# Sanctioning corporate environmental offenders by means of deferred prosecution agreements

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# ABSTRACT

Environmental protection for current and future generations is a fundamental constitutional right. The *National Environmental Management Act* 107 of 1998 aims to give effect to this right. Despite efforts to prevent pollution and ecological degradation and to promote sustainable development through criminal enforcement of environmental crimes, there are significant procedural limitations.

South African environmental law relies on a command-and-control approach, using criminal sanctions to enforce compliance. However, these criminal measures are reactive. This study identifies and examines the nature of environmental crimes and the shortcomings of criminal enforcement concerning corporate environmental crimes. It considers the implementation of deferred prosecution agreements (DPAs) in South Africa as an alternative to the primarily criminal-sanction approach. DPAs are agreements that allow offenders, often corporate entities, to avoid criminal prosecution by following certain conditions. The aim is to divert corporate offenders away from the criminal justice system while still achieving deterrence and promoting restorative justice. The study analyses the implementation of DPAs in the United States and England and Wales to provide a comparative perspective.

In South Africa, the use of DPAs is still unexplored. The need for a procedure of this kind has been acknowledged in reports, including the recommendations of the Judicial Commission of Inquiry into State Capture. However, there is no specific statutory process for diverting corporate offenders involved in environmental crimes away from the criminal justice system.

The study will explore DPAs' advantages, such as limited reputational damage, reduced collateral consequences, and the opportunity for corporations to implement proactive compliance measures, thereby deterring environmental transgressions and promoting corporate responsibility toward the environment.

This study aims to assess the practicability of DPAs as a viable solution in the South African environmental law enforcement context. It explores the benefits and challenges associated with implementing DPAs, considering their potential to

achieve environmental protection, corporate accountability, and the overall goals of justice in the South African context. Finally, the study makes recommendations to support the implementation of a DPA scheme in South African criminal procedural law.

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*Soli Deo gloria*.

## KEYWORDS

alternative dispute resolution, compliance, corporations, deferred prosecution agreements, deterrence, diversion, enforcement, environmental crime, human rights, proportionality, restorative justice, sanctions

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## LIST OF ABBREVIATIONS

| | |
|---|---|
| ADR | Alternative dispute resolution |
| CJA | *Child Justice Act* 75 of 2008 |
| CPA | *Criminal Procedure Act* 51 of 1977 |
| DEA | Department of Environmental Affairs |
| DFFE | Department of Forests, Fisheries and the Environment |
| DOJ | Department of Justice (USA) |
| DPA | Deferred Prosecution Agreement |
| DPP | Director of Public Prosecutions |
| GMB | Gerhard Minnebron |
| NDPP | National Director of Public Prosecutions |
| NECER | National Environmental Compliance and Enforcement Report |
| NEMA | *National Environmental Management Act* 107 of 1998 |
| NPA | National Prosecuting Authority |
| NPA Act | *National Prosecuting Authority Act* 32 of 1998 |
| NWA | *National Water Act* 36 of 1998 |
| PELJ | Potchefstroom Electronic Law Journal |
| SACJ | South African Journal of Criminal Justice |
| SAJELP | South African Journal of Environmental Law and Policy |
| SALC | South African Law Commission |
| USA | United States of America |
| USSC | United States Sentencing Commission |

# CHAPTER 1 INTRODUCTION AND METHODOLOGY

## *1.1 Introduction*

Section 24 of the *Constitution of the Republic of South Africa,* 1996 (the Constitution) provides that everyone has the right to an environment that is not harmful to their health or well-being and that it must be protected for the benefit of present and future generations through reasonable legislative and other measures. These measures must prevent pollution and ecological degradation, promote conservation, secure ecologically sustainable development and use of natural resources, and promote justifiable economic and social development.[1]

The legislature promulgated the *National Environmental Management Act* 107 of 1998 (hereafter *NEMA*) to give effect to this constitutional right. The principles contained in this Act apply throughout the Republic and form the framework for environmental management and implementation plans.[2] They guide the interpretation, administration, and implementation of *NEMA,* and any other law that protects or manages the environment.[3]

*NEMA* places a duty of care on every person who causes, has caused, or may cause significant pollution or degradation of the environment to:

> take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, insofar as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.[4]

The accepted model for enforcing environmental compliance is the use of criminal sanctions that form part of a command-and-control approach.[5] This methodology entails law enforcers monitoring compliance with environmental laws and upon

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1 Sections 24(b)(i)-(iii) of the *Constitution of the Republic of South Africa*, 1996.
2 Section 2(1)(b) of *NEMA*.
3 Section 2(1)(e) of *NEMA*.
4 Section 28(1) of *NEMA*; Le Roux *et al* 2017 https://www.mondaq.com/southafrica/directors-and-officers/629540/liability-of-directors-for-corporate-environmental-transgressions-a-south-african-case-study.
5 Paterson and Kotzé *Environmental Compliance and Enforcement* 44.

failure to comply, criminal prosecution follows.[6] Situ and Emmons[7] categorise environmental crimes as involving the person or entity who commits these. They distinguish between corporate, organised, state and personal environmental crimes. The authors state that environmental crime includes a variety of corporate crimes, which, in turn, embody a substantial part of white-collar crime.[8]

This study will consider the nature and limitations of enforcement with respect to corporate environmental crimes and examine the question as to whether a deferred prosecution agreement (hereafter DPA) structure should be implemented in South Africa as a practical alternative to the prevailing primarily criminal-sanction approach when it comes to the enforcement of environmental laws.

## *1.2 The research problem*

### *1.2.1 The nature and shortcomings of enforcement of environmental crime*

Section 49A of *NEMA* creates several offences to enforce environmental laws. In environmental criminal law, sanctions are mostly reactive.[9] They apply to criminalised conduct after the fact to restore the moral imbalance created by that conduct and impose punishment on the offender.[10] The enforcement measures aimed at ensuring compliance are placed in the hands of law enforcement agencies, the prosecuting authority, and the judiciary.

Section 24G of *NEMA* provides for a non-judicial process that permits *ex post facto* authorisation of activities that commenced unlawfully.[11] Any person who has commenced with a listed or specified activity without an environmental authorisation may apply to the minister responsible for environmental matters for a

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6 Kidd *Environmental Law* 269.

7 Situ and Emmons *Environmental Crime: The Criminal Justice System's Role in Protecting the Environment* 45.

8 Situ and Emmons *Environmental Crime: The Criminal Justice System's Role in Protecting the Environment* 45.

9 Kidd *The protection of the environment through the use of criminal sanctions* 266.

10 UNODC 2020 https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-8/key-issues/1--concept--values-and-origin-of-restorative-justice.html.

11 Paschke and Glazewski 2006 *PELJ* 21.

directive relating to that activity.[12]

Various authors criticised the primary use of criminal sanctions and limited use of administrative corrective measures as provided for in section 24G.[13] The most salient among these criticisms can be summarised as follows.

Kidd[14] criticises the use of criminal sanctions and states that:

> the obvious shortcoming of using criminal sanctions in the protection of the environment is that it is a reaction to offences that have already been committed and thus, so it seems, has already failed in its purpose of protecting the environment. Bearing in mind that the purpose of environmental law is protection of the environment, the criminal law in such circumstances does not achieve this objective, other than by deterring people from committing similar harmful actions.

Kidd[15] further identifies weaknesses of criminal enforcement that are generally intrinsic to any jurisdiction.[16] He identifies the lapses between the time at which the offence was committed and the conclusion of the trial, the reactive nature of criminal law, the stringent standard of proof, the constitutional safeguards inherent in a criminal trial, costs involved, time spent attending court appearances and, lastly, the issue of an act being illegal as opposed to criminal which is therefore morally neutral.[17] Several contingent weaknesses peculiar to South Africa are inadequate policing, the absence of public awareness of threats to the environment, the lack of adequate training of enforcement officers, the inexperience of court officials, inadequate penalties, tension between an approach of negotiation and a criminal sanction and, finally, the plethora of enforcement provisions in *NEMA*.[18]

According to an international study conducted by the European Network of Prosecutors for the Environment, the difficulty in a successful prosecution of environmental crimes can be attributed to several factors, such as a lack of knowledge and experience concerning these types of offences, difficulty in proving

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12 Section 24G(1)(a) of *NEMA.*
13 Kidd 1998 *SAJELP* 181; Hugo *Administrative penalties as a tool for resolving South Africa's Environmental compliance and enforcement woes* 55-56; Kohn 2012 *SAJELP* 8.
14 Kidd 1998 *SAJELP* 181.
15 Kidd *Environmental Law* 270-273.
16 Kidd *Environmental Law* 270-272.
17 Kidd *Environmental Law* 270-272.
18 Kidd *Environmental Law* 272-277.

causality, a lack of resources and that the criminal process tends to be cumbersome.[19]

### *1.2.2 Criminal liability of corporations*

According to Kidd[20] the majority of and most serious harm to the environment is caused by corporations. Lewis states the motivation for holding corporations accountable[21] as follows:

> Corporations have been at the forefront of industrialisation and globalisation, which in turn drives an economy, however they can cause considerable harm to individuals and the environment.

Section 332 of the *Criminal Procedure Act* 51 of 1977 (hereafter the *CPA*) provides for corporate criminal liability in South Africa. Section 332(1) accredits to a corporation the criminal conduct of persons acting on the instructions of a director or employee of that corporation.[22] The requirement for criminal liability is that an agent or servant must have acted within the course and scope of his or her employment or whilst furthering the interests of that corporation.[23] Criminal conduct can be either in the form of an act or an omission.[24] Liability extends to both common law and statutory offences.[25] Following the successful prosecution of a corporation, a court may only impose a fine, as a corporation cannot be sentenced to imprisonment.[26]

### *1.2.3 Deferred prosecution agreements*

DPAs are criminal enforcement mechanisms used to settle criminal cases out of court, thereby avoiding criminal prosecution on agreed conditions.[27] McCarron

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19 Boogers *et al Sanctioning environmental crime (WG4): International cooperation and specialisation of the judiciary* 17.
20 Kidd 2003 *SA Public Law Journal* 277; Lemkin 1996 *California Law Review* 307.
21 Lewis *Corporate Criminal Liability* 1.
22 Burchell, Burchell and Hunt *South African Criminal Law and Procedure* 472.
23 Jordaan 2003 *Acta Juridica* 48.
24 Sections 332(1)(a) and (b) of the *CPA*.
25 Jordaan 2003 *Acta Juridica* 51.
26 Section 332(2)(c) of the *CPA*.
27 Chance *Deferred Prosecution Agreements and U.S. Approaches to Resolving Criminal and Civil Enforcement Actions* 5.

defines DPAs as:

> negotiated agreements between a prosecutor and a person – frequently a corporate body – that is alleged to have committed a criminal offence.[28]

The South African Law Commission[29] (hereafter the SALC) investigated a system of out-of-court settlements[30] as one of the methods designed to divert an offender away from the criminal court system. In their report, an out-of-court settlement is defined as:

> an agreement between the prosecution and the defence in terms of which the accused undertakes to comply with conditions as agreed upon between the parties, in exchange for the prosecutor discontinuing the particular prosecution.

A DPA is a method used to divert a deserving offender away from the criminal court, thereby minimising the adverse consequences of a conviction whilst serving the aim of deterrence.[31] DPAs were implemented in countries such as France[32], Canada[33] and Japan[34], and are in the process of becoming law in Kenya[35] and Australia.[36] South Africa has not adopted a DPA scheme.

### *1.2.4 Comparative perspective*

This study will analyse the legal position regarding DPA schemes in the United States of America (hereafter the USA), on a federal level, and England and Wales. The USA, on a federal level, has a long history of implementing DPAs with respect to white-collar crime. The USA introduced a form of DPA in 1992.[37] Since then, the use of DPAs has been formalised in the *Justice Manual*.[38] The lessons learnt in the US

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28 McCarron 2016 *King's Inns Student Law Review* 54.
29 SALC *Out of court settlements in criminal cases* 5.
30 An out-of-court settlement is similar to a DPA.
31 SALC *Out of court settlements in criminal cases* 30.
32 Articles 41-1-2 and 180-2 of the French *Criminal Procedure Code* refer to a DPA as a "judicial public interest agreement".
33 Part XXII.1 of the Canadian *Criminal Code* refer to a DPA as a "remediation agreement".
34 Article 350-2 of the Japanese *Code of Criminal Procedure*.
35 Section 50A of the Anti-Corruption and Economic Crimes (Amendment) Bill 2021 proposes the formal introduction of DPAs into the *Anti-Corruption and Economic Crimes Act* 2003.
36 Schedule 2 of the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019.
37 Hill 2014 https://www.lexology.com/library/detail.aspx?g=4f0cc529-bfdb-49c3-ac8d-e989e87fc84a.
38 US Department of Justice *US Justice Manual* 9-28.200 https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations.

over the past 30 years may prove helpful as there are several environmental cases where DPAs were concluded.

In contrast, England and Wales introduced DPAs in 2014.[39] England and Wales adopted a strict procedural regime concerning DPAs.[40] Judicial oversight is an integral part of the process.[41] Furthermore, DPAs will only be offered to companies who have fully disclosed unlawful behaviour and cooperated during investigations.[42]

The contrast in the approach to DPAs in the USA, with their focus on prosecutorial autonomy on the one hand and the implementation of judicial oversight in England and Wales on the other, may have valuable lessons for South Africa. Another distinction is that the USA allows DPAs with respect to environmental crimes, whilst England and Wales allow DPAs for specific economic offences.[43]

### *1.2.5 DPAs in South Africa*

Strydom[44] argues that the use of criminal sanctions to enforce environmental law transgressions in South Africa resulted in the increase of criminal offences. Despite this, South African criminal procedural law has seen limited advancements to alleviate the burden on criminal courts. The most significant was the introduction of section 105A in the *CPA,* which provides for plea and sentence agreements.[45] Chapters 6 and 8 of the *Child Justice Act* 75 of 2008 (hereafter the *CJA*) make extensive provision for diversion of juvenile offenders. These measures are an indication that our criminal procedural law is ready to take the next logical step towards a system of negotiated restorative justice agreements.

There is currently no legislative process in South Africa regarding diversion from the

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39 Introduced in terms of the *Crime and Courts Act* 2013.

40 Vergis, Lau and Wong *Deferred Prosecution Agreements to be introduced in Singapore* 1-2.

41 Vergis, Lau and Wong *Deferred Prosecution Agreements to be introduced in Singapore* 1-2; paras 7 and 8 of Schedule 17 of the *Crime and Courts Act* 2013.

42 Deferred Prosecution Agreements Code of Practice issued in terms of para 2.8.2i of the *Crime and Courts Act* 2013.

43 Part 2 of Schedule 17 of the *Crime and Courts Act* 2013.

44 Strydom *The use and impact of criminal sanctions for environmental law transgressions in industrial facilities in South Africa* 69.

45 *Criminal Procedure Second Amendment Act* 62 of 2001. Date of commencement 14 December 2001.

criminal justice system of corporate offenders like that of other jurisdictions. In Volume 1 of the report of the Judicial Commission of Inquiry into State Capture[46] (hereafter the Zondo Commission) the Zondo Commission refers to DPAs as "an innovation" in reaction to the crimes identified in the report and recommends that DPAs be considered part of the four levels of response to corporate crimes.[47]

### *1.2.6 The possibility of DPA schemes for environmental crimes*

Several foreign jurisdictions are progressively embracing an approach to corporate environmental crime by using DPAs to divert corporations away from the criminal justice system.[48] A DPA is said to be "a useful and pragmatic tool" for prosecutors in instances where corporations must be held criminally accountable.[49] The approach of applying DPAs with respect to environmental transgressions by corporations has been adopted in France and is intended to:

> compensate for the lack of a transactional mechanism for efficient and rapid processing of proceedings initiated for serious environmental offences.[50]

In the USA, an environmentally related DPA is concluded with a corporation on condition that the corporation admits the wrongdoing, pays a fine, contributes to an environmental cause, co-operates with the prosecution regarding investigations against individuals of that corporation, and significantly, operates within the corners of the law in exchange for not being prosecuted.[51]

The benefits of a DPA in the case of environmental crimes make a DPA an appealing alternative to prosecution.[52] The publication of the agreement and a condition of corporate compliance would serve as a deterrent for other corporations not to

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46 Judicial Commission of Inquiry into State Capture Report *Part 1 Vol. 1 South African Airways and its Associated Companies*.

47 Judicial Commission of Inquiry into State Capture Report *Part 1 Vol. 1 South African Airways and its Associated Companies* 813.

48 France and the USA allow DPAs for environmental crimes.

49 McCarron 2016 *King's Inns Student Law Review* 55.

50 Navacelle 2022 https://navacelle.law/the-challenges-of-environmental-criminal-law-in-the-light-of-the-deferred-prosecution-agreement-in-environmental-matters/.

51 Block and Feinberg 2010 *ALI-ABA Business Law Course Materials Journal* 9-10.

52 Block and Feinberg 2010 *ALI-ABA Business Law Course Materials Journal* 7.

commit environmental transgressions.[53] Spalding[54] argues that DPAs provide restorative justice for corporations and their victims.

A question that begs to be answered is: Why has South Africa not embraced this advancement in criminal law in relation to environmental offences where corporations are involved? The most serious environmental crimes, such as pollution and waste management, are regarded as white-collar crimes as they are similarly committed by a respectable person with high social standing in the course of furthering business interests – borne from greed.[55] The advantage of a DPA in enforcing environmental crimes is that corporations will, as a condition of a DPA, implement a proactive compliance methodology as part of their corporate responsibility towards the environment.[56] DPAs will further serve to deter[57] corporations from committing environmental transgressions and avoid collateral prejudice of the corporation, such as insolvency, reputational damage and the consequential falling of share prices that would have resulted from a criminal conviction and sentence.[58] In environmental offences, a DPA may contain a provision stating that the corporation will, in addition to monetary penalties, engage in a form of community service or contribute to an environmental organisation.[59]

### *1.3 Research question*

The study aims to answer the following research question: How practicable are DPAs as a sanction in the South African environmental context to divert corporations that committed transgressions away from the criminal justice system and ultimately deter corporations from committing those offences?

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53 Arlen *Removing prosecutors from the boardroom* 62.
54 Spalding 2015 *Ohio State Law Journal* 385, 406.
55 Cassidy 2009 *Nat. Resources & Env't* 38.
56 Environmental Management Inspectorate *Basic Training Course Manual*: *Part 2* 333.
57 Clough and Mulhern "The prosecution of corporations" 189.
58 McCarron 2016 *King's Inns Student Law Review* 55.
59 Larkin 2013 *Loyola of Los Angeles Law Review* 6.

### *1.4 Research aims and objective*

The study aims to examine whether DPAs offer a practicable solution in the South African environmental context to divert corporations that committed transgressions away from the criminal justice system and ultimately deter corporations from committing those offences.

Given that ordinary criminal procedures have limitations in relation to their intrinsic and contingent disadvantages, the objective of the study is to critically consider the problem statement with reference to South African criminal law enforcement principles and approaches in general. The study will consider regimes pertaining to enforcement of environmental law and examine if DPAs could more effectively combat environmental crime by providing an alternative to a protracted criminal trial while serving as incentives to enhance good governance of a corporation with respect to its environmental responsibilities. This study aims to fill a void in South African procedural law.

The implementation of DPAs in foreign jurisdictions will be considered in terms of their positive and negative features. The focus will be on the USA at a federal level, as well as England and Wales, and will evaluate the approach regarding DPAs in each jurisdiction.

The outcomes of the investigation will be used to analyse DPAs in the South African statutory framework with an emphasis on corporations in the context of environmental law transgressions. A conclusion to the research will then be made based on its findings.

### *1.5 Premises, assumptions, and hypothesis*

The premise of the research is that the current system of reactive enforcement of environmental laws that follow the command-and-control approach is not an effective preventative measure. The assumption is that the primary use of criminal measures is ineffective, as reflected by extant research in the field of environmental law. The hypothesis is that DPAs can be meaningfully adopted as an alternative

dispute mechanism in the context of corporate environmental offences in South Africa.

### *1.6 Research methodology*

The research will be conducted through a qualitative methodology in terms of which data in the form of concepts, opinions or practices will be collected. For this research, the qualitative method selected is a combination of a literature review and a comparative study. The position regarding DPAs in the USA, and England and Wales will be analysed from a legal comparative perspective to conclude the influence it will have on the South African system.

The literature review will consist of the study of domestic and foreign legislation, case law, academic journals, related publications, textbooks, and Internet resources.

### *1.7 Framework*

In addition to this introductory chapter, this study will consist of the following four chapters:

Chapter 2 will investigate the South African approach to criminal enforcement in general and in respect of corporations and critically consider the current approach when it comes to the prevention of environmental law violations and the enforcement of environmental law.

Chapter 3 will examine the position in the USA and England and Wales in terms of DPAs as related to corporations and environmental offences and compare the approach with respect to the DPA schemes in these jurisdictions.

Chapter 4 will analyse the advantages and disadvantages of DPAs with emphasis on corporations in the context of environmental law transgressions and the suitability of these for South Africa.

Chapter 5 will present a summary and conclusion of the study in which the results of the research will be presented.

# CHAPTER 2 SOUTH AFRICAN APPROACH TO THE ENFORCEMENT AND PREVENTION OF ENVIRONMENTAL CRIMES

## *2.1 Introduction*

The previous chapter serves as the basis of this study and introduced the foundation of the research problem and methodology that underlines the research.

This chapter will examine the current approach in South Africa to the enforcement of criminal sanctions in general, as well as the approach to enforcing sanctions for environmental offences. The National Prosecuting Authority's role and significance in the enforcement cycle will be examined. The position in South Africa regarding the way corporate offenders are dealt with and its shortcomings for innovative sentencing options will be critically considered.

The disadvantages of the reactive approach to criminal offences will be discussed, and reference will be made to a practical example of the prosecution of a corporate entity that allegedly committed environmental offences pertinent to this study.

## *2.2 Approach to criminal law enforcement in South Africa*

South African law is subdivided into public law and private law.[60] Public law governs the relationship between the State, as the legislative authority, and the subjects of the State.[61] Criminal law is a branch of public law[62] and identifies conduct that may lead to criminal prosecution and establishes the punishment thereof.[63] The sources of South African criminal law are legislation, the common law and case law.[64]

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60 Snyman *Criminal Law* 3.
61 Snyman *Criminal Law* 3.
62 *Lelaka v S* (CAF10/2014) [2014] ZANWHC 34 (10 October 2014) para 17.
63 Mokhtar 2006 *Statute Law Rev* 41.
64 Snyman *Criminal Law* 5.

The purpose of criminal law was stated in *S v Makwanyane*[65] as:

> In all societies there are laws which regulate the behaviour of people and which authorise the imposition of civil or criminal sanctions on those who act unlawfully. This is necessary for the preservation and protection of society.

In accordance with the principle of legality, there can be no crime or punishment except in accordance with fixed, predetermined law.[66] Criminal liability is established when the following elements are present: an unlawful act, causation, and the act must have been committed with a form of intent.[67] In *Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd*[68] the court indicated that fault in the form of negligence may be sufficient to establish criminal conduct in environmental offences. According to Strydom,[69] this issue was not canvassed in the judgment and contends that negligence as a form of fault would lead to criminal liability with respect to environmental crimes in a limited number of instances, such as the violation of section 24G of *NEMA.*

Criminal sanctions are reactive.[70] For the most, criminal sanctions are only imposed once the harm has already occurred.[71] They apply to criminalised conduct after the fact to restore a moral imbalance created by that criminal conduct by punishing the offender.[72] Engen[73] formulates the reactive nature of criminal sanctions as follows:

> The state is justified in punishing someone if punishing him expresses well the appropriate indignation of the community toward his crime.

Save in a limited number of instances, criminal law is fundamentally punitive.[74] Punishment is meted out in proportion to the seriousness of the crime, the personal circumstances of the accused and the interests of the community.[75] Courts have

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65 *S v Makwanyane* (CCT3/94) [1995] ZACC 3 para 117.
66 Mokhtar 2006 *Statute Law Review* 41; *Masiya v DPP Pretoria (The State)* 2007 2 SACR 435 (CC) para 52.
67 *Mzwempi v S* 2011 2 SACR 237 (ECM) (28 April 2011) para 44.
68 *Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd* 2019 5 SA 275 (GP) para 76.
69 Strydom 2021 *South African Law Journal* 633, 639.
70 Kidd *The protection of the environment through the use of criminal sanctions* 266.
71 Kidd 2002 *SAJELP* 22.
72 UNODC 2020 https://www.unodc.org/e4j/en/crime-prevention-criminal-justice/module-8/key-issues/1--concept--values-and-origin-of-restorative-justice.html.
73 Engen *The Reactive Theory of Punishment* 25.
74 Hoctor *Criminal Law* 18.
75 *S v Zinn* 1969 2 SA 537 (A) 540G; *S v Rabie* 1975 4 SA 855 (A).

increasingly recognised the constitutional rights of victims and established the harm done to a victim as a distinct fourth factor to consider.[76] Punishment must be imposed with consideration of the four acknowledged theories of punishment, which are deterrence, prevention, rehabilitation and retribution.[77] The concept of restorative justice during the sentencing phase of a criminal trial aims to focus on repairing the harm that has been committed against the victim by involving the parties in a process where the harm caused is identified. The offender accepts responsibility, restitution is made, and measures are implemented to prevent a recurrence of the incident to reconcile the parties involved.[78]

Punishment has five principal functions. It must deter others from committing similar wrongdoings (general deterrence), it must deter the individual from committing wrongdoing in future (specific deterrence), it must allow for rehabilitation, it must protect society from harm (preventative), and lastly, it must be retributive.[79] The relationship between these aspects was succinctly elucidated in *S v Mudyiwayana*[80] as follows:

> Deterrence and retribution often tend to steer the severity of the proposed sentence in a certain direction. Rehabilitation, on the other hand, tends to pull the proposed sentence in another direction.

Gordon[81] points out that:

> The retributive theory finds the justification for punishment in a past act, a wrong which requires punishment or expiation. The other theories, reformative, preventive and deterrent, all find their justification in the future, in the good that will be produced as a result of the punishment.

The Constitutional Court affirmed that "the greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished."[82] The theory of deterrence is described as a utilitarian theory of punishment.[83]

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76 *S v Matyityi* (695/09) [2010] ZASCA 127 (30 September 2010) paras 16-17.
77 *S v Mokoena* (CC27/2021) [2022] ZAGPPHC 504 (22 June 2022) para 2.
78 Discussed in chapter 4.
79 *S v Van Loggenberg* 2012 1 SACR 462 (GSJ) para 6.
80 *S v Mudyiwayana* (CC17/2020) [2022] ZAWCHC 23 (2 March 2022) para 45.
81 Gordon *Criminal Law of Scotland* 50.
82 *S v Makwanyane* (CCT3/94) [1995] ZACC 3 (6 June 1995) para 122.
83 Gumboh 2017 *PELJ* 3.

Utilitarianism is a theory based on morality that postulates that the eventual good of society is to achieve contentment and avoid pain.[84] Gumboh[85] criticises the deterrence theory in that it may serve to justify excessive punishment to attain its purpose; secondly, it may lead to the imposition of harsher sentences; and lastly, it is doubtful that deterrence helps to reduce the incidences of crime. To achieve deterrence, the focus of the South African criminal justice system is on retribution.[86] In accordance with that approach, the offender deserves punishment.[87]

The enforcement measures to ensure compliance with laws are placed in the hands of law enforcement agencies, the prosecuting authority, and the judiciary. Crime is prosecuted at the instance of the State and not the victim, and any punishment imposed is carried out by state officials.[88] Traditionally, the State acted as the victim due to the approach that a crime is considered detrimental to the interests of the State.[89] Since the advent of a constitutional dispensation in South Africa, with the concomitant recognition of human rights, the criminal justice system has evolved to a victim centred approach to punishment.[90] In criminal proceedings, the State is represented by a state prosecutor, who is *dominus litis*.[91] The State must prove a crime beyond a reasonable doubt.[92]

## *2.3 The National Prosecuting Authority*

### *2.3.1 The Constitutional position*

The National Prosecuting Authority (hereafter the NPA) derives its powers from section 179(1) of the *Constitution,*[93] which creates a single national prosecuting authority in the Republic in which the authority to institute criminal proceedings

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84 Gumboh 2017 *PELJ* 3.
85 Gumboh 2017 *PELJ* 5-7.
86 Tshehla 2004 *SACJ* 2.
87 Tshehla 2004 *SACJ* 3.
88 Hoctor *Criminal Law* 18.
89 Kgosimore 2002 *Acta Criminologica* 69.
90 *S v Matyityi* (695/09) [2010] ZASCA 127 (30 September 2010) para 17.
91 Tshehla 2004 *SACJ* 3.
92 *S v T* 2005 2 SACR 318 (E) para 37.
93 The *Constitution of the Republic of South Africa*, 1996.

vests.[94] It further provides that the prosecuting authority may perform functions incidental thereto.[95] The primary function of the NPA, being the authority to prosecute or decline to prosecute, is an aspect that is particularly relevant to the research question of whether a DPA is a viable alternative to prosecution, especially in the context of the complexities involved in the prosecution of environmental crimes.[96]

The Constitution places a high premium on the independence of the national prosecuting authority.[97] In *S v Yengeni*[98] the Court stated:

> The independence of the judiciary is directly related to, and depends upon, the independence of the legal professions and of the NDPP. Undermining the freedom from outside influence would lead the entire legal process, including the functioning of the judiciary, being held hostage to those interests that might be threatened by a fearless, committed and independent search for the truth.[99]

Selabe[100] argues that the independence of the NPA is as important for the rule of law as an independent judiciary. Hamilton[101] supports this notion and states that a public prosecutor is vital in ensuring due process and the rule of law. This aspect relates to DPAs and judicial oversight over the process discussed hereunder.[102]

Section 179(2) of the Constitution mandates the NPA to institute criminal proceedings on behalf of the State.[103] It establishes the institutional framework through which that power is exercised.[104]

### *2.3.2 National Prosecuting Authority Act*

Section 2 of the *National Prosecuting Authority Act* 32 of 1998 (hereafter the *NPA*

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94 *S v Basson* 2007 3 SA 582 (CC) para 141.
95 Section 179(2) of the *Constitution of the Republic of South Africa*, 1996.
96 Murombo and Munyuki 2019 *PELJ* 5.
97 Section 179(4) of the *Constitution of the Republic of South Africa*, 1996.
98 *State v Yengeni* 2006 1 SACR 405 (T).
99 *State v Yengeni* 2006 1 SACR 405 (T) paras 52-53.
100 Selabe *The independence of the national prosecuting authority of South Africa: fact or fiction?* 105.
101 Hamilton "Prosecutorial independence and accountability" 13.
102 Discussed in chapter 4.
103 Du Toit and Ferreira 2015 *PELJ* 1507.
104 Thabo and Odeku 2021 *Obiter* 549.

