

PROCEDURAL DECRIMINALIZATION OF  
CERTAIN TRAFFIC OFFENCES

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MANY O LORD MY GOD ARE YOUR  
WONDERFUL WORKS WHICH YOU HAVE DONE.

Nndanganeni Jonathan RATSHIBVUMO

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# DEDICATION

*This dissertation is dedicated to  
my wife Nthambeleni and our children  
Muneirwa, Vusani*

# TABLE OF CONTENTS

SUMMARY .....	(ix)
OPSOMMING .....	(xi)
ABBREVIATIONS/AFKORTINGS .....	(xiii)

## CHAPTER 1

1. INTRODUCTION .....	1
1.1 INTRODUCTORY REMARKS .....	1
1.2 PROBLEM STATEMENT .....	5
1.3 RESEARCH METHOD .....	11
1.4 THE HISTORY OF THE PRESENT TRAFFIC LEGISLATION ...	12
1.4.1 Cape Ordinance 9 of 1846 .....	13
1.4.2 Road Traffic Ordinances, No. 21 of 1966 and Regulations ..	14
1.4.3 Road Traffic Act, No. 29 of 1989 .....	16
1.5 THE PROVISIONS OF THE DECRIMINALIZATION ACT (107 OF 1991) .....	18
1.6 PROBLEMS ENCOUNTERED IN OBTAINING RESEARCH MATERIAL .....	22

## CHAPTER 2

2. THE EXPERIENCE OF OTHER COUNTRIES .....	24
2.1 INTRODUCTION .....	24
2.2 ADMINISTRATIVE APPROACH IN NEW YORK .....	25
2.2.1 The plea of guilty .....	27
2.2.2 The plea of guilty with explanation .....	27
2.2.3 The plea of not guilty .....	28
2.3 ADMINISTRATIVE APPROACH IN CALIFORNIA .....	30

2.3.1	The plea of guilty .....	33
2.3.2	The plea of guilty with an explanation .....	33
2.3.3	The plea of "no contest" .....	33
2.3.4	The plea of not guilty with a confrontation hearing .....	34
2.3.5	The plea of not guilty with a request for a summary hearing .....	34
2.4	THE QUASI-JUDICIAL APPROACH, THE SEATTLE MODEL ..	35

### CHAPTER 3

3.	IDENTIFICATION OF TRAFFIC OFFENCES FOR DECRIMINALIZATION	38
3.1	INTRODUCTION .....	38
3.2	GUIDANCE BY THE LEGISLATURE .....	40
3.2.1	The Road Traffic Act 29 of 1989 .....	40
3.2.2	The Criminal Procedure Act 51 of 1977 .....	43
3.3	THE VIEWS OF CERTAIN WRITERS AND INSTITUTIONS .....	46
3.4	THE ATTITUDES OF OUR COURTS .....	55

### CHAPTER 4

4.	THE ENFORCEMENT OF ROAD TRAFFIC LAWS .....	69
4.1	INTRODUCTION .....	59
4.2	ENFORCEMENT ORGANS IN SOUTH AFRICA .....	59
4.2.1	Legislation .....	59
4.2.2	Traffic Policing organs .....	60
4.2.3	Adjudication: Sentencing of motoring offenders .....	66
4.3	TRAFFIC LAW ENFORCEMENT IN OTHER COUNTRIES .....	73
4.3.1	Immobilisation, wheel clamping and removal of vehicles ..	73
4.3.2	"Point demerit" System .....	75

4.3.3 Obstacles in the introduction of “point demerit” system in South Africa .....	78
4.3.4 Towing away and impounding of vehicles in South Africa ..	81
4.4 PERCEPTIONS ON TRAFFIC LAW ENFORCEMENT .....	81

## CHAPTER 5

5. STATISTICS .....	85
5.1 INTRODUCTION .....	85
5.2 PROSECUTIONS FOR TRAFFIC OFFENCES .....	85
5.3 TRAFFIC CASES IN COURTS .....	89
5.4 ROAD SAFETY IN SOUTH AFRICA .....	94

## CHAPTER 6

6. ASPECTS OF THE LAW OF CRIMINAL PROCEDURE AS THEY AFFECT LAW ENFORCEMENT .....	98
6.1 RELEVANT PROVISIONS .....	98
6.1.1 Prosecution for traffic offences .....	98
(i) Warnings .....	98
(ii) Arrests .....	99
(iii) Summons .....	100
(iv) Warrants of arrest .....	101
(v) Written notice to appear in court .....	102
(vi) Written notification in respect of compoundable offences .....	103
6.1.2 Adjudication of Prosecutions for traffic offences .....	104
(i) Compounded fines .....	104
(ii) Admission of guilt fines .....	105
6.2 REASONS FOR INEFFICACY OF THE CRIMINAL LAW SYSTEM IN TRAFFIC CASES .....	111

6.2.1	Evidential reasons .....	112
	(i) Privilege against self-incrimination .....	112
	(ii) Poor investigations .....	113
	(iii) Single witness .....	114
	(iv) Matrimonial privilege .....	114
	(v) The <i>factum probandum</i> in traffic cases .....	115
6.2.2	Administrative reasons .....	117
6.2.3	Procedural reasons .....	120
	(i) Section 56 of the Act .....	120
	(ii) Section 341 of the Act .....	121
	(iii) S 54 of the Act .....	123
	(iv) Section 55 of the Act .....	124
	(v) Investigations of traffic offenders .....	124
	(vi) Territorial jurisdiction .....	126
	(vii) Penalties in respect of traffic cases .....	126
	(viii) Proof of previous convictions .....	127
	(ix) Delays and multiple appearances in courts .....	128
6.3	EVALUATION OF THE EXISTING PROCEDURAL LAWS ON TRAFFIC OFFENCES .....	129
6.3.1	Advantages .....	130
6.3.2	Disadvantages .....	131
	(i) Unlicensed drivers .....	136
	(ii) Unavailability and unreliability of records of suspended or withdrawn driver's licences .....	137
	(iii) Permanent driver's licence .....	137
	(iv) Impossibility to administratively suspend or revoke a driver's licence .....	138
	(v) Discretion by courts to suspend or withdraw a driver's licence .....	138

(vi)	Driving under suspension or withdrawal not an offence in South Africa .....	138
(vii)	Many drivers in possession of multiple issues of driver's licences .....	139
(viii)	No register of prior traffic convictions .....	139
(ix)	Proving of prior traffic convictions nearly impossible .	140
(x)	Flooding of courts and traffic administrations with traffic cases and the reduced deterrent value .....	141
(xi)	Information system .....	142

## CHAPTER 7

7.	CONCLUSION .....	144
7.1	INTRODUCTION .....	144
7.2	OBSERVATIONS .....	145
7.2.1	TRAFFIC LAW ENFORCEMENT IN OTHER COUNTRIES	145
7.2.2	TRAFFIC LAW ENFORCEMENT IN SOUTH AFRICA ....	146
7.2.3	PROPOSED MEASURES TO ADDRESS TRAFFIC LAW ENFORCEMENT PROBLEMS IN SOUTH AFRICA .....	150
7.2.3.1	The draft decriminalization regulations .....	151
7.2.3.2	The draft notice in terms of the draft decriminalization regulations .....	156
7.2.3.3	Summary of the envisaged procedure contemplated in the Decriminalization Act .....	157
7.2.4	ANALYSIS OF THE CONTEMPLATED PROCEDURE IN TERMS OF THE DECRIMINALIZATION ACT AND THE DRAFT REGULATIONS .....	157
7.2.4.1	Criticism of the Enabling Act (Decriminalization Act of 1991) .....	157
7.2.4.2	criticism of the draft decriminalization regulations	160
7.2.4.3	Provisions of the Decriminalization Act, the draft regulations vis-a-vis provisions of the interim constitution on fundamental rights .....	163



7.3	RECOMMENDATIONS .....	165
7.3.1	THE DECRIMINALIZATION OF MINOR TRAFFIC OFFENCES .....	165
7.3.1.1	Criteria for re-classification of traffic offences .....	165
7.3.1.2	The establishment of an administrative adjudication system .....	168
7.3.1.3	Administrative adjudication system in operation ..	171
7.3.2	STEPS TO EFFECT DRIVER-CONTROL .....	174
7.3.2.1	Periodical re-issuing of driver's licences .....	175
7.3.2.2	Central register .....	175
7.3.2.3	Introduction of the points demerit system .....	176
7.4	CONCLUDING REMARKS .....	176
	BIBLIOGRAPHY .....	178
	TABLE OF STATUTES .....	184
	TABLE OF CASES .....	185

## SUMMARY

Traffic laws, rules and regulations are designed for the prevention of traffic collisions and congestion. The achievement of traffic safety rests on a foundation of sound traffic regulations made effective by proper enforcement. Road safety in South Africa is a matter of serious concern considering the number of deaths on the road annually. A high road carnage in South Africa cannot be attributed solely to the ever increasing population of road users and vehicles, but mainly to the lack of efficient traffic law enforcement. Road behaviour of motorists is determined *inter alia* by the chance of apprehension for traffic offences and the chance to have traffic prosecution finalised.

Traffic offences in South Africa form part of the criminal law equally with serious common law and other statutory crimes. All offences are in practice adjudicated upon by the criminal law courts according to the law of criminal procedure.

With traffic prosecutions numbering in millions, the need for judicial processing of these offences expeditiously has exceeded the capacity of the present court system. For some time the enforcement of our traffic law has been lacking in efficiency. The crisis in which our traffic law enforcement finds itself is characterized by a high number of traffic prosecutions which are not finalised as a result of offenders who do not pay fines, who do not appear in court and those who cannot be traced for summonses to be served on them. Traffic prosecutions swamp the magistrates' courts and the Department of Justice personnel have, as a result, not been able to cope with the workload.

In search for a solution to these problems, the effect of existing legislation, statutory provisions, administrative instructions and guidelines regarding the current traffic law enforcement system in South Africa were studied and analysed. The previous relevant research studies on the subject were consulted. A research on the experiences of other

countries in the administration of traffic laws was carried out. Comments on the subject were obtained from various persons and institutions charged with the administration of traffic law in South Africa. The recent proposals by the Department of Justice to remove certain traffic offences from the criminal justice system were studied and analysed.

In view of problems encountered, I directed my research towards seeking a mechanism whereby: the errant motorists would be successfully traced and be brought to book without delay, our courts would be relieved of the existing burden of traffic cases overcrowding our court calendars, sanctions equated with the conduct of a road user would be imposed, a fast, economic and efficient way of dealing with traffic offenders could be found, and the criminal stigma attached to traffic violations could be removed. There is a need for procedural decriminalization of certain traffic offences.

As an attempt to solve problems encountered in traffic law enforcement, recommendations are made for the re-classification as non-criminal of certain traffic offences and the introduction of a simplified adjudication procedure. These measures are conceived to protect the constitutional rights of the driving public, improve the driver behaviour and enhance society's interest in road safety.

## OPSOMMING

Verkeerswetgewing, -reëls en -regulasies het die voorkoming van verkeersbotsings en -opeenhopings ten doel. Die bereiking van verkeersveiligheid berus op 'n basis van deeglike verkeersregulasies wat deur behoorlike toepassing doeltreffend gemaak word. Gesien in die lig van die aantal sterftes op Suid-Afrikaanse paaie jaarliks is padveiligheid in Suid-Afrika 'n ernstige saak van kommer. 'n Hoë padslagting in Suid-Afrika kan nie slegs aan die steeds toenemende getal padgebruikers en voertuie toegeskryf word nie, maar hoofsaaklik aan die gebrek aan die doeltreffende toepassing van verkeersreg. Padgedrag van motoriste word onder andere bepaal deur die kans om vir verkeersoortredings betrap te word en die kans vir die vervolging om gefinaliseer te word.

Verkeersoortredings in Suid-Afrika vorm deel van die strafreg in gelyke mate met ernstige gemeenregtelike en ander statutêre misdrywe. Alle misdrywe word in prakties deur die strafhowe bereg ooreenkomstig die strafprosesreg.

Met verkeersvervolgings wat miljoene in getal beloop, het die behoefte aan geregtelike hantering van hierdie oortredings die vermoëns van die huidige hofstelsel te bowe gegaan. Die afdwinging van ons verkeersreg het vir 'n geruime tyd reeds tekort geskied aan doeltreffendheid. Die krisis waarin die toepassing van ons verkeersreg hom bevind, word uitgebeeld deur die groot aantal verkeersvervolgings wat nie afgehandel word nie weens oortreders wat nie boetes betaal nie, wat nie in howe verskyn nie en die wat nie opgespoor kan word nie. Verkeersvervolgings oorstroom die landdroshowe en die personeel van die Departement van Justisie is gevolglik nie in staat om die werkklading te hanteer nie.

In die soeke na 'n oplossing vir hierdie probleme is die uitwerking van bestaande wetgewing, statutêre voorskrifte, administratiewe voorskrifte en riglyne aangaande die huidige verkeersregtoepassingstelsel in Suid-Afrika bestudeer en ontleed. Die vorige

toepaslike navorsingstudies aangaande die onderwerp is geraadpleeg. 'n Onderzoek aangaande die ervaringe van ander lande by die administrasie van verkeerswetgewing is uitgevoer. Kommentaar aangaande die onderwerp is vanaf verskeie persone en instansies belas met die administrasie van verkeersreg in Suid-Afrika verkry. Die onlangse voorstelle van die Departement van Justisie om sekere verkeersoortredings uit die strafregstelsel te verwyder, is bestudeer en ontleed.

In die lig van probleme wat ondervind word, het ek my navorsing gerig op die soek na 'n meganisme waardeur die dwalende motoriste suksesvol en sonder oponthoud opgespoor en tot verantwoording gebring kan word, ons howe verlig kan word van die bestaande las wanneer verkeersake hofkalenders oorlaai, sanksies gelykwaardig aan die padgebruiker se optrede opgelê sal word, die vinnigste, mees ekonomiese en doeltreffendste wyse om met verkeersoortreders te handel, gevind kan word, en die kriminele stigma verbonde aan verkeersoortredings verwyder kan word. Daar is 'n behoefte aan prosedurele dekriminalisasie van sekere verkeersoortredings.

As 'n poging om probleme wat by die toepassing van verkeersreg ondervind word, op te los, word aanbevelings gemaak vir die herindelings van sekere verkeersoortredings as nie-krimineel en die instelling van 'n vereenvoudigde beregtingsprosedure. Hierdie maatreëls word in die vooruitsig gestel om die grondwetlike regte van die bestuurderspubliek te beskerm, die gedrag van bestuurders te verbeter en die publiek se belangstelling in padveiligheid te verhoog.

## ABBREVIATIONS/AFKORTINGS

AAB	Administrative Adjudication Bureau (New York)
CILSA	Comparative and International Law of Southern Africa
CSIR	Council for Scientific and Industrial Research
DMV	Department of Motor Vehicles (New York)
DPVT	Divisie vir Pad en Vervoer Tegnologie
NaTIS	National Traffic Information System
NIRR	National Institute for Road Research
NRSC	National Road Safety Council
PR	Project Report
PVB	Parking Violation Bureau (New York)
RSA	Republic of South Africa
RTQS	Road Transport Quality System
RU	Road Users
SACC	South African journal of Criminal law and Criminology
SACJ	South African journal of Criminal Justice
SAFE	Special Adjudication for Enforcement (State of Seattle)
TBVC	Transkei, Bophuthatswana, Venda, Ciskei
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TVB	Traffic Violation Bureau (New York)
UNISA	University of South Africa
WNNR	Wetenskaplike Nywerheids Navorsings Raad

\* A pronoun "he" unless specifically attached to an identified male person, refers to a female person as well.

