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Ex post facto environmental authorisation in South Africa: Comparative insights and implications for environmental law, pedagogy and curriculum reform

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1 Introduction

South African environmental law provides for a system of environmental permitting or authorisation.[1] Essentially, the law prohibits undertaking certain identified developments[2] (listed activities) without environmental authorisation from the relevant environmental authorities.[3] These are developments identified in the legislation as those that may significantly impact the environment. Such authorisation may allow the developers to commence developments subject to conditions that the relevant authorities may impose. However, such authorisation may also be withheld, thus

1 J Nel & R Alberts 'Environmental management and environmental law in South Africa: An introduction' in N King, HA Strydom & F Retief (eds) *Fuggle & Rabie's Environmental Management in South Africa* (2018 Juta) 1 at 35; F Craigie, P Snijman & M Fourie 'Dissecting environmental compliance and enforcement institutions' in A Paterson & LJ Kotzé (eds) *Environmental compliance and enforcement in South Africa: Legal perspective* (2009 Juta) 41at 49. Listed activities regarding s24 of the National Environmental Management Act 107 of 1998 (NEMA) are found in Government Notice R983-985 of Government Notice 38282 of 4 December 2014 as amended. For this chapter, the listed activities will be referred to as developments.

2 Development is defined as any human activity or endeavour that changes the *status quo and* affects or may affect the natural environment. See M Oosthuizen, M van der Linde & E Basson 'National Environmental Management Act 107 of 1998 (NEMA)' in ND King, HA Strydom & F Retief (eds) *Fuggle & Rabie's Environmental Management in South Africa* (3rd ed, 2018, Juta) 125 at 139; J Van Wyk *Planning law* (2nd ed, 2012, Juta) 411.

3 S24F of NEMA.

prohibiting the commencement of the development. In the South African context, such authorisation is known as environmental authorisation.[4]

This chapter aims to contribute not only to the doctrinal analysis of South Africa's environmental authorisation system but also to debates on legal curriculum transformation by proposing that *ex post facto* authorisation regimes offer a valuable lens for integrating real-world complexity and comparative insights into environmental law pedagogy. As legal educators respond to calls for curriculum reform and decolonisation, such contested provisions challenge students to critically assess the interface between law, governance, and development.

This chapter focuses on the environmental authorisations set out in section 24 of the National Environmental Management Act 107 of 1998 (NEMA) of South Africa as a basis for comparison with what is happening in other jurisdictions.

Although the commencement of these developments without environmental authorisation is unlawful and constitutes a criminal offence, some developers continue to commence developments without the necessary authorisation, making their developments unlawful. Before 2004, NEMA did not provide guidance on the course of action when a developer commenced unlawful development, nor did it clarify whether such a developer could seek authorisation post the construction phase. NEMA's predecessor, the Environmental Conservation Act 73 of 1989 (ECA), similarly criminalised unlawful developments.[5] However, like NEMA, ECA was also silent on the recourse for unlawful developments.

In 2004, the legislature significantly amended NEMA by inserting section 24G.[6] Generally, section 24G allows the developer of an unlawful development to apply for environmental authorisation retrospectively and be issued *ex post facto* environmental authorisation. Arguably, section 24G regularises the unlawful development, thus allowing the developer to proceed. However, upon its insertion into NEMA, section 24G attracted considerable attention and controversies concerning its theoretical and practical application.[7]

4 Different jurisdictions use different names to refer to similar authorisations in their legislation.
5 S22 read with s29(4) of ECA.
6 *National Environmental Management Amendment Act* 8 of 2004.
7 See L Kohn 'The Anomaly that is Section 24G of NEMA: An Impediment to Sustainable Development' 2012 *South African Journal of Environmental Law and*

In reaction to the controversies arising from section 24G's enactment, multiple judgments were made regarding section 24G.[8] However, it is worth noting that some of the judgements added to the challenges of section 24G due to their divergent and conflicting interpretations of the provision. Further, there is a plethora of literature around section 24G of NEMA, which purports to offer possible solutions to the challenges. The above notwithstanding, some challenges remain, and more controversies continue to arise concerning the theoretical and practical application of section 24G.[9] The ongoing conversation on section 24G suggests a need to take another critical look at and optimise section 24G in its practical application.

There are foreign jurisdictions with provisions similar to section 24G of NEMA, which serve the same purpose: to regularise unlawful developments, albeit under different names. This chapter focuses on the jurisdictions of Ireland, the United Kingdom (UK), India and Eswatini. These jurisdictions have comprehensive provisions and experience with *ex post facto* environmental authorisations (albeit under different names) similar to section 24G, as discussed in the sections of this chapter on foreign jurisdictions. South Africa may distil lessons from the experiences of these jurisdictions to improve its authorisation procedures, particularly its *ex post facto* environmental authorisation procedures.

Importantly, the comparative dimension of this chapter supports the transformation of environmental law curricula by highlighting global regulatory approaches that can be introduced into teaching. Incorporating comparative legal controversies into curriculum design enriches students'

Policy 1-26; R Paschke & J Glazewski '*Ex post facto* authorisation in South African environmental assessment legislation: A critical review' 2006 *Potchefstroom Electronic Law Journal* 1-32, J Hall 'Facing the music through environmental administrative penalties: Lessons to be learned from the implementation and impact of section 24G?' 2022 *Potchefstroom Electronic Law Journal* 1-34.

8 United Nations 'World economic situation and prospects 2022' (2020) available at: https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESP2020_Annex.pdf (accessed 22 December 2025).

9 For instance, see J Hall 'Facing the music through environmental administrative penalties: Lessons to be learned from the implementation and impact of section 24G?' 2022 *Potchefstroom Electronic Law Journal* 1-34; L Kohn 'The Anomaly that is Section 24G of NEMA: An Impediment to Sustainable Development' 2012 *South African Journal of Environmental Law and Policy* 1-26; R Paschke & J Glazewski '*Ex Post Facto* Authorization in South African environmental assessment legislation: A critical review' 2006 *Potchefstroom Electronic Law Journal* 1-32.

understanding of law as a socially embedded, problem-solving tool and enhances their preparedness for legal practice in a globalised regulatory environment.

Based on this understanding, this chapter aims to distil lessons for South Africa from Ireland, the UK, India and Eswatini by adopting a limited comparative research method in which it discusses aspects of the legislation and case law relating to the regularisation of unlawful developments in these selected foreign jurisdictions.[10] As Wiener indicates, environmental law borrows from other jurisdictions, especially when new challenges arise.[11] It should also be acknowledged that one country cannot merely transfer legislation from other jurisdictions, as their administrative systems and circumstances may differ.[12] In doing so, the law should adapt to the specific country's circumstances. This approach is followed in this chapter.

The chapter first provides an overview of environmental authorisation, including *ex post facto* authorisation. The discussion then turns to *ex post facto* environmental authorisation in South Africa, starting with a brief background on the *ex post facto* environmental authorisation in South Africa and section 24G. Some of the challenges or controversies of section 24G are then discussed. The chapter outlines the developments in the identified foreign jurisdictions to distil lessons for South Africa. In the final section, the chapter is devoted to the lessons learned and what they may suggest for South Africa.

2 Background of environmental authorisations

The following section addresses the notion of environmental authorisation in its general context to contextualise *ex post facto* environmental authorisation in South Africa.

10 F Venter *Legal research: purpose, planning and publication* (2018 Juta) at 54-57; G Samuel 'Comparative law and its methodology' in D Watkins & M Burton (eds) *Research methods in law* (2nd ed 2018 Routledge) 122 at 122-123.

11 J Wiener 'Something borrowed for something blue: Legal transplants and the evolution of global environmental law' 2001 *Ecology Law Quarterly* 1295-1372.

12 Wiener (n 11) 1295 at 1298.

2.1 Environmental authorisation

The concept of environmental authorisation emerged in the 1970s. During this time, concerns over environmental degradation caused by human activities were growing. As a result, pressure groups began advocating for government intervention to implement measures for environmental protection in the United States of America (USA).[13] In response, the USA required all Federal Agencies to conduct an environmental assessment on proposed major actions likely to impact the natural environment and report on these impacts.[14] This marked the advent of environmental assessments and environmental permitting. Environmental assessment is 'a systematic process of evaluating and documenting information on the potentials, capacities and functions of natural systems and resources to facilitate sustainable development planning and decision-making in general and anticipate and manage the adverse effects and consequences of proposed undertakings.[15]

According to Craigie, Snijman and Fourie,[16] environmental permitting allows environmental authorities to demand specific information on the environmental impact of the proposed development from the developer to make an informed decision as to whether to allow the development.[17] The developer must typically submit the information from the environmental assessment to the relevant environmental authority to determine whether to authorise a development. Although there are numerous types of

13 A Morrison-Saunders *An advanced introduction to environmental impact assessment* (2018, Edward Elgar) at 5; J Glasson, R Therivel & A Chadwick *An introduction to environmental impact assessment* (4th ed, 2013, Routledge) at 3.