*Act*) establishes a single national prosecuting authority that comprises national and deputy national directors, directors and deputy directors, and prosecutors.[105] The powers that the prosecuting authority exercises are the power to institute and conduct criminal proceedings, carry out any necessary functions which are incidental thereto, and discontinue criminal proceedings.[106]

### *2.3.3 The NPA as dominus litis*

South Africa follows a system of discretionary prosecution.[107] The prosecutor's authority to determine whether to institute a prosecution or not, prefer what the charges should be and the forum where the trial should be conducted is generalised in the concept that the prosecutor is *dominus litis*.[108] A member of the National Prosecuting Authority must exercise his or her powers, duties, and functions impartially and in good faith and must do so without fear, favour, or prejudice.[109]

### *2.3.4 Prosecuting Policy and Prosecuting Policy Directives*

Sections 179(5)(a) and (b) of the *Constitution* place a duty on the National Director of Public Prosecutions (hereafter the "NDPP") to issue a prosecution policy[110] and prosecution policy directives[111] which must be observed in the prosecution process.[112] The purpose of the Prosecution Policy is to determine the way prosecutors should exercise their powers and perform their duties and functions.[113] The prosecutor has the discretion to make decisions that affect the criminal justice process and, among others, decide whether to institute criminal proceedings against an accused or to withdraw charges.[114] Once provided with a docket, a prosecutor is

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105 Section 4 of the *NPA Act*.
106 Section 20(1) of the *NPA Act*.
107 SALC *Out of court settlements in criminal cases* 6.
108 Reddi 2018 *SACJ* 127; *Wickham v Magistrate, Stellenbosch* 2017 1 SACR 209 (CC) para 22.
109 Section 32 of the *NPA Act.*
110 NPA *Prosecution Policy* June 2013.
111 NPA *Prosecution Policy Directives* 1 May 2019. This document is marked "Confidential" and, unlike the Prosecution Policy, not in the public domain. The document was nonetheless found on the internet at https://www.studocu.com/en-za/document/university-of-the-western-cape/law-of-criminal-procedure/npa-directives-1-may-2019/69852061. There is a newer version of this document published on 1 July 2022, which is not readily accessible.
112 See also s 21 of the *NPA Act*.
113 NPA *Prosecution Policy* 3.
114 NPA *Prosecution Policy* 4.

compelled to consider whether to request further investigation of the case, institute prosecution, enter into a plea and sentence agreement, elect to divert the matter before trial and decline to prosecute, or merely decline to prosecute.[115] The decision to prosecute must be made with due consideration of the available evidence and whether such evidence indicates a "reasonable prospect of a successful prosecution."[116] A prosecutor must continually consider the merits of the case and may withdraw charges before a plea is entered, depending on the circumstances of the case.[117]

The Prosecution Policy Directives binds all members of the NPA, unless the contrary is implied or denoted, and determines the approach to be followed in executing the professional duties of prosecutors.[118] In contrast to the Prosecution Policy, the Prosecution Policy Directives are more elaborate and serve as codified instructions for prosecutors.

## *2.4 Enforcement of environmental laws*

### *2.4.1 The Constitutional imperative*

The Stockholm Declaration on the Human Environment[119] recognises that the natural and artificial aspects of the environment are vital to human well-being and the enjoyment of basic human rights and are equated to the right to life.[120] On 28 July 2022 the General Assembly of the United Nations adopted resolution A/RES/76/300 that acknowledges the right to a clean, healthy and sustainable environment as a human right.[121] In accordance with South Africa's international obligations, the *Constitution* embraces these globally acknowledged principles.

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115 NPA *Prosecution Policy* 5.

116 NPA *Prosecution Policy* 5; *Nzuza v NDPP* 2024 2 SACR 251 (GP) para 49.

117 NPA *Prosecution Policy* 5. See also s6 of the *CPA* that grants the prosecuting authority a discretion to withdraw charges or to stop prosecution.

118 NPA *Prosecution Policy Directives* para 6.

119 Stockholm Declaration on the Human Environment, in the *Report of the United Nations Conference on the Human Environment*.

120 Article 1 of the Stockholm Declaration on the Human Environment, in the *Report of the United Nations Conference on the Human Environment.*

121 *Resolution on the Human right to a clean, healthy and sustainable environment* Res 76/300, 28 July 2022 3.

Section 24 of the *Constitution* includes a comprehensive provision for environmental rights and stipulates as follows:

> Everyone has the right-
> (a) to an environment that is not harmful to their health or well-being; and
> (b) to have 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.

In *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism*[122] Murphy, J concluded that this right consists of two facets. Section 24(a) provides for a basic human right, whilst section 24(b) imposes a constitutional imperative to take positive steps through reasonable legislative and other measures to attain that right.[123] These measures must prevent pollution and ecological degradation, promote conservation, secure ecologically sustainable development and use of natural resources and promote justifiable economic and social development.[124] The words "through reasonable legislative and other measures"[125] in the section place a duty on the Government to enact legislation to give effect to this constitutional right.[126]

Kidd[127] argues that the inclusion of the words "other measures" in section 24 extends the operation of section 24 to natural and juristic persons.[128] This argument is supported by section 8(2) of the *Constitution,* which determines that a provision contained in the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable considering the nature of the right and any duty imposed in terms of the right. Chirwa[129] concludes that the jurisprudence arising from the constitutions of Germany, Ireland and South Africa recognises that constitutional

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122 *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2006 5 SA 512 (T) para 17.
123 Kidd *Environmental Law* 22.
124 Sections 24(b)(i)-(iii) of the *Constitution of the Republic of South Africa*, 1996.
125 Section 24(b) of the *Constitution of the Republic of South Africa*, 1996.
126 *HTF Developers (Pty) Ltd v The Minister of Environmental Affairs* 2006 5 SA 512 (T) para 17.
127 Kidd *Environmental Law* 22.
128 Kidd *Environmental Law* 24.
129 Chirwa 2006 *Law, Democracy & Development* 46.

rights bind non-state entities. Section 24 is considered anthropocentric as it focuses on people and their needs and interests.[130]

The implication of the inclusion of environmental rights in the *Constitution* was concisely stated in *Director: Mineral Development, Gauteng Region v Save the Vaal Environment*[131] as follows:

> Our Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication, requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country. Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns.

The sentiment expressed in this case appears in the number of environmental laws introduced in South Africa since the advent of the *Constitution*.[132] The Constitutional imperative regarding the environment creates a legal obligation to protect the environment.[133] An essential aspect of this right is the concept of sustainability.[134] A sustainable environment is interrelated to freedom, justice and equity, and it denotes a society where all stakeholders play a role in securing harmony with nature.[135]

South African environmental law comprises extensive national legislation, provincial legislation and ordinances, and local by-laws. Provincial legislation and legislation at local government level form part of the regulatory framework for environmental law.[136]

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130 Du Plessis 2006 *PELJ* 8.

131 *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* (133/98) [1999] ZASCA 9 (12 March 1999) para 20.

132 Goolam 2000 *Journal of African Law* 124. The most important of these are *National Water Act* 36 of 1998, the *National Environmental Management: Protected Areas Act* 57 of 2003, the *National Environmental Management: Air Quality Act* 39 of 2004, and the *National Environmental Management: Integrated Coastal Management Act* 24 of 2008.

133 Gaveni and Odeku 2021 *African Journal of Public Affairs* 22.

134 Section 24(b)(iii) of the *Constitution of the Republic of South Africa*, 1996.

135 Paddock 2012 *Envtl. L. Rep. News & Analysis* 590.

136 Van der Linde and Feris *Compendium of South African environmental legislation* 20.

### *2.4.2 The National Environmental Management Act*

#### 2.4.2.1 The nature of environmental protection in *NEMA*

*NEMA* was promulgated to fulfil the obligation imposed by the *Constitution*[137] to protect the environment through reasonable legislative measures.[138] This Act is the overarching framework for environmental legislation[139] and stipulates the general approach that other environmental legislation and administrative practices should follow.[140]

Chapter 1 of *NEMA* introduces a set of universally recognised principles that apply throughout the Republic to the "actions of all organs of state that may significantly affect the environment".[141] It forms the framework for environmental legislation, management, and implementation plans.[142] It not only guides the interpretation, administration and implementation of *NEMA*, but also any other law concerned with the protection or management of the environment.[143] In this regard Goolam[144] states:

> the striking feature of the recent environmental legislation is the inclusion of a set of fundamental principles setting out the general framework upon which each piece of legislation is based, and the concept of trusteeship and the concept of intergenerational equity.

The focal point of environmental law is the protection of the public interest concerning the prevention of pollution and the degradation of the environment, and it has developed an unquestionable public law character.[145] These objectives are attained by inflicting sanctions in the form of fines, incarceration, rehabilitation and remedial orders in the event of a breach of the duty of care.[146] *NEMA* establishes

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137 Section 24(b) of the *Constitution of the Republic of South Africa*, 1996.
138 Soltau 1999 *SAJELP* 33.
139 Nel and Du Plessis 2001 *SAJELP* 19, 36.
140 Hall *Judging Environmental Crime* 25.
141 Section 2(1) of *NEMA*.
142 Section 2(1)(b) of *NEMA*.
143 Section 2(1)(e) of *NEMA*.
144 Goolam 2000 *Journal of African Law* 128.
145 Bray 1989 *CILSA* 33.
146 Gaveni and Odeku 2021 *African Journal of Public Affairs* 30.

several enforcement measures consisting of civil,[147] administrative[148] and criminal measures.[149] According to Strydom, these form part of command-and-control mechanisms used to ensure compliance with and enforcement of environmental laws.[150] The command-and-control policy relies on regulation (permission, prohibition, standard setting, and enforcement) as opposed to financial incentives.[151]

*NEMA* stipulates the "the polluter pays" principle and states that those responsible for causing environmental harm must pay for remediation.[152] According to Strydom,[153] "the polluter pays" principle, the duty to secure ecologically sustainable development and the principles in *NEMA* are "foundational considerations in enforcing environmental laws, ultimately, to benefit the environment."

2.4.2.2 Specific environmental management Acts

*NEMA* is supplemented by sectoral legislation on the environment and natural resources management.[154] These are known as specific environmental management Acts (hereinafter referred to as SEMAs).[155] A repealed definition in *NEMA* termed a specific environmental management Act as an act of Parliament that regulates a specific aspect of the environment.[156] The amended definition in *NEMA* identifies these acts as the following:

(a) the *Environment Conservation Act* 73 of 1989.

(b) the *National Water Act* 36 of 1998 (hereafter the *NWA*).

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147 Sections 28(7) and 32 of *NEMA*.
148 Section 24G of *NEMA*.
149 Sections 49A and 49B of *NEMA*.
150 Strydom *The use and impact of criminal sanctions for environmental law transgressions in industrial facilities in South Africa* 69.
151 Paterson and Kotzé *Environmental Compliance and Enforcement* 44.
152 Strydom *The use and impact of criminal sanctions for environmental law transgressions in industrial facilities in South Africa* 94.
153 Strydom *The use and impact of criminal sanctions for environmental law transgressions in industrial facilities in South Africa* 94.
154 Nel and Du Plessis 2001 *SAJELP* 2, 3.
155 Kidd *Environmental Law* 42-43.
156 The definition was inserted in *NEMA* by s 1(d) of the *National Environmental Management Amendment Act* 46 of 2003 (with effect from 1 May 2005) and deleted by s 3(a) of the *National Environment Laws Amendment Act* 44 of 2008 (with effect from 11 September 2009).

(c) the *National Environmental Management: Protected Areas Act* 57 of 2003.

(d) the *National Environmental Management: Biodiversity Act* 10 of 2004.

(e) the *National Environmental Management: Air Quality Act* 39 of 2004.

(f) the *National Environmental Management: Integrated Coastal Management Act* 24 of 2008.

(g) the *National Environmental Management: Waste Act* 59 of 2008; or

(h) the *World Heritage Convention Act* 49 of 1999.

The definition extends to any regulation or other subordinate legislation regarding any of those Acts.[157] The aspects of the environment controlled by the distinctive Acts include biodiversity, water, air pollution control, waste, hazardous substances control, marine resources and marine pollution, environmental planning, and environmental impact assessment.[158] The legislation can further be divided into the distinct areas they regulate. These areas relate to natural resource management, waste management and pollution control, and land-use planning and development control. These sub-sectors are also referred to as "Green, Blue and Brown" regarding the compliance and enforcement activities being biodiversity and protected areas (green), integrated coastal management and freshwater resources (blue) and pollution, waste, and environmental impact assessment (brown).[159] SEMAs primarily enforce their provisions by implementing criminal penalties.[160]

The President of South Africa assented to the *Climate Change Act*[161] on 23 July 2024.[162] This Act is regarded as a specific environmental management act as defined in section 1 of *NEMA*.[163] The Act, amongst others, introduces carbon budgets for

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157 Section 1 of *NEMA*.
158 Murombo and Munyuki 2019 *PELJ* 3.
159 Department of Forestry, Fisheries and the Environment "National Environmental Compliance & Enforcement Report" 2011-2012 3.
160 Murombo and Munyuki 2019 *PELJ* 2.
161 Act 22 of 2024.
162 Government Notice 5050 in GG 50966 of 23 July 2024. Its commencement has not yet been proclaimed under s 38.
163 Section 5(2) of the *Climate Change Act* 22 of 2024.

companies with significant emissions levels.[164]

### *2.4.3 Enforcement of environmental laws*

Couzens[165] provides a functional definition of "enforcement" in the context of environmental law:

> The range of procedures and actions employed by a State. Its competent authorities and agencies to ensure that organizations or persons, potentially failing to comply with environmental laws or regulations, can be brought or returned into compliance and/or punished through civil, administrative or criminal action.

Craigie, Snijman and Fourie[166] identify five sequential elements that comprise the regulatory cycle of environmental enforcement. These are problem identification and strategy development, promulgation of legislation, compliance monitoring, and enforcement where non-compliance is discovered.

*NEMA* provides for compliance and enforcement measures, including administrative, civil, and criminal proceedings.[167] Considering the purposes of environmental law, enforcement measures should be applied to pre-empt conduct that may potentially cause environmental damage to the environment and pollution or result in the unsustainable use of natural resources.[168]

#### 2.4.3.1 Administrative measures

##### 2.4.3.1.1 Administrative enforcement of environmental provisions

Section 24G of NEMA provides for a non-judicial process that permits *ex post facto* authorisation of activities that commenced unlawfully.[169] The section provides that any person who has commenced with a listed or specified activity without an

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164 Doris 2024 https://www.africanlawbusiness.com/news/21230-south-africa-passes-climate-change-act.

165 Couzens *Enforcement of Environmental Law: Good Practices from Africa, Central Asia, ASEAN Countries and China* 1.

166 Craigie, Snijman and Fourie "Dissecting environmental compliance and enforcement" 48.

167 Strydom *The use and impact of criminal sanctions for environmental law transgressions in industrial facilities in South Africa* 9.

168 Murombo and Munyuki 2019 *PELJ* 9.

169 Paschke and Glazewski 2006 *PELJ* 21.

environmental authorisation may apply to the Minister responsible for environmental matters for a directive relating to that activity.[170] The Minister may issue a directive, consider a report and issue an environmental authorisation.[171] An administrative fine must be imposed before authorisation is granted or refused.[172]

Hugo[173] states that section 24G had the effect of encouraging environmental offences due to a prospect for later correction. He contends that the application of section 24G is contrary to the rule of law as provided for in section 1 of the Constitution, the latter as amplified by the principle of administrative legality and justice, given that section 24G allows for a lawful activity to flow from unlawful administrative action.[174]

Kohn[175] points out that section 24G undid the true purpose of the environmental impact assessment process, which is to identify and predict the potential environmental impact of a proposed activity. Criticism is also levied against the administrative fine calculator[176] published by the Minister of Environmental Affairs, as it fails to adequately account for pollution, cumulative impacts on the environment and profit derived from illegal activities.[177]

Section 22A of the *National Environmental Management: Air Quality Act*[178] prescribes an administrative fine which may not exceed R10 million that the licensing authority may impose for an applicant for an atmospheric emission license that engages in the unlawful conduct of a listed activity resulting in atmospheric emission before the license may be issued.[179]

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170 Section 24G(1)(a) of *NEMA*.
171 Sections 24G(1), 24G(2) and 24G(2)(b) of *NEMA*.
172 Sections 24G(1)(b)(i)-(viii) of *NEMA* sets out the directives the Minister may issue.
173 Hugo *Administrative penalties as a tool for resolving South Africa's Environmental compliance and enforcement woes* 55; *Body Corporate of Dolphin Cove v KwaDukuza Municipality* 2012 JOL 28771 (KZD) [41].
174 Hugo *Administrative penalties as a tool for resolving South Africa's Environmental compliance and enforcement woes* 56.
175 Kohn 2012 *SAJELP* 8.
176 Regulation 4 in GN R698 in GG 40994 of 20 July 2017.
177 Makgoka *A critical analysis of the National Environmental Management Act section 24G fine calculator* 46.
178 Act 39 of 2004.
179 Section 22A of the *National Environmental Management: Air Quality Act* 39 of 2004.

2.4.3.1.2 Compliance notices and directives

Environmental legislation provides that an official may direct an offender to take specified steps to comply with the law.[180] Section 28(4) of *NEMA* provides that the Director-General may issue directives to any person who is causing, has caused or may cause significant pollution or degradation of the environment. These may include directives to cease any activity, operation, or undertaking; to investigate, evaluate and assess the impact of specific activities and report thereon; commence taking specific measures before a given date; diligently continue with those measures; and to complete those measures before a specified reasonable date.[181]

Section 31L of *NEMA* confers powers to environmental management inspectors to issue compliance notices if there are reasonable grounds for believing that a person has not complied with a provision of the law for which that inspector has been designated or with a term or condition of a permit, authorisation or other instrument issued in terms of such law.[182]

Other legislation that provides for the issuing of directives include section 31A of the *Environment Conservation Act*[183], section 19 of the *NWA*[184] and section 45 of the *Mineral and Petroleum Resources Development Act*.[185] Feris[186] argues that in instances where the contravention of the act may have significant consequences for the environment, the most effective route to achieve enforcement would be criminal prosecution and not the issuing of a directive.

2.4.3.1.3 Withdrawal of authorisation

Section 34C of *NEMA* grants a court that convicted a person of an offence in terms of NEMA or a specific environmental management Act a discretion to withdraw any permit or other authorisation issued in terms of NEMA or a specific environmental

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180 King, Strydom and Retief *Fuggle & Rabie's Environmental Management* 248.
181 Sections 28(4)(a)-(e) of *NEMA*.
182 Sections 31L(1)(a) and (b) of *NEMA*.
183 Act 73 of 1989.
184 Act 36 of 1998.
185 Act 28 of 2002.
186 Feris 2006 *PELJ* 62.

management Act to that person if that person abused the rights conferred by the permit or authorisation.[187] According to Kidd[188], this is not an administrative measure as the discretion in terms of this section is granted to a court following a criminal conviction.

An instance of administrative sanction whereby a functionary may withdraw an authorisation is found in the *Marine Living Resources Act.*[189] Section 28 provides that the Director-General of the Department of Environmental Affairs and Tourism[190] may issue a written notice to a holder of any right, licence or permit in terms of the Act to provide a written motivation within a specified period why the right, licence or permit should not be revoked, suspended, cancelled, altered or reduced upon the occurrence of instances specified in the *Marine Living Resources Act*.[191] After the expiry of the specified period, the Director-General shall refer the matter, with any reasons furnished by the holder, to the Minister for a decision.[192] The Minister may revoke, suspend, cancel, or alter the terms or conditions of the right, licence or permit or decide not to take any such steps.[193]

#### 2.4.3.2 Civil procedures

Civil measures are primarily common-law remedies obtained in a civil court[194] in the form of an interdict.[195] To successfully obtain a final interdict, a litigant has to prove the existence of a clear right, an injury actually committed or reasonably apprehended, and the absence of similar protection through any other ordinary remedy.[196] Some foreign jurisdictions have implemented a system of civil sanctions imposed by courts instead of criminal sanctions.[197] The US has implemented an

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187 Section 34C(1)(a) of *NEMA*.
188 Kidd 2009 *SAJELP* 36.
189 Act 18 of 1998.
190 Currently known as the Department of Forestry, Fisheries and the Environment.
191 Section 28(1) of the *Marine Living Resources Act* 18 of 1998.
192 Section 28(2) of the *Marine Living Resources Act* 18 of 1998.
193 Section 28(3) of the *Marine Living Resources Act* 18 of 1998.
194 Strydom *The use and impact of criminal sanctions for environmental law transgressions in industrial facilities in South Africa* 9.
195 King, Strydom and Retief *Fuggle & Rabie's Environmental Management* 249.
196 *Tergniet and Toekoms Action Group v Outeniqua Kreosootpale (Pty) Ltd* (10083/2008) [2009] ZAWCHC 6 (23 January 2009) para 36.
197 Part 3 of the *Regulatory and Enforcement Sanctions Act* 2008 in the United Kingdom.

administrative and civil penalty system, allowing the Department of Justice to impose either administrative or civil sanctions instead of criminal sanctions.[198]

Section 32(1) of *NEMA* establishes legal standing in respect of a qualified person or group of persons to seek appropriate relief to enforce environmental laws in respect of what would constitute appropriate relief. Kidd[199] suggests with reference to the dictum in *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products*[200] that appropriate relief is not limited to a remedy that has already been recognised in South African law but that a breach or imminent breach of an environmental statute, and the public interest or the protection of the environment should be sufficient to entitle a party to ancillary relief. South African environmental laws do not provide for a set of codified civil enforcement tools in respect of environmental protection.[201]

#### 2.4.3.3 Criminal sanctions

Criminal enforcement measures have been used to protect the environment for some time.[202] Rabie[203] states that it is one of the most conventional methods to enforce criminal law and, consequently, to enforce environmental laws. Kidd[204] analyses various environmental laws and concludes that criminal sanction is the primary method of enforcement in environmental legislation, with exceptions. This method of enforcing environmental laws forms part of the "command and control" approach.[205]

*NEMA* and the other SEMAs provide for a considerable array of criminal offences, and if convicted, an offender may be liable to severe penalties, which may consist

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198 National Enforcement Training Institute "Practice Handbook: Administrative Enforcement at EPA: Strategies, Tools, Resources" 2.
199 Kidd 2010 *PELJ* 41-42.
200 *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products* 2004 2 SA 393 (E).
201 Fourie 2009 *SAJELP* 2.
202 Strydom *The use and impact of criminal sanctions for environmental law transgressions in industrial facilities in South Africa* 11.
203 Rabie 1972 *Comparative and International Law Journal of Southern Africa* 259-260.
204 Kidd *The Protection of the Environment through the use of Criminal Sanctions* 441.
205 Kidd *Environmental Law* 269.

of fines, imprisonment, or both.[206] Section 34 of *NEMA* further provides for ancillary orders a court may make following a conviction. An accused can be directed to pay compensation for damages or losses suffered to rehabilitate or repair environmental harm, reasonable costs incurred to prosecute, or damages equal to the benefit the accused may have derived from any wrongdoing.[207] The inclusion of remedial orders and compensation awards in terms of *NEMA* steers criminal law towards with the objectives of environmental regulation.[208]

### *2.4.4 Duty of care*

The Constitutional imperative to protect the environment is referred to as the duty of care and is established through section 28 of *NEMA*. This section directs any person who engages in activities that are likely to cause harm to the environment to take reasonable steps to prevent such environmental harm from occurring, continuing, or recurring.[209]

Section 28 of *NEMA* determines as follows:

> Duty of care and remediation of environmental damage
>
> (1) Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.[210]

The duty of care extends to an owner of land or premises, a person in control of land or premises or a person who has a right to use the land or premises on which or in which any activity or process is or was performed or undertaken or any other situation exists.[211] It is a requirement that the activity, process, or existing situation must cause, have caused or is likely to cause significant pollution or degradation of

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206 Strydom and Field 2023 *PELJ* 2.
207 Strydom and Field 2023 *PELJ* 2.
208 Murombo and Munyuki 2019 *PELJ* 7.
209 Gaveni and Odeku 2021 *African Journal of Public Affairs* 22.
210 Section 1 of *NEMA* extends the definition of person to include a juristic person.
211 Section 28(2) of *NEMA*.

the environment.[212]

The measures referred to in section 28(1) may include the following:

(a) investigate, assess and evaluate the impact on the environment;
(b) inform and educate employees about the environmental risks of their work and the manner in which their tasks must be performed in order to avoid causing significant pollution or degradation of the environment;
(c) cease, modify or control any act, activity or process causing the pollution or degradation;
(d) contain or prevent the movement of pollutants or the cause of degradation;
(e) eliminate any source of the pollution or degradation; or
(f) remedy the effects of the pollution or degradation.[213]

It is the responsibility of the person who causes, has caused or may cause significant pollution or degradation of the environment to take these measures. Failure to comply, may result in a directive being issued by the Director General.[214] The directives may include an order to cease any activity, operation or undertaking; to investigate, evaluate and assess the impact of specific activities and report thereon; to implement specific measures, continue with those measures and complete the measures within a reasonable timeframe.[215] *NEMA* provides that if a person fails to comply with a directive under section 28(4), the Director-General or a provincial head of the department may apply to a competent court for appropriate relief as part of reasonable steps that may be taken to remedy such a failure to comply.[216]

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 is an offence in terms of *NEMA.*[217] In addition, a failure to comply with a directive issued in terms of section 28(4) is an offence in terms of section 49A(1)(g) of *NEMA*.

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212 Section 28(2) of *NEMA*.
213 Section 28(3) of *NEMA*.
214 Section 28(4) of *NEMA*.
215 Section 28(4) of *NEMA*.
216 Section 28(7) of *NEMA*.
217 Section 49A(1)(e) of *NEMA*.

According to Soltau,[218] section 28 of *NEMA* contrasts with other environmental legislation aimed at specific activities and intends to establish environmental values. It is a measure aimed at regulating pollution and environmental degradation, irrespective of the source or object of pollution.[219]

### *2.4.5 Environmental management cooperation agreements*

Voluntary approaches by corporations to improve environmental compliance are structures put in place whereby corporations make commitments more than the legal minimum.[220] They can be divided into four categories: public voluntary schemes developed by a public body; negotiated agreements; unilateral commitments determined by the industry; and private agreements between stakeholders.[221]

NEMA governs environmental management cooperation agreements, which may be concluded between the government, represented by the Department of Forests, Fisheries and the Environment (hereafter the DFFE), and any person, including a corporation or community, to further the principles of *NEMA*.[222] The purpose of these is to protect or restore the environment and to improve the environmental performance of the regulated sector.[223]

Environmental management cooperation agreements may contain an undertaking to improve on the applicable standards for protecting the environment,[224] establish a set of quantifiable objectives and determine dates for achieving the undertaking.[225]

These agreements are considered part of the mechanisms to attain sustainable development.[226] They afford an element of flexibility to the industry to achieve their

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218 Soltau 1999 *SAJELP* 43.
219 Kidd *Environmental Law* 149.
220 Gunningham 2002 *Foreign Direct Investment and the Environment* 159.
221 Gunningham 2002 *Foreign Direct Investment and the Environment* 159.
222 Farina 2001 *Clean Air Journal* 12. See also s 35(1) of *NEMA*.
223 Fischer *Environmental management co-operative agreements: a contribution to pollution prevention in South Africa* 5; Farina 2001 *Clean Air Journal* 12.
224 Section 35(3)(a) of *NEMA*.
225 Section 35(3)(b) of *NEMA*.
226 Farina 2001 *Clean Air Journal* 16.

targets beyond that of the standard command-and-control approach to environmental regulation.[227]

The importance of this for this study as terms of a DPA, is the recognition that independent monitors and inspectors may be appointed, independently verifiable reports to indicate compliance with targets may be presented, and the establishment of norms and standards and agreement on terms or legislative requirements.[228]

### *2.4.6 Challenges regarding environmental prosecution*

In South Africa, environmental protection is mainly sought through criminal prosecution.[229] Regarding industry-related offences, role players in many environmental agencies are often reluctant to investigate pollution, waste and development transgressions due to a lack of adequate training in this field.[230] A successful criminal prosecution depends collecting evidence that would establish the offender's guilt beyond a reasonable doubt at a trial.[231] The Prosecution Policy Directives[232] do not guide prosecutors regarding environmental crimes.[233]

Fourie[234] concludes that:

> All things considered, the South African criminal justice system is ill-suited, ill-prepared and ill-resourced to be the sole forum for the levying of fines for environmental contraventions. Not only is criminal environmental enforcement not very successful (particularly in the case of pollution, waste and development contraventions) due to a range of institutional obstacles, but the existence of these obstacles, coupled with the very fact of low conviction rates, disincentivise criminal investigation and prosecution from the outset.

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227 Fischer *Environmental management co-operative agreements: a contribution to pollution prevention in South Africa* 31.

228 Section 35(3)(c) of *NEMA*.

229 Fourie 2009 *SAJELP* 2.

230 Fourie 2009 *SAJELP* 5.

231 *S v Meshack* (SS57/2022) [2023] ZAGPJHC 740 (27 June 2023) para 46.

232 NPA 2019 *Prosecution Policy Directives*.

233 In contrast, the Prosecution Guidelines issued by the Nieu South Wales Environment Protection Authority directs in respect of environmental crimes that a prosecutor should consider the availability and strength of any scientific evidence and the capabilities and expertise of any expert witness. (https://www.epa.nsw.gov.au/-/media/epa/corporate-site/resources/legislation/22j0619-epa-prosecution-guidelines-january-2022.pdf para 2.2.4.)

234 Fourie 2009 *SAJELP* 7.

The challenges in investigating industry-related environmental crimes are often aggravated by the difficulty of identifying the victim of the crime. According to Skinnider[235] is the focus of criminal law in general on individual victims as opposed to environmental law, which regards harm to the environment as an offence against the public interest. Despite this, a victim-centred approach to environmental harm may tend to cause delays in reporting crimes as the effects of the offending conduct may only manifest later.[236]

Environmental Management Inspectors, established by *NEMA*[237], have the authority to investigate environmental transgressions, inspect premises to ascertain whether legislation is adhered to, seize evidence of criminal conduct, issue compliance notices and issue admission of guilt fines as part of their enforcement powers.[238] The South African Police Service continues to play a role in enforcing environmental legislation to investigate environmental crimes.[239] Police officers are overburdened with regulating "normal" crimes, and not trained to investigate environmental crimes.[240] According to Fourie,[241] these factors tend to hamper or cause inadequate investigation of environmental crimes or dissuade any enforcement steps altogether.