## CHAPTER 1

### 1. INTRODUCTION

#### 1.1 INTRODUCTORY REMARKS

The life of man in society would be a continuing disaster were it unregulated. The principal means for its regulation is the law. When the law fails to retain the respect of the community, social disaster results. <sup>(1)</sup>

Roads and vehicles, like other inanimate objects could be reshaped and made over, but not so easily the driver. The driver must be governed by rules of driving conduct to avoid highway chaos.

Among legal norms, which are obligatory rules of conduct designed to protect people living in a particular society, we find traffic laws. <sup>(2)</sup>

According to JRL Milton, <sup>(3)</sup> road traffic legislation exists to regulate and control the traffic of vehicles and persons on public roads, so as to ensure efficient transportation of persons and goods and to control driving in the interests of the physical safety of persons on or using public roads.

Robert H Reeder <sup>(4)</sup> correctly states that the legitimate purpose of traffic laws, rules and regulations is to prevent traffic collisions and congestion.

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1 MA Rabie: *Southern Africa in need of law reform, Decriminalization of the law ideal*. Proceedings of the Southern Africa Law Reform Conference, Sun City, Bophuthatswana 11—14 August 1980 100.

2 HJ O'Brien: "Practical problems which face the traffic officer as a result of present traffic law." Paper presented at the NRSC Symposium on Law Enforcement and Road Safety, Pretoria October 1975 17.

3 *South African Criminal law and Procedure*, Vol III (1988) 653.

4 "The road user and the law." Paper presented at the ROBOT Symposium on Law Enforcement and Road Safety, Pretoria, October 1975 15 (unpublished).

Traffic laws establish standard rules of procedure to be followed by motorists in the operation of their vehicles so as to promote the safe and orderly flow of traffic. It may well be pointed out at the outset that traffic laws are simply safe driving practices put into writing. Their purpose is to ensure that each person walking or riding may know what is expected of him and what he may expect of others. <sup>(5)</sup> Traffic laws therefore do not relate to behaviour which is necessarily bad in itself, as are laws against theft, assault and indecency. According to MGT Cloete <sup>(6)</sup> traffic offences are not restricted to a specific section of the community or a group of people as is the case with ordinary crimes. They affect every member of the community almost every hour of the day and night. Traffic offences may well be seen as a 'folk crime' because the poor, the wealthy, the literate and illiterate, and the law abiding citizens have a share in it.

The question which is often asked is whether traffic offenders should be regarded as criminals. AJ Middleton <sup>(7)</sup> quoted Dr Terence Willet and Dr Roger Hood who found that in the United Kingdom, at least, not only the public but also police and magistrates, or justices of the peace, do not regard the contravention of traffic regulations as real crime. This view was also endorsed by Norval Morris <sup>(8)</sup> who stated that the law cannot successfully make criminal what the public does not want made criminal.

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5 RH Reeder (1975) op cit 11.

6 "Perception of traffic law enforcement" *Acta Criminologica* 1 (1988) 11.

7 "Road traffic and abuse of the criminal sanction" 1974 *THRHR* 159.

8 "The overreach of the criminal law" (1975) *Acta Juridica* 52.



According to RH Reeder, <sup>(9)</sup> the New York Vehicle and Traffic Law provides that a traffic infraction is not a crime and the punishment imposed therefore shall not be deemed for any purpose a penal or criminal punishment. However, serious traffic violations such as reckless driving, operating while in an intoxicated condition, hit and run and few others are defined as crimes and rules of criminal law have to apply.

The public does not equate a man who kills whilst driving dangerously with a normal criminal. <sup>(10)</sup> We are in fact, here dealing with what is essentially a breach of administrative rather than penal law, which should consequently be treated as part of the administrative rather than the penal process. <sup>(11)</sup>

Traffic offences in South Africa form part of the criminal law equally with serious law offences and other crimes. All contraventions of the criminal law are in principle adjudicated by the criminal law courts according to the criminal procedure.

Dr TJ Botha <sup>(12)</sup> has indicated that in the Republic of South Africa, there is no distinction between the felonies, misdemeanours or infractions as in the United States of America. The burden of proof on the state in the Republic of South Africa is 'beyond reasonable doubt', whereas in the United States of America, it has been reduced in respect of traffic cases prosecuted in the

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9 Op cit 26.

10 J MacMillan: *Deviant Drivers*, Saxon House Lexington books 5.

11 WF Friedman: *Law in a changing society*, Stevens & Sons Limited London (1972) 205.

12 *Obstacles in the way of a point demerit or conviction count system in the RSA. The present total lack of driver control.* Technical Note: NB 449/91, Roads and Transport Technology CSIR April 1991 8. (unpublished).

municipal/city court to 'on the balance of probabilities', as is applicable in civil cases.

Although traffic offences are adjudicated through Criminal Courts of law in South Africa, the attitude of our courts is that the traffic offender is not a criminal. In *S v Nagel*,<sup>(13)</sup> where the accused faced a charge of driving under the influence of liquor, Ludorf J remarked that the accused: "is nie 'n misdadiger in die gewone begrip van daardie woord nie. Hy is nie 'n dief of 'n rower nie."

AJ Middleton<sup>(14)</sup> correctly stated that the attempted regulation of road traffic by means of criminal sanctions, though it has been with us since 1846 has met with remarkably little success. Traffic law like anybody of law is sterile unless it is inherently sound and supported by effective enforcement machinery.<sup>(15)</sup> The usual way of dealing with a problem of violations is to force violators to comply with the rules.<sup>(16)</sup>

Many of the traffic offenders in high accident rate countries are people who, though they may have developed a hearty respect for the well-enforced criminal laws, still have very little respect for poorly enforced traffic laws.<sup>(17)</sup> With traffic prosecutions numbering in millions, the need for judicial processing of these offences has exceeded the capacity of the traditional

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13 1970 (2) SA 483(T) 484B.

14 Op cit 159.

15 op cit note 4 at 26..

16 MM Slavick: The enforcement of traffic law criteria for success as quoted by Botha TJ in his doctoral thesis: *Die Vaartbelyding van die strafprosesreg vir meer doeltreffende verkeersadministrasie*, (1990) 38.

17 DJM Vorster: "Human factors in safe road usage," CSIR Johannesburg, published in *ROBOT*, August to September 1973 36—43.

court system. <sup>(18)</sup>

Therefore there is a need for procedural devices whereby the machinery of justice is relieved. This can only be achieved by removing certain traffic offences from criminal courts and place them under administrative adjudication.

This research is aimed at examining the difficulties engendered by the current system which classifies all traffic offences as part of the criminal law proper, enquiring whether the criminal sanction is the appropriate measure to apply to all traffic offences and suggesting mechanism whereby effective traffic law enforcement may be achieved.

## 1.2 PROBLEM STATEMENT

Road carnage in the Republic of South Africa is very high in comparison with other countries in the world. The statistics taken by TJ Botha <sup>(19)</sup> show that in 1987 the United States of America lost 46 059 lives on their roads against 180 million vehicles and 2 fatalities per 100 million miles travelled. On the other hand the Republic of South Africa had 9 905 people killed in road accidents against 4,8 million road vehicles and 20 fatalities per 100 million miles travelled during the same year. During 1993 with the registered vehicles numbering 6 674 416, the reported collisions were 433 027 and injuries amounted to 127 740 in South Africa. <sup>(20)</sup>

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18 HL Ross: *Traffic law violation, A folk crime, Social problems* 8 (3), Winter 1960—61 231—240.

19 Op cit 1.

20 TJ Botha: "Vehicle information", extracted from central vehicle and ownership register, CSIR Technical Note NB 556/93. (unpublished).

This is an appalling finding when one compares the population in the number of vehicles in the United States of America with those of the Republic of South Africa. This situation depicts crisis in the traffic law enforcement. The philosophy underlying traffic law enforcement is that the compliance with traffic regulations will result in safe and efficient movement of all road users. Effective traffic law enforcement involves the detecting of offences, apprehending and prosecuting the offender, and meting out appropriate punishment in the administration of justice. <sup>(21)</sup> There has been an increasing concern in the past few years about the efficiency of the courts in handling large volume of traffic offences.

Traffic offences in South Africa form part of the criminal law equally with other crimes. The approach to road traffic regulations is and has always been based on criminal law, law of evidence and criminal procedure.

According to HJ Kriel, <sup>(22)</sup> the regulation of traffic affects each member of the community the moment a street is entered. Through the traffic court, most people are likely to get their first experience of criminal law.

From as early as 1974 some of the South African writers have expressed their dissatisfaction in the over-utilization of the criminal sanction especially over traffic offences. AJ Middleton <sup>(23)</sup> has indicated that the attempted regulation of road traffic by means of criminal sanction, though in

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21 JR Odendaal, TJ Botha, BC van Niekerk and HC Joubert: *A Synthesis of South African practice in traffic law enforcement*. South African Road Council, Department of Transport, Report S 89/3, Pretoria July 1989 1. (unpublished)

22 *Problems experienced by local and Provincial Authorities in the enforcement of road safety measures*, DPVT Technical Report RU/11/74 CSIR, Pretoria October 1974 41. (unpublished).

23 Op cit 159.

application for more than a century has met with remarkably little success. According to him, some of the traffic offences have to be removed from the criminal law, although on the other hand he acknowledged that some traffic offences have a definite place in the criminal law. A Rabie <sup>(24)</sup> is also of the view that over-utilization of the criminal sanction, apart from being unjustified, represents an injudicious use of energy. "It is injudicious to use a canon to shoot a sparrow."

He correctly indicates that over-criminalization has led to an inflation of crimes which has impaired the criminal law's image and has led to an erosion of respect for law generally.

Hulsman as quoted by A Rabie <sup>(25)</sup> stated 'It became evident that the machinery of justice simply could no longer deal with the tremendously increased and continuously increasing number of crimes. The position was aggravated by a rapid increase in the human population and thus the number of offenders.' The problem identified here is what we call 'calender crisis', that is the inability of the courts to keep current with their work both civil and criminal.

Seventy five per cent (4,5 million) of criminal cases that are recorded by the Department of Justice's criminal courts per year relate to traffic offences from parking where compound fines are paid to cases of homicide by vehicles which require court hearing. <sup>(26)</sup>

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24 "The need for Decriminalization" (1977) *CILSA* 201.

25 *ibid.*

26 *op cit* note 12 at 8.

During November 1984 the Institute of Foreign and Comparative law of the University of South Africa, compiled a report on "Traffic law Reform, a comparative-law study" in which the crisis in the traffic law enforcement was identified.<sup>(27)</sup> The report summarised the crisis in which our traffic law or its enforcement finds itself, *inter alia*, as follows:

- (a) Chances of being caught for traffic offences are generally low. Hence if a road user is caught he might regard himself as being just unfortunate, and might even harbour resentment towards the traffic officer for having singled him out.
- (b) Many summonses and notices to appear are ignored, often with impunity.
- (c) Traffic offences which are brought to court, nonetheless constitute a large enough group to disrupt the criminal justice system in the urban areas. It should be remembered here that in South Africa, all traffic offences, even the most trivial ones are classified as criminal offences.
- (d) ...
- (e) ...
- (f) ...
- (g) The malaise in which the enforcement of our traffic law finds itself, is reflected in lack of respect on the part of the public for a segment of the law which cares so much for their safety and would not be held by them in contempt were it enforced fairly and effectively. This lack of respect on the part of the public for traffic law and its enforcement explains, at least partially, the lawlessness that prevails in our courts."

The gravest problem in relation to traffic law enforcement today is probably the difficulties in serving the criminal summonses and the execution of criminal warrants.<sup>(28)</sup>

In most cases the offenders do not pay their fines, do not appear in courts,

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27 *Traffic Law Reform, A Comparative law study*, University of South Africa (1984) 3 (unpublished).

28 AJ Middleton "Decriminalization of road traffic offences" (1991) 4 SACJ 252.

cannot be traced for summonses to be served on them. Most of them are aware that the chances of being apprehended under the present system are remote. Most cases are closed when warrants of arrest are withdrawn due to the offender being untraceable.

The Committee of Inquiry into the Efficacy of Traffic law Enforcement in the Republic of South Africa established in 1991, <sup>(29)</sup> found that approximately 70% of traffic offenders against whom warrants of arrest have been authorised cannot be traced as a result of false addresses, contempt of the process of law by not responding to the court documents. Millions of rands of income in respect of traffic fines are thereby lost.

TJ Botha in his report, <sup>(30)</sup> has indicated that more than one million out of three million prosecutions for traffic offences per year are unfinalised due to the reason that offenders cannot be traced or that their identities cannot be established.

Although the South African Criminal Procedure Act <sup>(31)</sup> contains certain provisions which are aimed at relieving the machinery of justice in as far as certain petty offences are concerned, much is still left in the hands of the criminal justice. Section 57 of the Act provides for the payment of admission of guilt fine without appearing in court and s 341 of the Act provides for the compounding of certain petty traffic offences. In both

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29 *Report of the Committee of Inquiry into the Efficacy of traffic law enforcement in the Republic of South Africa*, PR 60/91, National Road Safety Council, Pretoria, (1991) 17—27. (unpublished).

30 *Aanbevelings vir die dekriminalisering van parkeertipe verkeersoortredings en voorgestelde wetgewing in hierdie verband*. DPVT Tegiese Nota NB/201/88, WNNR, Pretoria, Februarie 1988 1—2. (unpublished).

31 51 of 1977 as amended.

instances the courts are relieved only when the offender decides to pay the admission of guilt fine. If such offender fails to pay an admission of guilt fine, the course of criminal justice will follow its normal route through the courts. This may well be described as the limited type of procedural decriminalization.

According to SH Pieterse<sup>(32)</sup> the criminal due process is unnecessarily time-consuming and excessive stringent in the light of the limited penalties actually considered by the courts for these offences.

Even where traffic cases are taken to court, our courts have shown reluctance in imposing severe sentences. For an example, in *S v Dawson*,<sup>(33)</sup> the accused was fined R1-00 or in default of payment to four days' imprisonment for speeding offence. In *S v Motaung*,<sup>(34)</sup> the accused was sentenced to R6-00 or in default of payment to six days' imprisonment for travelling at a speed of 82 kilometres per hour in a 60 kilometres per hour zone.

According to Dr Botha<sup>(35)</sup> the cornerstone problem with traffic safety measures in South Africa is the lack of driver control. It is not possible to effectively control the driver if there is no register for prior traffic convictions. The present system of driver's licences has also to be reviewed to avoid malpractices which may lead to the issuing of multiple licences to

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32 *Onderhandelings met die Departement van Justisie betreffende 'n onderskeid tussen Strafregtelike en nie-Strafregtelike gedrag ingevolge Padverkeerswetgewing*, DPVT Tegniese verslag RU/16/76, WNNR, Pretoria September 1976 9. (unpublished).

33 1966 (1) SA 259 (N).

34 1972 (4) SA 687 (O).

35 op cit note 12 at 2.



same drivers, thereby rendering the suspension of errant drivers' licences ineffective.

The current system on traffic offences has a number of problems which cannot easily be solved. Some of the problems are that:

- the large number of traffic cases crowd the courts, taking up time which could better be spent on more serious crimes;
- adjudication of traffic cases in the courts is very expensive;
- there is no effective method which can bring all errant motorists to book;
- fines and penalties for traffic violations are often not aimed at improving traffic safety;
- the courts have incomplete driver records and therefore often apply the same sanction to a good driver as to a driver who has had many citations and/or accidents; and
- sentences vary from court to court so that two persons committing the same violation and appearing in different courts receive substantially different sentences.

Because of these and other problems, the state has seriously to consider the feasibility of reforming the present system on traffic offences.

### 1.3 RESEARCH METHOD

The methodology employed in conducting this research included a

literature survey. A number of reports from the Council for Scientific and Industrial Research (CSIR) Division of Roads and Transport Technology; the Department of Transport and papers delivered in symposia as well as reports from conferences conducted by the National Road Safety Council (NRSC), were studied. Literature from South African authors was also consulted. A study was also made of literature by foreign authors on traffic law enforcement.

