmental law and protect the environment. In South Africa enforcing environmental law remains a problem, and the root cause of this problem stems from the reliance on criminal law to enforce environmental law. The disadvantages of criminal sanctions outweigh the advantages. From

129 Loots "Making environmental law effective" 1994 *SAJELP* 17.

130 Refer to Kidd "The Protection of the Environment Through the Use of Criminal Sanctions: A Comparative Analysis with Specific Reference to South Africa" (Unpublished Ph.D. thesis, University of Natal 2002).

this it can be seen that other better alternatives should be used to enforce environmental law in South Africa.

In the following chapter an alternative approach to the use of criminal sanctions to enforce and to protect the environment would be discussed.

Chapter 5

5. Voluntary compliance measures and self-regulation

Voluntary compliance measures consist of certain environmental rules and regulations which corporate companies freely may choose to comply with. These rules and regulations are adopted voluntarily, and compliance is a matter of choice. Should companies not comply with these rules and regulations they would not be punished. Voluntary compliance measures differ fundamentally from legislation. With regard to legislation, compliance or non-compliance is not a matter of choice. Strict compliance is required, and in the case of non-compliance a penalty is imposed.

There are various types of voluntary compliance measures. This chapter focuses extensively on only one of these measures, and that is self-regulation. The chapter briefly discusses the history of voluntary compliance measures and self-regulation, the different types of voluntary compliance measures, self-regulation, and the advantages and disadvantages of it.

5.1 History of voluntary compliance measures and self-regulation

Voluntary compliance in the environmental sphere is not a new concept.¹³¹ The regulatory state in the form which we know it today began to emerge after World War I and the Great Depression. The focus of early environmental laws was on pollution control and on the conservation and protection of particular habitats, rather than on controlling the more generalised effects of human activity.¹³² In the absence of environmental laws and authorities entrusted with the enforcement of such laws, self-regulation or non-regulation was the norm.¹³³

131 Andrews "Environmental Regulation and Business Self-Regulation" 1998 *Policy Science* 179.

132 Kidd 2011 *Environmental Law*.

133 Paterson and Kotze (eds) 2009 *Environmental Compliance and Enforcement in SA* 270.

The post-war period in the developed world was characterised by rapid economic growth and industrial development, and in the 1960s environmental impacts started becoming a matter of public concern. In response to the growing awareness of the threats facing the natural environment, many environmental statutes were adopted by member countries of the Organisation for Economic Co-operation and Development (OECD) in the 1960s and 1970s. Specialised environmental agencies entrusted with enforcement of these statutes were formed.¹³⁴ Governments believed that their responsibility towards their citizens obliged them to pursue fairly interventionist policies, in order to ensure that the various actors within society made welfare-enhancing decisions. This was also the period that witnessed the explosion of social movements amongst environmental activists who had been lobbying for improved corporate conduct.¹³⁵

Industry was initially resistant to regulation. This was coupled to the limitations inherent in traditional command and control forms of regulation and this led to the emergence of alternative ways of seeking to secure environmental responsible behaviour, a process stimulated by global reforms in corporate governance.¹³⁶

During the 1990s, industries witnessed a revolution in the field of corporate governance.¹³⁷ Decision makers within industry were subject to far more demanding governance standards compared to those of their predecessors, and most large companies with consumer bases became aware of the need to be viewed as socially environmentally responsible.¹³⁸ Corporate Social Responsibility, which refers to an appreciation by firms that they are responsible

134 The United States Environmental Protection Agency (EPA) was formed in 1970. Prior to its formation environmental issues such as pollution were dealt with on an *ad hoc* basis by various administrative bodies. For a history of the emergence of the EPA see www.epa.gov.

135 Paterson and Kotze (eds) 2009 *Environmental Compliance and Enforcement in SA* 270.

136 Paterson and Kotze (eds) 2009 *Environmental Compliance and Enforcement in SA* 271.

137 This was promoted in South Africa by the King I Report on Corporate Governance 1994 and the King II Report on Corporate Governance 2002 available at <https://www.saica.co.za>.