14 RK Morgan 'Environmental impact assessment: The state of art' (2012) 30/1 *Impact Assessment and Project Appraisal* 5 at 5; M Jones and A Morrison-Saunders 'Embracing evolutionary change to advance impact assessment (IA)' (2020) 38/2 *Impact Assessment and Project Appraisal* 100 at -103.

15 See B Sadler *International study of effectiveness of environmental assessment. Final report: Environmental assessment in changing world; evaluating practice to improve performance* (1996, UNEP) at 11; J Glazewski and S Brownlie 'Environmental assessment' in J Glazewski & L Du Toit (eds) *Environmental law in South Africa* (2013, LexisNexis) at Chapter 10-5.

16 F Craigie, P Snijman & M Fourie 'Dissecting environmental compliance and enforcement institutions' in A Paterson & LJ Kotzé (eds) *Environmental compliance and enforcement in South Africa: Legal perspective* (2009 Juta) 41 at 49.

17 J Nel & R Alberts 'Environmental management and environmental law in South Africa: An introduction' in N King, HA Strydom & F Retief (eds) *Fuggle & Rabie's environmental management in South Africa* (2018 Juta) 1 at 35.

environmental assessments, the most prominent one is an Environmental Impact Assessment (EIA).[18]

In a nutshell, an EIA is a systematic prediction, assessment and evaluation of the impacts of the proposed development on the environment, formulating mitigation measures and alternatives and reporting to the relevant environmental authority to authorise the commencement of the proposed development.[19] The EIA is also considered an *ex-ante* environmental management instrument that is anticipatory and proactive and must be carried out before the commencement of development.[20] Various jurisdictions identify the kind of developments that require an EIA. An environmental authorisation serves as the final approval required to proceed with the proposed development following the completion of an environmental assessment.[21] Over time, the use of EIAs and environmental authorisations spread across the world. Today, they can be found in several countries.[22] Different jurisdictions use different terms for environmental authorisation, such as environmental license, planning permission, or environmental clearance.[23]

18 J Glazewski & S Brownlie 'Environmental assessment' in J Glazewski & L Du Toit (eds) *Environmental Law in South Africa* (2013, LexisNexis) at Chapter 10-5; M Kidd, F Retief and R Alberts 'Integrated environmental assessment and management' in ND King, HA Strydom and F Retief (eds) *Fuggle & Rabie's Environmental Management in South Africa* (3rd ed, 2018, Juta) 1213.

19 See B Sadler *International Study of Effectiveness of Environmental Assessment. Final Report: Environmental Assessment in Changing World; Evaluating Practice to Improve Performance* (1996, UNEP) at 11; Wood C *Environmental Impact Assessment: A Comparative Review* (2nd ed, 2003, Pearson) at 3; LF Martinez, J Toro and CJ León 'A complex network approach to environmental impact assessment' (2018) 37/5 *Impact assessment and Project Appraisal* 407 at407; J Van Wyk *Planning Law* (2nd ed, 2012, Juta) at 421; P Sands *Principles of International Environmental Law* (2nd ed (2003, Cambridge University Press) at 799-800; PJ Aucamp *Environmental Impact Assessment: A Practical Guide for the Discerning Practitioner* (2009, Van Schaik Publishers) 5.

20 J Glasson, R Therivel and A Chadwick *An Introduction to Environmental Impact Assessment* (4th ed, 2013, Routledge) 335; W Sheate 'Introduction to Environmental Auditing and Management' (date unknown) *Environmental editing and environmental management systems* available at <https://www.soas.ac.uk/cedep-demos/000_P508_ EAEMS_K3736-Demo/unit1/page_14.htm> (accessed 22 December 2020); AC Hayes 'What is impact assessment? Some personal reflections CP Wolf (1933–2015), edited posthumously by Adrian C. Hayes' (2017) 35/3 *Impact Assessment and Project Appraisal* 188.

21 Different jurisdictions have different names for the environmental authorisations.

22 RK Morgan 'Environmental impact assessment: The state of art' (2012) Impact *Assessment and Project Appraisal* 5-6.

23 See sec 32 of Environment Management Act 5 of 2002 of Eswatini.

From a legal education standpoint, tracing this historical and comparative evolution of environmental authorisation is invaluable for curriculum development. It enables students to understand not only the doctrinal foundations of environmental law, but also its normative shifts and global diffusion. Integrating this context into environmental law modules encourages learners to engage critically with the origins, objectives, and implementation gaps of regulatory tools like the EIA, thus enhancing the depth of legal analysis and comparative reasoning within the classroom.

Despite the objectives and ambitions of the law, instances of non-compliance persist, wherein developers commence projects requiring environmental authorisation without obtaining the necessary approval. Consequently, such developments are rendered unlawful. The foregoing raises the question of whether these unlawful developments can be regularised or if they remain in perpetual unlawfulness. If the answer to the former question is affirmative, then it is necessary to determine the procedure that must be followed to regularise unlawful development. If the answer is negative, should the developer cease its operations, rehabilitate the environment, and then retrospectively apply for environmental authorisation?

2.2 *Ex post facto* environmental authorisation

Ex post facto environmental authorisation combines two terms: ex *post facto* and environmental authorisation. The Latin phrase '*ex post facto*' translates as 'after the fact', referring to something that is done after the fact.[24] Therefore, *ex post facto* environmental authorisation refers to environmental authorisation granted after the commencement of the development that requires it.[25] The *ex post facto* environmental authorisation is described as a reactive regulatory tool[26] This is an exception to the general rule that

24 PD Reingold and K Thomas 'The wrong turn on the *ex post facto* clause' (2018) 106/3 *California Law Review* 595.

25 J Nel and R Alberts 'Environmental management and environmental law in South Africa: An introduction' in N King, HA Strydom and F Retief (eds) *Fuggle & Rabie's Environmental Management in South Africa* (3rd ed, 2018 Juta) 35.

26 ED McCutcheon 'Think globally, (en)act locally: Promoting effective national environmental regulatory infrastructures in developing nations' (1998) 31/2 *Cornell International Law Journal* 450.

some form of assessment must precede the commencement of certain identified developments that require prior authorisation.[27]

Similar to environmental authorisation, the developer must provide the environmental authority with information detailing the impact of the development on the environment, allowing the authority to decide whether to grant an *ex post facto* environmental authorisation. The *ex post facto* environmental authorisation permits the developer to continue with the unlawful development, subject to conditions that the environmental authority may impose.

Some countries, such as South Africa, Ireland, the UK, India and Eswatini, have introduced legislation allowing *ex post facto* authorisations.[28] The South African position is discussed first.

3 *Ex post facto* environmental authorisation in South Africa

As explained in the Introduction, *ex post facto* environmental authorisation was formally acknowledged in 2004 through an amendment of NEMA.[29] The erstwhile environmental framework legislation, ECA, prohibited the commencement of identified developments[30] without environmental authorisation.[31] ECA empowered the then minister responsible for environmental affairs to identify developments that required environmental authorisation before commencement and to publish EIA regulations to determine the procedure for acquiring environmental authorisation. Although the ECA was enacted in 1989, the EIA regulations were not published until 1997.[32] Some developers contravened the law by commencing with identified developments without environmental authorisation. ECA and its regulations were silent on whether an environmental authorisation could be issued retrospectively.

27 R Paschke and J Glazewski '*Ex Post Facto* Authorization in South African Environmental Assessment Legislation: A Critical Review' (2006) 9/1 *Potchefstroom Electronic Law Journal* 1 at 24; *Magaliesberg Protection Association v MEC of Agriculture* (1776/201 0) [2011] ZANWHC 67 (15 December 2011) para 49.

28 For instance, in Ireland and the UK the legislation provides for retention permissions while in India the legislation provides for an *ex post facto* environmental license.

29 National Environmental Management Amendment Act 8 of 2004.

30 ECA referred to such developments as identified projects.

31 S22 of ECA.

32 GNR 1182 & 1183: Government Gazette No 18261 of 5 September 1997

1998, hardly a year after the publication of ECA EIA regulations, NEMA repealed most provisions of the ECA; however, the repeal of sections related to environmental authorisation and EIA regulations was suspended, as NEMA did not have regulations to replace those of the ECA.[33] Like ECA, NEMA prohibited the commencement of developments (which it refers to as listed activities) without environmental authorisation.