Prosecution of a corporate entity is fraught with inherent difficulties relating to the structure of a corporate entity, as the management structures can be manipulated to protect the wrongdoers from accountability.[242] This aspect was strikingly demonstrated in the case of *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited.*[243] In this matter, a company fell afoul of its environmental

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235 Skinnider *Effect, Issues and Challenges for Victims of Crimes that have a Significant Impact on the Environment* 2-3.

236 Skinnider *Effect, Issues and Challenges for Victims of Crimes that have a Significant Impact on the Environment* 5.

237 Section 31B of *NEMA*.

238 DFFE *About Environmental Management Inspectorate (EMI)* https://www.dffe.gov.za/about-environmental-management-inspectorate-emi.

239 DFFE *About Environmental Management Inspectorate (EMI)* https://www.dffe.gov.za/about-environmental-management-inspectorate-emi.

240 Fourie 2009 *SAJELP* 5.

241 Fourie 2009 *SAJELP* 5.

242 Van Niekerk and Ponelis 2024 *PELJ* 9.

243 *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited* 2006 5 SA 333 (W).

obligations and the court had to adjudicate on contempt of court proceedings. All the directors resigned simultaneously. The court nonetheless found that they could not merely abandon their duties and obligations as directors and held them responsible for the first respondent's failure to comply with a court order.[244] Murombo and Munyuki[245] refer to this case to illustrate the intricacies of enforcing environmental crimes against a corporation due to it being a juristic person.

## *2.5 Prosecution of corporate entities*

### *2.5.1 Introduction*

The nature of a corporation is founded on common law as well as statutory law.[246] Regarding common law principles, a company is regarded as a separate legal person who can acquire rights and duties with concomitant legal implications.[247] The Constitution affirms that a juristic person is entitled to the same fundamental rights as a natural person to the extent required by the nature of the rights and the nature of that juristic person.[248] The converse of this is that a juristic person is bound by a provision of the Bill of Rights considering the nature of the right and the duty imposed by it.[249]

### *2.5.2 Companies Act*

Section 19(1) of the *Companies Act*[250] codifies the common law position set out above and provides that, from the date of its incorporation, a company:

> (a) is a juristic person which exists continuously until its name is removed from the companies register in accordance with this Act;
> (b) has all of the legal powers and capacity of an individual, except to the extent that-
> (i) a juristic person is incapable of exercising any such power, or having

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244 *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited* 2006 5 SA 333 (W) para 16.9.
245 Murombo and Munyuki 2019 *PELJ* 17.
246 Mupangavanhu *Directors' standards of care, skill, diligence, and the business judgment rule in view of South Africa's Companies Act 71 of 2008* 3.
247 Mupangavanhu *Directors' standards of care, skill, diligence, and the business judgment rule in view of South Africa's Companies Act 71 of 2008* 44.
248 Section 8(4) of the *Constitution of the Republic of South Africa*, 1996.
249 Section 8(2) of the *Constitution of the Republic of South Africa*, 1996.
250 Act 71 of 2008.

any such capacity; or
(ii) the company's Memorandum of Incorporation provides otherwise.[251]

The effect of section 19(1)(b) is that a company will have unlimited legal capacity, like that of a natural person unless its memorandum of incorporation explicitly restricts its capacity.[252]

An essential aspect of a corporation as a creature of statute is that it must demonstrate socially responsible behaviour, known as good corporate citizenship.[253] This aspect was dealt with in *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited,*[254] where the court referred with approval to the definition of good corporate governance by the King Committee as:

> A good corporate citizen is increasingly seen as one that is non-discriminatory, non-exploitative, and responsible with regard to environmental and human rights issues.[255]

The King IV Report proposes principles for corporations that specifically provide for responsible corporate citizenship that oversee and monitor its involvement in the environment with reference to its responsibility for pollution and waste management and the protection of biodiversity.[256]

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251 Sections 19(1)(a)-(b) of the *Companies Act* 71 of 2008.
252 Cassim 2010 *SA Mercantile Law Journal* 170-171.
253 Velasco 2006 *U.C. Davis Law Review* 460.
254 *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited* 2006 5 SA 333 (W) (15 May 2006).
255 *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Limited* 2006 5 SA 333 (W) (15 May 2006) para 16.9.
256 Principle 3 under Chapter 5 of Institute of Directors *The King IV Report on Corporate Governance* 45.

### *2.5.3 Criminal liability of corporations*

Du Toit[257] succinctly states the motivation for holding corporations accountable:

> Juis omdat hierdie entiteite dikwels magtig is en 'n groot negatiewe impak op mense, ander regspersone en die omgewing kan hê, moet hul aktiwiteite soms deur die reg aan bande gelê word.[258]

The *CPA* provides for corporate criminal liability in South Africa. Section 332(1) imputes to a corporation the criminal conduct of persons acting on the instructions of a director or employee of that corporation.[259] The *mens rea* of the offender is assigned to the corporation.[260] The requirement for criminal liability of the corporation is that an agent or servant must have acted within the course and scope of their employment or while furthering the interests of that corporate body.[261] Criminal conduct can be either an act or an omission[262] and extends to common law and statutory offences.[263] Liability is not attributed to the company based on the corporation's or its members knowledge of the unlawful act or omission.[264] Following the successful prosecution of a corporation, a court cannot sentence a corporation to imprisonment. The *CPA* provides that only a fine may be imposed.[265]

Du Toit[266] remarks that the objectives of corporate punishment should include deterrence, internal compliance, particular prevention, general prevention, compensation, restitution and restoration, retribution and the disclosure of information. He argues that there is a need for innovative sentencing options that should include publicity orders to attain retribution and deterrence.[267] Publicising a corporation's remedial measures would promote rehabilitation and act as a

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257 Du Toit *Die strafregtelike aanspreeklikheid van en straftoemeting aan regspersone* 1.
258 Precisely because these entities are often powerful and can have a large negative impact on people, other legal entities and the environment, their activities must sometimes be curbed by the law – my translation.
259 Burchell, Burchell and Hunt *South African Criminal Law and Procedure* 472.
260 *S v Dersley* 1997 2 SACR 253 (Ck) at 263B.
261 Jordaan 2003 *Acta Juridica* 48.
262 Section 332(1)(a) and (b) of the *CPA*.
263 Jordaan 2003 *Acta Juridica* 51.
264 *S v African Bank of South Africa Ltd* 1990 2 SACR 585 (W) 650.
265 Section 332(2)(c) of the *CPA*.
266 Du Toit 2016 *PELJ* 2.
267 Du Toit 2016 *PELJ* 12-13.

deterrent.[268] These aspects are equally relevant to environmental matters.

Borg-Jorgensen and Van der Linde[269] opines that section 332(1) is inadequate to cope with the development and extent of corporate activity in South Africa and suggests legislative reform.

### *2.5.4 Corporations and the environment*

Corporations, including transnational corporations, significantly impact the environment as they extract much of the earth's natural resources and release huge quantities of polluting substances, such as waste, in the pursuit of their goals.[270] According to Kidd[271] the majority of and most severe harm to the environment is caused by corporations. Oldfield[272] illustrates this as follows:

> Since 1988, just 100 companies have been responsible for 71% of global greenhouse gas emissions. In addition to this, only 25 corporations and state-owned organisations were found to be responsible for over 50% of the global industrial emissions during the same time period.

Another aspect of a corporation, identified by Spalding,[273] is the enforcement of extra-territorial crimes committed by multinational corporations. A connection is drawn between international environmental crime and corporate crime, to which the corporate structure of multinational corporations can provide an impenetrable defence.[274] In attaining the corporation's economic objectives, it should be limited by social and environmental imperatives as defined by constitutional values and legislation.[275] *NEMA* is an example of such legislation.

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268 Du Toit 2016 *PELJ* 13.
269 Borg-Jorgensen and Van der Linde 2011 *TSAR* 465.
270 Rowlands "Transnational Corporations and Global Environmental Politics" 133.
271 Kidd 2003 *SA Public Law Journal* 277; Lemkin 1996 *California Law Review* 307.
272 Oldfield 2022 https://sites.manchester.ac.uk/global-social-challenges/2022/07/07/corporations-vs-consumers-who-is-really-to-blame-for-climate-change/.
273 Spalding 2015 *Ohio State Law Journal* 402.
274 Di Valvasone date unknown https://centreforafricanjustice.org/holding-multinational-corporations-accountable-for-the-commission-of-international-environmental-crime/.
275 GN 1183 in GG 26493 of 23 June 2004 25.

Corporate liability for environmental transgressions is explicitly regulated in *NEMA* but is addressed in section 332(1) of the *CPA*.[276] However, *NEMA* includes criminal enforcement provisions to assist in prosecuting environmental offenders.[277] These provisions include an employer's liability for an act or omission of any manager, agent or employee which would be an offence under any provision in Schedule 3, and the employer shall be guilty of the said offence.[278] Any current director or a person who was a director of a firm[279] at the time of the commission by that firm of an offence listed in Schedule 3 shall be guilty of the said offence.[280] Section 34(7) signifies that at criminal proceedings, a prosecutor is required to prove that the company committed an offence, and once that is established, a director will have the evidential burden to show that he or she took all reasonable steps to prevent the commission of the offence.[281]

## *2.6 Assessment of the current model of law enforcement*

### *2.6.1 Critique with respect to criminal law enforcement in general*

The primary use of criminal sanctions as enforcement tools is criticised by several scholars. Kidd[282] identifies weaknesses of criminal enforcement that are generally intrinsic to any jurisdiction.[283] He elaborates that the lapses between the time at which the offence was committed and the conclusion of the trial, the reactive nature of criminal law, the stringent standard of proof, the constitutional safeguards inherent in a criminal trial, costs involved, time spent attending court appearances and, lastly, the issue of an act being illegal as opposed to criminal, which is therefore morally neutral.[284]

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276 King, Strydom and Retief *Fuggle & Rabie Environmental Management* 247.
277 Kidd *Environmental Law* 277.
278 Section 34(5) of *NEMA*.
279 Section 34(9) of *NEMA* defines a firm as an incorporated body or partnership.
280 Section 34(7) of *NEMA*.
281 Kidd 2003 *SA Public Law Journal* 279.
282 Kidd *Environmental Law* 270-273.
283 Kidd *Environmental Law* 270-272.
284 Kidd *Environmental Law* 270-272.

### *2.6.2 Criticism against use of criminal sanctions in environmental law enforcement*

Kidd[285] further criticises the use of criminal sanctions to protect the environment and argues that:

> The obvious shortcoming of using criminal sanctions in the protection of the environment is that it is a reaction to offences that have already been committed and thus, so it seems, has already failed in its purpose of protecting the environment. Bearing in mind that the purpose of environmental law is protection of the environment, the criminal law in such circumstances does not achieve this objective, other than by deterring people from committing similar harmful actions.

Several contingent weaknesses peculiar to South Africa are inadequate policing, the absence of public awareness of threats to the environment, the lack of adequate training of enforcement officers, the inexperience of court officials, inadequate penalties, tension between an approach of negotiation and a criminal sanction and, finally, the plethora of enforcement provisions in *NEMA*.[286]

Hapiz[287] identifies three concerns concerning environmental framework legislation. The first pertains to the imparity between the statutory punishment and the actual damages caused by corporations; second, the duration of the criminal process; and last, the uncertainty of the possible outcome of prosecution may prejudice victims of corporate crime.[288]

Further critique against the use of criminal sanctions in environmental law is one of overcriminalisation. Strydom[289] states that 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

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285 Kidd 1998 *SAJELP* 181.

286 Kidd *Environmental Law* 272-277. The Hon JH Jeffery, MP *Debate on Vote 22 (The Office of the Chief Justice)* 12 May 2022 (https://www.gov.za/speeches/speech-deputy-minister-justice-and-constitutional-development-hon-jh-jeffery-mp-during-0) confirmed the serious challenges experienced in the lower courts.

287 Hapiz *et al* 2022 *Environment-Behaviour Proceedings Journal* 105.

288 Hapiz *et al* 2022 *Environment-Behaviour Proceedings Journal* 105.

289 Strydom *The use and impact of criminal sanctions for environmental law transgressions in industrial facilities in South Africa* 17.

> obedience to any kind of legislative prescription. This has brought about a number of detrimental consequences.

According to Strydom[290] these "detrimental consequences" include the creation of too many criminals, which diminishes the effectiveness of the deterrent effect of punishment and respect for criminal law, overburdening of enforcement resources, and lastly, creating a false impression that legislative measures adequately protect the society.[291] Strydom argues that the cumulative effect of deterrence on environmental enforcement amounts to the erosion of deterrence.[292]

Paterson and Kotzé comment that there is a movement away from the command-and-control approach to enforce environmental crime to an approach to encourage and reward compliance.[293] The primary use of criminal sanctions proved to be limited to achieving the aim of deterrence.[294] In respect of the purpose of environmental law, the remark of Reiss[295] regarding compliance and deterrence is equally apposite:

> Compliance and deterrence forms of law enforcement have different objectives. The principal objective of a compliance law enforcement system is to secure conformity with law by means insuring compliance or taking action to prevent potential law violations without the necessity to detect, process, and penalize violators. The principal objective of deterrent law enforcement systems is to secure conformity with law by detecting violations of law, determining who is responsible for their violation, and penalizing violators to deter violations in the future, either by those who are punished or by those who might do so were violators not punished.

Strydom[296] suggests that criminal sanction should not be the default approach to enforce environmental law. This argument is supported by the contention that criminal law should be used as a last resort.[297] Strydom[298] identifies a further

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290 Strydom *The use and impact of criminal sanctions for environmental law transgressions in industrial facilities in South Africa* 17.

291 Strydom *The use and impact of criminal sanctions for environmental law transgressions in industrial facilities in South Africa* 17.

292 Strydom *The use and impact of criminal sanctions for environmental law transgressions in industrial facilities in South Africa* 71.

293 Paterson and Kotzé *Environmental Compliance and Enforcement* 44.

294 Murombo and Munyuki 2019 *PELJ* 3.

295 Reiss Jr 1984 *Law & Contemp Probs* 91.

296 Strydom *The use and impact of criminal sanctions for environmental law transgressions in industrial facilities in South Africa* 85.

297 Jareborg 2004 *Ohio State Journal of Criminal Law* 523.

298 Strydom *The use and impact of criminal sanctions for environmental law transgressions in industrial facilities in South Africa* 250.

challenge that relates to the complexity and frequent amendments of environmental law that constrains its certainty, precision, and effective compliance and enforcement. Fourie[299] points to the shortcomings of criminal sanctions as a method of enforcement of environmental laws as follows:

> Not only is criminal environmental enforcement not very successful (particularly in the case of pollution, waste and development contraventions) due to a range of institutional obstacles, but the existence of these obstacles, coupled with the very fact of low conviction rates, disincentivise criminal investigation and prosecution from the outset.

This aspect is accentuated by Fourie,[300] who criticises the prosecution of every environmental transgression or failure to adhere to the conditions of a permit as it places a heavy burden on an already overstrained criminal justice system.

Feris[301] attributes the difficulty with criminal law enforcement of environmental laws to the lack of capacity and insufficient resources within Government on a national and provincial level. In addition, the use of the 'command and control' approach to environmental enforcement does not provide sufficient incentives to encourage sustainable industrial practices by way of self-regulation.[302]

The object of enforcing environmental laws is the protection of the environment, to promote conservation and prevent harm,[303] These objectives are not necessarily the primary concern of criminal law.[304] Criminal law aims to achieve deterrence by the apprehension, conviction, and punishment of offenders.[305] This aspect of criminal enforcement may defeat the purpose of environmental laws, which is to protect the environment.

The prosecution of corporations and their officers for transgressions of environmental laws poses intricate legal challenges.[306] Widodo[307] and others state

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299 Fourie 2009 *SAJELP* 7.
300 Fourie 2009 *SAJELP* 2.
301 Feris 2006 *PELJ 53.*
302 Feris 2006 *PELJ 53.*
303 Kidd *Protection of the Environment* 7; Murombo and Munyuki 2019 *PELJ* 20.
304 Murombo and Munyuki 2019 *PELJ* 20.
305 *S v Makwanyane* (CCT3/94) [1995] ZACC 3 (6 June 1995) para 122.
306 Kidd 2003 *SA Public Law Journal* 277.
307 Widodo *et al* 2019 *Environmental Policy and Law* 80.

that corporate transgressions may manifest in various forms, including environmental crime, and are usually intentionally committed, whilst the individuals performing the unlawful actions are often aware of the law and find ways to circumvent it surreptitiously. The authors[308] itemise factors as to why it is difficult to prove these crimes:

a. It is not easy to detect as normal business activities conceal it;

b. The crime is complex as it involves dishonesty, deception, and theft and is often related to circumstances that are natural, technological, financial, legal, and organised, and involves many people over an extended period;

c. The complexity of the corporation obstructs the identification of the offender and leads to the diffusion of responsibility.

d. There may be many victims resulting from crimes such as pollution.

e. Difficulty in successfully prosecuting offenders due to obstacles and insufficient law enforcement;

f. Ambiguous laws create uncertainty;

g. Punishment of an offending corporation is often lenient, and

h. The criminal status of corporations is a point of contention when the requirements for criminal culpability are applied to corporations.

As indicated above, a company can only receive a fine as punishment.[309] This half measure would not solve the problem of preventing environmental crimes as offending corporations would assess the fine on a cost-benefit basis to determine whether compliance would be more beneficial than non-compliance.[310] A cost-benefit approach may lead to corporate recidivism, especially in relation to

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308 Widodo *et al* 2019 *Environmental Policy and Law* 80.

309 Sections 34(5)-(9) read with s 49A and Schedule 3 of *NEMA* imputes criminal liability on employers and directors for certain actions of managers, agents or employees where the environmental offence can be attributed to their conduct.

310 Singh 2010 88.

environmental crimes.[311]

Lastly, globalisation has given rise to the growth of national, multinational and transnational corporations[312], which presents challenges as a need is created for cross-jurisdictional legal and functional coordination, cooperation and collaboration.[313] Investigation and prosecution may prove to be difficult, especially if the offended country lacks a similar enforcement structure or where there may be political apathy towards enforcing transnational crime.[314]

### *2.6.3 Nature of punishment in industry-related environmental crimes*

*NEMA* provides for the increased sentence jurisdiction of a magistrate's court[315] to impose any penalty prescribed by it or any specific Environmental Management Act.[316] Consequently, the prosecution of environmental crimes is generally conducted in the magistrate's courts of South Africa.[317] Prosecutions are seldom instituted in the High Courts as courts of first instance.[318] The only known criminal matter instituted in a High Court was a private prosecution, which resulted in a conviction.[319] Although magistrate's courts are courts of record, their judgments are not readily available as these are not included in the law reports.[320] As a result, information regarding specific sentences is not accessible.[321] The most complete collection of cases relating to industrial environmental crime prosecutions available is found in a study done by Strydom and Field.[322] Their research reveals a trend to finalise environmental prosecutions through plea and sentence agreements in terms

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311 White 2017 *Crime, Law and Social Change* 118.
312 Singh 2010 65.
313 Lord 2023 *The British Journal of Criminology* 855.
314 Lord 2023 *The British Journal of Criminology* 855.
315 Magistrate's courts (or lower courts) are established in terms of s 2(1) of the *Magistrate's Court Act* 32 of 1944 for either a district or a regional division.
316 Section 34H(1) of *NEMA.*
317 Strydom and Field 2023 *PELJ* 6.
318 Strydom and Field 2023 *PELJ* 7.
319 *Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd* (CC82/2017) [2019] ZAGPPHC 86 (1 April 2019). At the time of the writing hereof, sentence is not yet imposed.
320 Strydom and Field 2023 *PELJ* 7.
321 The Centre for Environmental Rights publishes a limited number of cases from the magistrate's courts. These may be accessed at https://cer.org.za/virtual-library/judgments/magistrates-courts.
322 Strydom and Field 2023 *PELJ.*

of section 105A of the *CPA*.[323] In addition, they discovered that in 81 per cent of the cases considered, comparatively low fines were imposed, with only 5 per cent of the cases where high sentences were imposed.[324] The conclusion reached is that the retributive and deterrence value of the criminal sanction may be weakened due to a continual imposition of low sentences.[325]

In the past few years, news reports of "hefty fines" imposed for environmental transgressions have been reported. According to a report in the Mpumalanga Mirror, the Thaba Chweu Local Municipality was convicted of seven counts related to the contraventions of the *NWA*[326] and fined R10 million by the Lydenburg Magistrates' Court in terms of a plea and sentence agreement. Half of the sentence was suspended on certain conditions.[327]

The Mail & Guardian published an article that the Umsobomvu Local Municipality in the Northern Cape has been sentenced to a fine of R10 million for causing significant pollution or degradation of the environment by allowing raw sewage to be spilt into the environment. The whole of the sentence was suspended under certain conditions.[328]

Finally, the Lekwa Local Municipality in Mpumalanga was convicted in terms of a plea agreement and sentenced to a fine of R70 million. The conviction relates to contraventions of various environmental laws because they failed to prevent sewage from flowing into the Vaal River.[329]

Fourie[330] suggests that fines imposed by magistrates for environmental transgressions relating to development, pollution and waste management tend to

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323 Strydom and Field 2023 *PELJ* 13.
324 Strydom and Field 2023 *PELJ* 31.
325 Strydom and Field 2023 *PELJ* 31.
326 Act 36 of 1998.
327 Khumalo *Mpumalanga Mirror* https://mpmirroronline.co.za/local-municipality-fined-r10-million-for-contravening-environmental-laws/.
328 Bega *Mail & Guardian* https://mg.co.za/the-green-guardian/2023-02-13-northern-cape-municipality-slapped-with-r10m-fine-for-sewage-pollution/.
329 Carnie *Daily Maverick* https://www.dailymaverick.co.za/article/2023-06-25-mpumalanga-municipality-fined-r70m-for-vaal-river-sewage-pollution/.
330 Fourie 2009 *SAJELP* 6.

be extremely low. This statement is supported by information in the National Environmental Compliance & Enforcement Report (2022/23) of the Department of Forest, Fisheries and the Environment.[331] It provides "an overview of some of the more significant sentences" handed down in matters relating to environmental impact and pollution convictions.[332] An evaluation of the cases referred to indicates that the sentences were either wholly or partially suspended, thereby confirming the tendency of imposing lenient sentences in industry-related environmental offences.[333]

Below follows a discussion of a criminal case adjudicated in the regional court over which this author presided. It illustrates of the difficulties in prosecuting juristic persons for environmental transgressions, as discussed above.

## *2.7 Case study – State versus Middleground Trading*[334]

### *2.7.1 Background facts*

The Gerhard Minnebron Karst Spring falls in the geographical responsibility area of the Ventersdorp Local Municipality.[335] The Mooi River flows into a marshland situated on the farm Gerhard Minnebron (hereafter GMB) in the geographical area of Tlokwe Local Municipality near Potchefstroom.[336] The marshland is an area rich in peat. An oversimplified explanation of peat is an accumulation of partially decayed vegetation or organic matter under anaerobic conditions.[337] The peatland formed over thousands of years. In its natural state, peat functions as a water retention and filtration system. It has commercial and agricultural value and has been used in

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331 Department of Forest, Fisheries and the Environment *NECER* (2022/2023).

332 Department of Forest, Fisheries and the Environment *NECER* (2022/2023) 77-79.

333 Department of Forest, Fisheries and the Environment *NECER* (2022/2023) 77-79; Fourie 2009 *SAJELP* 2.

334 *S v Middleground Trading* (Potchefstroom Regional Court) (unreported) case number RC66/2016 (27 February 2018).

335 Sandenbergh Bekker *The more effective management of the Gerhard Minnebron as important resource of potable water for Potchefstroom* 5.

336 Farm Gerhard Minnebron 139 I-Q is in the Dr Kenneth Kaunda District Municipality in the Northwest Province.

337 In *Kooij v Middleground Trading 251 CC* (1249/18) [2020] ZASCA 45 (23 April 2020) it was remarked that "peat is plant material mostly found in wetlands. It is generally considered to be a fossil fuel" - endnote 1.

business ventures, inter alia, for cultivating mushrooms and compost and in a dried form as a fuel source.[338]

The farm is subdivided into smaller portions. Because of the rich deposits of peat, enterprises obtained permission regarding the applicable legislation to harvest peat from the marshland. To that extent, other persons harvested peat from their respective portions or contracted with the owners to harvest peat. Peat excavation on the marshland at GMB has been an ongoing venture for three decades.[339]

### *2.7.2 Criminal investigation*

Accused 1, Middleground Trading CC, a close corporation, has conducted peat harvesting or extraction on portions of the farm GMB from 2005 as a subcontractor of Stander Veen CC, the holder of a permit[340] granted in terms of the *Conservation of Agricultural Resources Act.*[341] The Department of Agriculture, Forestry and Fisheries, Department of Environmental Affairs (hereafter the DEA) and Department of Water Affairs, in a joint departmental operation, determined that severe degradation of the wetland on Portion 2 of the farm GMB has resulted from unlawful peat extraction.[342] Due to the extreme depletion of the peat bed in the marshland that was discovered in July 2011, the DEA issued a directive to cease further peat excavations.

### *2.7.3 Prosecution*

The State charged Accused 1, a close corporation, and Accused 2 and 3, both in their personal capacities with respect to several transgressions of *NEMA* and the *NWA*.[343] The charges relate to the activity undertaken by the close corporation to further its business of extracting peat in a wetland. The State alleged that the Accused committed the following offences:

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338 Winde and Erasmus 2011 *Water* 292-293.
339 Paragraph 6 of the heads of argument of the Accused.
340 The authorisation was handed in as Exhibit H.
341 Act 43 of 1983.
342 Department of Forest, Fisheries and the Environment *NECER* 2011/2012 54.
343 Act 36 of 1998.

a) The construction of facilities within 32 meters from a bank of a river or stream where the flood line is unknown without an environmental authorisation in contravention of section 24F of *NEMA*;[344]

b) the excavation, removal or moving of soil, sand or rock exceeding 5 cubic metres from a river or wetland without an environmental authorisation in contravention of section 24F of *NEMA*;[345]

c) the commission of an act or an omission which caused significant pollution or degradation of the environment concerning the harvesting of peat from a wetland in contravention of section 28(14) of *NEMA;*[346]

d) the commission of an act or an omission which caused significant pollution or degradation of the environment concerning the harvesting of peat from a wetland in contravention of section 49A(1)(e) of *NEMA*;[347]

e) the failure to adhere to a compliance notice in contravention of section 49A(1)(k) of *NEMA*[348], commencing of the activity of extracting peat without an environmental authorisation in contravention of section 49A(1)(a) of *NEMA;*[349]

f) committing the act of impeding or diverting the flow of a watercourse by extracting peat, causing an open body of water in contravention of section 151(1)(a) of the *NWA*;[350] and lastly,

g) altering the bed, banks, course, and the characteristics of a watercourse without authorisation.[351]

Accused 1, 2 and 3 pleaded not guilty to all the charges preferred against them and admitted to some of the exhibits the State intended to hand in.

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344 Count 1 of the charge sheet.
345 Count 2 of the charge sheet.
346 Count 3 of the charge sheet.
347 Count 4 of the charge sheet.
348 Count 5 of the charge sheet.
349 Count 6 of the charge sheet.
350 Count 7 of the charge sheet.
351 Count 8 of the charge sheet.

### *2.7.4 The evidence against the Accused*

Stander Veen CC and AH Stander, the member of that corporation, obtained authorisation from the Department of Agriculture in 1994 to harvest peat from the wetland on Portions 2 and 11 of the farm GMB. The authority was with respect to water usage as well as peat harvesting and granted in terms of the *Conservation of Agriculture Resources Act*[352]. Because of operational constraints in its ability to harvest peat, Stander Veen CC and Accused 1, Middleground Trading CC, concluded a contractor's agreement on 10 August 2005 in terms whereof Accused 1 would harvest the peat on behalf of Stander Veen CC. Throughout the operational period, an official from the Department of Agriculture was involved in monitoring and implementing the conditions of the licenses.

An environmental management inspector in the service of the DEA received a complaint from the Department of Water Affairs and went to portion 2 of GMB on 25 July 2011. He noticed a large body of open water within the wetland. On 18 August 2011 activity relating to the excavation of peat was observed at depths of 2.5 meters. As a result, the DEA issued a notice of intention to issue a compliance notice in terms of section 31L as well as a directive in terms of section 28(4) of *NEMA.* A final compliance notice was issued on 28 November 2011. All the activities on the premises ceased.

The prosecutor presented evidence of which a significant part was technical. The technical evidence pertained to aerial photographs of the area, the surveyor's calculations of the affected area, geographical evidence, and scientific evidence regarding the wetland with specific reference to GMB. Further evidence was that the farm was visited in 2008 to survey the wetland. In 2016, a noticeably larger wetland area was disturbed due to the harvesting. A geo-referenced aerial photograph depicted this aspect.

At the close of the State's case, the defence did not present any evidence and

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[352] Act 43 of 1983.

applied for a discharge in terms of section 174 of the CPA.[353]

### *2.7.5 Judgment*

The parties provided the court with heads of argument relating to the case's merits. On 27 February 2018, the court granted the application for discharge and returned a verdict of not guilty. In the judgment the court identified specific issues which resulted in the acquittal of all accused. These are:

a. The citing of Accused 2 and 3 did not adhere to the requirements of section 332 of the *CPA*. The State charged Accused 2 and 3 in their personal capacities and not as officials or directors of Accused 1. Accused 1 acted through its employees and directors, and, as there was no evidence of wrongdoing of Accused 2 and 3 personally, they could not be held accountable.

b. The State did not consider that the effect of the contractor's agreement between the corporate entities, established an employer-employee relationship. To that end, Accused 1 was an employee of another corporate entity, and the latter should have been charged as the principal or as a co-perpetrator. Lastly, accepting that there was a contractor's agreement between Stander Veen CC and Accused 1, the court found that Accused 1 did not act unlawfully. Stander Veen CC had the authority to harvest peat, which was a vital point of the case against Accused 1.

c. There were lacunae in the charge sheet and the evidence. The compliance notice did not include portion 11 of GMB, yet it was mentioned in the charge sheet. The compliance notice was served on other entities who were not involved in the activities on the farm.

d. Other persons or entities harvested peat on portions 30, 6 and 7. The State did not canvas the cumulative impact on the marshland.