138 Paterson and Kotze (eds) 2009 *Environmental Compliance and Enforcement in SA* 271.

for the economic, social and environmental impacts of the way they conduct their business, has become *sine qua non* for big business.¹³⁹

This combination of circumstances — the recognition that regulation is a necessary but insufficient instrument for environmental protection, coupled with the pressure on firms to be socially responsible actors — has stimulated interest in the use of voluntary approaches on the part of both government and industry during the past two decades. A proliferation of voluntary approaches has seen the light of the day, particularly in OECD countries.¹⁴⁰

Corporate self-regulation is a global phenomenon, and is increasingly being promoted as an instrument to protect the environment. There is a long history of self-regulation in Britain, which can be traced back to the 19th century and earlier.¹⁴¹ Self-regulation became the principal means of regulating the large number of industries, trades and professions which developed during and after the Industrial Revolution. Diversity of form and organisation has been a salient feature of self-regulation, and many systems of self-regulation which developed in the 19th century last to this day. Recent trends suggest that this long history is being reinforced by a "new wave" of self-regulation.¹⁴²

5.2 Types of voluntary compliance measures

There are different types of voluntary approaches. These can be divided in four categories. The different types of voluntary compliance measures include public

139 For a definition and explanation of Corporate Social Responsibility see <http://www.csr.gov.uk>.

140 Borkey, Glachant and Leveque "Voluntary approaches for environmental policy in OECD countries: An assessment" 1998 *CERNA* 5.

141 Baggot "Regulatory reforms in Britain, the changing face of self-regulation" 1989 *Public Administration* 435.

142 Bartle and Vass "Self-regulation and the regulatory state a survey of policy and practice" 2005 CRI Research Report 7.

voluntary programmes; negotiated agreements; unilateral commitments; and private agreements.¹⁴³

Public voluntary programmes are initiatives devised by environmental authorities in which enterprises are invited to participate. The measures are voluntary as there is no direct obligation to participate and no sanction for non-participation.¹⁴⁴ Incentives to encourage participation do exist. Negotiated agreements are agreements entered into between public authorities and an industry or individual enterprise.¹⁴⁵ Unilateral commitments are environmental measures introduced by an industry or an enterprise on its own initiative without direct involvement by either public bodies or civic society, as with self-regulation. Private agreements are agreements entered into between industry enterprises and other actors within civil society.¹⁴⁶

5.3 Corporate self-regulation

Self-regulation implies that firms recognise the environmental impacts of their products and processes and of their own initiative take action to mitigate the harmful effects of those products and processes.¹⁴⁷ The defining features of self-regulatory approaches are that they are developed and adopted by industry without intervention from government, and that the duties they place on members are in addition to those required by regulation. The forms of self-regulation are many and varied, as are the impetuses that give rise to self-regulation.¹⁴⁸

On the face of it self-regulation appears to be straightforward. It is the regulation of the conduct of individual organisations or groups of organisations by

143 Gunningham and Sinclair "Voluntary Approaches to Environmental Protection: Lessons to be learned from the Mining and Forestry Sectors" 2002 Paper presented at the OECD Global Forum on International Investment.

144 Paterson and Kotze (eds) 2009 *Environmental Compliance and Enforcement in SA* 274.

145 Paterson and Kotze (eds) 2009 *Environmental Compliance and Enforcement in SA* 274.

146 Paterson and Kotze (eds) 2009 *Environmental Compliance and Enforcement in SA* 274.

147 Hanks "Achieving industrial sustainable development in South Africa: What role for self-regulatory and co-regulatory instruments" 1998 *SAJELP* 318.

148 Paterson and Kotze (eds) 2009 *Environmental Compliance and Enforcement in SA* 275.

themselves. Regulatory rules are self-enforced.¹⁴⁹ Self-regulation differs from the condition of no regulation in that there is an explicit attempt to regulate conduct. Pure self-regulation also implies that there is no external involvement or control in the regulatory process and in the condition of the regulated organisation. This can be contrasted to strong statutory or command and control regulation in which the state, by a variety of means, specifies the regulations and monitors and enforces the conduct of the regulated organisations.¹⁵⁰ The regulatory rules are self-specified, that means conduct is self-monitored and the rules are self-enforced, implying no external involvement or control in the regulation process and the conduct of the regulated organisation.¹⁵¹