Developers carried out unlawful developments during the dispensations of both ECA and NEMA. This led to disputes between developers and individuals adversely affected by the unlawful developments. The individuals attempted to compel the developers to obtain an environmental authorisation for their unlawful development retrospectively.[34] The challenge was that the legislation was silent on whether the environmental authorisation could be issued *ex post facto,* an issue that the courts had to interpret.

In the case of *Silvermine Valley Coalition v Sybrand Van der Sput Boerderye and Others* 2002 (1) SA 478 (C),[35] the court held that an environmental authorisation could not be granted for an unlawful

33 NEMA repealed most of the sections of ECA although ss 21, 22 and 26 remained in force until the publication of the NEMA EIA regulations. S50(2) of NEMA provides that the stated secs of ECA and the notices and regulations issued pursuant thereto would be repealed on a date published by the minister once the minister was satisfied that regulations or notices issued under sec 24 of NEMA had made the regulations and notices under secs 21 and 22 of the ECA redundant. M Kidd *Environmental Law* (2011, Juta) at 238; M Kidd, F Retief and R Alberts 'Integrated environmental assessment and management' in ND King, HA Strydom and F Retief (eds) *Fuggle & Rabie's Environmental Management in South Africa* (3rd ed, 2018, Juta) 1230.

34 See for instance, see *Silvermine Valley Coalition v Sybrand Van der Sput Boerderye and Others* 2002 (1) SA 478 (C)*, Minister of Water and Environmental Affairs v Really Useful Investments* 2017 1 SA 505 (SCA) para 30; *BP Southern Africa v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 5 SA 124 (W).

35 The brief facts were that the first respondents had commenced with the construction of vineyards on the property, which involved quarrying for gravel, and the said construction had not been authorised. One of the applicants had previously written a letter to the respondents requesting them to carry out an EIA and stating that failure to do so would lead to the institution of legal proceedings. Also see M Kidd *Environmental Law* (2011, Juta) at 237; M Kidd, F Retief and R Alberts 'Integrated environmental assessment and management' in ND King, HA Strydom and F Retief (eds) *Fuggle & Rabie's Environmental Management in South Africa* (3rd ed, 2018, Juta) 1213 at 1228; JHE Basson 'Retrospective Authorisation of Identified Activities for the Purposes of Environmental Impact Assessment' (2003) 10/2 *South African Journal of Environmental Law and Policy* 135.

development. Hardly a year later, the court reached a somewhat different decision in *Eagles Landing Body Corporate v Molewa* 2003 1 SA 412 (T),[36] in which the court dealt with a similar issue. The court held that an environmental authorisation could be issued retrospectively for the completion of the partially completed activity if the result complied with the provisions and environmental protection of the environmental legislation.[37] This contradicted the *Silvermine Valley Coalition* decision. Following these conflicting decisions, the legislature amended NEMA by inserting sections 24F and 24G into NEMA.[38] Section 24F prohibits the commencement of developments without environmental authorisation. As indicated before, sections 24F and 24G have been amended several times.[39]

4 Section 24G NEMA

When section 24G was introduced, it temporarily provided an amnesty period for developers who commenced unlawful developments during the ECA era for six months.[40] However, the *National Environmental Management Amendment Act* 62 of 2008 abolished the six-month amnesty period.[41] As alluded to in the preceding sections, section 24G of NEMA has been amended several times.[42] This chapter focuses on the current

36 *Eagles Landing Body Corporate v Molewa* 2003 1 SA 412(T). The third respondent, a developer of a golfing estate, undertook earthworks on a section of the bank of the dam. The third respondent commenced with the construction. The applicant complained to the environmental authority about the construction works. The environmental authority issued the directive to the third respondent to cease the works and conduct an EIA. The *ex post facto* environmental authorisation was issued. Also see M Kidd *Environmental Law* (2011, Juta) at 237; M Kidd, F Retief and R Alberts 'Integrated environmental assessment and management' in ND King, HA Strydom and F Retief (eds) *Fuggle & Rabie's Environmental Management in South Africa* (3rd ed, 2018, Juta) 1229.

37 *Eagles Landing Body Corporate v Molewa* 2003 1 SA 412(T) 102-103.

38 *National Environmental Management Amendment Act* 8 of 2004.

39 *National Environmental Management Amendment* Act 62 of 2008 and *National Environmental Management Amendment* Act 30 of 2013. However, due to the limited scope of this chapter, the amendments will not be discussed in detail.

40 S7 of the National Environmental Management Amendment Act 8 of 2004.

41 See s12(3) of *National Environmental Management Amendment Act* 62 of 2008; Hall 2022 *PER* 7.

42 *National Environmental Management Amendment Act* 62 of 2008 and *National Environmental Management Laws Second Amendment* Act 30 of 2013. *The National Environmental Management Laws Amendment Act* 2 of 2022 introduced new amendments to s 24G of NEMA.

version of section 24G. Section 24G allows anyone who contravened section 24F(1)[43] or commences a waste management activity without a waste management license[44] to apply for environmental authorisation retrospectively.[45] Section 24G also pertains to the individual in control or the successor in title of the land where the unlawful activity occurred. This provision allows them to submit the section 24G application to the relevant minister responsible for environmental affairs, the minister for mineral resources, or the MEC, as the case may be.[46] The environmental authority must issue a directive outlining the applicant's steps after applying.[47] These steps involve stopping the activity immediately until a decision on the application is made, evaluating the activity's environmental impact, mitigating that impact, and conducting public participation. Moreover, the applicant could be required to submit an assessment report, an environmental management program, and any other documents that the environmental authority considers necessary.[48] The applicant must pay an administrative fine, which may not exceed R10 million, to the relevant authority for a decision on the application.[49] The environmental authority determines the quantum of the administrative fine. The Department of Forestry, Fisheries and Environment (DFFE) published section 24G Fine Regulations relating to the procedure to follow and criteria to consider when determining the administrative fine's quantum.[50] Once the administrative fine is paid, the appropriate authority must decide on

43 S24F prohibits carrying out listed activities without environmental authorisation or without compliance with the norms and standards, as the case may be.

44 See s20(b) of the *National Environmental Management: Waste Act* 59 of 2008. Waste management activities were included in s24G of NEMA by s9 of the *National Environmental Management Amendment Laws Second Amendment* 30 of 2013.

45 S24G(1) of NEMA. Sec 5 of the *National Environmental Management Laws Amendment Act* 2 of 2022 extends the application of s24G to any person in control or who is a successor in title to the land on which an unlawful activity is carried out. Sec24G also now includes the minister responsible for mineral resources and energy as an environmental authority.

46 S24G(1)(c) of NEMA.

47 S24G(1)(aa)(A) - (G) of NEMA.

48 S24G(1)(aa)(H) of NEMA.

49 S24G(4) of the NEMA. The maximum amount of the administrative fine was amended by the *National Environmental Management Amendment Act* 2 of 2022.

50 Regulations relating to the procedure to be followed and criteria to be considered when determining an appropriate fine in terms of s 24G are published in GN R698 in GG 40994 of 17 July 2017. Due to the scope of the chapter, these regulations will not be discussed in detail.

the application.[51] The environmental authority may either refuse to issue an *ex post facto* environmental authorisation or grant such authorisation, allowing the continuation of the activity, subject to conditions stipulated in the *ex post facto* environmental authorisation.[52] As part of the decision, the environmental authority may direct the applicant to rehabilitate or take other necessary measures.[53] In conclusion, the environmental authority may consider whether the applicant complied with the directive issued by the environmental authority.[54]

Notwithstanding payment of the administrative fine or granting of an *ex post facto* environmental authorisation, the environmental management inspectors, environmental mineral and petroleum inspectors or the South African Police Services, whatever the case may be, may still investigate any breach of the law, and the National Prosecuting Authority may still institute criminal charges against the applicant.[55] The environmental authority may defer the decision on the application if it is brought to its attention that criminal investigations are ongoing against the applicant concerning the listed activity on which the application is based until the investigation is concluded.[56]

4.1 The controversy around *ex post facto* environmental authorisation in South Africa

Some critics argue that section 24G undermines and mocks environmental management principles, such as sustainable development, precautionary principles, and preventive principles. This criticism seems flawed to the extent that sustainable development in terms of NEMA requires the integration of socio-economic, cultural and environmental factors into decision-making.[57] Section 24G creates an opportunity to assess the

51 S24(G)(2) of NEMA. The competent may also request more information from the applicant.
52 S24G(2) of NEMA.
53 S24G(3) of NEMA.
54 S24G(5) of NEMA.
55 S24G(6) of NEMA. The *Uzani* judgement demonstrates that the courts allow private prosecution. See *Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd* 2019 5 SA 275; Rantlo and Viljoen 2020 *Impact Assessment and Project Appraisal* 1-5.
56 S24G(7) of NEMA.
57 S1 of NEMA; *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 6 SA 4 (CC) paras 57-62; E Couzens

impacts of unlawful developments and consider socio-economic, cultural and environmental considerations in deciding whether to authorise the continuation of the unlawful development where they were initially not considered.[58] Additionally, the law compels environmental authorities to consider principles such as the precautionary principle and the preventive principle when deciding on matters related to the environment.[59] Therefore, when determining the application of section 24G, the environmental authority should consider precautionary and preventive principles. Furthermore, in deciding the *ex post facto* environmental authorisation application, the environmental authority may request the developer to desist from or prevent further environmental degradation where possible and take mitigation measures.