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[353] Section 174 of the *CPA* allows for a verdict of not guilty at the close of the case for the prosecution, if the court is of the opinion that there is no evidence upon which a reasonable person might convict. See *S v Golding* (CCC63/2019) [2023] ZAKZDHC 35 (30 May 2023) para 6.

e. The increase of uranium in the outflow was presented as an indication that the peat was depleted to such an extent that the remaining peat deposits could no longer function as a natural filtration system. However, evidence showed that a gold mine higher up in the river caused pollutants (including uranium) to be deposited into the water system. The effect thereof was not investigated.

f. The State's case was predicated on the assumption that the overharvesting of peat caused the marshland to disappear, resulting in a large open body of water. The inflow of water from the Bosbok dam, rainfall patterns and the effect of harvesting of peat by other entities were not considered.

g. An official from the Department of Agriculture continuously monitored the harvesting operation and advised Accused 1 as to more effective ways to harvest peat. The State elected not to call him as a witness, which was detrimental to the case. In addition, no evidence was presented that the Accused harvested peat from portions 4 or 8, mentioned in the charge sheet.

*2.7.6 Analysis*

It took seven years from the time the investigation began to conclude the matter with significant cost implications for the state and defence. It is my submission that this case illustrates the immense difficulties that the prosecution must deal with for a successful prosecution concerning environmental transgressions. In most cases of pollution and waste management, it may take a considerable period before the transgressions are discovered.

Presenting technical evidence is challenging as there is seldom information available to compare the impact on the environment. The effect of weather patterns and climate change on existing ecosystems also plays a role. There are several different statutes from different periods, which created a challenge as to which act is applicable in respect of which action was commenced under that specific act over a period.

This case further illustrates the challenge of the complexities experienced with different laws relating to the environment administered by different state

departments.[354] These complexities and harms require a response that is flexible and has different facets.[355]

## *2.8 Chapter summary*

In this chapter, the nature of criminal law and the way environmental transgressions are enforced is explored. It is shown that criminal measures are the primary enforcement tool with respect to environmental transgressions. However, criminal enforcement is reactive because enforcement measures are only applied after criminal conduct is discovered.

A further aspect discussed is the difficulty experienced in investigating and prosecuting of environmental transgressors. This aspect was illustrated with reference to an environmental criminal matter in the Regional Court. The technical element involved in proving the transgressions, the difficulty in prosecuting corporations, and the lengthy period it took to finalise the prosecution are evident in this case.

Environmental transgressions can broadly be divided by the type of offences and the type of offender. Corporations primarily commit industry-related transgressions. Corporations are driven by profit and, to that end commit offences in the resource management, waste management and pollution control, and land-use planning and development control spheres of environmental laws. There are similarities between white-collar crimes and industry-related environmental crimes, and these types of environmental crimes can be classified as a form of white-collar crime. This chapter further illustrates the lenient sentences imposed on corporations for environmental transgressions.

In the writer's opinion the current dispensation to impose criminal sanctions in all instances of environmental crimes precisely fails because it is not certain, swift, or severe. Considering the moderate sentences imposed for environmental offences, it

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354 Strydom *The use and impact of criminal sanctions for environmental law transgressions in industrial facilities in South Africa* 219.

355 White 2017 *Crime, Law and Social Change* 130.

is doubtful whether these sentences serve their purpose to deter offenders and prevent environmental crimes. Writer suggests that an innovative approach to sentencing corporations that commit these crimes must be implemented.

In the next chapter, attention is given to how an alternative to the prosecution of crimes through a non-prosecution process is implemented in foreign jurisdictions. The difference in approach in the USA and England and Wales to the conclusion of a DPA will be examined. Criticism for and against using DPAs will be studied to establish the lessons that may be learnt should DPAs be viable in South African criminal procedure.

# CHAPTER 3 A COMPARATIVE PERSPECTIVE OF DPAS IN THE USA AND ENGLAND AND WALES

## *3.1 Introduction*

DPAs are progressively implemented in several foreign jurisdictions to divert corporations that committed white-collar crimes away from the criminal justice system.[356] In this chapter, the legal position regarding DPAs in the United States of America (USA) on a federal level and England and Wales will be analysed. Both these jurisdictions follow a law system that is adversarial, similar to South Africa.[357]

The contrast between the approach to DPAs in the USA on a federal court level, focusing on prosecutorial autonomy on the one hand and the implementation of judicial oversight in England and Wales on the other, will be reviewed. Such an approach may be useful to establish the principles best suited in the South African context of criminal procedural law.

Finally, the advantages and disadvantages of DPAs will be analysed to establish a foundation from which the implementation of DPAs in South Africa will be investigated.

## *3.2 Definition and conceptual framework of DPAs*

### *3.2.1 Definition of a DPA*

A DPA is a voluntary agreement between a criminal prosecutor and typically a corporate offender confronted with white-collar criminal charges, in which the offender receives amnesty on specific terms and conditions instead of being prosecuted with respect to those charges.[358]

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356 DPAs were implemented in countries, such as France, Canada and Japan and are in the process of becoming law in Kenya and Australia.

357 Wille, Du Bois and Bradfield *Wille's principles of South African law* 33.

358 Debenham https://www.acfi.ca/2019/03/11/non-prosecution-agreements-deferred-prosecution-agreements-and-remediation-agreements/.

Davis[359] defines a DPA as:

> A Deferred Prosecution Agreement is a negotiated criminal procedure that allows individuals—and increasingly, corporations—to avoid a criminal conviction by reaching an agreement with the prosecutor to acknowledge responsibility for their acts, to make appropriate payment in lieu of fines, to modify their behavior and often to cooperate with ongoing investigations, in return for which criminal charges are either dropped or are not brought at all.

A DPA must be distinguished from a non-prosecution agreement in that the government and the offender agree to dismiss charges already filed in the case of DPAs and, in the case of non-prosecution agreements, that prosecution will not follow.[360] A DPA should further not be regarded as the conclusion to plea bargaining negotiations as the latter usually leads to a conviction and a lenient sentence.[361]

As discussed in Chapter 2, the prosecution has a choice of either prosecuting or withdrawing charges altogether with respect to corporations as the choice to divert prosecution is generally limited to specific individuals and certain offences.[362] Greenblum[363] contends that deferral of prosecution should be utilised in cases where the offender could be successfully prosecuted if indicted.

### *3.2.2 Purpose of DPAs*

The objective of a DPA is to provide an alternative to prosecution authorities on how to address increasing economic crimes.[364] DPAs are intended to augment the measures available to the prosecution in response to corporate transgressions.[365] Whilst a corporation cannot be incarcerated once convicted, DPAs intend to bring about a degree of corporate accountability[366] and possibly a change in the behaviour

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359 Davis 2022 *Columbia Journal of Transnational Law* 751.
360 Kaal and Lacine 2014 *Business Lawyer* 63.
361 Bekker 2001 *CILSA* 313.
362 Campbell 2021 *The Sydney Law Review* 192.
363 Greenblum 2005 *Columbia Law Review* 1869.
364 Mpofu *The Use of Deferred Prosecution Agreements in Tax Disputes* 29.
365 Campbell 2021 *The Sydney Law Review* 192.
366 Campbell 2021 *The Sydney Law Review* 192.

and values within corporations.[367] An important purpose of a DPA is to generate incentives for corporations to self-report after conducting internal investigations.[368]

### *3.2.3 Core principles of DPAs*

Grasso[369] identifies the contractual nature of a DPA in that it stems from an agreement between the government and the offender through which the latter admits the illegal conduct in exchange for the charges to be dismissed if the conditions are fulfilled.

The process of concluding a DPA is underscored by consideration of several principles intrinsic to this form of negotiated settlements. Campbell[370] argues that these core principles are:

> emerging as retrospective justification in an iterative fashion, rather than forming the basis for the initiation and approval of DPAs.

Kohn[371] discusses these principles in the South African context and, with reference to Makinwa, submits that a corporation, by self-policing, self-reporting, and cooperation, demonstrates behaviour that may convince a prosecutor to conclude a DPA rather than referring the matter to trial. [372]

#### 3.2.3.1 Corporate cooperation

Corporate cooperation will include past and future cooperation, as was evident in a DPA concluded in England in the matter of *Serious Fraud Office v Standard Bank Plc (Now Known as ICBC Standard Bank Plc)*.[373] It includes self-reporting of the wrongful act, disclosure of information to the relevant authority, waiver of privilege, and making individuals connected to the corporation available for interviews.[374] Self-

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367 Campbell 2021 *The Sydney Law Review* 192.
368 Jull 2018 https://mondaq.com/canada/criminal-law/735734/coming-in-from-the-cold-deferred-prosecution-remediation-agreements-in-canada.
369 Grasso 2016 *Journal of Business Law* 2.
370 Campbell 2021 *The Sydney Law Review* 198.
371 Kohn 2022 *Constitutional Court Review* 42.
372 Kohn 2022 *Constitutional Court Review* 42 footnote 286.
373 *Serious Fraud Office v Standard Bank Plc* [2016] - para 30 of the preliminary judgment.
374 Campbell 2021 *The Sydney Law Review* 198.

reporting is considered as a pre-requisite for a DPA.[375] In addition, to demonstrate its willingness to cooperate, a corporation is required to provide prosecutors with all relevant facts about the individuals involved in corporate misconduct.[376]

#### 3.2.3.2 Compliance

Campbell[377] submits that like cooperation, the principle of compliance has an element of retrospectivity whilst also being forward-looking. The question of whether the corporation has a compliance programme, the contents thereof and the necessity to amend the current programme forms part of this aspect.[378] The result of this principle will be the inclusion of a term in a DPA that the corporation reviews its compliance programme and, where necessary, improves the terms thereof.[379] Another important aspect is the appointment of an impartial overseer to monitor compliance with the terms of the DPA.[380]

#### 3.2.3.3 Compensation

A further principle is one of recompense in that a corporation will be required to pay a fine, make restitution, or pay other financial penalties as part of the agreement. In addition, a DPA may stipulate that victims of the alleged offence must be compensated and provide for a donation to a charitable organisation or other third party.[381]

#### 3.2.3.4 Accountability

Lastly, corporations must acknowledge responsibility for their wrongdoing and agree to implement reforms. Despite reservations regarding deferring of prosecution and

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375 King and Lord 2020 *Public Law* 9.
376 Werle 2019 *The Yale Law Journal* 1410.
377 Campbell 2021 *The Sydney Law Review* 206.
378 Campbell 2021 *The Sydney Law Review* 206.
379 Campbell 2021 *The Sydney Law Review* 206.
380 Campbell 2021 *The Sydney Law Review* 207.
381 Campbell 2021 *The Sydney Law Review* 211.

its impact on corporate accountability, Breuer[382] addressed the New York City Bar Association and stated:

> In the 1990s, however, the government began doing something new: agreeing to defer prosecution against the corporation in exchange for an admission of wrongdoing, cooperation with the government's investigation, including against individual employees, payment of monetary penalties, and concrete steps to improve the company's behavior. And, over the last decade, DPAs have become a mainstay of white-collar criminal law enforcement.
>
> The result has been, unequivocally, far greater accountability for corporate wrongdoing – and a sea change in corporate compliance efforts. Companies now know that avoiding the disaster scenario of an indictment does not mean an escape from accountability.

This opinion is supported by Spivack and Raman,[383] who argue that DPAs are used in instances where prosecutors may have had to decline to prosecute but instead conclude such an agreement, thus exacting justice in instances where there was no prospect of a successful prosecution. By imposing penalties that are proportional to the crime, a DPA will reflect the principle of accountability.[384]

### *3.2.4 Role within the criminal justice system*

Prosecutors dealing with corporate criminal liability have grappled with the process of indicting corporations, resulting in few being prosecuted.[385] Coffee best describes the essence of this conundrum[386] in his article "No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment". The arguments presented in his article are often used in submissions that corporations should not be prosecuted because they are not blameworthy.[387] As a result, DPAs have exceedingly become the preferred method for the DOJ in the US to overcome this issue when prosecuting corporate crime.[388]

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382 Breuer 2012 https://www.justice.gov/opa/speech/assistant-attorney-general-lanny-breuer-speaks-new-york-city-bar-association.
383 Spivack and Raman 2008 *Am Crim L Rev* 187-188.
384 Perez 2020 *Rule of Law and Anti-Corruption Center Journal* 17.
385 Greenblum 2005 *Columbia Law Review* 1863.
386 Coffee 1981 *Michigan Law Review*.
387 Uhlmann 2016 *UC Davis L. Rev*. 1245.
388 Parker and Dodge 2023 *Journal of Financial Crime* 942, 945.

Shiner and Ho[389] state that DPAs have a particular role in the criminal justice system as they fall within the mandate to prevent, deter, and ensure accountability for criminal offences. It is a mechanism for controlling and modifying the behaviour of corporations.[390] Senko[391] states that:

> In theory, DPAs play a vital role in avoiding harm to innocent third parties that would result from indictment of a corporate entity while still accomplishing the criminal justice goals of retribution and deterrence.

A DPA is a means to affect a shift in the prosecutorial approach of *ex post facto* punishment to a position of preventative forecast.[392] It provides an equidistant between prosecuting or declining to prosecute in corporate white-collar crime cases.[393] Furthermore, DPAs serve the public interest as they deliver a considerable advantage for all parties involved by avoiding the uncertainties, delays and costs of criminal litigation.[394]

## *3.3 Development of DPAs*

### *3.3.1 Origin and emergence of DPAs in the USA*

In the USA, the procedure of deferring prosecution referred to as pre-trial diversion, was traditionally used with respect to juvenile offenders and drug-related offences.[395] The Chicago Boys' Court conceived deferred prosecution in an attempt to prevent juvenile offenders from being stigmatised as criminals.[396] The Judicial Conference, the policymaking body for the federal courts in the USA, formally endorsed the practice in 1947 and deferred prosecution became a prominent approach to divert criminal adjudication of some juveniles in 1960.[397] The legal basis for negotiating a DPA originates from the *Speedy Trial Act*[398], which was introduced

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389 Shiner and Ho 2018 *Criminal Law and Philosophy* 715.
390 Shiner and Ho 2018 *Criminal Law and Philosophy* 720.
391 Senko 2009 *Southern California Interdisciplinary Law Journal* 163.
392 Kaal and Lacine 2014 *The Business Lawyer* 62.
393 Uhlmann 2013 *Maryland Law Review* 1312.
394 Bronitt 2024 *Undergraduate Transitional Justice Review* 9.
395 Greenblum 2005 *Columbia Law Review* 1865.
396 Greenblum 2005 *Columbia Law Review* 1866.
397 Greenblum 2005 *Columbia Law Review* 1866.
398 *Speedy Trial Act* 1974 (USA).

to prevent undue delays in the administration of justice.[399] The provisions in the Act determined the general powers and duties of federal prosecutors.[400]

In 1992 the USA introduced a form of DPA for a corporation. The Department of Justice reached a settlement with Salomon Brothers that included an agreement according to which prosecution of the organisation was waived due to its "unprecedented cooperation" with the investigation.[401] The agreement included a provision that Salomon Brothers would implement compliance measures and pay a fine, thereby avoiding an indictment and the consequences thereof.[402] Since then, DPAs for corporate offenders gradually gained considerable popularity as a prosecutorial tool over the last two decades.[403]

### *3.3.2 The introduction of DPAs in the United Kingdom*

The Committee of Ministers of the Council of Europe identified the need to simplify the criminal justice system to reduce the number of cases prosecuted and consequently lessen the burden on courts.[404] As a result, the committee adopted the recommendations to provide for discretionary prosecution, measures, including out-of-court settlements, when dealing with minor and mass offences, and simplification of ordinary judicial procedures on 17 September 1987. The Committee recommended that member states asses their legislation with respect to out-of-court settlements to allow a competent authority to promote the possibility of these, specifically for minor offences.[405] The European Commission for the Efficiency of Justice adopted the Compendium of "best practices" on time management of judicial proceedings at its 8th plenary meeting in Strasbourg on 8 December 2006.[406] These proceedings paved the way for DPAs to be introduced in England and Wales as a

399 Bronitt 2024 *Undergraduate Transitional Justice Review* 2.
400 Bronitt 2024 *Undergraduate Transitional Justice Review* 2.
401 Orland 2006 *Brooklyn Journal of Corporate, Financial & Commercial Law* 59.
402 Orland 2006 *Brooklyn Journal of Corporate, Financial & Commercial Law* 58-59.
403 Davis 2022 *Columbia Journal of Transnational Law* 753.
404 Council of Europe Recommendation no R (87) 18 1.
405 Article II b 1 of the Council of Europe Recommendation no R (87) 18 1.
406 European Commission for the Efficiency of Justice CEPEJ (2006) 13.

pilot project in specific courts. England and Wales formally adopted DPAs in 2014 through the *Crimes and Courts Act* 2013 (UK).[407]

## *3.4 Legislative framework for DPAs*

### *3.4.1 DPAs in the USA*

#### 3.4.1.1 Procedural framework for DPAs

The use of DPAs occurs mostly in the Criminal Division, Environment and Natural Resources Division and the Antitrust Division of the DOJ, which, as litigating divisions, largely deal with corporate criminal prosecutions.[408] The *Speedy Trial Act* of 1974 establishes the legal foundation for sanctioning the US Federal Government to conclude DPAs and refers to instances in which:

> prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.[409]

US Congress included an assessment of individual defendants to determine the progress and compliance with the terms of agreements of those individuals whose prosecution had been deferred.[410] In 1997, the DOJ decreed standards for deferral of prosecution and mentioned three principal objectives:

> (1) "preventing future criminal activity among certain offenders by diverting them from traditional processing into community supervision and services"; (2) "saving prosecutive and judicial resources for concentration on major cases"; and (3) "providing, where appropriate, a vehicle for restitution to communities and victims of crime."[411]

Following this, Deputy Attorney General Larry Thompson issued a memorandum that promoted the use of DPAs as an alternative to corporate prosecution.[412] Over the years, the DOJ, through various attorney generals, issued memoranda that prescribed guidelines to prosecutors when deciding whether to charge corporate

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407 Part 1 of Schedule 17 of the *Crime and Courts Act* 2013.
408 Uhlmann 2013 *Maryland Law Review* 1317-1318.
409 *Speedy Trial Act* 1974 18 U.S.C. § 3161(h)(2).
410 Senko 2009 *Southern California Interdisciplinary Law Journal* 169.
411 Senko 2009 *Southern California Interdisciplinary Law Journal* 169.
412 Parker and Dodge 2023 *Journal of Financial Crime* 944.

entities.[413] These guidelines provide for circumstances where prosecutors may defer prosecution instead of indicting.[414]

On 16 June 1999 the DOJ issued a memorandum named "Federal Prosecution of Corporations" containing general principles regarding the prosecution of corporations.[415] The memorandum recommended nine factors to be considered in deciding whether to prosecute a corporation.[416] These factors were supplemented in memoranda that followed, including corporate cooperation.[417] In 2008, a pertinent reference to DPAs was included in the United States Attorney's Manual.[418] It provides that:

> On the other hand, where the collateral consequences of a corporate conviction for innocent third parties would be significant, it may be appropriate to consider a non-prosecution or deferred prosecution agreement with conditions designed, among other things, to promote compliance with applicable law and to prevent recidivism. Such agreements are a third option, besides a criminal indictment, on the one hand, and a declination, on the other.[419]

It contained a list of actions a corporation must abide by for cooperation to be considered a mitigating factor within a settlement.[420]

The terms of a DPA generally include the corporation's admission of wrongdoing, a waiver of the statute of limitations, that the DPA is admissible in court, an undertaking that the entity will not violate the same law in the future, cooperation of the corporation to investigate a case against individual offenders, and agreement that employees of the corporate entity will comply with the terms of the DPA.[421] In addition to these terms, Hill[422] identifies an obligation to cooperate with the continuing investigation, which includes the availability of current employees' testimony, a condition that prohibits the defendant from publicly making

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413 Senko 2009 *Southern California Interdisciplinary Law Journal* 165.
414 Senko 2009 *Southern California Interdisciplinary Law Journal* 165.
415 Senko 2009 *Southern California Interdisciplinary Law Journal* 165. Known as the "Holder Memo".
416 Senko 2009 *Southern California Interdisciplinary Law Journal* 165.
417 Senko 2009 *Southern California Interdisciplinary Law Journal* 166-167.
418 Senko 2009 *Southern California Interdisciplinary Law Journal* 167.
419 United States Attorneys Manual 9-28.1100.
420 Parker and Dodge 2023 *Journal of Financial Crime* 944. Referred to as the "Yates Memo".
421 Senko 2009 *Southern California Interdisciplinary Law Journal* 170.
422 Hill 2014 *Deferred Prosecution Agreements: The US Experience and the UK Potential*.

contradictory factual representations to that of the agreement, and payment of penalties, fines and restitution or other remedial relief.

#### 3.4.1.2 Judicial oversight

The Speedy Trial Act[423] establishes time limits for concluding various stages of a federal criminal prosecution.[424] Its primary purpose is to ensure that defendants are brought to trial and to avert undue delay in the administration of justice.[425] The Speedy Trial Act requires no more than the timely approval of a DPA but does not provide judges with the ability to review the terms of the agreement or provide a guide as to the form of the agreement.[426] When a prosecution is deferred, a court must approve the waiver of the statute of limitations during the period prosecution is deferred.[427] Circuit courts have overturned efforts of federal district court judges to supervise corporate prosecution agreements.[428] Reilly[429] confirms that the oversight role of a district court is:

> limited to arraigning the defendant, granting a speedy trial waiver if the DPA does not represent an improper attempt to circumvent the speedy trial clock, and adjudicating motions or disputes as they arise.

The practical effect of this is that the US Justice Manual[430] is the primary instrument of control of prosecutors.[431]

Golumbic and Lichy[432] argue that the approach of the court in HSBC Bank USA[433] establishes the basis for a court's authority to review and approve a proposed DPA and may bring about the development of substantive judicial intervention in the deferral process. Finally, Fragale and Grilli[434] suggest that review and approval, as a

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423 *Speedy Trial Act* 1974 18 U.S.C. § 3161.
424 Cornell Law School 2024 https://www.law.cornell.edu/wex/speedy_trial_act_(1974).
425 Cornell Law School 2024 https://www.law.cornell.edu/wex/speedy_trial_act_(1974).
426 Nasar 2017 *New York University Journal of Law & Liberty* 883.
427 Uhlmann 2013 *Maryland Law Review* 1328.
428 Nasar 2017 *New York University Journal of Law & Liberty* 885.
429 Reilly 2023 *Arizona State Law Journal* 1372.
430 Available at https://www.justice.gov/jm/justice-manual.
431 Werle 2019 *The Yale Law Journal* 1410.
432 Golumbic and Lichy 2014 *Hastings Law Journal* 1331.
433 *HSBC Bank USA* 2013 WL 3306161.
434 Fragale and Grilli 2024 *Trento Student Law Review* 60.

form of judicial oversight, would ensure that DPAs align with legal principles and the pursuit of justice.

#### 3.4.1.3 Breach of a DPA

Considering that DPAs in the USA are not regulated in terms of legislation, many agreements contain a provision granting the prosecutor, and not a court, the power to determine whether a breach of its terms occurred.[435] In addition, the stipulation may include that the DOJ exercises the sole discretion to determine a breach without it being subject to judicial review.[436]

The only remedy available to an aggrieved corporation is to make a representation to the prosecutor's office.[437] The corporation must demonstrate in the submission that there was no breach, the alleged breach was not wilful or material, or that the perceived breach has since been remedied.[438] Failure to make a representation is an indication that the corporation is in breach of the terms of the DPA.[439] Once a breach is established, the DOJ may prosecute the corporation, and admissions made in the DPA are admissible in a subsequent trial.[440]

In 2019 Telefonaktiebolaget LM Ericsson[441] entered into a DPA with the DOJ to defer prosecution relating to offences of conspiracy to violate anti-bribery provisions and conspiracy to violate the books and records and internal control provisions of the Foreign Corrupt Practices Act.[442] Ericsson undertook payment of a total criminal penalty of $520,650,432 and agreed to the appointment of an independent compliance monitor and cooperation and disclosure conditions.[443] However, in 2023, the corporation breached the agreement's cooperation and disclosure terms.

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435 Senko 2009 *Southern California Interdisciplinary Law Journal* 172.
436 Senko 2009 *Southern California Interdisciplinary Law Journal* 172.
437 Senko 2009 *Southern California Interdisciplinary Law Journal* 172.
438 Senko 2009 *Southern California Interdisciplinary Law Journal* 172.
439 Senko 2009 *Southern California Interdisciplinary Law Journal* 172.
440 Senko 2009 *Southern California Interdisciplinary Law Journal* 172.
441 *United States v. Telefonaktiebolaget LM Ericsson Deferred Prosecution Agreement* 19 Crim 884 (AJN) https://www.justice.gov/opa/press-release/file/1272151/dl.
442 The *Foreign Corrupt Practices Act* 1977, as amended, 15 U.S.C. §§ 78dd-1.
443 *United States v. Telefonaktiebolaget LM Ericsson Deferred Prosecution Agreement* 19 Crim 884 (AJN) https://www.justice.gov/opa/press-release/file/1272151/dl.

Demonstrating the consequences of the breach of the terms of a DPA, Ericsson was prosecuted with respect to the original transgressions and entered into a plea agreement with the DOJ, waiving their right to a jury trial.[444] Subsequently, to conclude the matter, the corporation agreed to pay additional penalties, bringing the total amount to more than $1 billion.[445]

### *3.4.2 DPAs in England and Wales*

#### 3.4.2.1 Procedural framework for DPAs

DPAs were introduced in England and Wales in terms of the *Crime and Courts Act* 2013.[446] Section 45 establishes DPAs as provided for in Schedule 17, which defines a DPA as:

> A deferred prosecution agreement (a "DPA") is an agreement between a designated prosecutor and a person ("P") whom the prosecutor is considering prosecuting for an offence specified in Part 2 (the "alleged offence").[447]

The offences provided for in Part 2 of Schedule 17 are restricted to specified common law crimes and serious statutory economic offences[448] and are only available to corporations, specifically a body corporate, a partnership or an unincorporated association.[449] The power to negotiate a DPA vests in the Director of Public Prosecutions of England and Wales, the Director of the Serious Fraud Office and any prosecutor designated under this paragraph by the Secretary of State.[450]

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444 US Department of Justice 2 March 2023 https://www.justice.gov/opa/pr/ericsson-plead-guilty-and-pay-over-206m-following-breach-2019-fcpa-deferred-prosecution.

445 US Department of Justice 2 March 2023 https://www.justice.gov/opa/pr/ericsson-plead-guilty-and-pay-over-206m-following-breach-2019-fcpa-deferred-prosecution.

446 The *Crime and Courts Act* 2013 came into operation on 24 February 2014.

447 Schedule 17(1) of the *Crime and Courts Act* 2013.

448 These offences are the common law offences of conspiracy to defraud, and cheating the public revenue, as well as offences under the *Theft Act* 1968 (UK), *Proceeds of Crime Act* 2002 (UK), *Companies Act* 2006 (UK), *Fraud Act* 2006 (UK) and *Money Laundering, Terrorist Financing and Transfer of Funds Regulations* 2017 (UK).

449 McCarron 2022 *King's Inn Law Review* 56.

450 Schedule 17(3) of the *Crime and Courts Act* 2013; McCarron 2022 *King's Inn Law Review* 56.

The stated purpose of DPAs is:

> to provide prosecutors with an extra tool to tackle economic crime in England and Wales, which currently too often goes without redress.[451]

The schedule to the Act determines the provisions which must be included in a DPA.[452] In broad terms, these are a statement of facts relating to the alleged offence, which may include admissions, an expiry date on which the DPA discontinues, the conditions of the agreement, any financial penalty agreed between the prosecutor and the corporation, and setting out the consequences if the corporation fails to meet the terms.[453]

The Director of Public Prosecutions and the Director of the Serious Fraud Office are enjoined to issue a Code for Prosecutors.[454] The Code makes it incumbent on a prosecutor to have regard to the provisions thereof when negotiating a DPA with a corporation, approaching the court for the approval of a DPA and supervising a DPA after its approval.[455] The Code provides that a DPA is a discretionary instrument, and the decision on whether or not to enter into one must be based on an assessment of the evidence and the public interest.[456] During the evidential stage, a prosecutor must determine whether the requirements of the Code for Crown Prosecutors are met or if there is a reasonable suspicion that the corporation has committed the offence. There are reasonable grounds for believing that further investigation would provide admissible evidence and, as such, satisfy the full code test.[457] The public interest test apparently has the effect that it may still be in the public interest to conclude a DPA, even if it is not to continue with prosecution.[458]

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451 Ministry of Justice 2012 https://assets.publishing.service.gov.uk/media/5a7b9381ed915d4147621466/8463.pdf 3.
452 Schedule 17(5) of the *Crime and Courts Act* 2013.
453 Schedule 17(5) of the *Crime and Courts Act* 2013.
454 Schedule 17(6) of the *Crime and Courts Act* 2013.
455 Serious Fraud Office 2014 https://www.cps.gov.uk/sites/default/files/documents/publications/DPA-COP.pdf 2.
456 UK Parliament 2019 https://publications.parliament.uk/pa/ld201719/ldselect/ldbribact/303/30310.htm para 240.
457 Bisgrove and Weekes 2014 *Criminal Law Review* 426.
458 Bisgrove and Weekes 2014 *Criminal Law Review* 427.

In addition to the DPA Code of Practice, discretion must be exercised considering other codes of practice and guidance.[459] A prosecutor must consider the public interest factors, which set out factors favouring prosecution in the Code for Crown Prosecutors.[460] In addition, public interest factors suggestive of prosecution are the following:

a. A history of similar conduct that resulted in criminal, civil or regulatory enforcement measures against the corporation and/or its directors or partners and/or majority shareholders.

b. The alleged conduct is indicative of established business practices of the corporation;

c. The wrongful act occurred at a junction when the corporation had no compliance programme, or the compliance programme proved ineffective, and the corporation has not demonstrated a significant improvement in its compliance programme;

d. Failed to take adequate action to prevent future unlawful conduct despite previous warnings, sanctions, or criminal charges;

e. Failure to report the offending conduct within a reasonable time of its discovery;

f. Reporting the wrongful conduct without verifying its extent;

g. The extent of harm caused to the victims or substantial adverse impact on the integrity or confidence of markets or governmental institutions.[461]

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459 These include the Code for Crown Prosecutors, the Joint Prosecution Guidance on Corporate Prosecutions and, for bribery offences, the Bribery Act Joint Prosecution Guidance. (UK Parliament 2019 https://publications.parliament.uk/pa/ld201719/ldselect/ldbribact/303/30310.htm para 240).

460 Serious Fraud Office 2014 https://www.cps.gov.uk/sites/default/files/documents/publications/DPA-COP.pdf para 2.8; The National Archives 2024 https://www.legislation.gov.uk/uksi/2020/759/contents.