Differentiation can be made between self-regulation and enforced self-regulation. Enforced self-regulation refers to the regulator imposing a requirement on businesses to determine and implement their own internal rules and procedures to fulfil the regulator's policy objectives.¹⁵² A component of enforced self-regulation is the internal control system to enforce those rules and document those results.¹⁵³

Under this concept of enforced self-regulation, the government could compel each company to formulate a set of rules that is tailored to the unique set of environmental contingencies which the company faces.¹⁵⁴ A regulatory agency would either approve these rules or send them back for revision if they were insufficient or severe. At this stage in the process, groups and other interested parties would be encouraged to comment on the proposed rules.¹⁵⁵

149 Bartle and Vas 2005 *CRI Research Report* 19

150 Bartle and Vas 2005 *CRI Research Report* 31.

151 Bartle and Vas 2005 *CRI Research Report* 19.

152 Fairman and Yapp "Enforced self-regulation, prescription and conceptions of compliance within small businesses: The impact of enforcement" 2005 *Law & Policy* 493.

153 Braithwaite "Enforced self-regulation: A new Strategy for Corporate Crime Control" 1982 *Michigan Law Review* 1470.

154 Braithwaite 1982 *Michigan Law Review* 1470.

155 Braithwaite 1982 *Michigan Law Review* 1470.

The primary function of governmental inspectors would be to ensure the independence of this internal compliance group and to audit its effectiveness and toughness. Such audits would pay attention to the number of violators who had been disciplined by each company.¹⁵⁶ Traditional direct government monitoring would still be necessary for small firms which cannot afford their own compliance.¹⁵⁷

Governmental involvement would not stop at monitoring violations of the privately written and publicly ratified rules which would be punishable by law. This aspect of enforced self-regulation might sound radical, but it is however not as extreme as it might seem. The regulatory agencies would not ratify private rules unless the regulations were consistent with environmental legislation.¹⁵⁸

The King III Report on Corporate Governance,¹⁵⁹ in South Africa highlights the importance of environmental issues and sustainability. Principle 1 of the Report addresses responsible leadership and provides that responsible leaders should build sustainable business by having regard to the companies economic, social and environmental impact on the community in which it operates. It further states that responsible leaders should not compromise the natural environment and the livelihood of future generations.

In terms of principle the Board should ensure that the company complies with applicable laws and considers adherence to non binding rules and standards to which the company voluntarily complies to.

5.4 Types of self-regulation instruments

5.4.1 Firm-specific approaches

156 This would include a statistical monitoring of the relative frequency with which sanctions of different degrees of severity were imposed by each company.

157 Braithwaite 1982 *Michigan Law Review* 1471.

158 Braithwaite 1982 *Michigan Law Review* 1471.

159 King III Report on Corporate Governance available at <https://www.saica.co.za>.

Environmental management systems are those parts of a firm's management system which are specifically devoted to the environmental impacts of the firm's management system. Most large firms have formulated management systems to facilitate the day-to-day operation of their business.¹⁶⁰

The management system identifies the practices that will enable the firm to reduce its environmental impact, such as by curbing pollution, water wastage and carbon emissions.¹⁶¹ The main reason why firms choose to adopt environmental management systems are consumer and shareholder pressure, and fear of incurring liability for environmentally harmful practices.¹⁶² Firms who wish to join industry associations or certification schemes are required to have an environmental management system in place as a condition of membership.

5.4.2 Industry level approaches

The emergence of industry-wide codes was prompted by the recognition that the reputation of an entire industry may be adversely affected by the actions of a single firm within that industry.¹⁶³ This is true in those industries in which an individual firm's bad practice may cause egregious environmental harm, and in which consumers are not able to distinguish between the products and processes of individual firms based on their respective environmental track records, such as in the chemical and mining industries. A sound environmental track record may constitute a competitive advantage for firms within a particular industrial sector.¹⁶⁴

The most well-renowned industry-wide code of practice is the chemical industry's Responsible Care Programme.¹⁶⁵ This programme was first devised by the Canadian chemical industry in the late 1970s. It was adopted by