Critics of section 24G further argued that the provision is susceptible to abuse.[60] Several empirical studies were carried out in different provinces in South Africa, and the National Environmental Compliance and Enforcement Reports[61] have shown anecdotal evidence of the abuse of section 24G of NEMA.[62] However, this anecdotal evidence is not

'Filling Station Jurisprudence: Environmental Law in South Africa Courts and the Judgement in Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others' (2008) 15/1 *South African Journal of Environmental Law and Policy* 23 at 30; A Du Plessis 'Adding Flames to the Fuel: Why Further Constitutional Adjudication is Required for South Africa's Constitutional Right to Catch Alight' (2008) 15/1 *South African Journal of Environmental Law and Policy* 67.

58 See s24O of NEMA.

59 See s2 of NEMA.

60 L Kohn 'The Anomaly that is Section 24G of NEMA: An Impediment to Sustainable Development' (2012) 19/1 *South African Journal of Environmental Law and Policy* 1 3; RE Hugo 'Administrative penalties as a tool for resolving South Africa's environmental compliance and enforcement woes' (LLM-dissertation, University of Cape Town, 2014) 55; LMF September 'A critical analysis of the application of section 24G provisions of the National Environmental Management Act (NEMA), the Gauteng Province experience' (LLM-dissertation, North-West University Potchefstroom, 2012) 81.

61 These are annual reports released by the Department of Forestry, Fisheries and Environmental Affairs (DFFE) which give an overview of environmental compliance and enforcement activities undertaken by relevant institutions across the country.

62 RE Hugo 'Administrative penalties as a tool for resolving South Africa's environmental compliance and enforcement woes' (LLM-dissertation, University of Cape Town, 2014) 55; LMF September 'A critical analysis of the application of section 24G provisions of the National Environmental Management Act (NEMA), the Gauteng Province experience' (LLM-dissertation, North-West University Potchefstroom, 2012) 51; *The Body Corporate of Dolphins Cove v*

conclusive. The critics perceive section 24G as allowing the developers to choose whether to comply with the normal EIA requirements or circumvent the law and apply for an *ex post* facto environmental authorisation later. This is sometimes motivated by the perception that *the ex-ante EIA* process is cumbersome, while *ex post facto* environmental authorisation is perceived as cheap, short, and fast. The empirical studies conducted on section 24G have revealed that this perception is not accurate, as each case depends on its circumstances. This is primarily because section 24G is accessible to anyone who has violated section 24F of NEMA. Additionally, critics contended that section 24G might become a standard practice, allowing developers to bypass the obligation to apply for authorisations and then later rectify the illegal activity through section 24G

The differing interpretations and policy tensions related to section 24G offer a distinct chance to rethink how we teach environmental law. They underscore the importance of understanding environmental law not merely as a rigid collection of rules, but as a dynamic, debated, and developing area. By incorporating section 24G into a curriculum that emphasises critical legal analysis, statutory interpretation, and data literacy, we can better equip future environmental lawyers to navigate real-world complexities. Additionally, the empirical issues concerning abuse, discretion, and procedural evasion promote a problem-based, context-sensitive teaching method, aligning with the objectives of curriculum transformation and decolonised legal education.

Section 24G is also riddled with interpretation issues. The critics identified some problematic interpretations to including but not limited to the definition of such terms as 'commencement'[63] and the nature of the administrative fines in section 24G.[64] Section 24G was amended to clarify

Kwadukuza Municipality (8513/10) [2012] ZAKZDHC 13 (20 February 2012) para 57.

63 M Kidd *Environmental Law* (2011, Juta) at 244; M Oosthuizen, M Van der Linde and E Basson 'National Environmental Management Act 107 of 1998 (NEMA)' in ND King, HA Strydom and F Retief (eds) *Fuggle & Rabie's Environmental Management in South Africa* (3rd ed, 2018, Juta) 161; RE Hugo 'Administrative penalties as a tool for resolving South Africa's environmental compliance and enforcement woes' (LLM-dissertation, University of Cape Town, 2014) 55.

64 RE Hugo 'Administrative penalties as a tool for resolving South Africa's environmental compliance and enforcement woes' (LLM-dissertation, University of Cape Town, 2014) at 57; M Oosthuizen, M Van der Linde and E Basson 'National Environmental Management Act 107 of 1998 (NEMA)' in ND King, HA Strydom and F Retief (eds) *Fuggle & Rabie's Environmental Management in South Africa* (3rd ed, 2018, Juta) 125 at 166. See also *Plotz v MEC for Local*

the meaning of commencement. However, concerning the nature of the administrative fine, it is still unclear whether it is an administrative or punitive fine. It is beyond the scope of this chapter to attempt to determine the nature of the administrative fine. It has been unclear when section 24G is applicable, that is, whether it can be invoked for developments that have commenced but are not completed or even developments whose construction phase has been completed.[65] Additionally, it is unclear which developments are eligible for *ex post facto* environmental authorisation, that is, whether it applies to development that only has the construction phase or developments with both the construction and operational phases.

Further, it is unclear whether submitting a section 24G application is tantamount to an admission of guilt concerning the contravention of section 24F of NEMA. Further, it is perceived as presenting the competent authorities with a fait accompli wherein the authorities are left with little or no grounds to refuse the application because environmental degradation has occurred. This is often complicated by other factors, such as consideration of employment opportunities created by the unlawful development and other infrastructural developments.

These grey areas around legal interpretation, discretion, enforcement, and socio-economic trade-offs highlight the importance of incorporating statutory analysis, regulatory ethics, and interdisciplinary reasoning into environmental law curricula. In this regard, section 24G serves as a prime case study for exposing students to the real-world frictions between law on the books and law in action.

At this juncture, it is now imperative to turn to the discussion of *ex post facto* environmental authorisation in other jurisdictions, albeit in different names as found in the legislation and case law, to distil lessons for South Africa.

Government, Environmental Affairs and Development Planning, Western Cape WCD Cases No 12736/2014 of 20 May 2016 para 91. The court in this matter opined that section 24G is not a typical administrative penalty and neither strictly punitive as the payment of the administrative fine was for the consideration of the section 24G application.

65 *Supersize Investments v MEC of Economic Development Environment and Tourism Limpopo Provincial Government and Another* (70853/2011) [2013] ZAGPPHC 98 (11 April 2013) at para 3. In this case, the applicant commenced the development of an eco-estate on the basis of a fraudulent environmental authorisation, where the fraud was unknown to the applicant. The High Court erroneously stated that the effect of the rectification application in terms of sec 24G of NEMA was to suspend the penal provision contained in section 24F.

5 The foreign jurisdictions: Ireland, UK, India and Eswatini

To distil possible lessons for the operation of section 24G in South Africa, the countries of Ireland, the UK, India and Eswatini are considered. The method underpinning this part of the research entails a comparative legal analysis wherein provisions analogous to *ex post facto* environmental authorisation and the case law are considered to distil lessons for South Africa. To set the scene for the discussion on Ireland and the UK, it is imperative first to discuss the European Union (EU) law concerning EIAs and environmental authorisation to understand the *ex post facto* environmental authorisation in the UK and Ireland. The rationale for the foregoing is that the EU EIA legislation was applicable in the UK and Ireland[66] and the domestic laws of these states must comply with the EU EIA legislation.[67]

5.1 European Union

The EU law applies to the UK and Ireland in terms of section 2 of the European Communities Act 1972. Directive 2011/92/EU (as amended) regulates the EIA process in the EU[68] and details a list of developments in Annexes I and II of the Directive requiring an environmental authorisation known as developmental consent.[69] The developmental consent must be issued before the commencement of the identified developments. However, the Directive is silent on whether the developmental consent can be issued retrospectively.

66 The EU is a regional organisation made up of 27 states to which Ireland is party. The UK was party to EU until 31 December 2020 when UK exited the EU. However, the EU legislation that was applicable to UK as at 31 December 2020 is now part of the domestic law of United Kingdom pursuant to secs 2 and 3 of the European Union (Withdrawal) Act 2018. See The National Archives 'EU legislation and UK law' (Unknown date) *Legislation.gov.uk* https://www.legislation.gov.uk/eu-legislation-and-uk-law#:~:text=The%20UK%20is%20no%20longer,on%20legislation.gov.uk (accessed 7 May 2022).