461 Serious Fraud Office 2014 https://www.cps.gov.uk/sites/default/files/documents/publications/DPA-COP.pdf para 2.8.1.

Public interest factors against prosecution include cooperation, absence of similar conduct involving prior criminal, civil and regulatory enforcement actions against the corporation, an existing compliance programme, individuals in the corporation committed the wrongful conduct, the corporation is structured differently than when the offence was committed. In addition, a conviction may lead to a disproportionate outcome, and have collateral effects on the public, the corporation's employees and shareholders or institutional pension holders.[462]

The DPA Code of Practice sets out the process when deciding to offer a DPA.[463] A DPA may include an extensive range of stipulations, some of which are specified in a non-exhaustive list in Schedule 17.[464] The conditions may include payment of a financial penalty; payment of compensation to the victims of the alleged offence; financial donation to a charity or other third party; forfeiture of any profits made by the corporation from the alleged offence; implementation of a compliance programme or to effect changes to an existing compliance programme; cooperation with any investigation related to the alleged offence; and payment of any reasonable costs of the prosecution in relation to the alleged offence or the DPA.[465]

The court, in an open hearing, must approve the DPA and provide reasons for that declaration.[466] Thereafter, the prosecutor will publish the DPA and the initial and final ruling of the court on its website.[467] The effect of concluding a DPA on court proceedings is that the proceedings instituted through an indictment are automatically suspended.[468]

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462 Serious Fraud Office 2014 https://www.cps.gov.uk/sites/default/files/documents/publications/DPA-COP.pdf para 2.8.2.

463 Serious Fraud Office 2014 https://www.cps.gov.uk/sites/default/files/documents/publications/DPA-COP.pdf para 3.

464 Serious Fraud Office 2014 https://www.cps.gov.uk/sites/default/files/documents/publications/DPA-COP.pdf para 7(1).

465 Schedule 17(1)(3) of the *Crime and Courts Act* 2013.

466 Serious Fraud Office 2014 https://www.cps.gov.uk/sites/default/files/documents/publications/DPA-COP.pdf para 11(1).

467 Serious Fraud Office 2014 https://www.cps.gov.uk/sites/default/files/documents/publications/DPA-COP.pdf para 11(2).

468 Schedule 17(2) of the *Crime and Courts Act* 2013.

The motivation for accepting DPAs in England and Wales is comprised of legal and evidential aspects. Firstly, there were insufficient mechanisms to deal with corporate wrongdoings, and secondly, globalisation in respect of corporations and crimes.[469]

3.4.2.2 Judicial oversight

According to Bisgrove and Weekes[470], judicial oversight and approval of DPAs form the core of the DPA scheme in England and Wales. The entry into a negotiation and the final approval of a DPA requires reasoned judicial approval.[471] At the first stage, the commencement of negotiations, a preliminary hearing must take place, at which stage the court must declare whether the proposed conclusion of a DPA with an offending corporation is likely to be in the interests of justice and that the proposed terms of the DPA are fair, reasonable and proportionate.[472]

When the terms of the DPA have been negotiated, the prosecutor must apply to the court for a declaration that the DPA is in the interests of justice and that the terms of the DPA are fair, reasonable, and proportionate[473] and constitute the second stage. The DPA will come into force after the court's final approval.[474] Should the prosecution apply to vary the terms of a DPA, the court is required to review the terms sought to be amended, applying the same standard.[475]

The reasoning for including a strong element of judicial oversight is stated as follows:

> It is important to be clear that the proposed role of the judge in the DPA process is to provide independent scrutiny of the process in order to instil certainty and public confidence and ensure the proposed terms suitably address the alleged wrongdoing[476]

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469 Bildfell 2016 *Canadian Criminal Law Review* 198.
470 Bisgrove and Weekes 2014 *Criminal Law Review* 428.
471 Bisgrove and Weekes 2014 *Criminal Law Review* 428.
472 Schedule 17(7) of the *Crime and Courts Act* 2013.
473 Schedule 17(8)(1) of the *Crime and Courts Act* 2013.
474 Schedule 17(8)(3) of the *Crime and Courts Act* 2013.
475 Schedule 17(10) of the *Crime and Courts Act* 2013.
476 Ministry of Justice 2012 https://assets.publishing.service.gov.uk/media/5a7b9381ed915d4147621466/8463.pdf 22.

Regarding the first question of whether the DPA is "likely to be in the interests of justice," no criteria are provided to consider when making the decision.[477] Bisgrove and Weekes[478] suggest that to make such a conclusion, a judge will need experience regarding corporate fraud matters, understand the corporation's background and the circumstances of the offence, appreciate the intricacies involved in the investigation process and the length thereof and the difficulties of obtaining evidence of the wrongful act.

The question of whether the terms of the DPA are "fair, reasonable and proportionate" may be answered by applying the principles applicable in civil and criminal courts.[479] The principle entails a concept termed *ex aequo et bono*[480] and includes the notion that judicial discretion should be exercised upon reasonable practices, usages and customs that facilitate such decisions.[481]

3.4.2.3 Breach of a DPA

In England and Wales, the breach of a DPA is regulated under the *Crime and Courts Act*[482] and the Deferred Prosecution Agreement Code of Practice.[483] If, prior to the expiration of a DPA, a prosecutor believes that the corporation is in breach of the terms of a DPA, the prosecutor is obliged to request the corporation to rectify the alleged breach.[484] Failure to resolve the breach amicably will result in an application to court.[485] The *Crimes and Courts Act* stipulates that the prosecutor must bring an application to court.[486] The prosecutor may seek a finding by the court that the corporation is allegedly in breach of a term and set out the relief it seeks.[487] The court must determine whether the question of whether or not there has been a

477 Bisgrove and Weekes 2014 *Criminal Law Review* 429.
478 Bisgrove and Weekes 2014 *Criminal Law Review* 430.
479 Bisgrove and Weekes 2014 *Criminal Law Review* 430.
480 Translates to "according to the right and good".
481 Trakman 2008 *Chicago Journal of International Law* 642.
482 Schedule 17(9) of the *Crime and Courts Act* 2013.
483 Section 12 of the DPA Code of Practice.
484 Section 12(2) of the DPA Code of Practice.
485 Section 12(3) of the DPA Code of Practice.
486 Schedule 17(9)(1) of the *Crime and Courts Act* 2013.
487 Section 12(3) of the DPA Code of Practice.

breach of a term is to be adjudicated on the balance of probabilities.[488] Should a court confirm a breach with the terms of the DPA, it may invite the prosecutor and the corporation to agree to proposals to remedy the failure or terminate the DPA.[489] If an agreement is reached, an application must be brought to vary the terms of the DPA.[490]

In the instance that there is a material breach of the DPA, the parties are unable to agree on a suitable remedy, or the court does not approve a proposed remedy, the court may grant an order terminating the DPA.[491] The prosecutor may then apply to have the suspension of the indictment lifted.[492]

## *3.5 Assessment of DPAs*

### *3.5.1 Benefits of DPAs*

#### 3.5.1.1 Averting adverse consequences

Fragale and Grilli[493] analysed the advantages attached to DPAs and states that by concluding a DPA, it is possible to:

> avoid the stigma associated with formal processing and the resultant change in self-image, associations, and behavior associated with the negative societal reaction to the stigma.

The repercussions flowing from an indictment and trial may affect the reputation, shareholder trust, employee morale, and ability to secure contracts.[494] Parker and Dodge refer to this as the "corporate death penalty".[495] A conviction of a felony charge may result in a corporation being debarred from obtaining government contracts and having its authorisations withdrawn.[496]

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488 Schedule 17(9)(2) of the *Crime and Courts Act* 2013.
489 Schedule 17(9)(3) of the *Crime and Courts Act* 2013.
490 Section 12(4) of the DPA Code of Practice. See further Schedule 17(10) of the *Crime and Courts Act* 2013 which regulates the variation of a DPA.
491 Section 12(5) of the DPA Code of Practice.
492 Section 12(5) of the DPA Code of Practice; Schedule 17(2) of the *Crime and Courts Act* 2013.
493 Fragale and Grilli 2024 *Trento Student Law Review* 48.
494 Fragale and Grilli 2024 *Trento Student Law Review* 48.
495 Parker and Dodge 2023 *Journal of Financial Crime* 950.
496 Greenblum 2005 *Columbia Law Review* 1885.

The adverse consequences are best illustrated with what is known as the Anderson Effect.[497] Arthur Anderson, a major accounting firm, was convicted in 2002 for obstruction of justice and the violation of a prior settlement with the Securities and Exchange Commission.[498] The DOJ and the company could not reach consensus to conclude a DPA, and the DOJ indicted.[499] Andersen was subsequently convicted and sentenced to pay a fine of $500 000 in addition to an amount of $7 million in a civil settlement.[500] In addition, the firm was prohibited from auditing public companies, which meant the termination of its business.[501] The repercussions were dire: 28,000 employees lost their employment, and the firm's shareholders suffered major losses.[502] As a result of the backlash, the DOJ implemented a policy in terms of which federal prosecutors could use DPAs in corporate criminal cases.[503] A DPA offers the prosecutor and the corporate offender a mechanism to draft an agreement according to the specific needs of the respective parties.[504]

#### 3.5.1.2 Promoting corporate accountability

One of the conditions to avoid prosecution that may be included in a DPA is that a corporation may be required to implement substantial internal reforms to stimulate stronger compliance principles within the corporation.[505] The conditions relating to internal reform in DPAs may include that a corporation amends sales practices, review agreements with other entities, change the members of the board of directors, replacing company officials or employees, improve on established compliance programmes or establish effective programmes, and discontinue certain business connections.[506] The aim of changing corporate behaviour is to remove

497 Nasar 2017 *New York University Journal of Law & Liberty* 848.
498 Nasar 2017 *New York University Journal of Law & Liberty* 845.
499 Nasar 2017 *New York University Journal of Law & Liberty* 846.
500 Nasar 2017 *New York University Journal of Law & Liberty* 846.
501 Nasar 2017 *New York University Journal of Law & Liberty* 846.
502 Nasar 2017 *New York University Journal of Law & Liberty* 846.
503 Nasar 2017 *New York University Journal of Law & Liberty* 847.
504 Reilly 2023 *Arizona State Law Journal* 1353 - footnote 4.
505 Fragale and Grilli 2024 *Trento Student Law Review* 69.
506 Reilly 2015 *Brigham Young University Law Review* 342-343.

aspects of the corporation that contributed to criminal conduct.[507] In this regard Christie and Hanna[508] state:

> In contrast to the far more rigid criminal sentencing process, deferred prosecution agreements allow prosecutors and companies to work together in creative and flexible ways to remedy past problems and set the corporation on the road of good corporate citizenship. They also permit us to achieve more than we could through court-imposed fines or restitution alone. These agreements, with their broad range of reform tools, permit remedies beyond the scope of what a court could achieve after a criminal conviction.

DPAs can also import conditions regarding the board of directors' responsibilities of reporting oversight[509] and monitoring its compliance controls and procedures.[510]

#### 3.5.1.3 Reducing court congestion

During the negotiation stage, prosecutors engage the offender directly which allows for greater cooperation and effective resolution of the matter in a shorter period than normal court proceedings.[511] The preservation of investigative, prosecutorial, or judicial resources needed in corporate prosecution may tend to allow the conclusion of more cases.[512]

#### 3.5.1.4 Encouraging cooperation and remediation

It is a condition of a DPA that a corporation must fully cooperate with the DOJ, which entails self-reporting and providing information on individual criminal conduct.[513] Cooperation is established by full disclosure of wrongdoing and the making of admissions and affords the DOJ and the corporation the opportunity to work together to reform the corporation.[514] The level of cooperation not only

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507 Nasar 2017 *New York University Journal of Law & Liberty* 848.
508 Christie and Hanna 2006 *Am Crim L Rev* 1043.
509 Nasar 2017 *New York University Journal of Law & Liberty* 850.
510 Nasar 2017 *New York University Journal of Law & Liberty* 850.
511 Nasar 2017 *New York University Journal of Law & Liberty* 848.
512 Nasar 2017 *New York University Journal of Law & Liberty* 848; Uhlmann 2013 *Maryland Law Review* 1324.
513 Werle 2019 *The Yale Law Journal* 1373.
514 Xiao 2013 *Cornell Journal of Law and Public Policy* 245.

indicates that a DPA may be negotiated but, in England and Wales constitutes a public interest factor for the approval of the DPA.[515]

### *3.5.2 Critique against DPAs*

#### 3.5.2.1 Prosecutorial overreach

A point of critique regularly raised is that prosecutors have unrestrained discretion in deciding which environmental criminal cases to prosecute.[516] Arlen[517] criticised DPAs as, according to their application, infringing on the rule of law. She motivates the statement as follows:

> The DOJ has effectively granted authority to individual prosecutors' offices to use D/NPAs to create duties, interpret them, and enforce them, without either adequate constraint on their authority to create duties or effective oversight, internal or external.

A prosecutor's decision to bring criminal charges against a corporation suspected of unlawful conduct may result in reputational damage due to an indictment rather than the outcome of litigation and is usually a prelude to the demise of a company because of the diminished public trust in that company.[518] Prosecutorial discretion as to whether to prosecute determines a corporation's continued existence.[519] To establish a uniform approach to exercise this discretion on whether to charge corporate entities, the DOJ has issued several guidelines to assist prosecutors.[520]

In its nature, a DPA seeks to exact punishment on a guilty entity without the ancillary negative impact of an indictment.[521] As such, a DPA hold advantages for the corporation but allows prosecutors to use their disproportionate leverage in the negotiation of the terms and obligations of DPAs.[522] These terms, the extent determined by the prosecutor, may include a stipulation pertaining to cooperation,

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515 Campbell 2021 *The Sydney Law Review* 197.
516 Barret 1997 *Maryland Journal of Contemporary Legal Issues* 121.
517 Arlen 2016 *Journal of Legal Analysis* 231.
518 Senko 2009 *Southern California Interdisciplinary Law Journal* 165.
519 Senko 2009 *Southern California Interdisciplinary Law Journal* 165.
520 Senko 2009 *Southern California Interdisciplinary Law Journal* 165.
521 Senko 2009 *Southern California Interdisciplinary Law Journal* 169.
522 Senko 2009 *Southern California Interdisciplinary Law Journal* 169.

prosecutorial and not judicial determination of a breach of the agreement and the appointment of an independent overseer.[523] Some of the obligations imposed by a prosecutor in a DPA could not be achieved through normal litigation processes,[524] creating the perception that prosecutors consider themselves as the "new regulators, police and adjudicators of corporate misconduct".[525]

The aspect of regulating corporate behaviour may result in prosecutors imposing conditions that allow them to make decisions usually in the purview of the board of directors and shareholders.[526]

#### 3.5.2.2 DPAs are becoming the norm

According to Reilly,[527] DPAs in the USA have become the primary instrument to affect white-collar criminal law enforcement, causing a decrease in the prosecution of large corporations.[528] As a consequence of more DPAs concluded with corporations, individual transgressions are being disregarded. Werle[529] highlights this issue with reference to the approach in the USA with respect to corporate culpability as premised on an individual's antecedent criminal conduct. The DOJ explains this aspect in that, in most instances, there is insufficient evidence against individuals to secure a conviction.[530] In 2019, Deputy Attorney General Sally Yates issued a memorandum proclaiming that the DOJ will focus on holding the individuals who committed the wrongdoing accountable to prevent corporate crime.[531]

#### 3.5.2.3 Lack of transparency

The process of negotiating and concluding a DPA involves the prosecutor, the corporation, and their legal representatives. In the USA, the legal framework

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523 Senko 2009 *Southern California Interdisciplinary Law Journal* 169-173.
524 Nasar 2017 *New York University Journal of Law & Liberty* 874.
525 Parker and Dodge 2023 *Journal of Financial Crime* 946.
526 Meitl 2007 *Northern Kentucky Law Review* 1.
527 Reilly 2018 *Ariz. St. L. J.* 1113.
528 Reilly 2018 *Ariz. St. L. J.* 1113.
529 Werle 2019 *The Yale Law Journal* 1411.
530 Werle 2019 *The Yale Law Journal* 1412.
531 Werle 2019 *The Yale Law Journal* 1410.

requires a minimal standard of transparency.[532] Particulars of a DPA are published on the DOJ website.[533] The import of transparency is that the public is entitled to know the nature of the offence, and the subsequent sanction is to avoid a perception of corporations in concluding a DPA is being treated leniently on not punished at all.[534]

The criticism of a lack of transparency of DPAs has been overcome in the way England and Wales approach this aspect. Once the court approves a DPA, the prosecutor must publish the contents of the DPA as well as the outcome of the preliminary and final hearing.[535]

### *3.5.3 DPAs and the presumption of innocence*

In criminal proceedings, every person has the right to be presumed innocent.[536] This right is intrinsic to the right to a fair trial, which dictates that the guilt of an offender, including a corporate offender, must be proven at trial beyond reasonable doubt and thereafter receive a befitting punishment.[537]

DPAs have been criticised that they infringe on the presumption of innocence.[538] Shiner and Ho[539] identify two aspects of a DPA that enforce this perception. The first draws an analogy between the deprivation of liberty of an individual to the considerable monetary fine agreed on and constraints imposed on an offending corporation in a DPA.[540] The second element is based on the presumption of innocence itself and relates to the state imposing a punishment on the corporate offender without having gone through a trial at which the guilt of the accused was

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532 Werle 2019 *The Yale Law Journal* 1417.
533 Available at https://search.justice.gov/search?utf8=✓&affiliate=justice&query=dpa.
534 Bisgrove and Weekes 2014 *Criminal Law Review* 435.
535 Schedule 17(8)(7) of the *Crime and Courts Act* 2013.
536 Section 35(3)(h) of the *Constitution of the Republic of South Africa*, 1996.
537 Fragale and Grilli 2024 *Trento Student Law Review* 60.
538 Shiner and Ho 2018 *Criminal law and Philosophy* 2.
539 Shiner and Ho 2018 *Criminal law and Philosophy* 3.
540 Shiner and Ho 2018 *Criminal law and Philosophy* 3.

established beyond reasonable doubt.[541] The writers[542] analyse the legal position regarding DPAs and the presumption of innocence and conclude that:

> The agreement, finally, qualifies as genuinely an agreement, and is not objectionably coercive in the way that preventive detention of a natural person defendant is objectionably coercive.

Shiner and Ho[543] argue that a regular plea bargain does not infringe on the presumption of innocence and is analogous to a negotiated DPA.

### *3.6 Comparative assessment of DPAs in the USA and England and Wales*

The primary difference between the DPA schemes in the USA and England and Wales is that in England and Wales, the DPA scheme is established through legislation, whilst in the USA, the scheme is guided by the memoranda of the Attorney General.[544]

A cornerstone of a DPA shared between the structures of the USA and England and Wales, relates to corporate cooperation as one of the determining factors when considering whether the public interest would best be served by prosecuting or by offering a DPA.[545] An element of cooperation is the extent to which a corporation discloses information that will assist the prosecution in investigating the alleged transgressions that may lead to the prosecution of individuals within the corporation.[546]

Traditionally, in the USA, prosecutors had to assess the corporation's willingness to waive its attorney-client privileges in evaluating the corporation's cooperation.[547] In order to be eligible for a DPA, the corporation had to waive privilege to demonstrate cooperation.[548] Deputy Attorney General Mark Filip issued guidelines in 2008 that

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541 Shiner and Ho 2018 *Criminal law and Philosophy* 3.
542 Shiner and Ho 2018 *Criminal law and Philosophy* 25.
543 Shiner and Ho 2018 *Criminal law and Philosophy* 4.
544 Werle 2019 *The Yale Law Journal* 1408.
545 Mitchell, Imwinkelried and Stockdale 2021 *Journal of International and Comparative Law* 288.
546 Senko 2009 *Southern California Interdisciplinary Law Journal* 171.
547 Senko 2009 *Southern California Interdisciplinary Law Journal* 166.
548 Mitchell, Imwinkelried and Stockdale 2021 *Journal of International and Comparative Law* 288.

prohibit prosecutors from requesting disclosure of attorney-client privileged communications when evaluating whether the company is cooperating in the investigation.[549] In England and Wales, the Deferred Prosecution Agreements Code of Practice provides that the terms of a DPA are voluntary, and the Code cannot alter the law on legal professional privilege.[550] The Serious Fraud Office clarified that despite the fact that a waiver of privilege cannot be imposed, it would be a clear indication of cooperation.[551]

Another distinction is that on a federal level, the US Department of Justice allows DPAs for both individuals and corporations with respect to a broad scope of transgressions, including environmental crimes. In England and Wales, the use of DPAs is restricted for serious economic offences where the offender is a corporation.[552]

Lastly, there is a distinctive difference in the approach in these jurisdictions relating to judicial oversight. This aspect is comprehensively discussed above.[553]

## *3.7 Application of DPAs in environmental crime cases*

### *3.7.1 DPAs and environmental crimes in the USA*

The US Attorney's Manual prioritises corporate crime and specifically refers to the prevention of violations of environmental laws and unlawful business practices at the expense of the public interest.[554] The primary regulatory body with respect to the environment is the Environmental Protection Agency. However, other institutions such as federal agencies, state and local governments, and private institutions endeavour to promote environmental values.[555] Perez[556] remarks that in

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549 Senko 2009 *Southern California Interdisciplinary Law Journal* 167. The *Attorney-Client Privilege Protection Act* of 2007 and 2009 proposed to prohibit prosecutors from requesting waivers of privilege in all federal investigations in the USA but is not enacted.

550 Serious Fraud Office 2014 https://www.cps.gov.uk/sites/default/files/documents/publications/DPA-COP.pdf para 3.3.

551 Cheung 2018 *The Cambridge Law Journal* 14.

552 McCarron 2016 *King's Inns Law Review* 56, 59.

553 Paragraphs 3.4.1.2 and 3.4.2.2.

554 Section 9-28.010 of the US Attorneys Manual.

555 Light 2019 *Stanford Law Review* 142.

556 Perez 2020 *Rule of Law and Anti-Corruption Journal* 4.

the USA, the DOJ have concluded these agreements in most areas of corporate criminal wrongdoing, including environmental transgressions. The Environmental Protection Agency continuously makes use of DPAs to resolve environmental enforcement proceedings.[557]

Block and Feinberg[558] demonstrate the extent to which the USA has embraced DPAs with reference to several environmental cases. In some instances, the prosecution included conditions relating to community service projects[559] and bursaries aimed at environmental studies in the DPA.[560] This aspect was tempered, and prosecutors were directed not to include conditions in a DPA that the corporation contributes to a:

> charitable, educational, community, or other organization or individual that is not a victim of the criminal activity or is not providing services to redress the harm caused by the defendant's criminal conduct.[561]

Xiao[562] suggests that the use of DPAs should be limited to corporate crimes which primarily cause monetary damage and not environmental, physical, or irreparable damage. With respect to environmental crimes, a DPA constitutes a shift from the after-the-fact approach to punishment to an emphasis on compliance.[563]

Although DPAs have been concluded in the past with respect to environmental crimes, studies have shown that plea and sentence agreements are more often used, possibly due to preferences of the head of the EPA.[564]

### *3.7.2 DPAs and environmental crimes in England and Wales*

In England and Wales, the Environment Agency is the main regulatory body that mostly prosecutes strict liability environmental offences, which, upon conviction,

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557 Hill 2014 *Deferred Prosecution Agreements: The US Experience and the UK Potential*.
558 Block and Feinberg 2010 *ALI-ABA Business Law Course Materials Journal* 9-11.
559 Block and Feinberg 2010 *ALI-ABA Business Law Course Materials Journal* 11.
560 Block and Feinberg 2010 *ALI-ABA Business Law Course Materials Journal* 11.
561 Block and Feinberg 2010 *ALI-ABA Business Law Course Materials Journal* 17.
562 Xiao 2013 *Cornell Journal of Law and Public Policy* 237.
563 Kaal and Lacine 2014 *Business Lawyer* 2.
564 Alexander and Cohen 2015 *American Criminal Law Review* 572 and footnote 161.

lead to moderate fines.[565] The Environment Agency[566] published an enforcement and sanctions policy stating that its function is to enforce laws that protect the environment to secure compliance. When conducting an enforcement activity, the Agency aims to change the behaviour of the offender; disgorge financial gain or benefit arising from the offending conduct; consider an appropriate sanction and punishment for the offender; apply the principle of proportionality; take steps to restore any harm or damage and deter future breaches.[567]

The stated enforcement responses are primarily administrative and civil and, only as a last resort, criminal in nature.[568] According to Watson, most environmental offenders are not prosecuted.[569] DPAs can only be offered in specified common law and statutory offences relating to fraud, bribery, and other economic crimes of a serious nature.[570]

## *3.8 Chapter summary*

In this chapter, the origin, foundation, and implementation of DPAs in the USA on a federal level and in England and Wales were explored. It was demonstrated that a significant dissimilarity between these jurisdictions exists in the role of the judiciary in overseeing DPAs. In the USA, judicial oversight is limited to ensuring that the principles relating to a speedy trial are adhered to. In contrast, in England and Wales the court has a more prominent oversight function in that the negotiation, conclusion and any amendment must be evaluated against the question if the terms of a DPA are fair, reasonable, and proportionate.

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565 Watson 2005 *Environmental Law and Management* 3.

566 Environment Agency 2023 https://www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy/environment-agency-enforcement-and-sanctions-policy#introduction.

567 Article 4 of Environment Agency 2023 https://www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy/environment-agency-enforcement-and-sanctions-policy#introduction.

568 Article 7 of Environment Agency 2023 https://www.gov.uk/government/publications/environment-agency-enforcement-and-sanctions-policy/environment-agency-enforcement-and-sanctions-policy#introduction.

569 Watson 2005 *Environmental Law and Management* 3.

570 Part 2 of Schedule 17 of the *Crime and Courts Act* 2013.

DPAs are negotiated agreements but are mostly the result of a corporate offender voluntarily conceding information of environmental wrongdoing. The conclusion of a DPA is primarily done with respect to white-collar crimes and, in the USA, extends to corporate environmental crimes. The advantages and disadvantages of DPAs were scrutinised.

In the next chapter the approach used in South African criminal law with respect to the restorative justice mechanism will be investigated. The viability of DPAs with respect to corporate environmental crime will be considered to determine whether deferment of prosecution will alter corporate behaviour and function as a deterrent.

# CHAPTER 4 DPAS IN SOUTH AFRICA

## *4.1 Introduction*

In the previous chapter, the approach to DPAs followed in the United States on a federal level and in England and Wales was discussed. The USA follows a system where the DOJ, through the attorney-general, determines the policy with respect to corporate prosecution and DPAs. In England and Wales, the conclusion of a DPA is firmly rooted in legislation.

DPAs form part of a model of consensual adjudication.[571] This model contrasts the adversarial approach to criminal justice and aims to achieve justice that is negotiated, agreed and resolved between the parties rather than attained, rendered or meted out.[572] The South African criminal procedural law has, in a limited number of instances, accepted a process of a negotiated resolution to criminal cases where an offender is diverted away from the criminal justice system.

In this chapter, the South African criminal procedural law with reference to alternative dispute resolution (hereafter ADR) mechanisms will be examined. Their application and the scope thereof in environmental law enforcement will be considered. The chapter will conclude with a discussion of DPAs in the South African context in relation to their advantages and disadvantages and application in the context of environmental criminal matters.

## *4.2 Right to a speedy trial*

The Constitution provides that every accused person has a right to a fair trial, which includes the right to have their trial begin and conclude without unreasonable delay.[573] The objective of this provision is "to protect an accused's liberty, personal security and trial-related interests".[574] In *Sanderson v Attorney-General, Eastern*

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571 Solomon *Reforming Justice in Russia, 1864-1994: Power, Culture and the Limits of Legal Order* 67.

572 Solomon *Reforming Justice in Russia, 1864-1994: Power, Culture and the Limits of Legal Order* 67.

573 Section 35(3)(d) of the *Constitution of the Republic of South Africa*, 1996.

574 *Zanner v DPP* [2006] SCA 56 (RSA) para 11.

*Cape*[575], the Constitutional Court quoted with approval from a judgment of the Supreme Court of Canada, *R v Morin*[576], in which the protection of these three rights is described as follows:

> The right to security of the person is protected...by seeking to minimize the anxiety, concern and stigma of exposure to criminal proceedings. The right to liberty is protected by seeking to minimize exposure to the restrictions on liberty which result from pre-trial incarceration and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh.

In *Wild v Hoffert*[577] the court analysed the reasoning in *Sanderson v Attorney-General, Eastern Cape*[578] and concluded that different forms of prejudice may manifest from an unreasonable delay in finalising a trial. An unreasonable delay may impact the right to a fair trial or may be related to aspects not relevant to the trial itself. In the latter instance, the prejudice relates to loss of personal liberty if a person is detained pending trial, or his movement is restricted because of stringent bail conditions. In addition, prejudice follows because of the stigma of being prosecuted.[579]

### *4.3 Diversionary mechanisms*

Labuschagne[580] observes that, internationally, there is a trend to move from trial adjudication to consensual adjudication. In this regard, Imiera[581] argues that, if applied prudently, such an approach will function well in South Africa's criminal justice administration. Diversionary mechanisms, or ADR procedures, aim to resolve disputes without using litigation as recourse.[582] The instruments to attain the resolution of a dispute are conciliation, negotiation, mediation, and arbitration.[583]

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575 *Sanderson v Attorney-General, Eastern Cape* 1998 2 SA 38 (CC) para 20.
576 *R v Morin* (1992) 8 CRR (2d) 193 at 202.
577 *Wild v Hoffert* 1998 3 SA 695 (CC).
578 *Sanderson v Attorney-General, Eastern Cape* 1998 2 SA 38 (CC).
579 *Wild v Hoffert* 1998 3 SA 695 (CC) para 4.
580 Labuschagne 1995 *SACJ* 186.
581 Imiera 2019 *Politeia* 10-11.
582 Ngombane *Alternative dispute resolution: a mechanism for resolving environmental disputes in South Africa* 6.
583 Ngombane *Alternative dispute resolution: a mechanism for resolving environmental disputes in South Africa* 6.

Diversionary processes allow for a restorative justice approach and can resolve a dispute speedily.[584]

### *4.3.1 Restorative justice*

Restorative justice is a form of ADR.[585] It is an approach that provides an alternative manner for offenders, victims, and the community to obtain justice.[586] It is not a novel concept but has historically received little attention in the South African common law, particularly in the criminal justice context.