A survey was also made through questionnaires to some of the traffic law enforcement organs in South Africa. Questionnaires were forwarded to the Chief Traffic Officers of some major cities and some Chief Magistrates in South Africa. Such questionnaires were accompanied by a covering letter explaining the purpose of the research and requesting their co-operation. The response results of the survey appear in Chapter 5 of this study.

An analysis of the current legislation on traffic law, the law of Criminal Procedure on traffic cases has been made and the attitude of our courts towards punishing traffic offenders has been investigated in this research. Some members of the traffic law enforcement organs as well as some authors of the traffic law literature in South Africa were interviewed.

#### 1.4 THE HISTORY OF THE PRESENT TRAFFIC LEGISLATION

Before any self-propelled vehicle could be invented in South Africa, there were already laws in the Cape, Transvaal, Natal and Orange Free State enacted to regulate and control animal-drawn and other vehicles. From as early as 1896, such laws gave statutory recognition to various rules, requirements and administrative procedures and created offences which

were subsequently made applicable to motor vehicles and today form part of modern South African road traffic legislation.<sup>(36)</sup> Despite a steady flow of legislation over the years, and a number of inquiries into the problem of road safety, the traffic law enforcement system has changed very little. As far back as 28 February 1846, the criminal sanction was employed in South Africa to regulate road traffic.<sup>(37)</sup> According to AJ Middleton, the monetary fine backed by an alternative of imprisonment in default of payment of the fine, is still the spearhead of the campaign against traffic offenders.<sup>(38)</sup>

#### 1.4.1 Cape Ordinance 9 of 1846

The earliest traffic law was passed in 1846, an "Ordinance for the better Preservation of the Public Roads and the Prevention of Accidents and Injuries thereon."<sup>(39)</sup> This Ordinance imposed fines for a variety of traffic offences in and about Cape Town and Simonstown, in default of the payment of the fine, the offender was committed to prison. If the offender who refused to pay the fine had property, the magistrate was empowered to attach the property *in lieu* of the fine.<sup>(40)</sup> According to Cooper, this was the first legislative attempt in South Africa to deal comprehensively with road traffic on public roads.

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36 WE Cooper: *Motor Law* Volume 1 Juta & Co Ltd 2 (1982) 2.

37 AJ Middleton, YM Burn, G Carpenter: *A proposal for the decriminalization of the traffic law*. Confidential report for NRSC, Pretoria (1978) 1. (unpublished)

38 *ibid.*

39 Ordinance 9 of 1846.

40 S 6 of the Cape Ordinance *supra*.

The first self-propelled vehicle was welcomed in Pretoria on 4 January 1847 by the State President of the Transvaal Republic. The first statute to deal specifically with self-propelled vehicles was enacted in 1897 in the Transvaal. <sup>(41)</sup>

#### 1.4.2 Road Traffic Ordinances, No. 21 of 1966 and Regulations

With the establishment in 1910 of the Union of South Africa, the former provinces and the former territory of South West Africa, were given wide-ranging legislative powers in matters of road traffic, and in the exercise thereof enacted their own traffic Ordinances. Municipality authorities had power to pass by-laws affecting road traffic.

The then central government's post-second war policy of separate development greatly added to the number of law-making agencies at both the state and municipal level that led to multitude of bodies empowered to make traffic laws. Fortunately, the various law-making and law enforcement agencies have operated thus far more or less uniformly. <sup>(42)</sup>

In 1966 the erstwhile four Provincial Authorities of the Transvaal, Cape, Natal and Orange Free State, each introduced a Road Traffic Ordinance No. 21 of 1966 which was modelled on the Transvaal Ordinance. Road Traffic Regulations have been promulgated in respect of each of the ordinances and have been modelled on the

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41 op cit note 36 at 15.

42 op cit note 27 at 95.

Transvaal Regulations. By means of the 1966 ordinances and regulations, a uniform body of laws relating to road traffic was obtained to some extent. However, differences occurred due to the operation of four totally independent administrative and legislative bodies. <sup>(43)</sup>

The ordinances provided for matters such as: administrative machinery to administer the legislation; <sup>(44)</sup> registration and licensing; <sup>(45)</sup> control of the operation of public motor vehicles; <sup>(46)</sup> rules for the control and safety of road traffic; <sup>(47)</sup> powers of law enforcement organs; <sup>(48)</sup> making of regulation by provincial administrators and local authorities. <sup>(49)</sup>

Local authorities and provincial administrators promulgated regulations under the Ordinance. <sup>(50)</sup> Such regulations dealt mostly with registration plates, <sup>(51)</sup> clearance certificates, <sup>(52)</sup> permits, <sup>(53)</sup>

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43 op cit note 21 at 9.

44 Chapter I of the Ordinance 21 of 1966.

45 Chapter II of the Ordinance.

46 Chapter IV of the Ordinance.

47 Chapter VI of the Ordinance.

48 Chapters IX and XI of the Ordinance.

49 Chapter XIII of the Ordinance.

50 S 165 of the Ordinance.

51 Regulation 2 of the Regulations under the Ordinance.

52 Regulation 8 of the Ordinance.

53 Regulation 11 of the Ordinance.

roadworthy certificates,<sup>(54)</sup> procedures in respect of and exemptions from registration and licensing,<sup>(55)</sup> vehicle equipments,<sup>(56)</sup> dimensions of vehicles,<sup>(57)</sup> loads on vehicles,<sup>(58)</sup> requirements concerning public motor vehicles and buses,<sup>(59)</sup> driving signals and traffic control signals,<sup>(60)</sup> road traffic signs,<sup>(61)</sup> colours,<sup>(62)</sup> forms,<sup>(63)</sup> exemptions,<sup>(64)</sup> offences and penalties.<sup>(65)</sup>

#### 1.4.3 Road Traffic Act, No. 29 of 1989

In his criticism of the previous legislation on road traffic, JRL Milton,<sup>(66)</sup> said:

“It has always seemed anomalous that South African public roads, a singularly national institution, for most of their existence should have been subject to the parochial regime of provincially determined laws regulating the traffic using the roads. Indeed, the essential silliness

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54 Regulation 13 of the Ordinance.

55 Regulation 14 of the Ordinance.

56 Chapter II and IV of the Regulations under the Ordinance.

57 Chapter VII of the Regulations under the Ordinance.

58 Chapter VIII of the Regulations under the Ordinance.

59 Chapter IX and X of the Regulations under the Ordinance.

60 Chapter XI of the Regulations under the Ordinance.

61 Chapter XII of the Regulations under the Ordinance.

62 Regulation 177 of the Ordinance.

63 Regulation 178 of the Ordinance.

64 Regulation 180 of the Ordinance.

65 Regulation 182 of the Ordinance.

66 “A legislation — Road Traffic Act 29 of 1989”, *Annual Survey of South African law* (1989) 342.

of the situation was conceded when the provinces in a commendable act of co-operation enacted Road Traffic Ordinances that were for all practical purposes uniform and identical.”

In March 1989, the Parliament passed the Road Traffic Act <sup>(67)</sup> which came into operation on 1 June 1990. Regulations were also promulgated in terms of this Act. According to JRL Milton, <sup>(68)</sup> the offences under the Act are essentially, if not exactly identical to those found in the Ordinances. This Act was passed in order to consolidate and amend the laws relating to the registration and licensing of motor vehicles and other vehicles and the drivers thereof, and the regulation of traffic on public roads; and to provide for certain requirements of fitness. The Act as well as the Regulations have been modelled on the Ordinance and Regulations of the Transvaal. The consolidation of the Provincial Ordinances can be seen as the first step to bring uniformity in the road traffic system in the whole Republic of South Africa. <sup>(69)</sup>

There are few differences which can be identified between the current Act and the former Ordinances.

In terms of s 74 of the Act, a new system known as the Road Transport Quality System (RTQS) has been introduced. This is the system whereby all business operators of all taxis, road transport trucks and buses are registered.

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67 Act 29 of 1989.

68 Op cit 343.

69 PD Badenhorst: *Die Padverkeerswet van 1989, 'n Handleiding vir Verkeers- en Vredesbeamptes*, Juta & Kie Bpk Kaapstad (1990) 1.

In terms of s 41 of the Act, drivers of business vehicles have to be in possession of professional driving permits instead of the public driving permits.

The Act also provides for the introduction of regulated driving hours and periodical testing of vehicles for roadworthiness. <sup>(70)</sup>

Another major difference between the Act and the Ordinances is that as far as possible only the principles are laid down in the Act, leaving details to be regulated by the Minister of Transport Affairs to a much larger extent than was the case with the Administrators in respect of regulations under the Ordinances. <sup>(71)</sup>

#### 1.5 THE PROVISIONS OF THE DECRIMINALIZATION ACT (107 OF 1991)

This Act was passed to provide for the decriminalization of certain offences and matters connected therewith.

Section 3 of the Act empowers the Minister of Justice to appoint an Advisory Committee and in terms of s 5 such committee would advise the Minister on the necessity or desirability of replacing certain offences by an administrative sanction. The Minister of Justice may appoint such committee on his own initiative or at the request of another Minister or an Administrator. Therefore in case of traffic matters, the Minister of Justice would appoint such committee with the concurrence of the Minister of Transport. In order to decriminalize certain traffic offences, the Minister of

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70 S 50.

71 op cit 69 at 2.



Transport may request the Minister of Justice to institute an Advisory Committee to advise on the decriminalization of certain prescribed conduct in terms of the Road Traffic Act and its regulations. <sup>(72)</sup>

In terms of s 5 (2) of the Decriminalization Act, an Advisory Committee may make recommendations that certain offences be replaced by an administrative sanction, and also prescribe the procedure to be followed by a responsible authority in relation to the application and enforcement of any administrative sanction through regulations as contemplated in s 11 of the Act.

After considering the report referred to in s 5 of the Act, the Minister of Justice may with the concurrence of the other Minister or Administrator who administers any such law concerned, by notice in the gazette:

- declare this Act to be applicable to any such law;
- suspend any provision of any such law creating any offence and any such provision connected therewith; and
- take any course including the making of regulations under s 11 of the Act in place of such suspended provision in order to replace such offence by an administrative sanction. <sup>(73)</sup>

Decriminalizing traffic offences would mean that the Minister of Justice, with the concurrence of the Minister of Transport, could make regulations to replace certain traffic offences by an administrative sanction.

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72 Government Notice R910, Government Gazette No. 12441 of 26 April 1990.

73 S 2 of the Decriminalization Act (107 of 1991).

In terms of s 11 of the Act, such regulations will relate to, among others:

- the nature, extent, establishment, application and enforcement of any administrative sanction in the place of any legal provision creating an offence;
- the procedure to be followed by a responsible authority in relation to the application and enforcement of any administrative sanction; and
- the right to object to any decision of a representations officer and an administrative appeal to the justice of the peace and the procedure connected therewith.

Under definitions provided in s 1 of the Act, a “representations officer” is:

“any person employed by a responsible authority charged with the consideration of and decision on written representations in relation to fines or other administrative sanctions purporting to be payable or enforced by law.”

The procedure contemplated in the Act can therefore be summarised as follows:

If a person commits a decriminalized offence, an administrative sanction is imposed, for example, a fine. If that person feels aggrieved by the sanction, he may make written representations to a representations officer. If that person, after the decision by the representations officer, still feels aggrieved, he may lodge a written objection against it with justice of the

peace. <sup>(74)</sup> The decision of the justice of the peace is final and cannot be appealed against. <sup>(75)</sup> When the matter is before the Justice of the Peace, legal representation is not allowed. <sup>(76)</sup>

In brief, the Act removes the adjudication of contraventions of certain specified statutory offences from the ordinary courts of law. After the Minister of Justice has considered a report of the Advisory Committee, the decriminalized offences are specified in a notice in the Gazette. Once a notice has been promulgated, a person who contravenes any of the provisions of the law concerned would be dealt with in terms of the provision of the Act and the regulations published thereunder. Therefore any rights which an alleged offender had under the Criminal Procedure Act would not apply.

When analysing the whole Act, I noticed some major shortcomings. In terms of s 1 of the Act, the representations officer will be an employee of a responsible authority. That would mean that the representations officer being an officer attached to the statutory institution administering the particular law will have the function of adjudicating on dispute of both fact and law between the prosecuting authority and an offender. Therefore the independence or impartiality of the representations officer is questionable. The foundation of any modern legal system is the adjudication of dispute by an independent and impartial body which has no interest in the matter. <sup>(77)</sup>

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74 S 9 of the Act.

75 S 10 of the Act.

76 S 9 (2) (b) of the Act.

77 S 22 of the Interim Constitution of the Republic of South Africa (Act 200 of 1993).

It is my view that the principle *nemo debet esse iudex in causa propria sua* (no one shall be the judge in his own cause) should also be applicable to the tribunal created by the Decriminalization Act.

The exclusion of legal representation in all stages of objection proceedings is a departure from a sound principle and in conflict with the provisions of the Interim Constitution. <sup>(78)</sup>

## 1.6 PROBLEMS ENCOUNTERED IN OBTAINING RESEARCH MATERIAL

The Minister of Justice has in terms of s 3 of the Decriminalization Act <sup>(79)</sup> and on the advice from the Minister of Transport appointed an Advisory Committee for the decriminalization of road traffic offences. The appointment of this committee was made known through the press statement of 1 February 1993 <sup>(80)</sup> and by a Government Notice. <sup>(81)</sup> The Committee was appointed to advise the Minister on the necessity or desirability of replacing certain traffic offences in terms of Road Traffic Act, <sup>(82)</sup> by an administrative sanction. The delay in releasing a report on this matter, has an adverse effect on the research and some recommendations made in this work.

Although some writers have for the past two decades been raising their voices in need for the decriminalization of certain traffic offences, there is

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78 S 25 (3) of the Constitution *supra*.

79 Act 107 of 1991.

80 "The Star" 2 February 1993.

81 No. 119 of 4 February 1993 in Government Gazette No. 14567.

82 *supra*.

a limited number of literature on this field of study. More information was obtained from unpublished reports.

Another problem emanated from the diversity of operations and systems on the traffic law enforcement applied in the former Republic of South Africa and the former so-called TBVC states. Each state had its own traffic legislation. The overall picture of the number of traffic prosecutions could not easily be obtained. In most cases statistics were not updated. The statistics relied on in this research are mainly of the former Republic of South Africa.

## CHAPTER 2

### 2. THE EXPERIENCE OF OTHER COUNTRIES

#### 2.1 INTRODUCTION

The adjudication of minor traffic violations has been and still is, the subject of much discussion and research throughout the civilized world. With the growth of vehicle population all over the world, the problem of adjudicating the vast mass of offences which were committed has become acute.

Most states in the United States of America have succeeded in removing certain traffic offences from the sphere of the criminal law and procedure and created a special procedure to deal with them.

A report on the administrative adjudication of minor traffic offences in Illinois released in 1992 by NorthWestern University Traffic Institute, <sup>(1)</sup> indicates the majority of respondents favouring administrative adjudication of minor traffic offences. Respondents explained that administrative adjudication would unclog the courts, that minor traffic cases do not require the attention of a circuit judge to be handled properly and that the procedure would require fewer officers to testify.

The 1984 report by the University of South Africa on "Traffic law reform", <sup>(2)</sup> distinguished between pure administrative approach and quasi-judicial

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1 NorthWestern University Traffic Institute and National Centre for State Courts, *The Illinois Traffic Court Study* (1992) 26.

2 M Wiechers and JGM Saunders: *Traffic Law Reform. A Comparative Study*. Institute for Foreign and Comparative law, University of South Africa, Pretoria November 1984 8—15.

approach to the adjudication of traffic cases. To overcome the problem of traffic cases overcrowding courts and a high percentage of offenders who go unpunished, countries employed different approaches to the adjudication of traffic cases. In this chapter examples will be given of states with pure administrative approach and those with quasi-judicial approach to the traffic violations.