160 Paterson and Kotze (eds) 2009 *Environmental Compliance and Enforcement in SA* 276.

161 See <http://www.epa.gov/ems>.

162 Paterson and Kotze (eds) 2009 *Environmental Compliance and Enforcement in SA* 276.

163 Paterson and Kotze (eds) 2009 *Environmental Compliance and Enforcement in SA* 278.

164 Paterson and Kotze (eds) 2009 *Environmental Compliance and Enforcement in SA* 278.

165 See www.responsiblecare.org

chemical associations globally in an attempt to address the negative public perceptions which surrounded the industry, particularly after the Bhopal disaster of 1984. From an environmental perspective, the most important principle contained within the Responsible Care Global Charter¹⁶⁶ is that firms commit to making environmental considerations a priority in planning for all existing and new products and processes;¹⁶⁷ to report promptly on chemically-related environmental hazards;¹⁶⁸ to operate plants and facilities in a manner that protects the environment;¹⁶⁹ to conduct or to support research on the environmental effects of the industry's products, processes and waste materials;¹⁷⁰ and to participate with government and other actors to create responsible laws, regulations and standards to safeguard the environment.¹⁷¹

5.4.3 Non-industry-affiliated voluntary approaches

An example of a non-industry-affiliated approach is the International Organisation for Standardisation (ISO) which operates in conjunction with the national bureaux of standards, such as the South African Bureau of Standards.¹⁷² The International Organisation for Standardisation has been in existence since 1947. Its purpose is to facilitate international trade by developing a set of common standards with which goods and services must comply if a firm wishes to be ISO certified.¹⁷³ The ISO standardisation creates a common international language, enabling manufacturers in all parts of the world to produce goods to identical technical specifications.

The environmental standards are contained within the ISO 14000 series. The most important is the ISO 14001 standard, the only environmental standard for which firms can receive certification. ISO 14001 is a generic standard that all

166 *Responsible Care Global Charter* available at <http://www.caia.co.za/rescare.htm>.

167 Guiding principle 3 *Responsible Care Global Charter*.

168 Guiding principle 4 *Responsible Care Global Charter*.

169 Guiding principle 6 *Responsible Care Global Charter*.

170 Guiding principle 7 *Responsible Care Global Charter*.

171 Guiding principle 9 *Responsible Care Global Charter*.

172 Paterson and Kotze (eds) 2009 *Environmental Compliance and Enforcement in SA* 281.

173 See <http://www.iso.org/iso/home.htm>.

firms in all industries may adopt if they so wish. Firms which wish to receive ISO 14001 certification simply are required to adopt an environmental management system (EMS) that conforms to the ISO guidelines as to what should be included in a comprehensive EMS.¹⁷⁴

5.5 Advantages and disadvantages of self-regulation

Self-regulation has numerous advantages as compared to the criminal sanctions. However, it also has a few weaknesses. In the discussion that follows I discuss the weaknesses and focus particularly on the advantages of self-regulation.

The main weaknesses of self-regulation are that, firstly, there is a lack of sanctions and secondly, self-regulation has limited enforcement,¹⁷⁵ which might lead to collusion and anti-competitive behaviour. Secondly, the possibility of regulatory capture involves the control of regulation by parties not pursuing the public interest and, thirdly, that self-regulation has the perception of being too lenient and not achieving its objective.¹⁷⁶ The other disadvantages of self-regulation are the difficulties for employers to understand how self-assessment works and the lack of human initiative to implement self-assessment and control.¹⁷⁷

Self-regulation has many advantages. This will be witnessed from the discussion that follows.

Legal theorists have supported self-regulation on three grounds: economic, social and political.¹⁷⁸ Self-regulation is cost effective — the government would

174 See http://www.iso.org/iso/iso_catalogue/management_standards/iso_9000_iso14000.htm.

175 Schiavi and Solomon "Voluntary initiatives in the mining industry: Do they work" 2007 *GMI* 29.

176 Fairman and Yapp 2005 *Law and Policy* 8.

177 Fairman and Yapp 2005 *Law and Policy* 8.

178 Bregman and Jacobson "Environmental performance review: Self-regulation in environmental law" 1994 *Cardozo Law Review* 469.

have less of a burden with regard to costs as companies will bear their own costs.

Criminal sanctions do not provide any incentives to corporate companies in cases where such have been complying with environmental legislation. Self-regulation on the other hand can provide incentives to companies that comply and adopt self-regulatory rules.