The earliest reference to restorative justice in South African case law is found in *S v Shilubane*.[587] In this matter, the High Court, in an appeal, referred to "the new philosophy of restorative justice" and reduced a sentence of direct imprisonment for a minor crime.[588] Judge Bosielo remarked that compensation for the loss suffered by the complainant would have satisfied the purpose of punishment.[589]

In 2008, in a judgment on sentence in a murder trial, Judge Bertelsmann considered the approach of indigenous law to criminal law and concluded that the introduction of traditional, indigenous legal systems into the criminal justice system might increase the existing alternatives to imprisonment.[590] The learned judge remarked on the aspect of restorative justice as follows:

> Restorative justice has been developed by criminal jurists and social scientists as a new approach to dealing with crimes, victims and offenders. It emphasizes the need for reparation, healing and rehabilitation rather than harsher sentences, longer terms of imprisonment, adding to overcrowding in jails and creating greater risks of recidivism.
>
> While improving the efficiency of the criminal justice system is necessary, applying harsher punishment to offenders has been shown internationally to have little success in preventing crime. Moreover, both these approaches are flawed in that they overlook important requirements for the delivery of justice, namely:
> - considering the needs of victims;
> - helping offenders to take responsibility on an individual level; and

584 SALC *Out of court settlements in criminal cases* 8.
585 Greyvenstein 2023 *Servamus Community-based Safety and Security Magazine* 72.
586 UNODC *Handbook on Restorative Justice Programmes* 4.
587 *S v Shilubane* [2005] JOL 15671 (T).
588 *S v Shilubane* [2005] JOL 15671 (T) para 4.
589 *S v Shilubane* [2005] JOL 15671 (T) para 4.
590 *S v Maluleke* 2008 1 SACR 49 (T) at 39-40.

- nurturing a culture that values personal morality and encourages people to take responsibility for their behaviour.[591]

This case placed restorative justice in the foreground, and it became a consideration when courts decide on an appropriate sentence.

The Constitutional Court[592] highlighted the relationship between restorative justice in relation to criminal law and the philosophy of *ubuntu-botho*[593] and stated that it correlates with the international drive to develop restorative systems of justice based on reparative rather than purely punitive principles.[594] Restorative justice is focused on the victim as it seeks to empower victims, restore dignity and give victims a voice in the criminal justice process.[595]

According to Spalding[596], restorative justice sentencing options are available with respect to corporations for environmental transgressions in the USA through the USSC Sentencing Guidelines. The sentencing guidelines dictate certain general principles to consider when sentencing organisations.[597] These include that a sentence should include an order that the organisation must remedy any harm caused by the offence and probation to monitor the implementation of sanctions or to prevent future criminal conduct.[598] The guidelines include incentives for corporations that self-regulate through an effective compliance and ethics programme.[599]

### *4.3.2 Diversion*

An important mechanism for attaining restorative justice, is diversion. Diversion is

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591 *S v Maluleke* 2008 1 SACR 49 (T) at 52; Bekker and Van der Merwe 2009 *De Jure* 241.
592 *Dikoko v Mokhatla* (CCT62/05) [2006] ZACC 10 (3 August 2006).
593 Dolamo 2014 *Studia Historiae Ecclesiasticae* 215 describes the concept of *ubuntu-botho* as "an African cultural belief that called on individuals to come together and to be more communal in their outlook and, thus, to look out for each other"; *S v Makwanyane* (CCT3/94) [1995] ZACC 3 para 225.
594 Minority judgment of Sachs, J paras 114-115.
595 Van Willigenburg 2018 *Int'l J Restorative Just* 284.
596 Spalding 2015 *Ohio St. L. J.* 359.
597 Chapter 8 of the *US Sentencing Guidelines Manual* (2023).
598 USSC *Sentencing Guidelines Manual* 517.
599 USSC *Sentencing Guidelines Manual* 517.

defined as:

> the channelling of *prima facie* cases from the formal criminal justice system on certain conditions to extra judicial programmes, at the discretion of the prosecution.[600]

Primarily, the aims of diversion are the following:

- to make offenders accountable for their actions.
- to provide an opportunity for restitution.
- to identify the motivation for the behaviour.
- to prevent offenders from receiving a criminal record for petty crimes.
- to provide educational and rehabilitative programmes to the benefit of all parties concerned.
- to ease the burden on the formal justice system.[601]

Diversion is not intended to cause offenders to be less accountable for their actions but rather afford offenders the opportunity to reconsider and amend their conduct without being burdened with a criminal record.[602] Although there are provisions in the *CPA* for an offender to avoid the criminal justice process, the *CPA* does not provide for a diversion process.[603]

#### 4.3.2.1 Diversion in terms of the *CJA*

The only statutory form of diversion is found in the *CJA*.[604] This Act applies to children[605] in conflict with the law and provides that a prosecutor may divert a matter involving a child who allegedly committed a less serious offence.[606] The prosecutor must be satisfied that the factors referred to in sections 52(1)(a) to (d)[607] have been complied with; and if the child is 12 years or older but under the age of 14 years,

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600 Muntingh (ed) 2001 "The Effectiveness of Diversion Programmes-a longitudinal evaluation of cases" 6.
601 Muntingh and Shapiro "NICRO Diversion Options" 7.
602 Muntingh and Shapiro "NICRO Diversion Options" 6; s 271 of the *CPA*.
603 These are discussed hereunder.
604 Act 75 of 2008.
605 Section 1 of the *CJA* defines a child as "any person under the age of 18 years and, in certain circumstances, means a person who is 18 years or older but under the age of 21 years whose matter is dealt with in terms of section 4(2)".
606 Section 41(1) of the *CJA*. Schedule 1 itemises less serious offences.
607 Sections 52(1)(a)-(d) of the *CJA*.

that the child will benefit from diversion.[608] The four factors to consider are that the child acknowledges responsibility for the offence, which must be done without undue influence; there must be *prima facie* evidence that the child committed the offence; and consent to diversion by the child and his or her parent, or an appropriate person, if available.[609]

There are a number of diversion options available.[610] The options relevant to this discussion are a good behaviour order,[611] restitution or symbolic restitution,[612] payment of compensation to a specified person, persons, group of persons or community, charity or welfare organisation or institution,[613] and where there is no identifiable person, persons or group of persons to whom restitution or compensation can be made, provision of some service or benefit or payment of compensation to a community, charity or welfare organisation or institution.[614]

The consequence of a successful diversion in terms of the *CJA* is that a prosecution on the same facts may not be instituted.[615] Similarly, the institution of a private prosecution is provided for in section 7 of the *CPA* for the same crime or offence.[616] It is important to note that a diversion order in terms of the provisions of the *CJA* does not result a previous conviction as referred to in the *CPA*.[617]

#### 4.3.2.2 Adult diversion

The South African criminal justice system has no legislative framework to regulate adult diversion.[618] The way that the NPA has overcome this shortcoming is by implementing a process determined in the NPA Prosecuting Policy Directives.[619] Part 7 provides for diversion, restorative justice and informal mediation with respect to

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608 Sections 41(1)(a) and (b) of the *CJA*.
609 Sections 52(1)(a)-(d) of the *CJA*.
610 Section 53(3) of the *CJA*.
611 Section 53(3)(h) of the *CJA*.
612 Sections 53(3)(l) and (m) of the *CJA*.
613 Section 53(3)(p) of the *CJA*.
614 Section 53(3)(q) of the *CJA*.
615 Section 59(1)(a) of the *CJA*.
616 Section 59(2) of the *CJA*.
617 Section 59(1)(b) of the *CJA*.
618 Maimane *Restorative Justice for Adult Offenders in South Africa* 21.
619 Discussed in chapter 2.

adult offenders.[620] Diversion is defined as:

> The election, in suitable and applicable cases, of a manner of disposal of a criminal case other than through normal court proceedings.[621]

Diversion is preferred over withdrawal of a matter, as the offender is held accountable for his or her actions.[622] The matter may only be withdrawn after the offender completes a specified diversion programme or compensates the complainant.[623] To that end, the victim or complainant should be consulted before the prosecutor decides on diversion.[624] If the offender completes the diversion programme, he or she may not be prosecuted for that offence.[625]

Diversion, which may result in the withdrawal of the charges, should be reserved for less serious offences, such as those where an admission of guilt fine may be determined by the prosecutor.[626] Diversion that may lead to the withdrawal of a matter is deemed inappropriate where the offence is serious.[627]

In addition to the prerequisites for diversion as stipulated in the *CJA,*[628] considerations include whether the offender has a fixed address, acknowledged responsibility for the offence, and is willing to participate in a remedial programme.[629] Only in exceptional circumstances should an offender with a criminal record or a person who has previously been diverted as provided for be considered for diversion.[630] Upon the completion of the diversion programme, the service provider must provide the prosecutor with a report confirming that, and thereupon, the matter is withdrawn.[631] Failure to complete the programme will result in the

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620 NPA *Prosecution Policy Directives* 20.
621 NPA *Prosecution Policy Directives* 20.
622 NPA *Prosecution Policy Directives* 20.
623 NPA *Prosecution Policy Directives* 20.
624 NPA *Prosecution Policy Directives* 20.
625 NPA *Prosecution Policy Directives* 20.
626 NPA *Prosecution Policy Directives* 20. Section 57(5)(a) of the *CPA* provides that the magistrate of the district or area in question may from time to time determine the offence for which admission of guilt fine may be fixed.
627 NPA *Prosecution Policy Directives* 20.
628 Section 52(1) of the *CJA*.
629 NPA *Prosecution Policy Directives* 21.
630 NPA *Prosecution Policy Directives* 21.
631 NPA *Prosecution Policy Directives* 21.

prosecution of the offender for the offence.[632] Diversion should not be considered where it would bring the administration of justice in disrepute.[633]

In addition to these national directives, the DPP: Northwest issued a circular letter to all prosecutors in the Northwest Province to follow certain guidelines when considering mediation in criminal matters.[634] It stipulates that the written consent of the DPP is required when an environmental crime, amongst others, is considered for mediation.[635]

In respect of adult diversion, the *caveat* in *Director of Public Prosecutions v Thabethe*[636] should be observed:

> I feel obliged to caution seriously against the use of restorative justice as a sentence for serious offences which evoke profound feelings of outrage and revulsion amongst law-abiding and right-thinking members of society. An ill-considered application of restorative justice to an inappropriate case is likely to debase it and make it lose its credibility as a viable sentencing option.

A principled approach to adult diversion, as stipulated in the Prosecution Policy Directives, should dispel any reservations regarding the diversion process as an appropriate alternative to criminal proceedings.

### *4.3.3 Reparative justice*

A further approach to justice is reparative justice. Almassi[637] states that reparative justice:

> involves the restoration or reconstruction of confidence, trust, and hope in the reality of shared moral standards and of our reliability in meeting and enforcing them.

Reparative practises can be used in conjunction with retributive and restorative justice mechanisms.[638] An element of reparative justice is restitution for the harm

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632 NPA *Prosecution Policy Directives* 21.
633 NPA *Prosecution Policy Directives* 21.
634 DPP: Northwest Province *Circular 6/2022* dated 4 August 2022.
635 DPP: Northwest Province *Circular 6/2022* para 3.
636 *DPP v Thabethe* 2011 2 SACR 567 (SCA) para 20.
637 Almassi 2017 *Journal of Agricultural and Environmental Ethics* 202.
638 Augustinavicius 2010 *Undergraduate Transitional Justice Review* 203.

done.[639] Mostly, reparative justice measures find applicability in cases of human rights violations.[640] White[641] argues that a reparative justice approach to corporate environmental crime with an emphasis on repairing harm would be more effective than the conventional criminal sanction approach.

### *4.3.4 Diversionary provisions of the CPA*

The *CPA* contains a limited number of provisions for an accused who committed a relatively minor offence to admit guilt and pay a fine thereby avoiding formal court proceedings.[642]

#### 4.3.4.1 Admission of guilt fine

Section 57 provides that in matters where a summons was issued against an accused with respect to an offence for which a magistrate's court may impose a fine not exceeding the amount[643] determined by the Minister of Justice, the accused may admit his guilt with respect to the offence in question and pay a fine in an amount endorsed on the summons without appearing in court.[644] The introduction of this provision aimed to:

> avoid unnecessary court appearance, on a trivial charge, of an accused who is prepared to admit guilt by paying an admission of guilt fine in respect of the relevant charge.[645]

A person may decide to pay the admission of guilt fine to be released from custody, prevent a court appearance, or believe that it will dispose of the matter without the risk of incurring a criminal record.[646] It is evident that a person who elects to pay

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639 Augustinavicius 2010 *Undergraduate Transitional Justice Review* 203.
640 Muddell and Hawkins 2018 *Gender and Transitional Justice* 7.
641 White 2017 *Crime, Law and Social Change* 129.
642 *S v Elgin* 2022 1 SACR 325 (WCC) para 17.
643 Currently the amount is R10 000,00 in terms of GN R62 in GG 36111 of 30 January 2013.
644 Section 57(1) of the *CPA.*
645 Du Toit *et al* (eds) *Commentary on the Criminal Procedure Act* 8-1.
646 Van As and Erasmus 2020 *South African Crime Quarterly* 65.

the admission of guilt fine is deemed to be convicted and sentenced.[647] This approach has been criticised. In *S v Madhinha*[648], it was stated:

> In my view, the Legislature has provided the mechanism in section 57 of the Act to provide for settlement of trivial disputes between the State and an accused person where neither party wishes to go through a long trial procedure and both are willing to bring their dispute to a quick end.

The High Court held that it is doubtful that payment of an admission of guilt fine amounts to a conviction as provided for in section 271 of the CPA.[649] Despite this, payment of an admission of guilt in terms of section 57 will result in a criminal record.[650] This interpretation is in line with the judgment in *NGJ Trading Stores (Pty) Ltd v Guerreiro.*[651]

If it appears to a magistrate examining the proceedings that a conviction or sentence under section 57(6) is not in accordance with justice, such judicial officer may set aside the conviction and sentence and direct that the accused be prosecuted in the ordinary course.[652] This provision establishes a form of judicial oversight.

An admission of guilt fine may be determined by regulation by the Minister responsible for environmental offences. Such a regulation must specify offences in terms of *NEMA* or a specific environmental management Act with respect to which alleged offenders may pay an admission of guilt fine for that offence instead of being tried by a court.[653] The Minister of the DFFE has accordingly made regulations pertaining to the identification and setting of admission of guilt fines with respect to specific offences of the *National Environmental Management Waste Act*.[654] The maximum amount determined is R5 000,00.[655] The regulations apply only to offences pertaining to general waste, which bears the meaning of waste that does

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647 Section 57(6) of the *CPA*.
648 *S v Madhinha* 2019 1 SACR 297 (WCC) (7 December 2018) para 17.
649 *S v Madhinha* 2019 1 SACR 297 (WCC) (7 December 2018) para 5.
650 *S v Tong* 2013 1 SACR 346 (WCC) (7 September 2012) para 17.
651 *NGJ Trading Stores (Pty) Ltd v Guerreiro* 1974 4 SA 738 (A) at 746A.
652 Section 57(7) of the *CPA*.
653 Section 34G of *NEMA*.
654 Act 59 of 2008.
655 GN R635 in GG 39024 of 24 July 2015.

not pose an immediate hazard or threat to human health or the environment.[656]

Where regulations were made in terms of section 34, the determination by a magistrate for the district with respect to offences and the amount of the admission of guilt as provided for in section 57(5) of the *CPA* is not applicable.[657]

4.3.4.2 Admission of guilt fine after appearance in court

A further provision aimed at dispensing with criminal proceedings is contained in section 57A of the *CPA*. This section provides that an accused who has already appeared in court may pay an admission of guilt fine. The qualification is that the accused may either be in custody awaiting trial on that charge and not on another more serious charge, previously released on bail under sections 59 or 60, or released on warning under section 72.[658] This section does not apply to processes followed under sections 56 or 57 of the *CPA*. Again, an accused who paid an admission of guilt fine will have that entered as a previous conviction.

In practice, the distinction between sections 57 and 57A is that the former is aimed at "mass offences", such as traffic offences, and the latter for crimes or offences which are not serious.[659] In both instances, the maximum amount that may be fixed as payment of the admission of guilt is R10 000,00.[660]

Section 57(7) is applicable to any admission of guilt paid in terms of this section.[661]

4.3.4.3 Plea and sentence agreements

Prosecutors and legal representatives of accused persons have for some time been conducting informal plea-bargaining to secure a plea of guilty in terms of section 112(2) of the *CPA*.[662] A structured alternative to this practice was introduced as a

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656 Reg 3 of GN R635 in GG 39024 of 24 July 2015.
657 Section 34G(1) of *NEMA*.
658 Sections 57A(1)(a)-(c) of the *CPA*.
659 SALC *Out of court settlements in criminal cases* 15.
660 R62 in GG 36111 of 30 January 2013.
661 Section 57A(4) of the *CPA*.
662 Murombo and Munyuki 2019 *PELJ* 11. Kruger *Hiemstra's Criminal Procedure* 15-5 defines plea bargaining as "the procedure whereby the accused relinquishes the right to go to trial in

plea and sentence agreement in terms of section 105A of the *CPA*. A plea and sentence agreement is an agreement between an accused and the State, represented by the prosecutor, in terms of which an accused agrees to plead guilty in return for a lenient or reduced sentence.[663] The process involves negotiation between a prosecutor, who has received written authority from the NDPP to enter into a plea and sentence agreement, and an accused, who is legally represented.[664] The procedure is available to an accused who has not yet pleaded to the charge.[665]

The negotiation pertains firstly to a plea with respect to the offence the accused is charged with or a plea on any competent verdict with respect to that charge.[666] The second stage of the negotiation relates to the sentence, which may be imposed once the accused is convicted[667] and may include a compensation order.[668] The prosecutor may enter into the agreement after he or she has consulted with the investigating officer.[669] The prosecutor entering into such an agreement must have regard to the nature and circumstances of the offence, the personal circumstances of the accused and any previous convictions, and the interests of the community.[670] The prosecutor must, where it is reasonable to do so, consult with the complainant or his or her legal representative.[671] The court plays no role in these negotiations.[672]

When the formal requirements as contemplated in section 105A(2) have been observed, and before the accused is required to plead, the prosecutor shall inform the court of the agreement[673]. At this stage, the court exercises a judicial oversight function to establish whether the accused has entered into the plea and sentence

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exchange for a reduction in sentence; the prosecutor bargains away the possibility of a conviction in exchange for a punishment, which would be retributively just and cost the least in terms of the allocation of resources."

663 Ndlovu 2021 *De Rebus* 8.
664 Section 105A(1)(a) of the *CPA*.
665 Section 105A(1)(a) of the *CPA*.
666 Section 105A(1)(a)(i) of the *CPA*.
667 Section 105A(1)(a)(ii) of the *CPA*.
668 Section 105A(1)(a)(ii)(dd) of the *CPA*; s 300 of the *CPA*.
669 Section 105A(1)(b)(i) of the *CPA*.
670 Sections 105A(1)(b)(ii)(aa)-(dd) of the *CPA*; *S v Zinn* 1969 2 SA 537 (A) 540G; *S v Rabie* 1975 4 SA 855 (A).
671 Section 105A(1)(b)(iii) of the *CPA*.
672 Section 105A(3) of the *CPA*.
673 Section 105A(4)(a) of the *CPA*.

agreement and if the requirements of subsections 105A(1)(b)(i) and (iii) have been observed.[674] If the requirements have not been observed, the court shall inform the prosecutor and the accused to what extent the requirements are not met and afford the parties the opportunity to correct any oversight.[675] If the court is satisfied that the agreement accords with the requirements, the court shall require the accused to plead and direct that the contents of the agreement be disclosed.[676] The court shall then determine from the accused whether he or she confirms the terms of the agreement and any admission made by him or her in the agreement, the allegations in the charge to which he or she has agreed to plead guilty; and whether the agreement was entered into freely and voluntarily whilst he or she was in his or her sound and sober senses and without having been unduly influenced.[677] If the court is not satisfied that the accused is guilty of the offence charged with, does not admit an allegation in the charge, has erroneously admitted any allegation or has a valid defence to the charge, or, for any other reason, the plea should not stand, the court may note a plea of not guilty.[678] In that instance, the trial of the accused shall start *de novo* before another presiding officer unless the accused waives that right.[679]

If the court is satisfied that the accused admits the allegations in the charge and is guilty of the offence, the court shall consider the sentence agreement.[680] If the court is satisfied that the sentence agreement is just, the court shall inform the parties, convict the accused of the offence charged and sentence the accused in accordance with the sentence agreement.[681] If it is not, the court shall inform the prosecutor and the accused of the sentence that it considers just.[682] The prosecutor and the accused may withdraw from the agreement or abide by it with reference to the charge, and the court may proceed to impose the sentence it considers just.[683]

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674 Sections 105A(4)(a)(i) and (ii) of the *CPA*.
675 Sections 105A(4)(b)(i) and (ii) of the *CPA*.
676 Section 105A(5)(b) of the *CPA*.
677 Section 105A(6) of the *CPA*.
678 Section 105A(6)(b) of the *CPA*.
679 Section 105A(6)(c) of the *CPA*.
680 Section 105A(7) of the *CPA*.
681 Section 105A(8) of the *CPA*.
682 Section 105A(9)(a) of the *CPA*.
683 Section 105A(9)(b) of the *CPA*.

An essential aspect of this process is the participation of the complainant in the negotiation phase. Bekker[684] conveys the importance of this as follows:

> The other interests advanced by giving the victim a right to participate in the plea bargain are society's interests. Society benefits from victim participation in plea bargains in two ways. The first is that according to the victim the right to participate will result in more information being provided to the decision-maker. The second benefit which accrues to society from victim participation in plea bargains is that it promotes the effective functioning of the criminal justice system.

Acknowledging the rights of victims in the process enhances transparency and supports the notion that justice must manifestly be seen to be done.[685]

This provision introduces a strong element of judicial oversight with respect to a negotiation process in which a judicial officer is not a participant. However, this oversight is not unfettered. The function of the court is to determine whether the formal requirements were complied with and whether the accused duly admitted all the allegations to the charge he or she agreed to plead guilty to.

The principle when imposing a sentence is that it is the duty of a sentencing court to "impose an appropriate sentence according to long-standing principles of punishment and judicial discretion."[686] The legislature elected to use the word "just" with respect to the sentence and not the word "appropriate", which signifies that the sentencing court is required to consider whether the sentence is appropriate considering the facts and circumstances of the case, the interests of society and the victims and the personal circumstances of the accused.[687]

Murombo and Munyuki[688] submit that plea and sentence agreements have the potential to fulfil the objectives of environmental regulation as they include elements of reformation, remediation and deterrence if used in conjunction with innovative court orders. The writers caution against the potential weaknesses of this procedure.[689] These are identified as the requirement of section 105A that an

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684 Bekker 2001 *CILSA* 209; Kruger *Hiemstra's Criminal Procedure* 15-5.
685 *S v Sassin* (84/02) [2003] ZANCHC 44 (20 October 2003) para 11.4.
686 *S v Mhlongo* 2016 2 SACR 611 (SCA) para 9.
687 *S v Sassin* (84/02) [2003] ZANCHC 44 (20 October 2003) para 15.5.
688 Murombi and Munyuki 2019 *PELJ* 6, 29, 33.
689 Murombi and Munyuki 2019 *PELJ* 29.

accused must be legally represented, especially in the case of a corporate offender, insufficient scientific and financial data to enable prosecutors to negotiate a fair agreement; and lastly, that using the criminal justice system in this process would tend to lessen the seriousness of environmental offences and create an incorrect perception that the offender is a responsible corporate citizen.[690] A plea and sentence process presents an opportunity to regulate offences of non-compliance with environmental laws effectively.[691] A plea and sentence agreement in terms of section 105A is not subject to appeal; however, it may be subject to judicial review.[692]

#### 4.3.4.4 Compounding of minor offences

The only process which truly diverts a person away from the criminal court is found in section 341 of the *CPA*. This section provides that a person served with a notice setting out an alleged offence may pay the amount mentioned therein, and such person shall not be prosecuted for having committed such offence.[693]

Schedule 3 of the *CPA* specifies the type of offences and limits the scope of this section to a contravention of a by-law or regulation made by or for any council, board or committee established in terms of any law for the management of the affairs of any division, city, town, borough, village or other similar community and a limited number of traffic offences.[694]

An important distinction between this section and the other sections discussed is that payment of the fine precludes criminal prosecution for that offence and does not result in a previous conviction.

### *4.3.5 Exclusion of category of offences as a previous conviction*

A recent amendment in 2024 to the *CPA* provides that the Minister of Justice may, in consultation with the NDPP and the Minister of Police, declare any offence,

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690 Murombi and Munyuki 2019 *PELJ* 29-30.
691 Murombi and Munyuki 2019 *PELJ* 31.
692 *Moamogoe v The State* (191/2019) [2020] ZASCA 106 (18 September 2020) para 10.
693 Section 341(1) of the *CPA*.
694 Schedule 3 of the *CPA*.

category or class of offences, or offence committed in specified circumstances, with respect to which an accused may pay a fine without appearing in court; and which fine is not recorded in the criminal record book for admission of guilt fines, as an offence or offences that does not result in a previous conviction of an accused.[695] This determination must be published in the Gazette.[696]

The criteria to consider is that the offence must be a statutory offence punishable with a fine, with or without the option of imprisonment not exceeding six months.[697] In addition, the offence may not contain an element of violence or dishonesty; involve the infliction of mental, psychological or physical harm on another person; involve damage to property; involve cruelty to animals; be an offence against the administration of justice; or caused pecuniary or economic loss to another person.[698]

## *4.4 The position in South Africa*

### *4.4.1 Early development of a form of diversion*

Section 6 of the *CPA* provides that the Attorney-General[699] may withdraw a charge against an accused before an accused pleads to that charge[700] or may stop the prosecution with respect to that charge at any time after an accused has pleaded but before conviction.[701] In the latter instance, the accused shall be entitled to a verdict of acquittal with respect to that charge, but not with respect to the former instance.[702] This provision is applicable with respect to a private prosecution under section 8.[703] The prosecutor's options are limited to either prosecute or decline to prosecute an offender.[704]

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695 Section 57B of the *CPA* inserted by s 10 of the *Judicial Matters Amendment Act* 15 of 2023.
696 Section 57B(1) of the *CPA*.
697 Section 57B(2)(a) of the *CPA*.
698 Section 57B(2)(b) of the *CPA*.
699 The DPP.
700 Section 6(a) of the *CPA*.
701 Section 6(b) of the *CPA*.
702 See the provisos in ss 6(a) and (b) of the *CPA*.
703 Section 6 of the *CPA*.
704 Du Toit and Ferreira 2015 *PELJ* 1507.

The *Correctional Services and Supervision Matters Amendment Act*[705] proposed amending section 6 of the *CPA* to provide for a procedure where the prosecutor may reconsider the decision to prosecute.[706] The amendment sought to introduce section 6(1)(c) into the *CPA* and determines:

> at any time before judgment whether or not an accused has already pleaded to a charge, reconsider the case and upon receipt of a written admission made by the accused in respect of the charge brought against him or a lesser charge, suspend the court proceedings and place such person, with his concurrence, under correctional supervision on such conditions and for such period as may be agreed upon.[707]

The purpose hereof is to discontinue prosecution before judgment is delivered and effect some remedial measures in the form of correctional supervision with respect to an accused person.[708] In addition, the offender is evidently not convicted and, as a result, will not have a criminal record. As with the other provisions of the *CPA* that provide for some form of diversion, the significance is that criminal proceedings against the offender have commenced. These provisions qualify as actual out-of-court settlements, although they are not yet operational.[709]

### *4.4.2 The SALC and out-of-court settlements*

As part of its investigation into the simplification of the criminal procedure, the SALC[710] investigated the introduction of a system of out-of-court settlements in criminal cases in the South African criminal procedural law. The report states that policies concerning out-of-court settlements are premised on two key factors. The first pertains to economic considerations.[711] Secondly, the report recognised that organised and transnational crimes and cross-border crimes, including economic and environmental crimes, placed a strain on the criminal courts.[712] In addition, certain types of economic, environmental and transnational crimes are in their

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705 *Correctional Services and Supervision Matters Amendment Act* 122 of 1991. The effective date of this amendment is to be proclaimed.
706 Section 36 of the *Correctional Services and Supervision Matters Amendment Act* 122 of 1991.
707 Section 36 of the *Correctional Services and Supervision Matters Amendment Act* 122 of 1991.
708 SALC *Out of court settlements in criminal cases* 8.
709 SALC *Out of court settlements in criminal cases* 8.
710 SALC *Out of court settlements in criminal cases*.
711 SALC *Out of court settlements in criminal cases* 3.
712 SALC *Out of court settlements in criminal cases* 3.

nature complex, thereby demanding more proficiency in the procedural, legal and technical aspects of law enforcement.[713] The SALC acknowledged that it is essential to mandate the State to finalise criminal cases either by dismissal or through settlement to lessen the burden on the criminal justice system.[714]

With reference to the aim of a restorative justice approach of restoration and compensation in the process of resolving conflict, the SALC states that out-of-court settlements set out to achieve similar aims.[715] Based on their investigation, the SALC concluded that there exists a need in South Africa for out-of-court settlements in criminal cases.[716] The SALC recommended an amendment to the *CPA* to provide for these.[717]

A noteworthy characteristic of the proposed legislative amendments is that the prosecution may only offer an out-of-court settlement in a matter where a court, upon conviction of the accused, would impose a sentence other than imprisonment or a sentence of imprisonment of less than a year.[718] The intention is that the procedure would apply to less serious offences.

In addition, the recommendation provides for a process whereby a judicial officer of the same court may review the out-of-court settlement.[719] The right to review is, however, restricted to instances where the accused, a victim, or a police officer holds the view that the requirements of the statutory provisions have not been complied with or the conditions imposed are unreasonable.

Because these recommendations were not implemented, the NPA, in recognising the need for such a process in relation to crimes committed by adults, implemented the process of adult diversion in the NPA Prosecution Policy Directives.[720]

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713 SALC *Out of court settlements in criminal cases* 3.
714 SALC *Out of court settlements in criminal cases* 3, 7.
715 SALC *Out of court settlements in criminal cases* 8.
716 SALC *Out of court settlements in criminal cases* 32.
717 SALC *Out of court settlements in criminal cases* 52-55.
718 SALC *Out of court settlements in criminal cases* 52.
719 SALC *Out of court settlements in criminal cases* 55.
720 Discussed under para 4.3.2.2.

### *4.4.3 Corporate alternative dispute resolution*

Following the recommendation of the Zondo Commission[721] with respect to the accountability of corporations involved in a pattern of corrupt activities in relation to the Government of South Africa and related institutions, commonly referred to as "state capture", the NPA indicated that it would embark on a process to implement a policy giving effect to the recommendations.[722] Advocate Rabaji-Rasethaba, Deputy NDPP, subsequently announced a new NPA Policy Directive entitled "Corporate Alternative Dispute Resolution", which was implemented on 19 April 2024.[723]

#### 4.4.3.1 Introduction and general principles

The policy refers to the adult diversion provisions in another section.[724] It provides that with respect to certain corporations, it may be in the interest of justice to resolve criminal cases where the charges relate to serious corruption and related offences, other than through criminal prosecution.[725] The process is outlined as

> generally understood as the election, in suitable and applicable cases, of a manner of disposal of a criminal case against a company other than through normal criminal court proceedings. Criminal cases are diverted way [sic] from the formal criminal justice system at pre-trial stage, with a view to disposing of the case against the company, while still being able to proceed with a prosecution and asset forfeiture against the company's directors, employees or agents.