## 2.2 ADMINISTRATIVE APPROACH IN NEW YORK

The New York State has been the first jurisdiction in the world to decriminalize minor traffic offences and to adopt a pure administrative form of adjudicating them. <sup>(3)</sup>

A report of the Task Force on Administrative Adjudication of Traffic Offences in California, <sup>(4)</sup> indicates that by 1969 the criminal court of the city of New York was handling over 800 000 cases involving moving traffic infractions and over 3 200 000 cases involving non-moving infractions. It was virtually impossible for the courts to process this volume of cases properly. As a result, New York passed legislation transferring responsibility for adjudicating moving traffic infractions from the criminal court to the New York State Department of Motor Vehicles. On July 1, 1970, the Department's Administrative Adjudication Bureau (AAB) was assigned responsibility for handling such minor offences, as speeding, improper turning, tailgating and improper lane-changing. Another legislation was passed transferring cases involving parking infractions to the

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3 op cit note 2 at 8.

4 (1976) 1 Department of Motor Vehicles, *Report of the Task Force on Administrative Adjudication of Traffic Offences in California - A feasibility Study* 24.

New York City Parking Violation Bureau (PVB) of the New York City Transportation Administration. The criminal courts remained trying serious traffic violations such as vehicular homicide, driving while intoxicated, reckless driving, and leaving the scene of an accident.

The New York State Administrative Adjudication programme is operated by the Traffic Violation Bureau (TVB) of the New York State Department of Motor vehicles. The 1969 enabling legislation declared Traffic Violation Bureau's proceedings to be civil in nature without the possibility of a jail sentence. The Traffic Violation Bureau's hearing officers are called administrative law judges. They are experienced lawyers with special training in traffic law and road safety principles. <sup>(5)</sup>

The administrative adjudication process in New York as discussed by Roy Finkelstein and John P McGuire in their final report, 1971, <sup>(6)</sup> takes the following form: An errant driver is issued with a summons by a police officer, which in addition to the usual information about the violation also contains an appearance date and time, a statement of the driver's right to a lawyer and a fine schedule. The schedule is independent of previous convictions. A copy of summons is sent to the Department of Motor Vehicles (DMV) headquarters and is entered into a computerized driver records within one to three days after the issue. The driver has a choice of three possible pleas: guilty, guilty with explanation, or not guilty.

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5 op cit note 2 at 9.

6 (1971) 11 *An Optimum System for Traffic Law Enforcement, Driver Control, Final Report* California 1-1 to 1-5.



### 2.2.1 The plea of guilty

If the driver involved pleads guilty, a fine can be mailed to the Department of Motor Vehicles or be paid in person at the Department's Adjudication offices. Where the driver is caught in a speeding offence of 25 miles per hour in excess of the limit, or if a conviction for the violation could result in the suspension of the driver's licence, appearance before the hearing officer is compulsory. Traffic legislation in New York provides for both mandatory suspension for conviction of violating certain sections of the Vehicle Code and discretionary suspension for persistent violators. If the driver is required to appear in person and has mailed the fine in, the fine and summons are returned to the driver together with a date, time and location for a hearing. If the driver may attempt to pay the fine in person, the computer will not accept the plea and will schedule a hearing for that driver within seconds.

### 2.2.2 The plea of guilty with an explanation

In this case, the driver simply appears at a hearing location before a hearing officer. Evidence is recorded mechanically and there is a computer network from the hearing venue and the Department of Motor Vehicles. The clerk takes the driver's licence and summons to check through a computer for any other outstanding summons and for a valid licence. The driver is again advised of the right to legal representation and is warned that the driving privilege may be in jeopardy and then asked to plead. The driver pleads guilty and gives an explanation. The conviction is entered directly into the

entire driving record displayed on the computer. The hearing officer then imposes a penalty which cannot include imprisonment. Payment of fine is made to the clerk and the conviction is noted on the licence.

### 2.2.3 The plea of not guilty

A driver may plead not guilty by mail or in person and be given an appearance date and time to appear in the county in which the violation occurred. Adjournments can be made through mail or telephones. Anyone who does not reply to a summons by the date specified is automatically sent a notice of licence suspension. The contested hearing takes place in a more informal manner than a trial and the rules of evidence are not strictly followed. After all the evidence has been presented, the hearing officer makes the determination and only after it is entered into the computer, can the driver's previous record be seen.

The hearing officer is a lawyer who has passed a civil service examinations, had a month of training, and is a full-time employee of the Department of Motor Vehicles. There is no provision for a trial by jury or legal aid although the motorist is free to bring along a legal representative. An appeal may be noted against the determination of the hearing officer within 30 days of the decision by paying a non-refundable ten-dollar-fee. If an appeal is only on the severity of the penalty, the transcript of the record of proceedings is not necessary. The tapes of the original hearing are kept for six months before being destroyed. The appeal is heard by a three-men

Appeal Board consisting of lawyers, two of whom may be hearing officers. The case may further be appealed to the courts. Judicial review of an adverse appeal is also available, this time to be exercised by the ordinary courts.

The United States' Department of Justice has issued a publication <sup>(7)</sup> indicating the achievements of the Traffic Violation Bureau of the New York State Department of Motor Vehicles. According to that publication, <sup>(8)</sup> the system introduced in New York has shown to be time- and cost effective, and to have resulted in an increase in summonses being issued as well as in a simultaneous reduction in summonses being ignored. As a result, the Traffic Violation Bureau was able to put up overall revenues by not less than 25 per cent while reducing operating costs when compared with the more cumbersome criminal court system.

Roy Finkelstein and another in 1971, <sup>(9)</sup> gave a statistical data of the achievements of the Traffic Violation Bureau as follows:

During the first six months, a total of 270 000 summonses were issued. Of this total, about 60% answered summonses voluntarily. The remaining drivers were sent letters suspending their drivers' licences. This brought the overall compliance up to 75%, which was very much greater than what was achieved in the court. Almost all cases are settled within a month of the violation. About 30% of the summonses resulted in a plea of guilty with

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7 (1975) Administrative Adjudication Bureau of the New York State Department of Motor Vehicles 27—30.

8 *ibid.*

9 *op cit* 1—5.

explanations. An additional 5% of the cases were not guilty pleas. In contested cases, about 60% of the drivers were found guilty. The average time to handle a guilty plea with an explanation was estimated at five to ten minutes.

A hearing officer was observed to have heard 150 such cases or about one every three minutes. Cases involving not guilty pleas were estimated to take about twice as long. Although no cost data was available, it was felt that the costs of this programme are significantly lesser than those for operating the court.

### 2.3 ADMINISTRATIVE APPROACH IN CALIFORNIA

Studies of the traffic court system in California found a number of problems which could not easily be solved. There was a large number of traffic citations crowding the courts, taking up time which could better be spent on serious crimes, adjudication of traffic citations in the courts was expensive; fines and penalties imposed for traffic violations appeared not to be aimed at improving traffic safety; the courts had incomplete driver records and could therefore apply the same sanctions to a good driver as to a driver who has had many citations and/or accidents; and lastly court procedures and sanctions varied from court to court, so that two persons committing the same violation in different counties may receive greatly different sanctions. <sup>(10)</sup>

As a result of these problems, the state legislature amended the Penal Code

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10 Thomas J Novi: Department of Motor Vehicle, *What is Administrative Adjudication of Traffic Infractions?* (1978) folio 2.

so as to provide for the administrative adjudication of traffic infractions in California. That was six years after New York had implemented administrative adjudication of traffic infractions. <sup>(11)</sup> The Penal Code was amended to the effect that an infraction violation of the Vehicle Code or an infraction violation of the local non-parking Traffic Ordinance adopted pursuant to the Vehicle Code is neither a crime nor a public offence. <sup>(12)</sup>

Adjudication is by a hearing officer with both legal and traffic safety background appointed by the Administrative Adjudication Board (AAB). The hearing is informal with the burden of proof set at clear and convincing evidence. All appeals against the determination of the hearing officer are referred to the Administrative Adjudication Board. An ultimate appeal may be made to a superior court.

The process of handling traffic infractions in California as set out in a Feasibility Study Report in 1976, <sup>(13)</sup> is as follows:

The citing officer prepares a notice to appear in respect of a person who has committed a traffic infraction. The notice has to contain the particulars of the driver as well as the vehicle involved. The notice has to disclose the violation with which he or she is charged, the time within which to answer, the time and venue for the hearing and a uniform sanction imposed for the alleged violation. The time for appearance has to be 14 days after the issue of the notice. The hearing place may either be the Adjudication Hearing Office or at a court designated by the Board as an administrative hearing

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11    ibid 10.

12    op cit note 4 at 8—10.

13    ibid 10.

location.

The citing officer delivers a notice to appear to any person accused of an infraction violation of any provision of the Vehicle Code or of an infraction of a local non-parking traffic Ordinance adopted pursuant to the Code. A copy of the notice is filed with the Administrative Adjudication Hearing office or court and another copy with the law enforcement agency employing the citing officer. Legal representation is allowed in any administrative adjudication proceedings.

Any person who receives a notice to appear shall answer such notice by personally appearing or by mail within 14 calendar days of the date of the alleged infraction. Failure to answer within 14 days constitutes a waiver of the right to a confrontation hearing. The Board may suspend that person's driver's licence or his driving privilege until he answers.

A hearing may either be a confrontation or in a summary form. In confrontation hearings the cited person and the citing police officer appear, whereas in summary hearings, only the cited person appears. The proceedings are recorded entirely and verbatim by automatic recording devices. Recordings are preserved for a period of not less than 30 days after the period for an appeal has expired and no longer than the period specified by the Board by rule and regulation.

Any person receiving an adverse determination from a hearing officer may note an appeal to the Administrative Adjudication Board. No appeal shall be reviewed by the Board if it is filed more than 30 days after the appellant received notice of the decision appealed against. The fee for filing an appeal

is ten dollars. If not satisfied with the decision of the Board, a further appeal may be noted to the superior court.

The notice to appear provides for five types of pleas. <sup>(14)</sup> The errant motorist may plead guilty, guilty with explanation, plead "no contest", plead innocent and have a confrontation hearing, and may plead innocent and have a summary hearing.

### 2.3.1 The plea of guilty

A driver who pleads guilty may mail a notice within 14 days with the payment to the Hearing Office, where the driver's record will be updated and checked for previous convictions. The driver with too many prior citations has to appear before a hearing officer who would consider all the facts and decide on the proper sanction.

### 2.3.2 The plea of guilty with an explanation

The driver may intend to explain the circumstances which led to the violation of an infraction. The driver has to appear before the hearing officer within 14 days of receiving the notice. Before the hearing officer could determine the appropriate sanction, previous records, if any, of the driver have to be checked.

### 2.3.3 The plea of "no contest"

In this case the driver does not admit or deny the commission of an infraction, but simply mails the notice to appear with payment to the

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14 Thomas J Novi: (1978) op cit folio 4.

hearing officer with an indication of “no contest” on the notice. The notice is processed as if the plea is that of guilty, but that response cannot be used as an admission of guilt in any future criminal or civil court actions.

#### 2.3.4 The plea of not guilty with a confrontation hearing

Where the driver pleads not guilty and wants the traffic officer present at the hearing, the driver mails a notice to appear within 14 days stating that there should be a confrontation hearing. At the hearing the driver and the traffic officer will give evidence and each party will be allowed to cross-examine the other. The driver may engage the service of a legal representative. The Hearing Officer may ask both parties further details of the incident. Thereafter the Hearing Officer would give a determination and impose an appropriate sanction if the driver is found guilty.

#### 2.3.5 The plea of not guilty with a request for a summary hearing

The driver may decide to plead not guilty but would not question the officer who gave the summons. The driver would go to the Hearing Office within 14 days and have a summary hearing. At the hearing the information on the notice to appear is given the same weight as if the officer had appeared and testified. The hearing officer follows the same procedures as would have been followed had the driver requested a confrontation hearing.

Sanctions that could be imposed for committing infractions are:



- referring the errant driver to the traffic safety school;
- monetary sanctions; and
- suspension of the driver's licence.

Basically, the Californian approach has similar characteristics with the approach in New York. Material differences which can be identified are, *inter alia*, in respect of appeals where in New York the ultimate appeal goes to the ordinary courts whereas in California the ultimate appeal goes to the Superior Courts, options of plea where in New York the errant motorist has three options whereas in California the driver has five options of plea.

#### 2.4 THE QUASI-JUDICIAL APPROACH, THE SEATTLE MODEL

In New York the legislature implemented a pure administrative type of adjudication in respect of traffic infractions. The New York state was followed by California, Rhode Island and the District of Columbia. <sup>(15)</sup>

Unlike in other states in the United States, the Seattle adopted a quasi-judicial approach in the adjudication of decriminalized minor traffic offences.

The 1984 Comparative law study by the University of South Africa, <sup>(16)</sup> has a good exposition of the approach in Seattle. According to this approach, all traffic offences remain to be adjudicated by the ordinary courts, but in respect of infractions, use is made of new, time and cost effective

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15 op cit note 2 at 16.

16 op cit note 2 at 13.

procedures, and more stress is laid upon rehabilitation.

The Seattle model for handling minor traffic offences originated in 1974 as a Special Adjudication for Enforcement (SAFE) programme of the National Highway Traffic Safety Administration of the United States Department of Transportation and the Seattle municipal court system. The main objective of the Seattle model is not only to relieve courts of their traffic cases burden, but also to promote road safety through applying the swift, cost effective but fair adjudication to traffic offenders, identifying problematic programmes and removing chronic traffic violators from the roads.

To achieve these ends, use is made of a quasi-judicial form of adjudication which appears to be a modification of the traditional judicial approach and not a replacement thereof. Traffic offenders are informed by mail either that statute demands their appearance before the Traffic Violation Bureau (TVB) or that they have an option to pay by mail or to appear at the Traffic Violations Bureau (TVB) within ten days. Hearings take place before magistrates designated by and working under the supervision of the ordinary court system.

There are two options open to the offender to channel the hearing of their respective cases. They may either schedule an appointment with a magistrate for a definite time, or they may just walk-in. "Walk-ins" are accommodated as soon as possible in addition to scheduled hearings. At the informal hearing the magistrate in chamber reviews the facts of the case with the offender and at the end of it makes a finding. After listening to the facts of the case, the magistrate has three options open. The magistrate may:

- refer the case to court for trial on the basis of insufficient facts to render an undisputed judgment of guilt or innocence;
- find the offender not guilty; or
- find the offender guilty and after considering the defendant's past driving record which is immediately available by video terminal access to state files, sentence him.

In the final analysis, the Seattle model, like the New York approach, has shown to be cost-effective in areas where the ordinary courts are overburdened. The average time spent on a hearing is approximately six minutes. The difference is that the percentage of cases referred to trial under the Seattle model, namely 10%, is considerably higher than the 0,6% of cases taken on appeal from the New York State Traffic Violation Bureau courts of first instance.

These developments on traffic cases have not yet taken place to any mentionable extent in the Republic of South Africa. Until now the Republic of South Africa has relied mainly on the criminal law and the law of criminal procedure for both the adjudication of traffic prosecutions and punishing the guilty. The administrative measures in other countries are aimed mainly at increased driver control and more specifically, at the driving privilege.

## CHAPTER 3

### 3. IDENTIFICATION OF TRAFFIC OFFENCES FOR DECRIMINALIZATION

#### 3.1 INTRODUCTION

In South Africa criminal law courts adjudicate all contraventions according to the law of Criminal Procedure, irrespective of whether they are traffic offences or ordinary crimes. For a period of more than 20 years now, many institutions and persons in South Africa have been conducting research on the decriminalization and administrative adjudication of traffic offences. What has remained is to determine which offences should be decriminalized and which should remain within the realm of the criminal justice system.