67 For instance, see *Commission of the European Communities v Ireland* [2008] ECR I-4911 para 23.

68 European Commission 'Environmental impact assessment-EIA' (date unknown) *Environment* available at EIA https://ec.europa.eu/environment/eia/eia-legalcontext.htm (accessed 7 May 2022). See also *R (on the application of David Padden) v Maidstone Borough Council* [2014] EWHC 51 (Admin) para 52.

69 See article 2 of the 2011/92/EU Directive. Article 1(1)(c) defines development consent as an authorization by the environmental authority that entitles the developer to proceed with the development.

The above notwithstanding, UK courts have interpreted EU law as allowing *ex post facto* development consent (*ex post facto* planning permission). In the matter of *R (Baker) v Bath & North East Somerset Council* [2013] EWHC 946 (Admin),[70] For example, the Queen's Bench Division of the High Court in the UK stated that EU law allows *ex post facto* planning permission to be granted for unlawful developments. However, the court held that *ex post facto* planning permission may be granted only in exceptional circumstances. It should be subject to conditions to prevent the circumvention of the EU rules. The court further held that *ex post facto* planning permission should remain the exception.[71] Therefore, although Directive 2011/92/EU does not explicitly provide for *ex post facto* environmental authorisation, some EU Member States, such as the UK, seem to recognise such authorisation. The section below explores Ireland and the UK's position to determine whether their domestic law allows *ex post facto* environmental authorisation. If the answer is affirmative, what lessons may South Africa derive from the situation.

5.2 Ireland

In Ireland, the EIA process is regulated by the *Planning and Development Act* 30 of 2000 (PDA). The Irish planning law refers to developmental consent as planning permission, while the equivalent of South African *ex post facto* environmental authorisation is the so-called 'retention permit'. Section 32(1)(a) of the PDA pertains to any person who intends to conduct a development that is not exempt[72] from obtaining planning permission.[73] In section 32(1), the PDA expressly allows the granting of *ex post facto* authorisation (a retention permit) for unlawful (unauthorised) development.[74] It is a criminal offence to carry out an unlawful

70 *R (Baker) v Bath & North East Somerset Council* [2013] EWHC 946 (Admin) at para 15; *R(Ardagh Glass) v Chester City Council* [2010] EWCA 172. See also *Commission of the European Communities v Ireland* [2008] ECR I-4911 para 11.

71 *R (Baker) v Bath & North East Somerset Council* [2013] EWHC 946 (Admin) at para 24; *Commission of the European Communities v Ireland* [2008] ECR I-4911at para 57. The court did not refer to the specific EU Directive, nor did it state what the exceptional circumstances would be.

72 Exempted development is defined in sec 4 of the PDA.

73 S32(2) of the PDA prohibits development without planning permission. It is an offence to carry out an unauthorised development regarding sec 151 of the PDA.

74 Sec 32(1)(b) read with sec 34(12) of the PDA. Also see *Commission of the European Communities v Ireland* [2008] ECR I-4911 para 24.

development.[75] If the unlawful development is reported, the planning authority or any person may request the High Court or Circuit Court to make an appropriate order concerning the unlawful development. Such an order may include the cessation of operations, the rehabilitation of the environment or construction, or the removal, demolition or alteration of any structure or other feature.[76]

Applying for a retention permit in Ireland does not rectify the development's unlawfulness.[77] The developer of the unlawful development may not use the granting of a retention permit as a defence against prosecution.[78] Therefore, as in South Africa, the Irish planning law does not prohibit the prosecution of the developer of the unlawful development, notwithstanding the granting of a retention permit.

The Commission of the European Communities (Commission)[79] challenged the legality of retention permits in Ireland before the European Court of Justice (ECJ) in the case of the *Commission of the European Communities v Ireland* [2008] ECR I-4911. The Commission contended that Ireland had failed to take all the measures necessary to ensure that an EIA is carried out before the commencement of projects within the scope of the Directive that requires an EIA.[80] In its arguments, the Commission complained that the retention permit contained in the Irish domestic law undermined the preventive objectives of the Directive. Furthermore, it argued that the provisions of a retention permit were incorporated in the general provisions applicable to a normal planning permit and that there was nothing to indicate that a retention permit was limited to exceptional cases.[81] In its defence, Ireland contended that a retention permit issued in terms of the PDA and the Planning and Development Regulations, 2001,

75 S151 of the PDA. See also *Commission of the European Communities v Ireland* [2008] ECR I-4911 para 54.
76 Sec 160 of the PDA.
77 Department of the Environment, Community and Local Government *A Guide to Planning Enforcement in Ireland* (2012, Government of Ireland) 13.
78 S262(2) of the Planning and Development Act 30 of 2000.
79 The Commission of the European Communities is the policy-making and implementing body of the EU.
80 *Commission of the European Communities v Ireland* [2008] ECR I-4911 para 41. Additionally, it was alleged that Ireland had failed to adopt all measures necessary to ensure that the development consents given for, and the execution of, wind farm developments and associated works at Derrybrien, County Galway were preceded by an EIA. The complaint was based on articles 2, 4 and 5 to 10 of Directive 85/337, either in its original version or its subsequent amendments.
81 S32 of PDA.

was an exception to the general rule that requires planning permission to be granted before the commencement of development.[82] Additionally, Ireland contended that the retention permit met the objectives of the Directive of protecting the environment since removing an unlawful development might not be the most appropriate measure to achieve that protection.[83] The ECJ held that the Irish planning law established retention permits and equated their effects to ordinary planning permits.[84] The ECJ further held that a system of retention permits, such as that in force in Ireland, might encourage developers to circumvent the necessary environmental assessment of the proposed development. Therefore, the ECJ stated that Ireland had failed to comply with the requirements of the Directive by granting such retention permits where no exceptional circumstances were provided.[85] However, the ECJ did not describe what might amount to exceptional circumstances.

It follows that the EU and Irish planning laws allow retention permits. However, unlike in South Africa, the retention permits may be granted only subject to *exceptional circumstances* to avoid encouraging prospective developers to circumvent the normal EIA process.

5.3 United Kingdom

Like Ireland's, the UK EIA regime flows from Directive 2011/92/EU (as amended).[86] In the UK, environmental authorisation is also known as planning permission.[87] The planning permission is granted for developments classified as 'EIA developments'.[88] The *ex post facto*

82 *Commission of the European Communities v Ireland* [2008] ECR I-4911 para 44.
83 *Commission of the European Communities v Ireland* [2008] ECR I-4911 para 44.
84 *Commission of the European Communities v Ireland* [2008] ECR I-4911 para 55.
85 *Commission of the European Communities v Ireland* [2008] ECR I-4911 para 61.
86 J Glasson, R Therivel and A Chadwick *An Introduction to Environmental Impact Assessment* (4th ed, 2013, Routledge) at 43; *R (on the application of David Padden) v Maidstone Borough Council* [2014] EWHC 51 (Admin) at para 50; J Rantlo and G Viljoen 'A critical appraisal of *Uzani Environmental Advocacy CC v BP Southern Africa (Pty) Ltd 2019* (5) SA 275 (GP)' (2020) 38/5 *Impact Assessment and Project Appraisal* 441 at 3.
87 *R (on the application of David Padden) v Maidstone Borough Council* [2014] EWHC 51 (Admin) para 49. The local planning authorities are the local borough or district council.
88 Unauthorised EIA development means EIA development that is the subject of an enforcement notice. See regulation 34 of the Town and Country Planning (Environmental Impact Assessment) Regulations (2017). For detailed discussion on development permitted see sec 60 of Town and Country and Planning Act

environmental authorisation is regulated by the Town and Country Act 1990 (T&CPA) and the Town and Country Planning (Environmental Impact Assessment) Regulations 2017.[89] The Regulations are accompanied by Schedules 1 and 2, containing a list of EIA developments. Regulations 3 and 36, read with section 57(1) of the T&CPA, require the planning authority to grant planning permission for EIA developments only after an EIA is carried out.[90]

As in Ireland, the UK law also permits the regularisation of unlawful EIA developments by obtaining *ex post facto* authorisation. The unlawful developments are classified as having breached planning control.[91] Breach of planning control is defined as 'the carrying out of development without required planning permission'.[92]

There are two ways in which a developer may obtain an *ex post facto* authorisation. Firstly, the local planning authority may request the developer or the occupier of the land on which the unlawful development is situated to apply for an *ex post facto* authorisation under section 73A of the T&CPA.[93] Section 73A provides that the local planning authority may grant an *ex post facto* authorisation for developments carried out before the date of application. However, section 70C of the T&CPA empowers

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1990; B Denyer-Green and N Ubhi *Development and Planning Law* (2012, Estates Gazette) at 37; J Blackhall *Planning Law and Practice* (2016, Routledge).