The purpose of corporate ADR is to provide an effective mechanism to the NPA to resolve multi-jurisdictional criminal matters against multinational companies; recover the proceeds of unlawful activities, and compensate the victims of those activities.[726] This measure will ensure that South Africa complies with its international obligations with respect to combatting corruption and may result in enhanced

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721 Discussed under para 4.5.1.

722 Paine and Pather *Daily Maverick* https://www.dailymaverick.co.za/article/2022-01-06-the-pros-and-cons-of-deferred-prosecution-agreements-is-it-a-case-of-justice-deferred-is-justice-denied/.

723 Rabaji-Rasethaba *Daily Maverick* https://www.dailymaverick.co.za/opinionista/2024-02-06-npa-gets-new-weapon-that-brings-companies-on-board-in-fight-against-corruption/. The policy is *Part 51*: *Prosecuting Policy Directives*, but accessible as a separate document.

724 Part 7 of the NPA *Prosecuting Policy Directives*.

725 Part 51 of the NPA *Prosecuting Policy Directives* para A 1.

726 Part 51 of the NPA *Prosecuting Policy Directives* para A 3.

corporate accountability.[727] A corporate ADR may only be issued by a Director of Public Prosecutions and an investigating director.[728] A decision to offer a corporate ADR to a corporation with respect to corruption-related offences is guided by four principles.[729] These pertain to legality and rationality, public interest, guided discretion, and transparency.[730]

#### 4.4.3.2 Suggested criteria

The Prosecuting Policy stipulates criteria and sub-criteria which must be considered to determine if a corporate ADR would be in the public interest.[731] Timeous and voluntary disclosure includes the disclosure of evidence and information related to unlawful activity as well as information not previously available to the NPA or law enforcement agencies.[732] Another factor is the extent of cooperation with the investigators and prosecution. The disclosure of evidence, evidential material, and the identity of persons within and outside of the corporation are considered.[733] It further entails cooperation in any investigation, prosecution, or other proceedings in South Africa and abroad, as well as whether the corporation conducts a forensic investigation at its own expense.[734]

Furthermore, the willingness of the corporation to make fair, reasonable and proportional restitution of the proceeds of the unlawful activities must be taken into account.[735] The nature and seriousness of the transgressions and the intricacy of the case, including the availability of resources to conduct an effective prosecution and the possible length of a criminal trial, must be considered.[736] Another consideration is the frequency of the wrongdoing and involvement of the company in such wrongdoing. Related to this is the extent to which an individual within the

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727 Part 51 of the NPA *Prosecuting Policy Directives* para A 3.
728 Part 51 of the NPA *Prosecuting Policy Directives* para F.
729 Part 51 of the NPA *Prosecuting Policy Directives* para C 1.
730 Part 51 of the NPA *Prosecuting Policy Directives* paras C 1(a) to (d).
731 Part 51 of the NPA *Prosecuting Policy Directives* para E 1.
732 Part 51 of the NPA *Prosecuting Policy Directives* para E 2.
733 Part 51 of the NPA *Prosecuting Policy Directives* para E 3.
734 Part 51 of the NPA *Prosecuting Policy Directives* para E 3.
735 Part 51 of the NPA *Prosecuting Policy Directives* para E 4.
736 Part 51 of the NPA *Prosecuting Policy Directives* para E 5.

company embarks on a folly of his or her own to benefit the corporation.[737] Any previous unlawful actions, including civil and regulatory wrongdoings, establishing a pattern of transgressions of the corporation, the extent thereof and the size of that corporation must be considered.[738]

The question of whether the corporation has implemented a compliance programme to detect misbehaviour, and its effectiveness is of importance. If a corporation is prepared to implement such a programme, in instances where a programme does not exist, or the review and improvement of a current programme by an external compliance evaluator will be an indication that a corporate ADR may be offered.[739] Related to this is the question of whether the wrongful acts were committed when the corporation did not have a compliance programme or if such a programme was inadequate to prevent the transgressions. If the company fails to implement or improve the compliance programme since becoming aware of the wrongdoings, it will be an indication against an ADR process.[740]

The possibility of significant collateral prejudice to the corporation in the event of a prosecution, subsequent conviction, and ensuing asset forfeiture proceedings on the sustainability of the corporation, including any negative effect on its shareholders and employees, the economy and the community may also be considered.[741] Finally, the extent of any action taken by the corporation to remedy any harm it caused or to compensate victims for damage suffered is a factor.[742]

#### 4.4.3.3 Procedure

A corporation may elect to self-report and approach the NPA with a written request to consider a corporate ADR. [743] In that instance, the procedure to be followed is the

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737 Part 51 of the NPA *Prosecuting Policy Directives* para E 6.
738 Part 51 of the NPA *Prosecuting Policy Directives* para E 7.
739 Part 51 of the NPA *Prosecuting Policy Directives* para E 8.
740 Part 51 of the NPA *Prosecuting Policy Directives* para E 8.
741 Part 51 of the NPA *Prosecuting Policy Directives* para E 9.
742 Part 51 of the NPA *Prosecuting Policy Directives* para E 10.
743 Part 51 of the NPA *Prosecuting Policy Directives* para H 1.

same as when a prosecutor elects to invite a corporation that committed offences relating to corruption.[744]

After a prosecutor evaluates an assigned matter and concludes that there is a suspicion that a corporation committed corruption or corruption-related offences and that it may be in the public interest to conclude a corporate ADR, that prosecutor may recommend to the DPP or an investigating director that an invitation be extended to the corporation.[745] Where the DPP or an investigating director decides that a corporate ADR may be suitable in the circumstances, the corporation may be invited to make a representation to confirm this.[746] The letter must be structured in a specific manner.[747] Upon the acceptance of the invitation, the NPA will draft a letter of undertaking setting out the terms of the negotiations.[748] Similarly, the corporation will provide stipulated undertakings.[749] A corporation must authorise a person or persons to act on its behalf.[750]

#### 4.4.3.4 Contents of the ADR agreement

A corporate ADR must be in writing.[751] The agreement must include a short description of the allegations and the offences the corporation is suspected of; reference to the decision not to prosecute the corporation for the alleged offences; acknowledgement of responsibility by the corporation; motivation why the corporation's conduct and undertakings satisfy the criteria for a corporate ADR; information of the remedial action the corporation intends to take; a statement that the decision not to prosecute the corporation does not extend to individuals who may be prosecuted under the *Prevention of Organised Crime Act;*[752] and lastly, if the

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744 Part 51 of the NPA *Prosecuting Policy Directives* para H 2.
745 Part 51 of the NPA *Prosecuting Policy Directives* para G 1.
746 Part 51 of the NPA *Prosecuting Policy Directives* para G 2.
747 Part 51 of the NPA *Prosecuting Policy Directives* para G 3.
748 Part 51 of the NPA *Prosecuting Policy Directives* para G 5.
749 Part 51 of the NPA *Prosecuting Policy Directives* para G 6.
750 Part 51 of the NPA *Prosecuting Policy Directives* para G 8.
751 Part 51 of the NPA *Prosecuting Policy Directives* para I 1.
752 Act 21 of 1998.

NPA discovers evidence that materially impacts the assessment and resultant decision to offer an ADR, the NPA may proceed with prosecution.[753]

If restitution has not yet been affected, the ADR agreement may determine a date when it must be done.[754]The corporation may be required to consent to an order in terms of the *Prevention of Organised Crime Act*[755].

4.4.3.5 Miscellaneous provisions

The policy further provides that information elicited during engagements is with prejudice and a matter of record.[756] In accordance with this, any information and evidence obtained may be used in the investigation and prosecution of any individual associated with the corporation, whether under the *Prevention and Combating of Corrupt Activities* Act[757], for proceedings under the *Prevention of Organised Crime Act*[758], or to investigate and prosecute other companies.[759]

The corporation has the right to legal representation during the initial negotiation phase.[760] The corporation may establish a claim to legal professional privilege, and the NPA has no right to information subject to such privilege.[761] The NPA may not require the corporation to waive legal professional privilege to establish the corporation's willingness to cooperate, but it may voluntarily waive such privilege.[762]

The policy provides guidelines for the calculation of any financial restitution to be made[763] on the advice of the Asset Forfeiture Unit of the NPA or the Investigating Directorate, considering each case on its own.[764] An independent accountant or auditor may be appointed to quantify the value of the proceeds derived from

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753 Part 51 of the NPA *Prosecuting Policy Directives* I 1(a) to (f).
754 Part 51 of the NPA *Prosecuting Policy Directives* para I 2.
755 The *Prevention of Organised Crime Act* 21 of 1998 provides for asset forfeiture with respect to the proceeds of crime upon conviction. See NPA *Part 51*: *Prosecuting Policy Directives* para I 3.
756 Part 51 of the NPA *Prosecuting Policy Directives* para J 3.
757 Act 12 of 2004.
758 Act 21 of 1998.
759 Part 51 of the NPA *Prosecuting Policy Directives* paras J 1 and 2.
760 Part 51 of the NPA *Prosecuting Policy Directives* para K 1.
761 Part 51 of the NPA *Prosecuting Policy Directives* paras K 2 and 3.
762 Part 51 of the NPA *Prosecuting Policy Directives* paras K 4 and 5.
763 Part 51 of the NPA *Prosecuting Policy Directives* para L.
764 Part 51 of the NPA *Prosecuting Policy Directives* paras L 1 and 2.

unlawful activities.[765] The policy prescribes guidelines to follow when calculating the amount.[766] These are the calculation of the upper limit of the amount and the appropriate amount of restitution, both to be done in terms of certain provisions of the *Prevention of Organised Crime Act*.[767] The guidelines include additional factors to consider when determining the final amount.[768] When determining the profit derived from unlawful activities, fixed or overhead business expenses that would have been incurred in the normal course of conducting business will not be included in the calculations.[769]

Under the heading "Procedural arrangements," the process discussed above is restated.[770] If a matter has been enrolled in a criminal court, the charges must be withdrawn, and the reasons for the withdrawal must be provided to the presiding officer.[771] A copy of the ADR agreement must be filed in the "B" section of the docket.[772] The Directives prescribes the process in which restitution that impacts on asset forfeiture proceedings in terms of the *Prevention of Organised Crime*[773] is to be made.[774] A summary of the ADR agreement must be published on the NPA website.[775]

#### 4.4.3.6 Evaluation of the policy

The Policy is not without its limitations. It includes a definition of benefits, compliance programmes and corruption. A compliance programme is defined as "an anti-corruption compliance programme".[776] Corruption has the meaning in terms of the *Prevention and Combating of Corrupt Activities Act*.[777] It is evident from this

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765 Part 51 of the NPA *Prosecuting Policy Directives* para L 3.
766 Part 51 of the NPA *Prosecuting Policy Directives* para L 4.
767 Part 51 of the NPA *Prosecuting Policy Directives* paras L 4(a) and (b).
768 Part 51 of the NPA *Prosecuting Policy Directives* para L 4(c).
769 Part 51 of the NPA *Prosecuting Policy Directives* para L 5.
770 Para 4.4.3.3; Part 51 of the NPA *Prosecuting Policy Directives* para M.
771 Part 51 of the NPA *Prosecuting Policy Directives* para M 4.
772 Part 51 of the NPA *Prosecuting Policy Directives* para M 5. Section "B" of a police docket contains internal reports and memoranda. See *Wolf v S - Ruling* (16/2022) [2023] ZAECQBHC 62 (20 October 2023) para 1.
773 Act 21 of 1998.
774 Part 51 of the NPA *Prosecuting Policy Directives* para M 6.
775 Part 51 of the NPA *Prosecuting Policy Directives* paras N 1 and 2.
776 Part 51 of the NPA *Prosecuting Policy Directives* para B 1.
777 Section 3 of the *Prevention and Combating of Corrupt Activities Act* 12 of 2004.

section that corruption is not defined but rather assigned a meaning with reference to a specific offence under that Act, which limits the use of the corporate ADR policy to offences that resort within this meaning. This assertion is supported by the direction contained in the policy that a corporate ADR may be made with respect to corruption, or offences related to corruption.[778] However, the limitation in the definition of the policy excludes the possibility of offering a corporate ADR in environmental offences. In this chapter, an argument will be made that industry-related corporate environmental crimes are a form of white-collar crime.

A further concern is that the policy stipulates that a prosecutor must be satisfied that there is a suspicion of corrupt activities. This requirement overlooks the standard for prosecution as stated in *National Director of Public Prosecutions v Sijoyi Robert Mdhlovu*:[779]

> It follows that a prosecutor need not have evidence establishing a *prima facie* case or proof beyond a reasonable doubt when deciding to initiate a prosecution. Suspicion of guilt on reasonable grounds suffices. The question is what a reasonable prosecutor would have done in light of the information available at the relevant stage.

A matter will normally be brought to a prosecutor to decide whether to prosecute or not based on the evidence accumulated by the investigating officer. Conspicuously absent from the wording of the policy is the requirement of reasonable grounds.

It is unconstitutional for a person who has previously been either convicted or acquitted to be tried again for that offence.[780] A corporation that enters into an ADR agreement is neither convicted nor acquitted. If the corporation fully complied with the terms of the ADR agreement, the NPA is ostensibly not going to prosecute that corporation. The issue of a private prosecution in terms of section 7 of the *CPA* then becomes important.[781] The policy does not provide for an indemnity against a private prosecution.

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778 Part 51 of the NPA *Prosecuting Policy Directives* para D 2.
779 *NDPP v Mdhlovu* (194/2023) [2024] ZASCA 85 (3 June 2024) para 21.
780 Section 35(3)(m) of the *Constitution of the Republic of South Africa*, 1996.
781 Discussed under para 4.6.

Since a corporate ADR agreement is not governed by legislation, it is unclear whether the NPA, in terms of this policy, will be able to conclude an ADR agreement where the corporation informally admits the commission of a criminal offence and no formal criminal charges were laid. McKeon[782] remarked that the State has the authority to enforce the criminal law in its capacity as the prosecutorial authority and not in a civilian capacity. There is no prohibition to prevent the NPA from proceeding with criminal charges despite the completion of a diversion programme.

Although the policy is necessitated by the absence of a statutory provision to achieve a similar outcome, a policy cannot supplant a statutory provision.[783] These aspects can only be remedied through legislative change.

## *4.5 DPAs in South Africa*

### *4.5.1 The Zondo Commission*

The Zondo Commission was established on 25 January 2018 as part of the remedial action taken by the then Public Protector, Adv Thuli Madonsela, in her "State of Capture" Report in October 2016.[784] The Zondo Commission issued Part 1 Volume 1 of its report on 14 January 2022.[785] It recommends, as part of the four levels of response to crimes committed by corporations, that DPAs should be considered as the second level of response.[786] A DPA is described as "an innovation" in reaction to the crimes identified in the report.[787]

The Zondo Commission defines a DPA as an agreement between a prosecutor and an accused corporation in terms of which the criminal liability of corporation can be

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782 McKeon 2018 *The Dangers of Deferment: The Case against Australia's Proposed Deferred Prosecution Agreement Scheme* 17.

783 *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* (252/99) [2001] ZASCA 59 (17 May 2001) para 7.

784 Proclamation 3 of 2018 in GG 41403 of 25 January 2018; Judicial Commission of Inquiry into State Capture Report *Part 1 Vol. 1*: *South African Airways and its Associated Companies* i.

785 Judicial Commission of Inquiry into State Capture Report *Part 1 Vol. 1: South African Airways and its Associated Companies*.

786 Judicial Commission of Inquiry into State Capture Report *Part 1 Vol. 1: South African Airways and its Associated Companies* 813.

787 Judicial Commission of Inquiry into State Capture Report *Part 1 Vol. 1: South African Airways and its Associated Companies* 813.

inferred from admitted facts and, in exchange, the prosecutor defers prosecution depending compliance with agreed measures.[788] It is stated that the purpose of implementing such a process is as an incentive to self-report unlawful behaviour of the corporation and ensure future compliance by the corporation.[789] The Zondo Commission acknowledges that corporations are often major players in corruption-related offences.[790] It criticises the absence of legislative provisions for DPAs as a hindrance to the effective prevention of corrupt activities.[791] It is of importance that the Zondo Commission suggests a form of judicial oversight by a tribunal to prevent prosecutorial overreach.[792]

The Zondo Commission calls on the Government in its summary of recommendations to introduce a DPA system in South Africa through legislation.[793] In response, the President stated that the South African Law Reform Commission "is considering deferred prosecution agreements as part of its review of the criminal justice system."[794]

### *4.5.2 Advantages and disadvantages of DPAs*

#### 4.5.2.1 Advantages

DPAs are regarded as "a formidable tool in the legal arsenal" with several advantages.[795] As discussed in Chapter 2, a prosecutor has a choice of either prosecuting or declining to prosecute a criminal matter. A DPA bridges the divide

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788 Judicial Commission of Inquiry into State Capture Report *Part 1 Vol. 1: South African Airways and its Associated Companies* 813-814.

789 Judicial Commission of Inquiry into State Capture Report *Part 1 Vol. 1: South African Airways and its Associated Companies* 814.

790 Judicial Commission of Inquiry into State Capture Report *Part 1 Vol. 1: South African Airways and its Associated Companies* 815.

791 Judicial Commission of Inquiry into State Capture Report *Part 1 Vol. 1: South African Airways and its Associated Companies* 816.

792 Judicial Commission of Inquiry into State Capture Report *Part 1 Vol. 1: South African Airways and its Associated Companies* 820.

793 Zondo Commission date unknown https://www.statecapture.org.za/site/files/announcements/672/OCR_version_-_State_Capture_Commission_Report_Part_VI_Vol_IV_-_Recommendations.pdf 23-24.

794 The President of South Africa October 2022 https://www.gov.za/sites/default/files/gcis_document/202210/state-capture-commission-response.pdf para 2.1.35.

795 Van Niekerk and Ponelis 2024 *PELJ* 24.

between these two alternatives.[796]

The prosecution may find it exceedingly difficult to prove the guilt of white-collar offenders as the evidence is complex, and the offender has vast financial resources at its disposal to challenge the evidence.[797] A criminal matter can thus be disposed of without going through a prolonged trial, which will save court time and costs.[798] Related to this is that the speedy finalisation of criminal cases may lead to more cases being disposed of and ultimately improving society's view of the administration of justice.[799]

According to Shiner and Ho[800], the incentive for the corporation to conclude a DPA lies in the certainty of receiving a lenient penalty in exchange for completion of the conditions *in lieu* of the uncertainty of the outcome and possibility of a hefty sentence. A related aspect is that a DPA has the benefit of avoiding the delays and prohibitive costs of criminal litigation.[801] The apprehension of being labelled as a criminal following a conviction is a factor that may influence a decision on whether to dispute a criminal charge.[802] The terms of a DPA can be constructed in a manner that allows for structural reforms, like the implementation of a compliance programme, ethical norms, and internal safeguards.[803]

In addition, DPAs are useful mechanisms when dealing with corporate transnational crime to overcome enforcement challenges and improve cross-border law enforcement cooperation.[804] In multi-jurisdictional cases, the prosecution and corporate offender have certainty in the outcome of the case and the amount of the financial penalty imposed.[805]

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796 Parker and Dodge 2023 *Journal of Financial Crime* 944.
797 Braithwaite 1985 *Annual Review of Sociology* 16.
798 Zierdt and Podgor 2007 *Ky. LJ* 35.
799 SALC *Out of court settlements in criminal cases* 30.
800 Shiner and Ho 2018 *Criminal law and Philosophy* 20.
801 Bronitt 2024 *Undergraduate Transitional Justice Review* 9.
802 SALC *Out of court settlements in criminal cases* 30.
803 Parker and Dodge 2023 *Journal of Financial Crime* 944.
804 Lűth 2021 *Transnational Legal Theory* 322-323.
805 Chelsie 2019 119.

#### 4.5.2.2 Disadvantages

Although the conclusion of criminal matters is, in general, not afforded wide publicity insofar as high-profile cases or cases where the public has a vested interest, publicity of an incident is a reality in an open and democratic society.[806] The conclusion of a negotiated settlement, especially in corporate environmental crimes done in private, may result in the public forming a negative perception of the administration of justice.[807] The SALC identified the possible absence of judicial oversight as a weakness of the system.[808] This aspect is fully canvassed hereunder.[809]

It is a constitutional imperative that a prosecutor must exercise his or her duties independently and impartially, that is, without fear, favour or prejudice.[810] The Code of Conduct for Members of the NPA[811] dictates that prosecutors must display integrity and be persons whose conduct is objective, honest and sincere. A prosecutor's character traits or personal biases may influence negotiations and result in unequal treatment of an offender.[812]

With respect to DPAs, attorneys and prosecutors may be able to exert undue influence to accept terms or make admissions to settle.[813] The possibility that a prosecutor or attorney may exert influence to reach an agreement is not unique to DPAs.[814] When an accused pleads guilty to a charge, a court must be convinced of certain requirements to safeguard against a wrong conviction. In *S v Moyo*[815], these pre-requisites are stated as follows:

> However, a court must also be satisfied that the accused person understands that each admission made in the statement is conclusive proof of the allegation

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806 Broughton 2020 *PELJ* 25.
807 SALC *Out of court settlements in criminal cases* 31.
808 SALC *Out of court settlements in criminal cases* 31.
809 See para 4.5.5.
810 Section 179(4) of the *Constitution of the Republic of South Africa*, 1996; *Corruption Watch NPC v President of the Republic of South Africa; Nxasana v Corruption Watch NPC* 2018 2 SACR 442 (CC) paras 18-19.
811 Part A in GN R1257 in GG 33907 of 29 December 2010.
812 SALC *Out of court settlements in criminal cases* 31.
813 SALC *Out of court settlements in criminal cases* 31.
814 SALC *Out of court settlements in criminal cases* 31.
815 *S v Moyo* (25/2022) [2022] ZAGPJHC 250 (21 April 2022) para 15.

> admitted, and that the court may convict them on those admissions if they establish the accused person's guilt as charged; that the statement was made freely and voluntarily, in the absence of any undue influence; that the accused person has read and understood each admission contained in the statement; that the statement correctly records the facts that the accused person wishes to admit; and that the accused person is fully informed of the constitutional rights waived by a guilty plea.

It is the author's opinion that a well-drafted provision in legislation with respect to a DPA scheme would dispel this concern.

### *4.5.3 Effective criminal sanctions*

#### 4.5.3.1 Criminal sanctions as a deterrent

The success of criminal sanctions as a deterrent is premised on efficient and effective enforcement mechanisms such as detection, investigation and prosecution.[816] The deterrent theory entails that criminal sanctions as a deterrent will be successful only if there is a reasonable certainty that the police will apprehend an offender, that the prosecution of the crime will be effective and result in a conviction, and that the offender will serve his sentence and not be freed on parole too early or escape from prison.[817]

White-collar crimes have in the past and still are dealt with differently than violent crimes, like murder or robbery.[818] Generally, perpetrators receive more lenient sentences as they are not considered to be "prison material" by reason of their often-perceived respectable backgrounds.[819] This approach tends to create an impression that the game is worth the candle.[820] In *De Villiers v S*[821], the court encouraged stricter sentences for white-collar crimes. If this approach is the hallmark of corporate criminal enforcement in South Africa, DPAs will be an attractive alternative to prosecution.

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816 UNCAC 2020 https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/16-18November2020/V2006560e.pdf 2.
817 Snyman *Criminal Law* 14.
818 *S v Sadler* [2000] 2 All SA 121 (A) para 11.
819 *S v Sadler* [2000] 2 All SA 121 (A) para 11.
820 *S v Sadler* [2000] 2 All SA 121 (A) para 11.
821 *De Villiers v S* (P130/2012) [2012] ZAFSHC 172 (14 September 2012) para 15.

The effectiveness of criminal sanctions to prevent environmental crimes is dependent on "the likelihood of apprehension, prosecution, conviction, and significant penalty".[822] Kidd[823] states that:

> Effective 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.

In Chapter 2, reference was made to the nature of sentences imposed with respect to environmental transgressions with reference to practical examples. Environmental laws provide for substantial penalties depending on the nature of the offence. Section 49B of *NEMA* prescribes penalties of R10 million or imprisonment not exceeding ten years or to both such fine and such imprisonment[824]or R5 million or imprisonment of up to five years or to both such fine and such imprisonment[825] with respect to specified offences created in section 49A. According to Strydom,[826] it appears that there is a tendency to prescribe the same maximum penalty in *NEMA* and the other three framing laws for serious and less serious offences. In contrast, the penalty provisions in the *NWA* tend to be more forgiving and provide that, on a first conviction, the offender may be sentenced to a fine or imprisonment for a period not exceeding five years or to both a fine and such imprisonment.[827] As demonstrated in Chapter 2, environmental transgressions are seldom visited with severe penalties.

Abbot[828] identifies the pitfalls involved in lenient sentences as:

> From an economic perspective, low fines are not conducive to effective deterrence and compliance because they contribute to a reduction in the expected punishment. Coupled with the cautious approach to prosecution, the deterrent effect of this enforcement tool is limited.

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822 Kidd "Criminal Measures" 241.
823 Kidd "Criminal Measures" 241-242.
824 Section 49B(1) of *NEMA.*
825 Section 49B(2) of *NEMA*.
826 Strydom *The use and impact of criminal sanctions for environmental law transgressions in industrial facilities in South Africa* 11.
827 Section 151(2) of the *NWA*.
828 Abbot 2005 *Journal of Environmental Law* 170.

Murombo and Munyuki[829] observe that:

> This is the case especially with corporate offenders, who may very well have deep pockets to pay any fine or compensation ordered. It is difficult to assess whether the agreed penalties were high enough to make the companies feel the pinch without knowing the complete financial circumstances of a company.

Corruption and crime will decline when citizens know that the arrest, prosecution, conviction, and sentence of offenders are predictable as part of an effective and efficient court system.[830] The effective prosecution of crime is a constitutional objective and a priority for the State.[831]

The author contends that if a corporate offender has a selection between prosecution and certain consequences upon conviction or concluding a DPA, a strong criminal justice system will promote the latter choice.[832] The element of deterrence will only be attained by the interplay between the severity of punishment and the probability of conviction.[833]

#### 4.5.3.2 Deterrent aspect of DPAs

One of the aims of a DPA is that it will function as a general deterrent because of the substantial terms agreed upon.[834] Xiao[835] identifies three components of DPAs that will serve the objects of deterrence. These are a heavy fine as they impact the profits of a corporation, wide-ranging remedial plans under the oversight of monitors, which may reduce the prospect and incentive to commit transgressions in future, and finally, the prosecution flowing from a breach of the DPA.[836]

According to Bildfell[837], DPAs achieve deterrence by mirroring the consequences of a conviction and publicity afforded. The punishment with respect to environmental

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829 Murombo and Munyuki 2019 *PELJ* 30.
830 Mogoeng "The Rule of Law in South Africa: Measuring Judicial Performance and Meeting Standards" 4.
831 Broughton 2020 *PELJ* 7.
832 See Kidd *Environmental law* 273 regarding the lack of expertise of court officials.
833 Werle 2019 *The Yale Law Journal* 1381.
834 Lord 2023 *The British Journal of Criminology* 855.
835 Xiao 2013 *Cornell Journal of Law and Public Policy* 251.
836 Xiao 2013 *Cornell Journal of Law and Public Policy* 251.
837 Bildfell 2016 *Canadian Criminal Law Review* 168.

offences emanating from such an agreement should be commensurate to the crime and serve the purpose of deterrence as part of the criminal justice system.[838] Xiao[839] states that DPAs are likely to serve general deterrence similarly to fully litigated cases. By implementing remedial programmes, compliance is promoted, and the likelihood of recurrence is reduced.[840]

### *4.5.4 Application of DPAs in environmental crimes*

#### 4.5.4.1 Nature of environmental crimes

In England and Wales, prosecutors conclude DPAs exclusively in instances where corporations commit white-collar crimes. The USA allows for a more liberal approach in that DPAs may be concluded with respect to white-collar crimes as well as certain environmental crimes.

Edelhertz[841] defines white-collar crime as:

> an illegal act or series of illegal acts committed by nonphysical means and by concealment or guile, to obtain money or property, to avoid the payment or loss of money or property, or to obtain business or personal advantage.

Braithwaite elucidated the nature of a white-collar offender[842] with reference to Chambliss, who argued:

> White-collar criminals are among the most deterrable types of offenders because they satisfy two conditions: they do not have a commitment to crime as a way of life and their offenses are instrumental rather than expressive.

Corporate crime is a form of white-collar crime.[843] Apel and Paternoster[844] postulate that some enterprises apply a set of norms that induces violations of laws. The authors state that:

> White-collar crime is produced because there is a culture within an industry or within a firm/business that provides both the normative approval of illegal acts and

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838 Harig 1992 *Duke Law Journal* 165.
839 Xiao 2013 *Cornell Journal of Law and Public Policy* 252.
840 Bildfell 2016 *Canadian Criminal Law Review* 168.
841 Edelhertz *The nature, impact, and prosecution of white-collar crime* 3.
842 Braithwaite 1985 *Annual Review of Sociology* 16.
843 Hapiz *et al* 2022 *Environment-Behaviour Proceedings Journal* 104.
844 Apel and Paternoster "Understanding 'Criminogenic' Corporate Culture" 17.

> a structure of incentives to reward compliance with these norms as well as punishment for noncompliance.[845]

The conclusion is that if transgressions are to the benefit of the corporation, they are overlooked, thereby cultivating an ethos of wrongdoings that is passed on to other business practices.[846]

The correlation between corporate environmental crime and white-collar crime can be drawn by dividing the concept into two components, which are "corporate crime" and "environmental crime"[847]. Situ and Emmons[848] categorise environmental crimes with reference to the person or entity who commits these. They distinguish between corporate, organised, state, and personal environmental crimes.[849] The authors state that environmental crime includes a variety of corporate crimes, which, in turn, embody a substantial part of white-collar crime.[850] Lemkin[851] refers to organisational environmental crimes as the "most repugnant of all white-collar crimes." Light[852] examines the correlation between the law governing the corporation in relation to its operation throughout its tenure and concludes that corporate law and other regulations governing corporations should fundamentally be considered the law of the environment.

#### 4.5.4.2 Penalties in terms of *NEMA*

As discussed above, industry-related environmental crimes are offences in the sphere of resource management, waste management and pollution control, and land-use planning and development control.[853] The nature of these offences is comparable to white-collar crimes.