The prime motivation for decriminalizing certain traffic offences is to relieve the criminal courts of part of the existing burden imposed on them by traffic law cases. By 1976, classified traffic offences adjudication of which falls under the criminal courts were already 500. <sup>(1)</sup>

Procedural decriminalization of certain traffic offences as proposed in this study, refer to procedural devices whereby the machinery of justice is relieved by administrative sanctions. It is not suggested that crimes in question be simply repealed and the conduct involved condoned. At this stage writers and institutions have not yet come up with clear criteria to

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1 SH Pieterse: *Onderhandelings met die Department van Justisie betreffende 'n onderskeid tussen strafregtelike en nie-strafregtelike gedrag ingevolge Padverkeers Wetgewing RU/16/76* (unpublished) 8.

determine offences for decriminalization. AJ Middleton,<sup>(2)</sup> a well-known proponent for the decriminalization of road traffic offences indicated that what is still necessary is to determine the criteria for decriminalization and acknowledged that an approach to his study would be difficult as there were no existing criteria for decriminalization. It is interesting to note that the same writer earlier on in his article,<sup>(3)</sup> asserted that the lack of moral reprehensibility involved in traffic offences is the reason for the public's attitude that traffic offences are not real crimes. This view was criticised by the Viljoen Commission,<sup>(4)</sup> which also failed to lay down criteria for decriminalization but only indicated that the acceptable basis for decriminalizing offences is the overload of work in the criminal court justice system. The Commission recommended depenalization to reduce overpopulation in prisons. In his literature study, TJ Botha,<sup>(5)</sup> referred to a problem of a large number of traffic offences and could not establish criteria to identify offences which can be decriminalized. He emphasised on the distinction between parking and serious offences.

Sauders and Wiechers<sup>(6)</sup> state that traffic offences which do not contain a serious threat to road safety should be redesigned as mere civil administrative violations.

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2 "Decriminalization of Road Traffic Offences" (1991) 4 SACJ 247—248.

3 AJ Middleton: "Road Traffic and abuse of the criminal sanction" (1974) *THRHR* 159.

4 *Viljoen Commission of Inquiry into the Penal System of Republic of South Africa* (RP 78 of 1976) Government Printer, Pretoria 16.

5 *Literatuur oor die Rol van Verkeersoortredings by Verkeersveiligheid en die Beregtingsproses* (1990) Navorsingsverslag NB/384/90 Pretoria (unpublished) 48 and 57—58.

6 *Traffic Law Reform - A Comparative Law Study* Compiled by the Institute of Foreign and Comparative Law of the University of South Africa as commissioned by the National Road Safety Council, Pretoria (1984) 6.

Although these writers could not determine the criteria for decriminalization in clear terms, their contributions in this field of study which will be referred to later in this chapter, serve as guidelines on the decriminalization of certain traffic offences. In an attempt to identify traffic offences for decriminalization, guidance by the legislature on traffic and other laws was sought, views of writers and surveys by different institutions were studied, and lastly the attitude of our courts on certain traffic contraventions was considered.

### 3.2 GUIDANCE BY THE LEGISLATURE

The majority of road traffic offences are contained in the Road Traffic Act, <sup>(7)</sup> while a few are also to be found in other Acts, municipal by-laws and to a limited extent in our common law. <sup>(8)</sup> Penal provisions in the Traffic Act and procedures for dealing with traffic offences laid down in the Criminal Procedure Act, <sup>(9)</sup> show the degree with which traffic offences are viewed by the legislature.

#### 3.2.1 The Road Traffic Act 29 of 1989

This Act provides for a variety of road traffic offences and their penalties. Such offences are classified into driving offences, <sup>(10)</sup>

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7 Act 29 of 1989.

8 Offences such as culpable homicide and murder could arise from negligent driving of a motor vehicle and intentional conduct from driving of a motor vehicle which leads to the death of a human being. Both culpable homicide and murder are common law offences. In *S v Dube* 1972 4 SA 515 (W) the accused was charged with murder arising from a motor collision.

9 Act 51 of 1977.

10 Ss 120—125 of the Road Traffic Act supra.

offences pertaining to the roadworthiness <sup>(11)</sup> and registration of motor vehicles. <sup>(12)</sup>

Penal powers created by the legislature in the Act, guide us to determine the gravity and the less seriousness of an offence. Violation of traffic rules is prescribed in the Act and its regulations and one section, that is s 149, contains all the penalties arranged according to the varying degrees of seriousness with which the offences are viewed by the legislature.

The maximum penalty, for example, for passing other traffic proceeding in the same direction in a place which could create a hazard to other traffic is a fine not exceeding R24 000 or to imprisonment for a period not exceeding six years or to both such fine and such imprisonment. <sup>(13)</sup>

Driving while under the influence of intoxicating liquor or drug having narcotic effect, or with excessive amount of alcohol in blood, <sup>(14)</sup> is viewed in a serious light by the legislature, because the penalty is a fine not exceeding R24 000 or to imprisonment for a period not exceeding six years or to both such fine and such imprisonment. <sup>(15)</sup>

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11 Ss 57—73 of the Act.

12 S 14 of the Act.

13 S 91 (2) of the Act.

14 S 122 (1) or (2) of the Act.

15 S 149 (1) of the Act.

The most serious category is reserved for the so-called 'hit and run' offences, where a driver, after a collision with another vehicle or a pedestrian, seeks to avoid liability by fleeing the scene and failing to report the accident or to render any assistance. In cases where death or injury has been caused to any person, the maximum fine is R36 000 or to an imprisonment for a period not exceeding nine years. <sup>(16)</sup>

Reckless driving carries the penalty of a fine not exceeding R24 000 or to imprisonment for a period not exceeding six years whereas negligent driving carries a fine not exceeding R12 000 or to imprisonment for a period not exceeding three years. <sup>(17)</sup>

Exceeding speed limits, <sup>(18)</sup> failure to comply with instruction or direction of an Inspector of Licences, Traffic Officer, Examiner of Vehicles or Peace Officer, <sup>(19)</sup> fall into the category of offences with a maximum penalty of R12 000 or three years' term of imprisonment. <sup>(20)</sup> Penalty for an offence in terms of any other provisions of the Act not stipulated in s 149 of the Act, is a fine not exceeding R4 000 or to imprisonment for a period not exceeding one year. <sup>(21)</sup>

The magistrate's court has jurisdiction to impose any penalty

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16 S 149 (4) (a) of the Act.

17 S 120 (1), read with s 149 (5) of the Act.

18 S 85 (4) of the Act.

19 S 12 (1) of the Act.

20 S 149 (3) of the Act.

21 S 149 (6) of the Act.



provided for in this Act. <sup>(22)</sup> Penalties provided for in this Act, serve as guidelines to distinguish between serious and minor traffic offences.

### 3.2.2 The Criminal Procedure Act 51 of 1977

Although prosecutions for traffic offences are adjudicated as criminal offences in courts of law, Criminal Procedure Act, contains provisions aimed at relieving the machinery of justice as far as certain petty offences are concerned. Section 57 of the Act provides for the payment of admission of guilt for petty offences without appearance in court being required. Section 341 allows the compounding of certain petty traffic offences. Compoundable traffic offences as classified under schedule 3 of the Act are:

- driving a vehicle at a speed in excess of prescribed limit;
- driving a vehicle which does not bear prescribed lights, or any prescribed means of identification;
- driving a vehicle which is defective or any part whereof is not properly adjusted, or causing any undue noise by means of a motor vehicle;
- leaving or stopping a vehicle where it may not be left or stopped, or leaving it in a condition not allowed;
- owning or driving a vehicle for which no valid licence is held;

and

- driving a motor vehicle without a driver's licence.

Payment of a fine in respect of compoundable offence has the effect that the offender is not prosecuted and the offence is not taken as a previous conviction against the offender. <sup>(23)</sup>

An admission of guilt in terms of s 57 of the Act, is payable on a summons or a notice to appear in court. The offender is then regarded as having been found guilty of, and sentenced for the offence and it may be held against him as a previous conviction. The magistrate of the district determines an admission of guilt fine. <sup>(24)</sup> Drunken driving, reckless and negligent driving offences are examples of offences in respect of which an admission of guilt is not prescribed due to the seriousness of their nature.

The provisions of ss 57 and 341 of the Criminal Procedure Act, relieve courts in that the accused does not make a court appearance. In this sense one may safely speak of a limited type of procedural decriminalization. Section 57 of the Criminal Procedure Act does not provide an instance of true decriminalization, since the person in question is still regarded as a criminal in that, for record purposes he is "deemed to have been convicted and sentenced by the court in respect of the

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23 S 341 (1) of the Criminal Procedure Act supra.

24 S 57 (5) (a) of the Act.

offence in question.”<sup>(25)</sup>

On the other hand, a person who compounds his offence in terms of s 341 of the Act purchases the privilege not to be labelled a criminal. According to A Rabie,<sup>(26)</sup> compounding of offences may be regarded as a limited kind of decriminalization, because a true decriminalization only occurs when the offence in question is purged from the calender of crimes. and this does not happen here. These provisions of the Criminal Procedure Act do not decriminalize the conduct because should the person in question decide not to pay the admission of guilt fine, or not to compound the offence, the course of criminal justice will follow its normal route through the courts.

The Minister of Justice determines an admission of guilt fine from time to time in the Gazette,<sup>(27)</sup> and the offences for which such determination is made are regarded as petty. Presently the admission of guilt fine does not exceed R1 500 for each offence category. Compoundable offences are determined by the Minister of Justice by notice in the gazette. The Minister may add any offence to the offences mentioned in schedule 3 of the Act or remove therefrom any offence mentioned therein.<sup>(28)</sup>

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25 S 57 (6) of the Act.

26 “Crimes, Offences and Administrative Contraventions” (1978) SACC 20 at 31.

27 The latest Government Notice in which the Minister of Justice determined an admission of guilt fine as an amount not exceeding R1 500 is No. R2332 of 1 December 1993 in Government Gazette No. 5211 of 1 December 1994.

28 S 341 (4) of the Criminal Procedure Act supra.

The legislature has, by these provisions, indicated offences which may not necessarily be adjudicated through the criminal justice. Most traffic offences are disposed of through the procedures provided for either by s 57 or s 341 of the Criminal Procedure Act.

### 3.3 THE VIEWS OF CERTAIN WRITERS AND INSTITUTIONS

More often literature takes a partial stand by demanding that even if the imposition of a sanction is conceivable in traffic offences, it must not be allowed that criminal punishment be used as a sanction. The proclaimers of the policy of decriminalization of traffic cases do however make a distinction between serious and minor traffic offences. The general feeling is that the breach of traffic law commands should not be regarded as a crime that invites criminal sanction.

According to László Viski, <sup>(29)</sup> a breach of traffic law rules does not entail moral censure because anybody who infringes the rules walk in a society with his head held as high as before.

AJ Middleton, <sup>(30)</sup> a great proponent for the decriminalization of traffic offences is of the view that even if the public is well aware that safety provisions in the road traffic legislation are intended for their well-being, and that breaches of such regulations have serious, frequently fatal consequences, it does not regard a traffic offender as a criminal.

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29 *Road Traffic Offenders and Crime Policy*. Akadémiai Kiadó, Budapest (1982) 64—65.

30 *Op cit* 159.

A Rabie, <sup>(31)</sup> supports the idea of excising traffic offences from the calendar of crimes in order to confine criminal law to its proper field. Removing traffic offences from the ambit of the criminal law enables the police and law courts to concentrate on the proper criminal cases which they are called upon to investigate and adjudicate.

MGT Cloete, <sup>(32)</sup> indicates that the majority of road users prefer to pay admission of guilt and spot fines rather than to appear in court. If they appear in court, the actual imposition of punishment by a court is generally, considerably lighter than the maximum permissible sanctions. According to his observation, traffic violations and law enforcement are regarded as of lesser importance and eventually seen as harassment which the road-user has to tolerate. He has also noted that punishment imposed on violators of serious traffic offences does not have the desired effect. A discussion on the attitude of our courts on traffic cases later in this chapter will support his observations.

László Viski, <sup>(33)</sup> has taken a stand against the idea of complete decriminalization of the traffic law or its relegation to administrative law in its totality. According to this writer, instead of decriminalizing traffic law in totality, acts should be re-categorised by the sanctions to be applied. This sanction-orientated approach would mean categorization of traffic acts into those which need criminal sanction on one hand and those which need administrative sanction on the other.

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31 Op cit 34.

32 "Perception of Traffic Law Enforcement" (1988) *ACTA Criminologica* (1) 11 at 14.

33 Op cit 81.

JP Economos and another, <sup>(34)</sup> argue that traffic offences should not be regarded as crimes because the public generally does not consider most traffic violations as criminal acts and most violators of traffic laws consider it inappropriate to be treated in the same way as petty criminals.

Wolf Middendorf, <sup>(35)</sup> is of the view that with minor cases, the aims of criminal justice are most likely realised through modelling proceedings on the simplified way. Simplified proceedings in traffic cases would yield good results if conducted before an administrative authority. In grave cases the ordinary criminal procedure should be retained.

AJ Middleton, <sup>(36)</sup> has given guidance on the classification of traffic offences into those which call for criminal sanction and those which need administrative sanctions. According to Middleton, offences such as reckless driving and driving under the influence of liquor or drug with narcotic effect, warrant criminal sanction as a sanction of first instance. Driving without a valid driver's licence and driving a vehicle which is not validly licensed are examples of offences which though remaining within the main body of criminal law, do not warrant criminal sanction as a sanction of first instance but as a sanction which should only be applied after other sanctions have failed. As regards offences such as driving or operating a defective vehicle, an administrative sanction should be employed through insisting that the annual application for the vehicle

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34 *Traffic Court procedures and Administrations*. American Bar Association, Chicago 2nd edition 1983 17 and 28.

35 *The effectiveness of punishment especially to Traffic Offences*. Fred B Rothman & Co South Hackensack (1968) 116.

36 *Op cit* 167.

licence be accompanied by a roadworthy certificate. The offences which are presently committed through failure to comply with the rules of the road and regulatory road signs could be replaced by a single prohibition against dangerous driving or obstructing the flow of traffic. To such offences he advocates the introduction of the accrual of demerit points in accordance with a point demerit system as applied in most western countries.<sup>(37)</sup>

This writer has tried to identify traffic offences which need administrative sanctions through his classification. He has introduced licence-based sanction and accrual of demerit points in certain categories of traffic offences. In my view, licence-based sanction on the driving of defective vehicles will not succeed in avoiding hazardous situation in our roads if applied in isolation because licence fees are paid annually and while waiting for the licensing period, the defective vehicle would be on the road. Licence-based sanction could successfully be used as a sanction of last resort for the errant motorists who could not be traced after violating traffic law. This sanction can therefore not be confined to defective vehicles only but to all traffic offences to track down the errant motorist.

Many institutions and persons conducted research on traffic law and made recommendations for the reform of traffic law. The New York University<sup>(38)</sup> made a study on "The effectiveness of punishment especially in relation to traffic cases" and recommended that in as far as traffic offences are

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37 In the United States of America, "points demerit" system won a wide approval in 1954. In Canada driving violations were reduced by half within six months of the introduction of point system in 1960. (South African Roads Board project Report 192/90 on "The registration, employment and proving of previous convictions including the implementation of a point or offences count system within NaTIS") CSIR, Pretoria (unpublished report.) It is a system whereby each traffic offence has a fixed number of penalty points associated with it.

38 *Publication of the Comparative Criminal Law Project.* New York University (1968) 115.

concerned, two types of proceedings should be distinguished. On one hand there are proceedings in the less serious or minor cases in which the interests of the community can be safely allowed to prevail and on the other hand, there are proceedings in the grave or more serious cases which call for the severe penalty, and in such cases the rights of the individual require every possible protection. Rights of individuals referred to in this study may properly be protected through proper enquiries which are adequately done in courts of law. Therefore offences which call for severe penalty should be dealt with through criminal courts.