A further advantage of self-regulation is that it encourages political participation by assigning enforcement to companies, by asking companies to set and devise the content of the regulation.¹⁷⁹ This would also tap management in companies to design custom-made regulatory systems and constantly cheaper and more effective modes of control would emerge.¹⁸⁰

Self-regulation has a low regulatory burden on companies. It will result in companies being more committed to the rules they have written and this would foster pride and loyalty within the company.¹⁸¹ Opposed to criminal sanctions, self-regulation is presented as being tailored to the particular circumstances of the individual company or industry. Self-regulation can also be a win-win solution, as companies enhance their productivity while at the same time protecting the environment.¹⁸²

If a company is responsible for writing and enforcing its own code of conduct, the notion of self-regulation would be more palatable and the company would be more dedicated in complying with such rules.¹⁸³

179 Bregman and Jacobson 1994 *Cardozo Law Review* 470.

180 Bregman and Jacobson 1994 *Cardozo Law Review* 470.

181 Bartle and Vas 2005 *CRI Research Report* 1.

182 Sinclair "Self-regulation versus command and control beyond false dichotomies" 1997 *Law & Policy* 529.

183 Braithwaite *Michigan Law Review* 1480.

5.6 Conclusion

Command and control instruments, particularly criminal sanctions, have not been successful in preventing environmental degradation and protecting the environment. The disadvantages of using criminal sanctions, which have been acknowledged by scholars, have been discussed.

In order to overcome the ineffectiveness of criminal sanctions, voluntary compliance measures have started to gain popularity. Various types of voluntary compliance measures are available. Self-regulation is only one example of voluntary compliance measures.

A salient feature of self-regulation is that the rules are enforced by the companies and not by the State. The State cannot penalise companies that do not comply with the rules which they have created, which is one of the main disadvantages of self-regulation.

Self-regulation should however be encouraged by the State, particularly in South Africa, as this is a more suitable mechanism to protect the environment.

Chapter 6

6. Conclusion

In South Africa AMD is currently a major threat to the environment and particularly the countries water resources. The mining industry, which is the foremost contributor to the countries economy, is a major contributor to AMD. The problem of AMD has reached crisis point and unless steps are not taken to remedy the problem, AMD will cause serious environmental harm.

The adoption of the Constitution has brought environmental concerns to the fore. The inclusion of a right to an environment that is not harmful to the health and well-being of persons, as contained in section 24, has brought substantial change to environmental governance and environmental compliance and enforcement. The Constitution further initiated reform by the authorities into the old and obsolete environmental regime that was inherited from the previous political regime.

The State has fulfilled its obligation in terms of the Constitution to "take reasonable legislative measures". This can be witnessed from the volume of environmental legislation which covers almost every aspect of the environment. The question arises what "other measures" — besides promulgating legislation — has the State taken to protect the environment. A further question which arises is whether the State is doing enough to ensure that environmental law is enforced and complied with by companies.

To answer these questions, it will be noticed that the State has not taken sufficient "other measures" besides promulgating legislation to protect the environment. Secondly, it can be stated that there is a problem with the enforcement and compliance of environmental legislation. The reason is that the State relies heavily on the use of command and control measures to enforce environmental law. The State should therefore promote the use of alternative measures by companies and industries to ensure compliance and enforcement

of environmental laws, which might lead to environmental protection. Command and control measures such as criminal sanctions have not been very successful in achieving environmental protection.

A suitable alternative measure which can be used to achieve environmental protection is through the use of self-regulation by companies. Companies such as mines should develop their own set of rules which they pledge to follow and to adhere to. These rules should be developed by taking into account the type of company or industry and the possible environmental issues which need to be addressed. The State should measure the performance of companies by having an inspector that carries out inspections at companies to assess how companies are complying to the rules. In order to motivate companies to comply with such rules, they should be given an environmental rating on their adherence to their environmental rules.

Self-regulation would make companies more accountable and it will also raise awareness regarding the environment. An environmental rating on the adherence to environmental rules which companies have adopted will lead to competition with their competitors and this would foster motivation to comply with the rules companies have adopted. This environmental rating would also set a reputation for companies which they would try to maintain in the competitive environment in which they do business. This would result in the environment being protected.

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