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845 Apel and Paternoster "Understanding 'Criminogenic' Corporate Culture" 17.
846 Apel and Paternoster "Understanding 'Criminogenic' Corporate Culture" 15.
847 Hapiz *et al* 2022 *Environment-Behaviour Proceedings Journal* 104.
848 Situ and Emmons *Environmental Crime: The Criminal Justice System's Role in Protecting the Environment* 45.
849 Situ and Emmons *Environmental Crime: The Criminal Justice System's Role in Protecting the Environment* 45.
850 Situ and Emmons *Environmental Crime: The Criminal Justice System's Role in Protecting the Environment* 45.
851 Lemkin 1996 *California Law Review* 307-308.
852 Light 2019 *Stanford Law Review* 140.
853 Strydom and Field 2023 *PELJ* 5.

*NEMA*, as the overarching environmental legislation, provides for penalties for environmental transgressions, which include a fine or imprisonment.[854] Section 34(1) of *NEMA* further provides as follows:

> Whenever any person is convicted of an offence under any provision listed in Schedule 3 and it appears that such person has by that offence caused loss or damage to any organ of state or other person, including the cost incurred or likely to be incurred by an organ of state in rehabilitating the environment or preventing damage to the environment, the court may in the same proceedings at the written request of the Minister or other organ of state or other person concerned, and in the presence of the convicted person, inquire summarily and without pleadings into the amount of the loss or damage so caused.

The court hearing the matter may, upon proof of such amounts, enter judgement therefor against the convicted person, which judgement amounts to a civil judgement and is executable in terms of civil processes.[855] Furthermore, a court convicting a person for any offence as listed in Schedule 3 of *NEMA* may enquire into and asses the monetary value of the advantage gained, or possibly gained, as a result of the offence and may award damages or compensation or a fine equal to the amount so assessed, or order that person to take remedial steps.[856] A convicted person may further be ordered to pay the reasonable costs incurred by the prosecutor and the organ of state concerned in the investigation and prosecution of the offence.[857] Schedule 3 of *NEMA* refers to offences in national and provincial legislation, including provincial ordinances. *NEMA* also provides that a court may, upon conviction, make an order for the withdrawal of any permit or authorisation issued in terms of *NEMA* or a specific environmental management Act or disqualification of that person from obtaining such a permit or authorisation for five years.[858]

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854 Section 49B of *NEMA*.
855 Section 34(2) of *NEMA*.
856 Sections 34(3)(a) and (b) of *NEMA*.
857 Section 34(4) of *NEMA*.
858 Section 34C of *NEMA*.

Finally, upon conviction, a court may declare any item that was used for or in connection with the commission of the offence and was seized under the provisions of *NEMA* to be forfeited to the State.[859]

4.5.4.3 Environmental offences specific measures imposed in terms of a DPA

In general, a DPA provides for large penalties, corporate compliance programmes, appointment of external monitors, and undertakings of cooperation by the corporate offender.[860] However, DPAs in environmental cases should include measures aimed at the protection of the environment.[861] The aim should be to further the duty of care principle by preventing significant pollution or degradation of the environment from occurring, continuing, or recurring.[862] The measures outlined in *NEMA* to establish corporate environmental values, would form the basis of the conditions in terms of which a prosecution may be deferred. [863]

These include:

> (b) inform and educate employees about the environmental risks of their work and the manner in which their tasks must be performed in order to avoid causing significant pollution or degradation of the environment;
>
> (c) cease, modify or control any act, activity or process causing the pollution or degradation; contain or prevent the movement of pollutants or the cause of degradation;
>
> (d) contain or prevent the movement of pollutants or the cause of degradation;
>
> (e) eliminate any source of the pollution or degradation; or
>
> (f) remedy the effects of the pollution or degradation.

Ancillary to these measures would be the determination of a monetary penalty commensurate to the penalty provisions of *NEMA*[864] or in accordance with the penalty provisions of the pertinent specific environmental management Act. If a specimen, container, vehicle, vessel, aircraft or document that was used for the purpose of, or in connection with, the commission of the offence was seized,

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859 Section 34D of *NEMA*.
860 Uhlmann 2013 *Maryland Law Review* 1301.
861 Hapiz *et al* 2022 *Environment-Behaviour Proceedings Journal* 105.
862 Section 28(1) of *NEMA*.
863 Sections 28(3)(b)-(f) of *NEMA*.
864 Section 49B of *NEMA*.

provision, similarly to the provisions of *NEMA,* should be made for the forfeiture of those items.[865]

If the transgression caused loss or damage or there were costs incurred or likely to be incurred to rehabilitate the environment or prevent damage to the environment, that amount must be calculated and included in the agreement.[866] A further provision may be included to calculate the financial benefit derived from the offence and provision for the disgorgement of the benefit, payment of compensation in equal measure to the benefit, or an agreement to undertake remedial action.[867] The DPA should include provision for the offender to refund any costs incurred in the investigation and prosecution up to the time a DPA is concluded.[868]

Lastly, depending on the nature of the transgression, a DPA may contain a provision setting out particulars of the way the offender failed to adhere to a provision of the law on the environment or with a condition of a permit and set out steps the offender should take to rectify the non-compliance within a specified period.[869]

### *4.5.5 Judicial oversight*

Judicial oversight is defined as a process by which the judiciary assesses the legality of an action of a person or a public or private authority in accordance with the provisions of the constitution or laws of that country.[870] Judicial oversight of the administration is primarily interrelated to judicial review.[871] Mollah[872] delineates judicial review as:

> The power of the courts to examine the legality of the official act and thereby to safeguard the fundamental and other essential rights of the citizens.

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865 Section 34D of *NEMA*.
866 Sections 34(1) and (2) of *NEMA.* This is applicable when an accused person is convicted.
867 Section 34(3) of *NEMA.* This is applicable when an accused person is convicted.
868 Section 34(4) of *NEMA*.
869 Section 31L of *NEMA*.
870 Mollah 2018 *Global Encyclopedia of Public Administration, Public Policy, and Governance Springer, Cham* 1.
871 Mollah 2018 *Global Encyclopedia of Public Administration, Public Policy, and Governance Springer, Cham* 2.
872 Mollah 2018 *Global Encyclopedia of Public Administration, Public Policy, and Governance Springer, Cham* 2.

However, courts can only intervene in administrative activities when approached by a person who believes that the conduct of the public officials has infringed on his or her rights or is likely to infringe on such rights.[873]

In South Africa, the prosecutorial discretion whether to prosecute or not, is exercised without judicial oversight.[874] In *National Director of Public Prosecutions v Zuma,*[875] the Supreme Court of Appeal confirmed that courts might interfere with decisions to prosecute in circumstances where the prosecuting authority had given an undertaking not to prosecute or in instances where an undertaking not to prosecute had been given in exchange for a plea or co-operation.[876] Reddi[877] states that courts retain some degree of oversight in order to maintain the principle of interest of justice or to ensure that an accused's right to a fair trial is not infringed on. If the discretion is exercised improperly, a court may review the decision.[878]

The prosecuting authority has the absolute discretion whether to prosecute or not and as a result, whether to offer a DPA or not.[879] In essence, is a DPA an agreement between the state and a corporate offender in terms of which prosecution is suspended pending the offender's admission of wrongdoing and commitment to rehabilitation and fulfilment of certain conditions stipulated in the agreement.[880] Prosecutors are in a favourable position to use the threat of prosecution and the consequences which may follow to impose onerous terms and conditions on the corporation.[881] The SALC acknowledged that prosecutorial abuse of power is a reality with referred to studies conducted in the USA and that a review process should be implemented.[882] Although there is no constitutional or practical obstacle to judicial

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873 Mollah 2018 *Global Encyclopedia of Public Administration, Public Policy, and Governance Springer, Cham* 8.
874 Reddi 2018 *SACJ* 127.
875 *NDPP v Zuma* (573/08) [2009] ZASCA 1.
876 *NDPP v Zuma* (573/08) [2009] ZASCA 1 para 39.
877 Reddi 2018 *SACJ* 127.
878 *Boshoff v NDPP* (5095/2017) [2018] ZAFSHC 51 (8 March 2018) para 10.
879 Mitchell, Imwinkelried and Stockdale 2021 *Journal of International and Comparative Law* 307.
880 Senko 2009 *Southern California Interdisciplinary Law Journal* 169.
881 Senko 2009 *Southern California Interdisciplinary Law Journal* 169.
882 SALC *Out of court settlements in criminal cases* 42.

oversight of DPAs in the USA, it is limited to internal administration by the DOJ.[883] In contrast, English law imposes a duty on the courts to review the suitability of a DPA.[884]

The approach to judicial oversight of DPAs in England and Wales rests on two determinations: the first is whether it is in the interest of justice, and the second if the agreement is fair, reasonable and proportionate.[885] Considering the discussions against DPAs with respect to prosecutorial overreach, it is submitted that public interest and transparency, a strong element of judicial oversight, similar to England and Wales, should be the foundation of a DPA scheme in South Africa.

A DPA is a negotiated contract between the prosecution and the corporate offender. In the South African context, the requirement of fairness, reasonableness and proportionality may be answered with reference to the principles set out in *AB v Pridwin Preparatory School*[886]:

> (i) Public policy demands that contracts freely and consciously entered into must be honoured;
>
> (ii) A court will declare invalid a contract that is prima facie inimical to a constitutional value or principle, or otherwise contrary to public policy;
>
> (iii) Where a contract is not prima facie contrary to public policy, but its enforcement in particular circumstances is, a court will not enforce it;
>
> (iv) The party who attacks the contract or its enforcement bears the onus to establish the facts;
>
> (v) A court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases in which harm to the public is substantially incontestable and does not depend on the idiosyncratic inferences of a few judicial minds;
>
> (vi) A court will decline to use this power where a party relies directly on abstract values of fairness and reasonableness to escape the consequences of a contract because they are not substantive rules that may be used for this purpose.

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883 Mitchell, Imwinkelried and Stockdale 2021 *Journal of International and Comparative Law* 306-307.

884 Mitchell, Imwinkelried and Stockdale 2021 *Journal of International and Comparative Law* 306.

885 Discussed in chapter 3.

886 *AB v Pridwin Preparatory School* 2019 1 SA 327 (SCA) para 27; *Beadica 231 CC v Trustees for the time being of the Oregon Trust* [2020] ZACC 13 para 57.

As discussed in this chapter, the notion of judicial oversight in certain negotiated resolutions to criminal matters is not foreign to South African courts.[887] In *S v Esterhuizen*[888], the High Court stated that the approach of a court in considering the justness of a plea and sentence agreement is one where the seriousness of the crime, the personal circumstances of the accused and the interest of the community are weighed, and taken into consideration whether the facts admitted, the crime and aggravating and mitigating circumstances indicate that justice is served. Steyn[889] suggests that the Legislature used the word "just" and not "appropriate" as the benchmark to evaluate the sentence agreement, which is purposefully included in section 105A(8)[890] to direct the presiding officer to exercise discretion as provided in *S v Zinn*[891], and as a reminder that the prosecution and offender have considered aspects that may not be within the knowledge of the judicial officer. Such considerations include the merits of the State's case, probable duration of a trial, and the defence of the accused.[892] A similar approach may inform judicial oversight in a DPA when considering if the agreement is fair, reasonable, proportionate, and in the interest of justice.

Judicial oversight should provide the assurances needed to maintain the rule of law and a fair and just criminal process to achieve a speedy resolution to criminal procedures.[893]

### *4.6 After the fact private prosecution of corporations*

Section 7 of the *CPA* provides that in any case in which the DPP declines to prosecute any offence, certain classes of persons may institute a private prosecution.[894] The classes of persons entitled to institute a private prosecution are limited to natural

887 See the discussion of s 105A of the *CPA*.
888 *S v Esterhuizen* 2005 1 SACR 490 (T) 495.
889 Steyn 2007 *SACJ* 214.
890 Section 105A(8) of the *CPA*.
891 *S v Zinn* 1969 2 SA 537 (A) at 540G.
892 *S v Esterhuizen* 2005 1 SACR 490 (T) 494.
893 SALC *Out of court settlements in criminal cases* 21.
894 Section 7(1) of the *CPA*.

persons.[895] A further qualification is that a certificate[896] to the effect that the DPP declined to prosecute must be presented to the official authorised to issue process.[897]

In addition to section 7 of the *CPA*, section 8 determines that a prosecution with respect to an offence may be instituted and conducted in any court competent to try that offence by any organisation upon which or any person upon whom the right to prosecute with respect to any offence is expressly conferred by law.[898] The National Society for the Prevention of Cruelty to Animals is an example of a body to which such statutory power of private prosecution has been conferred upon by section 6(2)(e) of the *Societies for the Prevention of Cruelty to Animals Act*.[899]

*NEMA* introduced a novel approach to private prosecution with respect to an environmental breach of duty which departed from the narrow application of the *CPA*. Section 33 of *NEMA* provides that any person may institute and conduct a prosecution with respect to any breach or threatened breach of any duty concerned with the protection of the environment if the breach of that duty constitutes an offence.[900] Prosecution may be instituted if it is in the public interest or in the interest of the protection of the environment.[901] Section 1 of *NEMA* defines a person to include a juristic person. An important distinction between section 8 of the *CPA* and section 33 of *NEMA* is that section 33 does not require a prosecutor to issue a certificate *nolle prosequi*. The relevance of private prosecution to DPAs relates to the question of whether the refusal of a prosecutor to prosecute on the completion of a DPA may result in a private prosecution in terms of section 33 of *NEMA*.

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895 Sections 7(1)(a)-(d) of the *CPA*.
896 Section 7 of the *CPA* refers to a "certificate *nolle prosequi".*
897 Section 7(2)(a) of the *CPA*.
898 Section 8(1) of the *CPA*.
899 *Societies for the Prevention of Cruelty to Animals Act* 169 of 1993; *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* 2017 1 SACR 284 (CC) paras 47–48.
900 Section 33(1) of *NEMA*.
901 Sections 33(1)(a) and (b) of *NEMA.*

In *Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd*[902], a private prosecution for an environmental law transgression, a first in South Africa, was instituted following a retrospective authorisation through an application in terms of section 24G of *NEMA*. In this case, the accused applied successfully for authorisation in terms of section 24G with respect to the construction of filling stations without obtaining environmental authorisation. The accused paid an administrative fine and obtained authorisation. Although section 24G does not preclude a criminal prosecution, no prosecution followed.

In general, in a matter of this nature, the prosecutor may decline to prosecute due to:

> time and resources required for prosecution, overloaded courts and inadequate convictions are major challenges to prompt and successful prosecution.[903]

In this regard, the SALC proposed that a private prosecution, as provided for in section 7 of the *CPA,* is precluded during the process of an "out-of-court settlement" or after its successful implementation. [904]

## *4.7 Chapter summary*

The *CPA* has several statutory provisions that recognise a procedure in terms whereof an accused may be diverted from the criminal justice system. It is evident from the discussion of the diversionary mechanisms in the *CPA* that there is no legislative procedure in our criminal justice system to divert corporations that have committed serious environmental crimes from prosecution. The procedure in section 105A, whereby criminal proceedings are curtailed, nevertheless necessitates a criminal process.

Where the *CPA* does not provide alternatives for prosecution, the NPA has introduced policies to overcome the void. Considering that at present the *CPA* limits measures to effect diversion to less serious offences, the corporate ADR policy of

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902 *Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd* 2019 5 SA 275 (GP).

903 September *A critical analysis of the application of S24G provisions of the National Environmental Management Act* 54.

904 SALC *Out of court settlements in criminal cases* 55.

the NPA aims to achieve diversion and restorative justice with respect to serious corporate crimes. This form of alternative dispute mechanism is comparable to a DPA, but a crucial difference is that the corporate diversion is still dependent on criminal proceedings that have been set in motion.

A DPA is defined as a negotiated agreement between a prosecutor and a person, including a corporate body, which allegedly committed a criminal offence. A further definitional element is that a DPA is an agreement by the prosecutor to refrain from prosecuting a corporate offender if that offender agrees to specified conditions. The South African Law Commission has adopted a similar definition with reference to out-of-court settlements and extended it to include compliance with the terms of the agreement.

None of these practices equates to a DPA scheme as implemented in other jurisdictions discussed in the previous chapter. The criminal justice system in South Africa is ready to accept an alternative to criminal prosecution in the form of a negotiated deferral of prosecution. Considering the definition of "enforcement" and the stages involved in environmental law enforcement, it is evident that the common denominator is compliance. In this context, it is submitted that DPAs would make a useful contribution to the protection of the environment.

In Chapter 5, the conclusion to the study will be discussed, and recommendations will be made based on the findings.

# CHAPTER 5 CONCLUSION TO THE RESEARCH

## *5.1 Introduction*

Since the advent of constitutional democracy and the concomitant entrenchment of basic human rights, specifically environmental rights, South Africa has progressively introduced legislation to protect the environment for the benefit of present and future generations through reasonable and other measures and to assume its obligations and duties under international law relating to the environment. The enforcement of these laws has presented a particular challenge to the NPA owing to the complexities involved in investigating and proving the guilt of the offender at a trial, specifically where that offender is a corporation and, if convicted, the nature of the penalties imposed.

The primary objective of the study is to investigate whether DPAs offer a practicable alternative in the South African environmental context to divert corporations that violate environmental laws away from the criminal justice system. Considering the nature and limitations of the preferred criminal-sanction enforcement approach, the study explored the deterrent effect that DPAs may have on corporations to prevent future transgressions of environmental law.

Chapter 1 outlined the framework of the study and introduced a background to the study. The problem statement was defined, and the research question was posed. The chapter detailed the methodology of the research.

In Chapter 2, the current enforcement model of criminal sanctions as the preferred enforcement mechanism was reviewed. The chapter contains a discussion of the command-and-control approach followed with respect to environmental transgressions and the critique against such an approach.

Chapter 3 focused on the history and implementation of DPAs in the USA and England and Wales and probed the similarities and differences in each of these jurisdictions' approach to DPAs. The study detailed the advantages and disadvantages of DPAs emerging from its application.

In Chapter 4, the research was directed at the current ADR mechanisms in South African criminal procedural law and reference is made to the models of restorative justice and diversion. The various provisions in the *CPA* that provide for alternative resolutions to criminal processes were discussed. The nature of environmental crimes was explored, and a relationship between white-collar crimes and industry-related environmental crimes was drawn.

In this chapter the outcomes of the study will be delineated, a conclusion based on the research will be drawn and recommendations will be made in accordance with the findings.

## *5.2 Research outcomes*

*NEMA* introduced administrative, civil, and criminal measures to enforce the Constitutional right to have the environment protected. The execution thereof was primarily accomplished by criminal sanctions promulgated in the various environmental laws. The NPA is mandated to prosecute offenders and is guided by its constitutionally imposed duties, the *NPA Act* and directives.

Environmental crimes are distinguished with reference to the compliance and enforcement activities they intend to regulate, such as biodiversity and protected areas, integrated coastal management and freshwater resources and pollution, waste, and environmental impact assessment. Corporations mostly affect the spheres of the environmental law concerned with freshwater resources, pollution, waste, and environmental impact assessment to further their commercial goals. Considering the elements of white-collar crimes, the author submits that industry-related corporate environmental crimes are a form of white-collar crime as they relate to the functioning of the corporate enterprise to further its business interests and objectives. As such, these types of corporate environmental crimes would be placed within the ambit of offences for which DPAs may be a suitable alternative to the preferred criminal sanction approach.

The current preferred method of criminal enforcement of environmental transgressions has proved to be cumbersome in matters where the offender

contests the accusations. In instances of a conviction following a guilty plea or resulting from a plea and sentence agreement, the sentences were found to be forgiving. Furthermore, the prosecution of corporations and the effectiveness of criminal sanctions as a deterrent for corporate crime were examined, and it was found that corporate environmental crimes are mostly visited with overly lenient sentences. As a result, the preferred regime of criminal sanctions pertaining to the enforcement of environmental law fails as an effective deterrent.

The NPA prosecution policy establishes a discretion to prosecute based on recognised guidelines. It further confirms that a prosecutor has the discretion whether to institute criminal proceedings, even if criminal conduct is *prima facie* established. It was found that current legislation provides for limited diversionary provisions, necessitating the NPA to introduce mechanisms in the form of adult and corporate diversionary processes in their prosecution policy. The NPA has introduced a corporate diversion regime, however only with respect to specific defined corrupt activities. This system resembles the way DPAs were implemented in the USA on a federal level through guidelines contained in memoranda of the DOJ under the direction of the United States District Attorney.

Although the SALC has recommended that out-of-court settlements be implemented in South Africa, no amendments were made to the *CPA* to give effect to this proposal. A process for negotiated plea and sentence agreements is found in section 105A of the *CPA*. The Zondo Commission recommended the introduction of legislation to enact the use of DPAs to contend with the number of foreseen corruption prosecutions of corporations that may ensue because of its investigation.

In the jurisdictions of the USA and England and Wales, DPAs have proven to be a valuable middle course between prosecuting and declining to prosecute to effect accountability of corporations for their criminal conduct. Despite misgivings of scholars regarding DPAs, the model, as introduced in England and Wales has been adopted in several other countries.

### *5.3 Recommendations*

Considering that the process to divert a corporate offender from prosecution adopted by the NPA involves the withdrawal of charges in exchange for the offender adhering to conditions, DPAs would achieve the same outcome for corporate environmental offenders, with the benefit of imposing conditions that extend beyond those listed in the corporate ADR policy directives of the NPA.

Although it was shown that there are challenges in some facets of a DPA, an approach incorporating best practices from the USA and England and Wales should dispel any reservations about its advantages with respect to corporate crime, and by extension industry-related environmental offences. In the South African context, with its similar constitutional and institutional approach to criminal procedure, the DPA scheme, as applied in England and Wales, with adaptations where appropriate, would be preferred as a foundation for such a scheme in our procedural law.

There are significant advantages to the introduction of a DPA scheme in instances of corporate industry-related environmental transgressions. DPAs provide an alternative to conventional prosecution to hold corporate entities accountable without the necessity of expending resources and costs involved in a protracted criminal trial. In the context of environmental crimes, a DPA scheme offers a solution to the obstacles faced with enforcing those laws. It would effectively deter corporate environmental crime and serve as an incentive to enhance good corporate governance with respect to its environmental responsibilities and promote sustainability. It would provide the machinery for the State to impose a penalty and ancillary orders relating to the rehabilitation of the environment, disgorge a benefit derived from the offence and effect corporate regulatory changes to ensure future compliance. The benefit for the corporation lies in the continued operation of the business enterprise for the benefit of the economy, employees, and shareholders, as well as the absence of the negative consequences following a conviction.

The study intended to examine the hypothesis that DPAs can be meaningfully adopted as an alternative dispute mechanism in the context of corporate environmental offences in South Africa. Considering the findings of the study, the

author submits that the hypothesis is proved and that DPAs are a suitable mechanism for the State to enforce corporate environmental transgressions.

## *5.4 Legislative reforms*

To effectively implement a structured DPA scheme that adheres to the rule of law, comprehensive legislative reforms that introduce DPAs as an NPA prerogative and provide for judicial oversight are required. The author suggests that the SALC consider reviewing the criminal justice system to include legislative reforms for DPAs as set out hereunder.

### *5.4.1 Amendments to the CPA*

#### 5.4.1.1 Conclusion of DPAs

A DPA should be defined in section 1 as an agreement between the prosecuting authority and a corporate offender in which the prosecutor consents to suspend or postpone the initiation or continuation of criminal proceedings for a defined period, during which the corporate offender is required to fulfil certain conditions.

Section 6 of the *CPA* should be amended to provide for conditional suspension of prosecution for the purpose of negotiating and concluding a DPA. In addition, an amendment should include a provision that a corporate offender is discharged from prosecution for the offence or offences stated in the indictment upon successful completion of the DPA.

It would be necessary to introduce a new section to the *CPA* to provide for negotiating and entering into an agreement between a corporate entity and a designated prosecutor. The corporation must be legally represented. The provision should include the factors to evaluate whether it would be appropriate to conclude a DPA. These factors may include the nature and seriousness of the offence; the pervasiveness of the specific criminal conduct within the corporation and its history of previous transgressions of a similar nature; timely and voluntary self-reporting of its misconduct and willingness to cooperate; the existence of a compliance programme and adequacy of an existing compliance programme; the remedial

actions taken by the corporation since the transgressions were disclosed; collateral consequences should prosecution follow; and the extent to which alternative remedies to prosecution would be adequate.

It should be a requirement that the agreement underlying the DPA should include a complete charge sheet in the form of an indictment and that it must be filed with the registrar of the court, a statement of facts, the agreement to defer and particulars of the penalty and ancillary directives, restitution, remedial steps towards rehabilitation of the environment and governance reforms; and provision for the appointment of a monitor and the responsibilities and powers of the monitor. A statement of the prosecutor that the State have sufficient facts to establish a case against the corporation, that the penalties and terms establish a satisfactory punishment considering the alleged offences and that the terms will effectively reform the corporation and prevent future transgressions must form part of the agreement.

The NPA must publish a concluded DPA, including the court order regarding the approval of its terms, on the NPA's website unless precluded from doing so by statute, or if there is a possibility that its publication may prejudice other legal proceedings.

A schedule must be added to the *CPA* to set out the crimes and offences for which a DPA may be offered, which should provide for crimes relating to corrupt activities and specified environmental offences.

5.4.1.2 Terms of a DPA

The *CPA* should prescribe the possible terms of the DPA but should permit flexibility in styling a DPA to the needs identified in an individual case, which would allow wider discretion in including conditions pertinent to DPAs in environmental crimes.

In general, terms may include the admission of unlawful behaviour setting out particulars of the conduct; the payment of a fine; the requirement for cooperation with any ongoing investigation into related individual criminal conduct; the adoption of compliance programmes, improvement of current compliance programmes or

other reform measures to corporate governance; the imposition of limits on public statements; restrictions on current business practices and the appointment of an independent monitor to administer the company's implementation of the terms of the DPA. Provision should be made to exclude conditions that may affront constitutional rights, such as the waving of attorney-client privilege.

The CPA should stipulate terms pertaining to the duration of the DPA, provision for the breach of a DPA, and include conditions to enable the state to prosecute with less difficulty in the event of a breach. Detailed terms may establish that any information disclosed would be admissible at a subsequent trial. Finally, an amendment should provide for the variation of the terms of the agreement.

#### 5.4.1.3 Judicial oversight

A provision should be included to provide for judicial oversight of DPAs. The approach in England and Wales with respect to judicial oversight over DPAs is preferred to promote legitimate law enforcement interests, which would entail a three-tiered approach.

In the first place, the State must obtain judicial approval to propose a DPA to a corporate offender by establishing that the decision to conclude a DPA is in the interest of justice in that it would be fair, reasonable, and proportionate. To satisfy this, a prosecutor should establish that the discretion to offer the DPA is based on considerations relating to the financial implications of the prosecution of the offender, the available resources, the cooperation of the corporate offender and the reasonable prospects of a successful conviction.

In the second place, in the exercise of this oversight regarding the final approval of the agreement, a court should consider whether the terms of the DPA are in the interests of justice and are fair, reasonable and proportionate.

Finally, judicial oversight would be required if there is a breach of the terms and the State elects to terminate or vary the agreement. These stages in the process would guarantee transparency and serve the public interest.

#### 5.4.1.4 Private prosecutions

The provisions contained in section 7 dealing with private prosecutions should be amended to provide for the suspension of the right to institute a private prosecution during the period agreed in terms of the DPA with respect to the fulfilment of the conditions. The institution of a private prosecution after successful completion of the DPA should be precluded entirely.

### *5.4.2 Amendments to NEMA*

Section 33 of *NEMA* should be amended to reflect the amendment to section 7 of the *CPA* regarding private prosecution in environmental offences. Section 34 should include a provision for DPAs with respect to defined environmental transgressions, specifically for industry-related offences of a serious nature. The pertinent terms of a DPA with respect to environmental crimes should be stipulated, including the calculation of the fine, compensation, cost of prosecution and remedial orders or costs of remediation.

Provision for independent monitors or inspectors, similarly to the provision in section 35 of *NEMA*, should be made to assist a prosecutor in evaluating compliance with the terms of the DPA.

### *5.4.3 Amendments to the NPA Act*

The *National Prosecuting Authority Amendment Act*[905] amends the *NPA Act*[906] *and* introduces measures to establish the Investigating Directorate against Corruption to investigate particularly serious unlawful conduct committed in serious, high-profile or complex corruption, commercial or financial crime.[907] The *National Prosecuting Authority Amendment Act* inserts into the *NPA Act*[908] the power to investigate crimes and offences referred to the Investigating Directorate by the NDPP, arising from recommendations of commissions of inquiry, reported specified offences, crimes of

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905 *National Prosecuting Authority Amendment Act* 10 of 2024.
906 *NPA Act.*
907 Preamble to the *NPA Act*.
908 Section 7 of the *NPA Act*.

dishonesty, or the contravention of specified statutory offences.[909] Similarly, section 7 of the *NPA Act* should be amended to include for this directorate to prosecute corporations that commit specified environmental crimes and allow the NPA to conclude DPAs in those instances. The extent of the powers of the prosecutor in initiating and concluding a DPA must be defined or included in the prosecution policy directives.

### *5.5 Closing remarks*

South African law has progressed over several years to a point where diversion away from a stereotypical criminal enforcement approach to a restorative justice approach is widely accepted. This approach is evident from legislation, namely the *CJA*. In addition, section 105A of the *CPA* provides for a negotiated plea and sentence procedure subject to judicial endorsement. The administrative provisions pertaining to adult diversion contained in the NPA Prosecution Policy Directives have been implemented and used for some years, and the NPA expanded its diversionary measures to include for corporate diversion, which has yet to be tested in practice.

In its report, the Zondo Commission advocated for the adoption of DPAs with respect to the alleged commission of corporate white-collar crimes. The South African criminal justice system has evolved to implement a system of DPAs with a strong element of judicial oversight. In recognising specific corporate environmental crimes as a form of commercial crime, a logical progression is to divert corporations away from criminal prosecution on negotiated terms.

The implementation of DPAs is dependent on a strong criminal justice system, which is an important incentive for a corporation to consider a DPA instead of wagering on a prosecution that may eventually fail. Some critics express the view that DPAs amount to delayed justice. There are demonstrable advantages of DPAs relating to the criminal justice system.

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[909] Sections 7(a)–(c) of the *NPA Act.*

The writer submits that if a principled approach is followed when offering a DPA to a corporate offender and subject to judicial oversight, the introduction of a DPA scheme presents an effective and pragmatic procedural alternative to the conventional criminal sanction approach to enforce corporate environmental criminality whilst attaining the objectives of restorative justice. Such a structure may have its most significant impact on modifying corporate behaviour with respect to environmental governance.

It will provide a deterrent dynamic to environmental enforcement and create corporate responsibility that will guarantee the Constitutional imperative of sustainable development and protection of the environment for future generations.

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