The University of South Africa <sup>(39)</sup> has made a comparative law study on "Traffic law Reform" and recommended that decriminalization of minor traffic offences would require their re-classification as mere administrative violations, the elimination of imprisonment as a penalty option in respect of them, and the introduction of administrative sanction, notably through driver's licensing procedures. <sup>(40)</sup> Application of criminal law should be confined to such forms of road behaviour which seriously affect road safety. Traffic offences which do not contain a serious threat to road safety should be re-designed as mere civil administrative violations.

The NorthWestern University Traffic Institute <sup>(41)</sup> on its study on the "Illinois Traffic Court" has given an example of minor traffic violations which need to be decriminalized as illegal left turn, failure to yield and

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39 op cit note 6.

40 To identify habitual errant motorists, the Department of Transport in its report on Dekriminalisasie van Verkeersoortredings (1992) recommended the introduction of a card system to keep record of each driver (unpublished report) 15.

41 *The Illinois Traffic Court Study*. National Centre for State Courts (unpublished report) (1992) 38.



controlled traffic signal violations. L Oosthuizen <sup>(42)</sup> in his study on "Certain aspects concerning traffic offences in the Republic of South Africa" (my English translation) indicates that there are essentially two types of traffic offences, namely: those where court appearance is obligatory and those where spot fines or admission of guilt fines are permissible and a court appearance not obligatory. This classification could assist the proponents for decriminalization to recommend that all traffic offences in respect of which admission of guilt fines and spot fines are prescribed be decriminalized. My submission is influenced by the finding in this study that 88% of all traffic offences consist of those violations in respect of which admission of guilt fine and spot fines have been prescribed.

SH Pieterse <sup>(43)</sup> in his report on the "Dealings with the Department of Justice on the distinction between criminal and non-criminal conduct in terms of Road Traffic Legislation" (my English translation), has indicated that the normal criminal case list is suffering as a result of an overload of traffic cases in courts. He suggests that a partial solution could be found in the re-classification as non-criminal of those traffic offences which are essentially administrative. He referred to all non-moving violations such as certain motor vehicle defects, parking offences and those offences where the violator is entitled to pay an admission of guilt fine. According to this author such decriminalized traffic law offences should be handled by licensing authorities. His reasoning is that by removing such offences from the criminal law, accident generative offences will be highlighted and the

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42 *Sekere aspekte betreffende verkeersoortredings in die Republiek van Suid-Afrika* CSIR (RU/3/75) Pretoria (unpublished report) (1975) 3.

43 *Op cit* 8—9.

desired deterrent effect of criminal sanction will increase.

Decriminalization as suggested by AJ Middleton <sup>(44)</sup> would not apply to matters in respect of which an admission of guilt fine is not presently payable. Thus serious offences and matters where orders other than the unconditional payment of a fine is allowed would not be included. He further indicated that no penalty other than a fine would be contemplated in respect of offences so decriminalized.

In his thesis Dr Botha <sup>(45)</sup> indicates that in less serious traffic offences, moral reprehensibility is absent and that, that is the reason why traffic offenders are not regarded as criminals. The aim of punishment which is deterrent cannot be attained in respect of minor traffic offences. He recommends that suitable administrative sanctions should be determined and implemented, namely, administrative fines, disqualification from the right to use the road, probation and alternative behavioural control techniques. The writer here is emphasizing the driver-control measures which, in my view, should be the ultimate aim of administrative sanctions so that at the end of the day we should have rehabilitated controllable road users.

The Department of Justice has since long been considering the decriminalization of minor statutory offences. During collaborations with the Department of Justice in connection with the decriminalization of parking offences and the collection of comments in 1988, <sup>(46)</sup> Advocate

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44 Op cit 253.

45 *Die vaartbelyding van die Strafprosedere vir meer doeltreffende Verkeersadministrasie*. Proefskrif ter vervulling van die vereistes vir die graad Ph D aan die Universiteit van Kaapstad, September 1990 69.

46 TJ Botha: *Collaborations with the Department of Justice in connection with Decriminalization of Parking Offences and the collection of comments*. Technical Note NB/197/88 CSIR February 1988

Noeth stated that the Minister of Justice wishes that non-moving traffic offences be removed from courts, and further that the complex procedures followed in criminal courts suit ordinary criminal offences such as theft, robbery and many others, not non-moving traffic offences. At the same meeting Advocate Botha indicated that the number of moving traffic offences committed in South Africa was 4 billion per year and that the number of parking offences was twice as much per year. He estimated the number of prosecutions for such offences as only 3 million. According to Advocate Botha, it is not the Department of Justice alone which is overburdened, but also other traffic law enforcement agencies. In 1993, the Minister of Justice, in terms of s 3 of the Decriminalization Act, <sup>(47)</sup> appointed an Advisory Committee, <sup>(48)</sup> to advise him on the feasibility of decriminalizing certain traffic offences.

According to SH Pieterse, <sup>(49)</sup> the move to decriminalize is not a new one. He refers to the situation in the United States of America where by 1973 in at least six states, legislation existed providing for a "less than criminal" classification of certain traffic offences and where other states amounting to six in number seriously considered establishing a non-criminal violation category. His recommendations that in South Africa adjudication of serious traffic offences should remain under the jurisdiction of existing court system and that the decriminalized traffic offences be handled by licensing

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(unpublished.)

47 Act 107 of 1991.

48 The Committee was appointed in terms of Government Notice No, 119 of 4 February 1993 in Government Gazette No, 14567, and the appointment was announced in a press release of 1 February 1993. ("The Star" 2 February 1993.)

49 Op cit 9.

authorities sounds considerably proper.

In the final analysis one finds that these writers and researchers have common motivations for removing certain traffic offences from the criminal justice system which may be summarised as the lack of criminality element in such offences, public perceptions that errant motorists are not criminals, over-crowding of cases in criminal courts which militates against the proper and efficient handling of criminal cases, and the lack of the deterrent effect of criminal sanctions for minor traffic contraventions on errant motorists.

They are *ad idem* that certain traffic offences are serious and can be properly handled if left in the criminal courts. Negligent driving, reckless driving and drunken driving were given as examples of offences which should not be removed from the criminal justice. The feeling is that non-moving offences such as certain motor vehicle defects, parking offences, compoundable offences and offences in respect of which the violator is allowed to pay admission of guilt fine, should be decriminalized.

These authorities could not determine the criteria in terms of which offences for decriminalization could be easily identified from other offences. They base categorization of offences in terms of sanctions to be imposed, for example, offences for which admission of guilt fine is payable, and those for which only a fine as a punishment can be imposed. What is of essence is to establish criteria and not listing the offences for decriminalization because as traffic legislation changes constantly we might be without a final list.

Contributions made by these authorities give one an idea of which offences

may be decriminalized and those which should remain in the criminal justice system.

### 3.4 THE ATTITUDES OF OUR COURTS

The attitudes of our courts towards traffic offences could well be illustrated by judgments given and sentences imposed in respect of certain offences. Generally, the tariff which is usually given for traffic offences is one of fairly nominal fine with the alternative of a short period of imprisonment. This does not apply to minor traffic offences only, punishment in respect of serious traffic offences seems not to have the desired effect.

MGT Cloete,<sup>(50)</sup> correctly states that in most cases where an admission of guilt fine is fixed, the majority of road users prefer to pay that fine and spot fines rather than appear in courts.

The attitudes of our courts can be illustrated by few examples given in this study.

In *R v Brorson*,<sup>(51)</sup> the accused was convicted for driving under the influence of liquor. It was stated that driving under the influence of liquor is regarded as one of greatest social evils from which the country is suffering. The question is whether our courts view this offence in a serious light like other ordinary crimes? In *S v Lombard*,<sup>(52)</sup> the accused was convicted of drunken driving. Williamson JA made the following

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50 Op cit 14.

51 1949 (2) SA 819 (T) 820.

52 1967 (4) SA 538 (A) 545C.

comments:

“I feel, however, that in regard to an offence of the nature of which the appellant was convicted, an offence involving foolish irresponsibility and negligence rather than criminality - the procedure of periodical imprisonment would in many cases be appropriate.”

This is a clear indication that our courts do not regard traffic offences as crimes for they lack the element of criminality in them. This view is well illustrated in *S v Nagel*,<sup>(53)</sup> quoted earlier in chapter 1 of this work where the accused was convicted of drunken driving and sentenced to six months' term of imprisonment. On appeal against the sentence, a remark was made by Ludorf J that a person who is guilty of reckless driving or of driving under the influence of liquor: “is nie 'n misdadiger in die gewone begrip van daardie woord nie. Hy is nie 'n dief of 'n rower nie.” (is not a criminal in the true sense of the word. He is not a thief or a robber.) (My English translation.)

The attitudes of our courts in sentencing traffic offenders may also be seen in some cases of reckless and/or negligent driving. In *Nkosi's* case,<sup>(54)</sup> the magistrate had sentenced the accused to six months' imprisonment for negligent driving. On review the sentence was altered to a fine of R60 or sixty days' imprisonment.

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53 1970 (2) SA 483 (T) 484B.

54 1972 (4) SA 542 (N).

In *S v Mantile*,<sup>(55)</sup> the appellant was convicted of reckless driving and was sentenced to nine months' imprisonment. His driver's licence was also suspended for six months. He noted an appeal against the sentence. In this case the appellant had overtaken a truck in the face of the complainant's oncoming vehicle, notwithstanding that he had to cross a no-overtaking barrier line in order to do so. As a result there was a partially head-on collision, although fortunately no one was seriously injured. AJ Davies in the course of delivering a judgment stated:

"The sentencing of errant motorists who have been convicted of reckless driving in circumstances pointing to a flagrant disregard for the safety of other road users is no easy matter. On the one hand there are the factors personal to the accused and the fact that such a person is not *a criminal in the everyday sense of that word; he is not a rapist or a robber or a thief*, (my italics) and a goal sentence condemns him to association with people of that ilk. On the other hand, there are the interests of the public to consider. It is unfortunately true that this type of reckless driving, involving the crossing of no-overtaking barrier lines on curves or rises to the great danger of oncoming traffic is very rife. In one's own experience hardly any journey on the National road passes without witnessing one or more instances of such utter recklessness."

The judge further stated that:

"However, I am satisfied that there is no purpose to be served by imposing a lengthy prison sentence. A short, sharp lesson is what is required \*...".

A sentence of nine months' imprisonment was reduced to one month's imprisonment. The circumstances of the case and the seriousness of the offence committed deserve more severe sentence than the one imposed

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55 1985 (1) SA 651(TK) at 653H and 654D.

here. This clearly shows the attitude of our courts to traffic offences.

An offence of exceeding a speed limit is not regarded as a serious offence by courts. Some very low fines have been imposed for speeding. In *S v Dawson*,<sup>(56)</sup> the accused was fined R1 or four days' imprisonment. In *S v Motaung*,<sup>(57)</sup> the accused had been sentenced to R6 or six days' imprisonment for travelling at a speed of 82 kmph in a 60-kmph-zone. A more recent example of a sentence for speeding is in *S v Wells*<sup>(58)</sup> where the accused received a fine of R60 or thirty days' imprisonment for speeding at the rate of 137 kmph through a 120-kmph-zone.

In view of the above illustrations, it would be proper to remove petty traffic offences from our criminal courts. Our courts approach traffic cases differently from when they approach ordinary crimes. The general attitude is that traffic offences are not crimes, hence the lenient sentences imposed by our courts. From these illustrations one may apply the sanction-orientated approach in terms of which the previous sanctions serve as a guideline to separate petty traffic offences from those which are serious. If minor traffic offences are to be decriminalized it is necessary that they be re-classified as mere administrative violations and imprisonment as a penalty option be eliminated and that administrative sanction be introduced.

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56 1990 (1) SACR 401 (T).

57 1972 (4) SA 687 (O).

58 1990 (1) SA 816 (A).



## CHAPTER 4

### 4. THE ENFORCEMENT OF ROAD TRAFFIC LAWS

#### 4.1 INTRODUCTION

The complete role of law is to lay down rules, administer and police their application, adjudicate alleged offenders and impose sanction on those found guilty. To achieve these ends there should be agencies to enforce that law.

M Kreml as quoted by Fisher and Reeder <sup>(1)</sup> states that traffic law like any body of law, is sterile unless it is inherently sound and supported by effective enforcement machinery. Traffic law in South Africa is effected through legislation, traffic control and policing and adjudication. In this chapter, a brief exposition is given of organs involved in the traffic law enforcement, traffic law enforcement measures in other countries and perceptions on traffic law enforcement from various quarters.

#### 4.2 ENFORCEMENT ORGANS IN SOUTH AFRICA

##### 4.2.1 Legislation

The legislation defines and specifies correct or incorrect road users' behaviour. Since the Road Traffic Act of 1989 <sup>(2)</sup> was approved and systematically implemented, attention has been given to a number

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1 *Vehicle Traffic law* published by the Traffic Institute, North Western University, Evanston Illinois (1974) 26,

2 Act 29 of 1989.

of amendments that have extensive positive implications for orderly road traffic. Section 7A of the Act provides for the creation of a National Road Traffic Law Enforcement Committee, which advises the Minister of Transport on the law enforcement and other related issues. Another remarkable amendment is a requirement that each driver is obliged to have a driver's licence available for inspection at all times. <sup>(3)</sup> According to HJ Kriel <sup>(4)</sup> the enforcement's ultimate aim is to reduce accidents and create effective traffic control through voluntary compliance by road users with traffic legislation.

#### 4.2.2 Traffic Policing organs

Traffic policing in South Africa is executed by officials known as traffic officers, police officers and military police. Besides enforcing all legislation pertaining to crimes under the common law and other Acts, police officers are empowered by their Act to enforce road traffic legislation within the ordinary course of their general duties. <sup>(5)</sup> Road collisions that resulted in death or serious injuries are investigated by the South African police. Police dockets are also opened for the investigation of very serious traffic offences, such as driving under the influence of intoxicating liquor, failing to stop after a road collision, forgery and counterfeiting of a driver's licence and many others.

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3 S 215 of the Act.

4 *Problems experienced by Local and Provincial Authorities in the enforcement of road safety measures*, National Institute for Road Research, South Africa, Internal Report R4/11/74 October 1974 1. (unpublished)

5 S 5 of the Police Act 7 of 1959.

Military police, on the other hand, enforce legislation relating to military activities, as well as, *inter alia*, road traffic legislation in respect of roads in military areas of jurisdiction or military vehicles on public roads. <sup>(6)</sup>

The Road Traffic Act <sup>(7)</sup> provides for the appointment of traffic officers, <sup>(8)</sup> traffic wardens, <sup>(9)</sup> parking attendants, <sup>(10)</sup> examiners of driver's licences, <sup>(11)</sup> examiners of vehicles, <sup>(12)</sup> and inspectors of licences. <sup>(13)</sup>

In terms of s 11 of the Act, traffic officers, besides acting as inspectors of licences, perform functions such as: ordering drivers to stop vehicles inspecting, testing any part and functioning of the vehicle; ascertaining dimensions, load or mass of the vehicles; temporarily forbidding any person who, by reason of physical or mental condition, is not capable of driving a vehicle; regulating and controlling traffic upon any public road; requiring particulars of any person suspected of having committed an offence in terms of the Act; impounding any document or demanding production of any

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6 Paragraph 28 of the Code of Conduct under the Defence Act 44 of 1957.