89 Wood C *Environmental impact assessment: A comparative review* (2nd ed, 2003, Pearson) at 56; J Glasson, R Therivel and A Chadwick *An Introduction to Environmental Impact Assessment* (4th ed, 2013, Routledge) at 61; *R (on the application of David Padden) v Maidstone Borough Council* [2014] EWHC 51 (Admin) para 52. The 2017 Regulations have repealed the previous 2011 T&PC Regulations.

90 Regulation 3 of the Town and Country Planning (Environmental Impact Assessment) Regulations (2017); *R (on the application of David Padden) v Maidstone Borough Council* [2014] EWHC 51 (Admin) para 50-53; *R (Ardagh Glass Ltd) v Chester City Council* [2011] PTSR 1498 para 3; *R (Baker) v Bath & North East Somerset 5 Council* [2013] WWHC 946 (Admin) para 15; J Glasson, R Therivel and A Chadwick *An Introduction to Environmental Impact Assessment* (4th ed, 2013, Routledge) at 64.

91 Sec 171A(1) of the Town and Country and Planning Act 1990. Also see GOV UK 'enforcement and post-permission matters' (date unknown) *GOV.UK* available at https://www.gov.uk/guidance/ensuring-effective-enforcement (accessed 9 May 2022).

92 S171A of the Town and Country and Planning Act 1990.

93 S73A of the Town and Country Planning Act 1990; *R (Ardagh Glass Ltd) v Chester City Council* [2011] PTSR 1498 para 6; GOV UK 'Enforcement and post-permission matters' 2004 *GOV.UK* available at https://www.gov.uk/guidance/ensuring-effective-enforcement#Retrospective-planning-application (accessed 18 November 2021).

the local planning authority to refuse to grant *ex post facto* authorisation for an unlawful development for which a pre-existing enforcement notice has been issued.[94]

In *R (On application of Ardagh Glass) v Chester City Council* [2011] PTSR 1498,[95] the issue related to the commencement of an EIA development without planning permission. The Secretary of State requested the developer to apply for planning permission, which was later refused.[96] Subsequently, the developer submitted two applications for *ex post facto* authorisations under section 73A of the T&CPA for unlawful development. The permission was duly granted.[97] These *ex post facto* authorisations were challenged in court.

In the court a *quo* (the High Court), one of the issues was whether the court could make an order prohibiting the granting of any *ex post facto* authorisation.[98] The court held that planning authorities could lawfully grant an *ex post facto* authorisation as long as they paid careful attention to the need to protect the objectives of the Directive, which allowed the Member States to formulate their procedures. On appeal before the Appellate Division, the issue was whether the court *a quo* erred by holding that an *ex post facto* authorisation could be granted for an EIA development. The Appellate Division concurred with the court *a quo* and held that the EU law allows an *ex post facto* environmental authorisation for three reasons, namely that it accorded with common sense, the need to ensure that the measures aimed at ensuring compliance with the Directive

94 Sec 70(C) of the Town and Country Planning Act 1990. The pre-existing enforcement notice is an enforcement notice issued before the application was received by the local planning authority. Also see *Wingrove v Stratford on Avon District Council* [2015] EWHC 287 (Admin).

95 Applications for planning permissions were submitted during the construction phase only in 2004. The Secretary of State refused to issue planning permission in a decision made in 2007.

96 *R (Ardagh Glass Ltd) v Chester City Council* [2011] PTSR 1498 para 4. The Secretary of State refused to grant planning permission because of the deficiency of the application before her. She was of the view that the applicant should submit a fresh application.

97 *R (Ardagh Glass Ltd) v Chester City Council* [2011] PTSR 1498 at para 6. Other matters were also raised but the focus of this discussion is on the retrospective planning permission.

98 *R (Ardagh Glass Ltd) v Chester City Council* [2011] PTSR 1498 at para 8.

were proportionate under EU law[99] and the fact that the ECJ judgment in the *Commission v Ireland* case allowed for such an authorisation.[100]

The court held that it would be an affront to common sense not to allow an *ex post facto* authorisation in the case of an inadvertent failure to comply with the law. Further, it would be senseless to compel the local planning authority to require the decommissioning of the development before considering any further application for an authorisation, at least because the removal process might cause serious environmental harm.[101] The court further held that while the Member States must take the necessary measures to ensure compliance with the Directive, it was considered a fundamental principle of EU law that such measures must be proportionate.[102] The refusal of an *ex post facto* authorisation without considering the circumstances would be disproportionate.

The court further held that the decision-maker must consider whether granting the *ex post facto* environmental authorisation would give the developer an advantage he should be denied. Moreover, the decision-maker must determine whether the public can be given an equal opportunity to participate in decision-making and whether the circumstances are exceptional. The decision-maker must ensure that prospective developers are not encouraged to circumvent the law by ensuring the developer does not gain an improper advantage. The planning authorities must notify the developer that they will be required to remove the unlawful development unless they can demonstrate exceptional circumstances to justify its retention.[103] However, the court did not define the exceptional circumstances.

99 The concept of proportionality in relation to enforcement matters is provided for in the National Planning Policy Framework 2012, which provides that the enforcement action is discretionary, and local planning authorities should act proportionately in responding to suspected breach of planning control. Some local planning authorities will consider the degree of harm caused by the alleged breach and determine whether it justifies taking action. The local planning authority may decide not to take any action if it believes that planning permission is likely to be issued. Also see GOV UK 'Enforcement and post-permission matters' 2004 *GOV.UK* <https://www.gov.uk/guidance/ensuring-effective-enforcement#Retrospective-planning-application> (accessed 18 November 2021).

100 *R (Ardagh Glass Ltd) v Chester City Council* [2011] PTSR 1498 para 14.

101 Id para 15.

102 Id para 16.

103 *R (Ardagh Glass Ltd) v Chester City Council* [2011] PTSR 1498. Also see *R (on the application of David Padden) v Maidstone Borough Council* [2014] EWHC 51

In *R (on the application of David Padden) v Maidstone Borough Council* [2014] EWHC 51 (Admin)[104] the court considered two issues. First, the Maidstone Borough Council (Council) failed to consider whether there were exceptional circumstances for granting an *ex post facto* authorisation. Secondly, the court considered whether the Council could consider if such an *ex post facto* authorisation would provide the developer with an unfair or improper advantage. The court quoted with approval the decisions of the ECJ in *Commission of the European Communities v Ireland*[105] and the *R (on the application of Ardagh Glass) v Chester City* [2011] PTSR 1498[106] and reaffirmed that the *ex post facto* authorisation could be issued lawfully for EIA developments only under exceptional circumstances. The court further held that the Council had also not considered the question of unfair or improper advantage.[107] The court, therefore, revoked the *ex post facto* authorisation.

5.4 India

India is, of course, not situated in the EU, but as in the UK and Ireland, the authorities require an environmental assessment for listed developments before their commencement, and the developer must be granted environmental authorisation, which it refers to as environmental clearance.[108] Like South Africa, India is regarded as a developing country with similar developmental issues.[109] The granting of an environmental clearance (India's environmental authorisation) is regulated by EIA Notification 2006.[110] Article 2 of the EIA Notification 2006 prohibits

(Admin) at para 58.

104 *R (on the application of David Padden) v Maidstone Borough Council* [2014] EWHC 51 (Admin).

105 *Commission of the European Communities v Ireland* [2008] ECR I-4911.

106 *R (Ardagh Glass Ltd) v Chester City Council* [2011] PTSR 1498.

107 *R (on the application of David Padden) v Maidstone Borough Council* [2014] EWHC 51 (Admin) para 56.

108 For this chapter, environmental clearance will be referred to as environmental authorisation.

109 United Nations. 'World Economic Situation and Prospects 2022' (2020) available at https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESP2020_Annex.pdf (accessed 19 November 2022).