7 Supra note 2.

8 S 3 (1) (a) (iv).

9 S 3 (1) (a) (v).

10 S 133 (1) (c).

11 S 3 (1) (a) (iii).

12 S 3 (1) (b) (iii).

13 S 3 (1) (b) (i).

document prescribed in terms of the Act; inspecting any vehicle of an operator in the premises in which it is kept, inspecting any motor vehicle and impound any document where it is found that the engine or chassis number of such motor vehicle differs from the engine or chassis number as specified in the document; and demanding from an owner or operator of a motor vehicle police clearance in respect of the vehicle before it could be taken across the borders of the Republic of South Africa. The list of functions of traffic officers mentioned is not exhaustive.

Traffic wardens are appointed by a local authority to exercise or perform such powers and duties of traffic officers within an area under such local authority.<sup>(14)</sup> The Act makes provision for the local authority to appoint parking attendants. However the Act neither describes a "parking attendant" nor does it stipulate the powers and duties of such official. In most cases, parking attendants enforce parking regulations. They are not authorised to enforce any other traffic rules.

The duty of an examiner for driver's licences is to test any applicant for a learner driver's licence to determine whether such applicant is fit and competent to obtain such licence for the class of vehicle for which the application was made.<sup>(15)</sup> An examiner of vehicles inspects, examines and tests any vehicle to determine whether it is

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14 S 3 (1) (d).

15 S 10 (1).

roadworthy.<sup>(16)</sup>

In addition to the duties performed by a traffic officer, an inspector of licences may, by notice in writing, direct the owner, operator or driver of the vehicle not complying with requirements for a roadworthy certificate, to produce such vehicle for examination or testing, and also cause any instructor to produce evidence of registration as an instructor.<sup>(17)</sup> To perform such duties the traffic officer should have an appointment as an inspector of licences. In *S v Makela*<sup>(18)</sup> it was held that a person should have been specifically appointed as an inspector of licences before that person could perform duties as such and that it must be proved in court that the officer was appointed as such.

Traffic officers employed by local authorities enforce road traffic legislation as well as the by-laws of such local authority as "peace officers" in terms of s 334 (1) of the Criminal Procedure Act.<sup>(19)</sup> They may act against any offence under any law committed within the area of jurisdiction of the local authority by which they are employed.

A "Synthesis of South African Practice in Traffic Law

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16 S 9 (1).

17 S 8.

18 1974 (2) SA 423 (1).

19 51 of 1977.

Enforcement”<sup>(20)</sup> report shows that traffic officers may patrol city centres of urban areas on foot to enforce parking regulations and also on motor cycles and motor vehicles to ensure proper traffic flow and to combat moving violations. Residential areas in urban areas are patrolled in order to curtail moving violations, make the public aware of the presence of the law enforcement agency, identify forsaken vehicles, check conditions of road signs and road marking, and in most cases, follow-up complaints. Rural areas are patrolled by inspectors or traffic officers of the provincial authority only.

As their *modus operandi*, traffic enforcement personnel erect road-traffic checkpoints for the purpose of checking the roadworthiness of vehicles and to combat drunken driving. At checkpoints, aspects such as overloading, speed checking, safety belts, vehicle and driver licensing and the use or misuse of minibuses are attended to. In smaller traffic departments, the assistance of the South African Police and Provincial inspectors is obtained.

Checkpoints may be erected to uncover a broad spectrum of crime. In such cases checkpoints are erected as a combined exercise between the South African police, the South African National Defence and the traffic department. This exercise is usually carried out at or near schools, or at intersections where existing traffic control mechanisms are inadequate to deal with the large volume of peak-hour traffic.

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20 The Division of Roads and Transport Technology, CSIR, Pretoria, Synthesis Report No. 589/3 March 1989 42—45. (unpublished).

Pursuit or hot pursuit of traffic violators may also be resorted to in order to enforce traffic laws. Abandoned vehicles may be towed away to open the roadway in order to obtain or restore proper traffic flow. The towing of vehicles causing an obstruction or hindering traffic flow, especially during peak-hours is regarded as one of the most effect means of enforcing parking or stopping regulations. <sup>(21)</sup>

A report prepared by an Organisation for Economic Co-operation and Development Research Group, <sup>(22)</sup> indicates that one of the final steps in a series of possible enforcement action is taken by the courts. The power of the courts forms an integral part in the traffic law enforcement system. Courts interpret the law, determine guilt and take appropriate action to improve road user behaviour, rather than offending drivers permanently. The report recommends that certain decriminalization of traffic laws would seem to be normal and that there should be a system which provides for two systems to run concurrently, namely, one traditional penal system for more serious traffic offences and the other must be an expeditious administrative procedure for minor cases. It is further indicated in this report that if apprehension, conviction and punishment are not quick and inevitable, many criminologists believe that the severity of punishment alone is apt to have little effect. <sup>(23)</sup>

The total risk on the part of an individual road user is the product of

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21     ibid.

22     *Research on Traffic Law Enforcement: Effects of the Enforcement of Legislation on road user behaviour and traffic accidents*, Paris (1974) 11.

23     at 19.

three components, namely: the chance of detection when committing an offence, the chance of prosecution after detection, and the chance of a penalty after prosecution. Effective enforcement secures all these three components.

Dr TJ Botha <sup>(24)</sup> correctly states that road behaviour of motorists is determined *inter alia* by the chance of apprehension for traffic offences and the chance to have a traffic prosecution finalised. According to his observation, prosecution statistics show that traffic prosecution by far dominates the number of general prosecutions. As a result, more than one million prosecutions are never finalised and a further one million are only finalised with great effort.

#### 4.2.3 Adjudication: Sentencing the motoring offender

Effective law enforcement must be backed by effective legal process in court. Law enforcement on its own, without the committed and enthusiastic support of the country's judicial system, is almost a futile effort.

Courts play an important role in the enforcement of traffic laws. After determining guilt of the offender, courts pronounce the appropriate action to be taken to punish the offender. One of the factors which should not be undermined when imposing a sentence is the interest of society. In *R v Karg* <sup>(25)</sup> Appeal Judge Schreiner

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24 *Beregting: 'n Vaartbelynde verkeersberegtingstelsel*, Vervoer inligting buro, DPVT, WNNR Pretoria (unpublished) 1.

25 1961 (1) SA 231 (A).



expressed himself in strong terms that it was not wrong that the natural indignation of interested persons and the community at large should receive some recognition in the sentences that courts impose, and that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may be tempted to take the law into their own hands. On the other hand, whenever any sentence is imposed, it becomes most important that every individual case should be closely scrutinised and that no general yardstick should be employed. <sup>(26)</sup>

According to H J Kriel <sup>(27)</sup> the objective of the sanction component of the traffic law system is to ensure that risk-generated behaviour does not occur. This objective is achieved both by imposing sanctions on drivers who have been adjudicated as guilty of having violated traffic law and by deterring others through the threat of possible sanctions. Now the main question is how effective the objective of the sanctions implemented by the courts is and whether the criminal sanction is an effective deterrent against future offenders.

Roger Hood <sup>(28)</sup> correctly states that magistrates are faced with a dilemma. They are pressed by both the motorists and pedestrians to regard traffic offences as a serious threat to the safety of

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26 *R v Poeyzn* 1947 (2) SA 262 (K). Punishment must fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances — *S v Khumalo* 1973 (3) SA 697 (A).

27 *Toepassing van Padverkeerswet gewig en regsbedeling*, National Instituted for Road Research, South Africa 1974, Internal Report (RU/6/74), Pretoria (1974) 14. (unpublished)

28 *Sentencing the motoring offender*, A study of magistrates' views and practices, Heinemann Publishers, London, 97.

thousands of people and their motorcars. It is widely believed that firm law enforcement and effective action by the courts can make drivers more responsible and careful and remove the dangerous ones from the road.

If one looks at examples of sentences imposed in courts for traffic offences it is discouraging to note that for those who appear in courts, the actual imposition of punishment by courts is generally considered lighter than the maximum permissible sanction. Even in as far as serious traffic offences are concerned, punishment seems not to have the desired effect. One would expect our courts to be influenced by the maximum penalties for traffic offences provided for in the traffic legislation.

During the era of the ordinances in respect of each province in South Africa, <sup>(29)</sup> maximum penalties were fixed at, for example, a 'fine of R800 or two years' imprisonment for reckless driving, <sup>(30)</sup> a fine of R400 or one-year-term of imprisonment for negligent driving, <sup>(31)</sup> inconsiderate driving, <sup>(32)</sup> and for driving a motor vehicle while the concentration of alcohol in blood exceeds a statutory limit (when concentration of alcohol is not less than 0,08 gram per 100 millilitres of blood). <sup>(33)</sup> For driving a motor vehicle on a public road while

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29 The repealed Road Traffic Ordinances 21 of 1966.

30 S 138 (1) of the Ordinance.

31 Supra note 45.

32 S 139 of the Ordinance.

33 S 140 (2) of the Ordinance.

under the influence of intoxicating liquor or a drug having a narcotic effect, a maximum fine of R800 or two years' imprisonment was fixed. <sup>(34)</sup>

Against this background, one finds that even for an offence such as driving under the influence of liquor which is regarded as one of the major causes of traffic accidents in all industrialized countries, our courts are reluctant to impose severe sentences. Despite reports of horrific traffic accidents the fine limit for traffic offences remained the same for more than two decades. The legislature cannot escape a blame for such delayed reaction to put traffic legislation current with the prevailing situations in our roads.

In *S v Maseko*, <sup>(35)</sup> the accused who was a first offender on a charge of driving under the influence of liquor was sentenced to six months' imprisonment which was wholly suspended for three years on certain conditions. It was stated that the proper punishment for a first offender should not have been one of imprisonment without the option of fine or at best without the suspension of the imprisonment.

In *S v Hodgert*, <sup>(36)</sup> the accused who had three previous convictions for driving under the influence of liquor was fined R200 or in default of payment of the fine 100 days' imprisonment and in addition 80 days' imprisonment conditionally suspended for three years.

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34 S 140 (1) of the Ordinance.

35 1972 (3) SA 348 (T).

36 1974 (1) SA 63 (N).

In *S v Lombard*,<sup>(37)</sup> on appeal the court did not interfere with the sentence of three months' imprisonment for driving under the influence of liquor where the accused had a previous conviction thereof. These sentences display a tendency of leniency on traffic cases on the part of our courts.

In *S v van Zyl*,<sup>(38)</sup> for reckless driving the accused was sentenced to a fine of R100 or 90 days' imprisonment, and 60 days' imprisonment conditionally suspended for three years. In *S v Hein*,<sup>(39)</sup> the accused was found guilty for driving without reasonable consideration for another road user and was sentenced to a fine of R30 or thirty days' imprisonment.

In view of the high death toll in our roads resulting from collisions, the legislature after twenty two years decided to review penalties for traffic offences and increased the maximum sentences for traffic offences in terms of the Road Traffic Act.<sup>(40)</sup> Penalties for traffic offences are provided for in s 149 of the Act. For example the maximum sentence for driving under the influence of liquor is a fine of R24 000 or six years; imprisonment,<sup>(41)</sup> for the so-called "hit and run" where death of a human being resulted is a fine of R36 000 or

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37 1967 (4) SA 538 (A).

38 1969 (1) SA 553 (A).

39 1976 (2) SA 397 (O).

40 supra note 2.

41 S 149 (2) Road Traffic Act supra.

nine years' imprisonment,<sup>(42)</sup> for reckless driving, a fine of R24 000 or six years' imprisonment,<sup>(43)</sup> for negligent driving, a fine of R12 000 or three years' imprisonment.<sup>(44)</sup>

Despite severe sentences provided for in the Act, our courts still impose lenient sentences. In *S v Malala*,<sup>(45)</sup> the accused was convicted of driving a motor vehicle with the concentration of alcohol in blood in excess of the statutory limit.<sup>(46)</sup> In terms of s 149 (2) of the Act, the maximum sentence for such offence is R24 000 or six years' imprisonment. The magistrate sentenced the accused to a fine of R900 or six months' imprisonment.

In *S v Ntlele*<sup>(47)</sup> the sentence of R1 500 or six months' imprisonment imposed by the magistrate for driving a motor vehicle with alcohol in blood exceeding the statutory limit was altered on review to eight months' imprisonment, wholly suspended on certain conditions. The reasons for reducing the sentence on review were the personal circumstances of the accused, that he was a first offender and has low income.

In *S v More*<sup>(48)</sup> the accused was sentenced to a fine of R300 or three

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42 S 149 (4) (a) of the Act.

43 S 149 (5) (a) of the Act.

44 S 149 (5) (b) of the Act.

45 1993 (2) SACR 573 (O).

46 Contravening s 122 (2) (a) of the Road Traffic Act supra.

47 1993 (2) SACR 610 (W).

48 1993 (2) SACR 606 (W).

months' imprisonment for negligent driving. On review the sentence was reduced to a fine of R100 or two months' imprisonment. The court considered the personal circumstances of the accused and his source of income. In *S v Madliwa* <sup>(49)</sup> the appellant was convicted of negligent driving and was sentenced to four months' imprisonment. In addition his licence was suspended for six months. He noted an appeal against sentence but as he failed to appear personally or through counsel in the hearing, the court felt that the sentence was severe and dealt with it under its powers of review. His negligence consisted in making a U-turn in a street when it was not safe for him and caused a collision. The appellant was a first offender with five children to support. On review the court found the appellant's personal factors mitigating against a prison sentence and decided that a substantial fine could serve as deterrent. The court altered a sentence of four months' imprisonment to R400 or twenty days' imprisonment and the suspension of driver's licence was set aside as it was found not mandatory for negligent driving.

Examples which have been given relate to serious traffic offences and the sentences imposed cannot easily convince the road user that non-compliance with traffic legislation placed the offender in an unfavourable position in relation to a self-accepted risk of severe punishment.

#### 4.3 TRAFFIC LAW ENFORCEMENT IN OTHER COUNTRIES

Most countries have introduced different systems to improve road traffic management. For parking offences, they have introduced immobilisation, wheel clamping and removal of vehicles, and for the rest of traffic offences, they have introduced points counting system best known as “point demerit” system. According to L Oosthuizen,<sup>(50)</sup> “point demerit” system is a method of evaluating drivers’ records by assessing different weights in terms of a number of points to various traffic violations committed by them within a given time period and to base a subsequent action on the accumulation of a specific number of points. This system has been designed to improve the driving behaviour. Although the main objective of these systems is to attain effective management of road traffic, countries have different approaches to achieve the same goal.

##### 4.3.1 Immobilisation, wheel clamping and removal of vehicles

In London, traffic laws are enforced by police, traffic wardens and parking attendants.<sup>(51)</sup> The London Road Traffic Act of 1991 has provided for the decriminalization of offences committed in contravention of orders in permitted parking places such as meter bays and residents’ bays. Such areas are controlled by parking attendants to the exclusion of police and traffic wardens. However, in areas outside such permitted parking places, offences would

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50 *The point demerit system as a means of improving driver behaviour.* Internal Report by National Institute for Road Safety, South Africa R4/8/75 (1975) 4. (unpublished)

51 *Traffic in London: Traffic Management and Parking Guidance.* Local authority circular 5/92 dated 26 August 1992, issued by the Department of Transport, published by HMSO publication centre, London (1992) 48—49.

remain subject to criminal law. The Road Traffic Act of 1991 gives local authorities new powers in relation to wheel clamping and removal. Local authority parking attendants issue charge notices and authorize wheel clamping and removal of the vehicles for parking offences. The release fee is prescribed by the Home Secretary and currently stand at £38-00 plus a fixed penalty for an offence committed as reflected in the notice. Motorists who feel they should not have been clamped may apply for refund or argue the matter in court.

The London Police have found wheel clamping action to be the most effective deterrent against illegal parking and have found removal action to make the greatest contribution to improving traffic movements. These sanctions require owners or drivers to pay the penalty charge they have incurred, at the discounted rate if payment is made within 14 days, before they can recover their vehicles or have them released from wheel clamp.

In Columbia the immobilisation of vehicles is for infractions such as parking in a non-parking zone, continued parking after the allotted time on the parking meter has expired or parking in a parking bay at a parking meter at a time not allowed, such as during peak hours.