110 *Alembic Pharmaceuticals Ltd v Rohit Prajapati* 2020 4 CPSCI (SC) para 6. The EIA Notification of 2006 repealed the EIA Notification of 1994. The deadline for obtaining environmental clearance under the EIA Notification 1994 was 30 June 2001. In 2002, the government issued a circular that extended the period of obtaining environmental clearance to 2003.

the commencement of the listed development before the environmental clearance is granted. The EIA Notification 2006 is silent on granting *ex post facto* environmental clearance.[111]

In 2002, the Union Ministry of Environment and Forest issued an administrative circular permitting *ex post facto* environmental clearance for the projects that had commenced without environmental clearance under the erstwhile EIA Notification of 1994.[112] However, the legality of the circular and the *ex post facto* environmental clearance were challenged before the courts. In *Alembic Pharmaceuticals Ltd v Rohit Prajapati* 2020 4 CPSCI (SC), the Supreme Court of India determined the issue of whether the *ex post facto* environmental clearance could be issued under a 2002 administrative circular. The facts are brief that some industries operating unlawful developments applied for this *ex post facto* environmental clearance, and the applications were duly granted. These *ex post facto* environmental clearances were challenged before the National Green Tribunal (Tribunal).[113] In 2006, the Tribunal held that the 2002 circular that permitted the *ex post facto* environmental clearances was contrary to the law.[114] The Tribunal further ruled that the *ex post facto* environmental clearance granted to some industrial units be revoked and that those industries must close down.[115] The Tribunal further directed the industrial units to pay compensation for causing environmental degradation, the money from which could be used to rehabilitate their development areas. Some of these industrial units launched review proceedings at the High

111 The erstwhile EIA Notification 1994 also did not make a provision for *ex post facto* environmental clearance.

112 *Alembic Pharmaceuticals Ltd v Rohit Prajapati* 2020 4 CPSCI (SC) at para 1.

113 The National Green Tribunal is a body established in terms of the National Green Tribunal Act 2010. It is established to facilitate 'effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto.'

114 *Alembic Pharmaceuticals Ltd v Rohit Prajapati* 2020 4 CPSCI (SC) at para 1.

115 *Alembic Pharmaceuticals Ltd v Rohit Prajapati* 2020 4 CPSCI (SC) at para 1. The industrial units had missed the deadline for obtaining environmental clearances in terms of the EIA Notification of 1994 (as was then applicable). Thus, the industrial units were operating without the requisite environmental authorisation. The circular in question sought to extend the deadline for applying for an *ex post facto* environmental authorisation.

Court against the Tribunal's decision, but the review was dismissed. Hence, the appeal was made before the Indian Supreme Court.[116]

The Supreme Court had to determine whether an *ex post facto* environmental clearance could be granted, subject to the circular in question.[117] The Supreme Court held that an *ex post facto* environmental clearance was fundamentally at odds with the EIA Notification 1994.[118] The court stated that *ex post facto* environmental clearance was unorthodox and undermined the fundamental principles of environmental law.[119] Therefore, the Supreme Court held that environmental law could not allow the notion of *ex post facto* environmental clearance as this would be contrary to both the precautionary principle as well as the need for sustainable development.[120]

Although the court was vehemently opposed to the notion of *ex post facto* environmental clearance, it upheld the granting of it and permitted the holders thereof to continue with their operations. In reaching its decision, the Supreme Court quoted with approval its decision in *Lafarge Umiam Mining Private Limited v Union of India* (2011) 7 SCC 338,[121] where it called for applying the constitutional doctrine of proportionality to environmental matters.[122] The Court cautioned itself to take a balanced approach which would hold industrial units accountable without ordering the closure of their operations.[123] Therefore, the revocation of the *ex post facto* environmental clearances and the closure of the industries were not warranted. The Court ordered the industries to pay compensation for the rehabilitation of the environment in observance of the precautionary principle. Therefore, the industrial units could continue their operations but had to pay compensation for the rehabilitation.

116 *Alembic Pharmaceuticals Ltd v Rohit Prajapati* 2020 4 CPSCI (SC) at para 12.
117 *Alembic Pharmaceuticals Ltd v Rohit Prajapati* 2020 4 CPSCI (SC) at para 21.
118 *Alembic Pharmaceuticals Ltd v Rohit Prajapati* 2020 4 CPSCI (SC) at para 23. The reason why a retrospective environmental clearance or an *ex post facto* environmental clearance is 'alien to environmental jurisprudence is that before the issuance of an environmental clearance, the statutory notification warrants a careful application of mind, besides a study into the likely consequences of a proposed activity on the environment.' The court further opined that if the environmental clearance 'was to be ultimately refused, irreparable harm would have been caused to the environment.'
119 *Alembic Pharmaceuticals Ltd v Rohit Prajapati* 2020 4 CPSCI (SC) Para 23.
120 *Alembic Pharmaceuticals Ltd v Rohit Prajapati* 2020 4 CPSCI (SC) Para 23.
121 *Lafarge Umiam Mining Private Limited v Union of India* (2011) 7 SCC 338.
122 *Alembic Pharmaceuticals Ltd v Rohit Prajapati* 2020 4 CPSCI (SC) Para 39.
123 *Alembic Pharmaceuticals Ltd v Rohit Prajapati* 2020 4 CPSCI (SC) Para 39.

However, the Supreme Court reached a different decision in the matter of *Electrosteel Steels Limited vs Union of India* Civil Appeal No 7576-7577 of 2021.[124] The issue before the court was whether the operation of an unlawful development that contributes to the country's economy and provides livelihood should be shut down for the failure to obtain environmental clearance without an opportunity to regularise the unlawful development.[125] The Court held that the Indian Environment (Protection) Act 1986 does not prohibit *ex post facto* environmental clearance.[126] *Ex post facto* environmental clearance may be issued where the unlawful projects are in compliance with the law or they can be made to comply with the environmental norms[127] The Court further held that *ex post facto* environmental clearance could not be declined with pedantic rigidity, oblivious of the consequences of ceasing the operations of the unlawful development.[128] In its reasoning, the Court distinguished Alembic Pharmaceuticals' decision from the matter *in casu* where it indicated that in the former, the Court dealt with the legality of the administrative circular while the latter dealt with the 2017 Notification, which is a statutory instrument.[129] *Ex post facto* environmental clearance must not be granted routinely but only under exceptional circumstances.[130]

Similarly, in *Pahwa Plastics Pvt Ltd. vs Dastak Ngo* 2022 SCC OnLine SC 362[131] The Supreme Court reached a somewhat similar decision to that reached in the *Electrosteel Steels Limited* case. The Court dealt with the issue of whether the unlawful manufacturing units (the appellants), which employed 8000 workers and who were awaiting the decision on

124 *Electrosteel Steels Limited vs Union of India* Civil Appeal No 7576-7577 of 2021 para 82.
125 *Electrosteel Steels Limited vs Union of India* Civil Appeal No 7576-7577 of 2021 para 82.
126 *Electrosteel Steels Limited vs Union of India* Civil Appeal No 7576-7577 of 2021 para 84.
127 *Electrosteel Steels Limited vs Union of India* Civil Appeal No 7576-7577 of 2021 para 84.
128 *Electrosteel Steels Limited vs Union of India* Civil Appeal No 7576-7577 of 2021 para 83.
129 *Electrosteel Steels Limited vs Union of India* Civil Appeal No 7576-7577 of 2021 para 87.
130 *Electrosteel Steels Limited vs Union of India* Civil Appeal No 7576-7577 of 2021 para 87.
131 *Pahwa Plastics Pvt Ltd v Dastak Ngo* 2022 SCC OnLine SC 362.

their *ex post facto* environmental clearance, could be directed to cease their operations pending the finalisation of the application.[132]

The Court held that an establishment run by appellants that employs 8000 employees and that provides livelihood cannot be closed down 'only on the technical irregularity of not obtaining prior Environmental Clearance, irrespective of whether or not the unit causes pollution.'[133] The Court reiterated that the Environment (Protection) Act, 1986 does not prohibit the granting of *ex post facto* environmental clearance. Therefore, the appellants were allowed to continue with their operations pending the finalisation of the *ex post facto* environmental clearance.[134]

The foregoing judgements indicate that although the Indian environmental framework legislation does not expressly provide for *ex post* fact environmental clearance, the Central Government may, from time to time, allow *ex post facto* environmental clearance through directives. Further, based on the principles of sustainable development, the precautionary principle and the proportionality principles, the Indian judiciary has so far upheld the *ex post facto* environmental clearance and the continuation of unlawful development subject to the payment of compensation to rehabilitate the environment.

5.5 Eswatini

In Eswatini,[135] the issuing of environmental authorisation is regulated in terms of the Environment Management Act 5 of 2002 (EMA), and the Environmental Audit, Assessment and Review Regulations 2002 (EAARR).[136] The EAARR requires that newly listed developments (projects) that are likely to have an impact on the environment must be issued an environmental clearance certificate (ECC). It is an offence

132 *Pahwa Plastics Pvt Ltd v Dastak Ngo* 2022 SCC OnLine SC 362 para 2.
133 *Pahwa Plastics Pvt Ltd v Dastak Ngo* 2022 SCC OnLine SC 362 para 54.
134 *Pahwa Plastics Pvt Ltd v Dastak Ngo* 2022 SCC OnLine SC 362 para 68.
135 Formerly Swaziland.
136 Swaziland Environment Act 1992 was repealed by section 86 of EMA. However, the EAARR 2000 that were promulgated under Swaziland Environment Act 1992 remain in force and are in force concurrently with the new Environment Management Act 5 of 2002; Environmental Law Alliance Worldwise 'Eswatini (formerly Swaziland)' (date unknown) *Environmental Law Alliance Worldwise* available at https://www.elaw.org/eialaw/swaziland (accessed 7 February 2022).

punishable by a fine, imprisonment, or both upon conviction for one to carry out listed projects without an ECC.[137]

The EMA makes a distinction between proposed developments and existing developments that are likely to have an impact on the environment. The Eswatini Environmental Authority is mandated to identify a list of developments that have an impact on the environment and that raise a concern.[138] The Eswatini Environmental Authority may request the owner of the unlawful development to submit an environmental audit report and a comprehensive mitigation plan within six months after notification to do so.[139] The environmental audit report, amongst other things, must describe the environment, describe the impact on the environment and evaluate the activities that were undertaken. If the Eswatini Environmental Authority is satisfied with the contents of the above-mentioned reports, the Eswatini Environmental Authority may grant *ex post facto* authorisation. However, the environmental authority may refuse to issue *ex post facto* authorisation for the unlawful development if it believes that the continuation of the development is likely to cause further environmental degradation or be harmful to the public and that the mitigation measures proposed are inadequate.[140]

The comparative analysis of environmental authorisation systems in Ireland, the UK, India, and Eswatini mentioned above lays a strong foundation for rethinking environmental legal education and curriculum formulation. These global perspectives highlight varied regulatory philosophies and practical issues, providing essential insights for legal education in South Africa. Integrating this comparative jurisprudence into the curriculum enhances students' critical comprehension of environmental governance and aligns legal education with the realities of practice in a globalised and environmentally threatened world. This emphasises the need for a reformed curriculum, one that is interdisciplinary, contextually

137 Sec 32 of Environment Management Act 5 of 2002.

138 Subsequent to this identification of the projects, the Authority is mandated to ask the developer of the project to prepare and 'submit an environmental audit report and a CMP within six months after notification to do so.'

139 Regulation 4(1)(b) of the EAARR. For the contents of the environmental audit report, see the Second Schedule of the EAARR. Also see Bray 'Development and the Balancing of Interest in Environmental Law: Swaziland' 472.

140 Regulation 15(3)(a) of the EAARR; E Bray 'Development and the Balancing of Interest in Environmental Law: Swaziland' in M Faure and W Du Plessis (eds) *The Balancing of Interest in Environmental Law in Africa* (2011, Pulp) 474.

aware, and responsive to the changing relationship between law, policy, and sustainability.

6 Lessons distilled

While the legal systems, environmental conditions, geographical positions and administrative law principles in each of the four countries under discussion are very different, it merits looking at the gist of their *ex-post facto*-like environmental authorisation provisions to improve on the interpretation and implementation of section 24G of NEMA in South Africa. The lessons that one may distil from the discussion above include the following:

6.1 Exceptional circumstances

The first lesson South Africa may distil from the UK, Ireland, and India is that an *ex post facto* environmental authorisation may be granted only subject to exceptional circumstances. The discussion revealed that contrary to South Africa, where *ex post facto* environmental authorisation is available to any developer who constructed unlawful development, an *ex post facto* environmental authorisation is only issued when the developer has proven the existence of exceptional circumstances. Furthermore, the environmental authority must also ensure that it considers the existence of the exceptional circumstances before granting *ex post facto* environmental authorisation. However, the courts did not define what amounts to exceptional circumstances. Therefore, it is submitted that some parameters for exceptional circumstances must be created. The *ex post facto* environmental authorisation is accordingly considered as an exception to the general rule that an environmental authorisation must be carried out before the construction phase of the development. It is argued herein that the consideration of the existence of exceptional circumstances may curb the current problem in South Africa, where section 24G is considered as a norm and abused. This problem results from the fact that any developer who commenced with the unlawful development may apply for *ex post facto* environmental authorisation. However, the requirement of exceptional circumstances may ensure that not just everybody who is operating unlawful development is eligible for *ex post facto* environmental authorisation.

6.2 Unfair or improper gain

The second lesson relates to unfair or improper gain resulting from granting the *ex post facto* environmental authorisation. The EU law, Irish and English planning law mandate the competent authorities to determine whether the applicant stands to obtain unfair or improper gain if the *ex post facto* environmental authorisation is granted. The competent authorities must ensure that granting the *ex post facto* environmental authorisation does not encourage prospective developers to circumvent the law to obtain an improper advantage. Although the courts did not describe how this may be done, they argued that each case must depend on its merits and that competent authorities must be allowed to exercise their discretion. Therefore, in the South African context, the environmental authorities must determine whether the applicant for *ex post facto* environmental authorisation will gain improper or unfair gain should the *ex post facto* environmental granted, which they would have otherwise been denied. If the applicant for the *ex post facto* environmental authorisation has or is likely to obtain unfair or improper advantage or gain from unlawful operations, such must be considered during the determination of the *quantum* of the administrative fine. That is, the existence of an unfair or improper advantage must lead to either the refusal of the application or the maximum administrative fine.

6.3 Fines for rehabilitation

In South Africa, the *ex post facto* environmental authorisation applicant must pay the administrative fine. However, it is unclear whether the administrative fine is a punitive fine or an administrative fee. If the former is the case, then this position defeats the purpose of section 24G, which is meant to regularise unlawful developments rather than to punish. Further, it is not clear whether the government may use administrative fines to rehabilitate the environment if the applicant fails to rehabilitate because the administrative fine is paid into the state's purse. In contrast, in India, the applicants of the *ex post facto* environmental clearance must pay compensation aimed at rehabilitating the environment. The compensation is used to address the environmental damage caused by the developer. The lesson for South Africa is that the legislation ought to be amended to provide for an administrative fee or compensation that would be used explicitly for the rehabilitation of the environment where the applicants

for *ex post facto* environmental authorisation had caused environmental degradation. The government would also have to determine how the amount of compensation would be calculated.

6.4 Audit reports

While South Africa requires the developer or any person responsible for an activity who wishes to obtain *ex post facto* environmental authorisation to carry out an assessment post-commencement, Eswatini requires an audit report. The benefit of this is that an environmental audit is usually undertaken post the commencement of the project, unlike an EIA, and thus may be a more suitable tool. Thus, a lesson for South Africa is that the applicants for *ex post facto* environmental authorisation must undertake environmental auditing and compile audit reports, as these are the most suitable tools to use in the circumstances.

7 Conclusion

In the above discussion, I have argued that while section 24G provided a solution for regularising unlawful developments, the practical application of this provision remains problematic and controversial despite several amendments and court pronouncements. It follows, therefore, that the conversation on section 24G continues, and this raises the question of how the provision can be improved and optimised. The jurisprudence of *ex post facto* environmental authorisations in the EU and India, for example, suggests that the discussion should shift from whether *ex post facto* environmental authorisations ought to be allowed to how environmental law principles and good governance standards can strengthen their procedural and substantive safeguards. This comparative study contributes to legal education by highlighting the necessity of integrating real-world regulatory dilemmas into the teaching of environmental law. Jurisdictions such as Ireland, the UK, India and Eswatini that have a procedure similar to *ex post facto* environmental authorisation offer the following lessons for South Africa;

- *ex post facto* environmental authorisation is issued only under exceptional circumstances,
- the developer must not obtain an unfair and improper advantage,
- a fine may be levied for rehabilitation and
- alternative tools such as environmental audits may be employed.

Although the foreign jurisdictions discussed above offer possible lessons for South Africa, issues still require further research. Firstly, it remains to be determined what would amount to exceptional circumstances for *ex post facto* environmental authorisation to be granted. Furthermore, the nature and the purpose of an administrative fine in section 24G must be revisited, and clarity must be provided as to whether it is a punitive fine or an administrative fee.

From a curriculum reform perspective, this analysis underscores the importance of embedding comparative and critical environmental law perspectives into South African legal education. The evolving nature of section 24G and the broader implications of *ex post facto* authorisations offer fertile ground for reshaping environmental law pedagogy, encouraging students not only to engage with normative legal texts but also to critically interrogate legal instruments through policy, practice, and transnational lenses. Ultimately, this chapter advocates for a forward-looking, contextually engaged, and critically informed curriculum that equips future legal practitioners and scholars with the analytical tools necessary to navigate complex environmental governance challenges.