<sup>(52)</sup> A vehicle would be immobilised if two consecutive citations had been given for the same parking infraction and if both citations were past due. Payment of citation is due within 15 days of its issue. As soon as payment of two consecutive citations for the same infraction

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52 Tile 40, Motor Vehicles and Traffic Code, District of Columbia Code 1981 edition.



has become overdue, the registered owner of the vehicle is informed that the vehicle will be immobilised. Immobilisation of a vehicle renders the owner liable to the payment of a fine of \$50-00 in addition to the fine due for each of the original infractions.

#### 4.3.2 “Point demerit” System

Each of the fifty states of the United States has its own traffic laws and a state police or highway patrol for the enforcement of traffic laws. The position in the United States was explained by Robert H Rheeder at “Robot Symposium” in 1975.<sup>(53)</sup> He indicated that in the United States, municipalities of any size have a Police department which enforces the traffic laws. Each state has a Motor Vehicle Department which performs functions such as re-issuing, suspending or revoking or withdrawing a driver’s licence. There is a law for each state which provides that for any traffic case handled by the magistrate or a court, the clerk of court must within ten days send off a report of conviction for every item entered against the driver.

A point demerit system was introduced in the United States in order to pinpoint the habitually reckless or negligent drivers. Such drivers are pointed out so that they could be given a particular kind of attention. This system won wide approval in the United States in 1954 although it had been in operation in the state of Connecticut since 1947. By 1958 twenty six American and Canadian states had

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53 *The road user and the law*, a paper delivered at a Comprehensive Proceedings Symposium on law enforcement and road safety, published by NRSC, Pretoria (1975) 3—7.

adopted the system.

A report by the South African Roads Board Research and Development Advisory Committee, <sup>(54)</sup> gives a good exposition of how point demerit system generally operates. It indicates that as a method of driver improvement, this system operates on the principle of allotting a number of points to certain traffic offences (most moving violations) according to their gravity. Action is taken after a certain predetermined number of points has accumulated. This action usually involves a letter warning the driver that he has to improve his driving, an interview with the driver in order to discuss his driving record, re-examination of the driver's ability to drive, and as a last resort, the suspension of the driver's licence for a specified period. The ultimate aim is to remove those people from the roads who are unable to improve their driving to ensure the safety of other road users.

In Ontario, Canada, driving violations were reduced by half and the number of collisions on the roads dropped from a total of 195 a day to 51 within six months of the introduction of the point demerit system.

In New Zealand the number of demerit points is 40 for drunken driving, reckless driving, dangerous driving and 25 for careless or inconsiderate driving. When a driver has accumulated 60 points, the

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54 *The registration, employment and proving of previous traffic convictions including the implementation of a point or offence court system within NaTIS, South African Roads Board Research and Development Advisory Committee, Project Report 192/90, CSIR, Pretoria, (unpublished) (1990) 2.1 — 2.3.*

Ministry of Transport will advise and warn that driver of the consequences should further points be received. When the driver has accumulated 75 points, a senior traffic officer conducts an interview in an attempt to help the driver improve his driving habits. If the driver accumulates 100 points within one year, he is disqualified from driving for six months.

L Oosthuizen <sup>(55)</sup> indicates that Japan has been applying a point demerit system since 1968. In Japan the system provides for a suspension or withdrawal of the licence of a driver who has accumulated a certain number of points within three years. In South Carolina, since 1955, the system has been operating consistently. A driver who accumulates 6 points gets a letter of caution from the Highway Department. After the driver has accumulated 12 points, the Highway Department issues a notice by registered mail that the driver's licence has been revoked or suspended. A driver whose licence has been revoked or suspended has to surrender the licence to the Department within ten days failure of which the driver could face a penalty of \$100 fine or thirty days term of imprisonment. <sup>(56)</sup>

In Indiana a survey was conducted to obtain public reaction to the system which is operated there. The report <sup>(57)</sup> indicates that more than three thousand drivers were questioned and most of them were found to be favourably disposed towards the system. Most drivers

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55 op cit 110.

56 ibid 8.

57 op cit note 29 at 2.27.

regarded it as a fair system which makes drivers more careful.

From examples given, a point demerit system appears to be a reliable and fair basis for authorising driver improvement actions and a tool for the administrator to carry out the principles established for driver improvement programmes. It also provides drivers with a standard for improving their driving habits prior to reaching the level that would identify them as frequent or habitual offenders thereby becoming subject to licence suspension or revocation.

It is clear that traffic law enforcement measures such as wheel clamping and removal of the motor vehicle are effective tools for parking offences. The point demerit system serves as a driver controlling mechanism for other traffic offences excluding parking offences. The effectiveness of this system is quite admirable. A question which could naturally follow is whether the same system could successfully apply in the current South African traffic law set up.

#### **4.3.3 Obstacles on the introduction of "point demerit" system in South Africa**

The success of the point demerit system in other countries makes it critically essential to consider introducing it in South Africa. The Committee of Inquiry into the Efficacy of Traffic Law Enforcement

in the Republic of South Africa <sup>(58)</sup> discovered that there is a multitude of problems which could frustrate the effective functioning of the point system in South Africa. This assessment is corroborated by Dr Botha who states that there is no effective driver-control in South Africa. <sup>(59)</sup>

For the system to be effective it has to be ensured that there is a link between the identity of the driver and the driver's record. According to the Criminal Procedure law, <sup>(60)</sup> this is traditionally done by means of fingerprints. The Committee of Inquiry referred to earlier reveals that in most cases fingerprints are not taken for traffic offences and therefore the keeping of a collision register becomes useless. The proof of previous convictions, where admission of guilt fines were paid, is problematic where the accused denies his record and it has to be proved. In terms of the latest Supreme Court ruling, <sup>(61)</sup> the original case record must be submitted in this connection. Records are destroyed by the Department of Justice after a period of between 2 months and 7 years and are thus not always available for the proof of previous conviction which is necessary for the implementation of the point demerit system. <sup>(62)</sup>

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58 *Report of the Committee of inquiry into the efficacy of traffic law enforcement in the Republic of South Africa*, (PR 60/92), NSRC, Pretoria (1991) 24. (unpublished).

59 *Obstacles in the way of a point demerit or conviction count system in the Republic of South Africa. The present lack of driver control*. Technical Note (NB 449/91) (unpublished) 2.

60 S 37 of the Criminal Procedure Act supra note 19.

61 *S v Long-distance (Metal) Pty Ltd* 1990 (2) SA 277 (A).

62 op cit note 33 at 24.

According to Dr Botha <sup>(63)</sup> not all licensed drivers are recorded in the central register in South Africa. Lack of strict control of licensed drivers gives the way for forgeries and counterfeits. Dr Botha estimated that there were 1 million unlicensed drivers in 1990. He indicates that the system in which the Department of Home Affairs issues identity documents, makes it possible for one to have more than one document. If the applicant has a driver's licence, each of the documents would contain a driver's licence. In that case the suspension or revocation of driver's licences will not serve any purpose because the driver will use a spare copy of the driver's licence. This is one of the cornerstone problems which makes the driver-control mechanism impossible.

An observed weakness in the present traffic law enforcement system in South Africa is that it puts more emphasis on the apprehension of the individual violator rather than introducing measures which would in the long run control driver-behaviour and traffic flow to avoid further malfunctions on the road.

In my view the introduction of point demerit system in South Africa is long overdue. The authorities are faced with a challenge of introducing a mechanism whereby driver control techniques could be applied. Until such time that every road user becomes his own control officer, traffic violations will continue to increase. The point demerit system could serve as a sword hanging over the head of each motorist.

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63 op cit 3 — 9.

#### 4.3.4 Towing away and impounding of vehicles in South Africa

Traffic departments in South Africa, working on an administrative plane can tow away and impound injudiciously parked vehicles. This non-criminal sanction has proved to be a remarkably efficient deterrent to motorists. <sup>(64)</sup>

#### 4.4 PERCEPTIONS ON TRAFFIC LAW ENFORCEMENT

Many perceptions have been raised on the enforcement of road traffic legislation. According to MGT Cloete, <sup>(65)</sup> a traffic offence, unlike ordinary crimes, does not conflict with the moral feelings of the people.

NW Hiemstra <sup>(66)</sup> is of the opinion that members of the public do not see traffic offences as the cause of most traffic accidents. They view an accident as an 'act of God' or an event that 'just happens'. It is therefore difficult for the public to become outraged over an event which one views as being uncontrollable and a result of fate. With these beliefs, traffic law enforcement becomes a nuisance and cannot have an impact on the driving community.

The way in which traffic law enforcement agencies formulate and apply their policies is also to blame for a negative perception towards the system. If the enforcement action is not risk-related and the execution thereof not based on sound road safety and law enforcement principles, it becomes completely unacceptable to the road user. When chances of being caught

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64 AJ Middleton: "Road Traffic and abuse of the criminal sanction" *THRHR* May 1974 159 at 161.

65 "Perception of traffic law enforcement" *Acta Criminologica* (1) (1988) 11.

66 *Injury control in traffic safety*. Springfield, Illinois, Charles & Thomas publisher (1970) 5.

for traffic offences become low, a situation of deliberateness on the part of the road users arises. MGT Cloete <sup>(67)</sup> has correctly stated that in the majority of traffic cases, the road user is fully aware that he is committing an offence and risks the chance that he will not be observed.

The general public's attitude towards law enforcement is a negative one. They regard the traffic officer as a persecutor and not as someone who promotes road safety. They view the enforcement of traffic laws as a means to generate revenue, especially as it emphasises on the apprehension of the individual violator rather than prevention prior to the violation. In many instances law enforcement takes recourse to methods of surveillance from concealed positions and the use of equipments which are not easily visible. These measures lead to antagonism and suspicion from the public that it is nothing more than a money making operation unrelated to traffic safety. <sup>(68)</sup>

According to HJ Kriel <sup>(69)</sup> a further aspect that influences the public's negative perception on the adjudication of traffic cases is the complexity of traffic laws. The convenient and necessary fiction that every man is presumed to know the law, is seldom a hardship where conduct is morally reprehensible. Where conduct is morally neutral, such as in traffic cases, it is essential that its unlawfulness should be brought strongly to the notice of the public. This view is supported by MGT Cloete <sup>(70)</sup> who states that ignorance of why traffic law is enforced, the way it is done and the necessity thereof, more often create a faulty impression and a negative perception.

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67 op cit 13.

68 ibid.

69 op cit note 4 at 13.

70 op cit 13.



Members of the public cannot be expected to read each Provincial Gazette to be up to date with all the amendments to the road traffic laws. There are instances where an unsuspecting motorist is presented with a summons and taken to court for breaching a regulation which he never imagined existed. <sup>(71)</sup>

The system is often referred to as a 'dog law', because when training a dog and being unable to communicate with it, one simply waits until it does something of which he does not approve and then hit it. <sup>(72)</sup>

As an example, basic concepts such as "public road", "driver" and "motor vehicle" have taxed the courts' power of interpretation. In *S v van Rooyen*, <sup>(73)</sup> the accused discovered in court to his amazement, that pushing a car was the same thing as driving it, with dire consequences if one happens to be intoxicated at the time. Likewise, the most surprising places, including privately owned beaches have turned out to be public roads within the ambit of the traffic law. <sup>(74)</sup>

Lawlessness on our roads may also be attributed to the road users' attitude towards each other. E Spoerer as referred to by MGT Cloete <sup>(75)</sup> outlines man's attitude towards other road users. He states that behind the wheel practically every driver is both judge and executioner in as far as the real or imagined offences of other road users are concerned. Every other

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71 op cit note 39 at 162.

72 HJ Kriel: *Enforcement of road traffic legislation and the administration of justice*, Internal Report (RU/6/76), Pretoria NIRR 13. (unpublished).

73 1968 (1) SA 641 (T).

74 *S v Rabie* 1973 (2) SA 305 (O).

75 op cit note 65 at 15.

driver is individually labelled and classified, judged and sentenced. This self-appointed executioner, labels the other driver as 'dunce', 'stupid', someone who should 'have his head examined' or who 'bought his driver's licence at a shop counter'. This self-appointed judge regards himself as the only normal and sane driver on the road. More damage has resulted on our roads from this bad attitude.

Traffic law enforcement organs such as police officers and traffic officers blame courts for inefficacy on the enforcement. A research conducted in Paris in 1974 <sup>(76)</sup> shows that police are usually unhappy with having to spend time in courts testifying on traffic offences which, in their opinion, are treated too leniently.

Traffic officers are also perturbed by the fact that they have to contend daily with the public's disrespect for traffic law and that judicial officers are too sympathetic to accused persons who had committed gross violations of traffic laws and too many cases are withdrawn by public prosecutors. <sup>(77)</sup>

The perceptions raised call for a mechanism which would create a more positive awareness and attitude for an effective traffic law enforcement. Both the legislature and the traffic law enforcement organs on one hand and the driving community on the other are partly to blame for the inefficacy in which law enforcement finds itself at present.

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76 op cit note 22 at 11.

77 TJ Botha, *Die Kommissie van ondersoek na die struktuur en funksionering van die howe onder the voorsitterskap van sy edele Regter Hoexter*. Die getuienis van Advokaat TJ Botha in sy private hoedanigheid. NIRR, CSIR, South Africa, (RU/12/81) 75. (unpublished).

## CHAPTER 5

### 5. STATISTICS

#### 5.1 INTRODUCTION

The statistical data arranged for presentation in this chapter were obtained through the study of the existing literature, questionnaires circulated to different law enforcement organs and information obtained from certain institutions. By analysing the following statistics one will be able to know the volume of work arising from traffic cases and also the road safety situation in South Africa. Statistics presented here are in respect of prosecutions for traffic offences, traffic cases in courts and road safety in South Africa.

#### 5.2 PROSECUTIONS FOR TRAFFIC OFFENCES

In his thesis<sup>(1)</sup> Dr Botha indicated that there is no central register yet for traffic offences in South Africa, and therefore statistical data shown are based on estimations.

Dr Botha gave a figure of prosecutions in respect of different types of offences for the year 1989.<sup>(2)</sup> On the following table a distinction has been made between prosecutions in terms of ss 54, 56 and 341 and the Criminal

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1 "Die Vaartbelyning van die Strafprosesreg vir meer doeltreffende verkeersadministrasie". Proefskrif ter vervulling van die vereistes vir die graad Ph.D aan die Universiteit van Kaapstad September (1990) 88.

2 *ibid*

Procedure Act. <sup>(3)</sup>

**Table 1**

Prosecutions made in terms of	Number of prosecutions in 1989	Total in percentage
S 54 of the Act	453 503	9,5%
S 56 of the Act	2 164 059	47%
S 341 of the Act	2 177 515	49%
TOTAL	4 795 077	100%

Source: TJ Botha, 2

From this table it appears that prosecutions in terms of s 54 of the Criminal Procedure Act are minimal and a high percentage of prosecutions is in respect of ss 56 and 341 of the Act.

The following table shows an increase in traffic prosecutions. This is shown by comparing figures of prosecutions in respect of each province in 1972 and prosecutions figures in 1989. <sup>(4)</sup>

**Table 2**

	1972	1989	Percentage
Transvaal (TPA)	179 520	532 968	+ 196,8%
Cape Province (CPA)	66 122	86 188	+ 30,3%
Natal (NPA)	49 442	176 499	+ 257,0%
Orange Free State (OFS)	27 766	106 265	+ 282,7%
TOTAL	322 850	901 920	+ 179,4%

Source: TJ Botha, (1990) 4

3 supra

4 TJ Botha, Statistics of Traffic prosecutions in 1989, Roads and Transport Technology, CSIR Technical Note NB/382/90, Pretoria, August (1990) 2. (unpublished).

The above figures show a high increase in the traffic prosecutions within a period of seventeen years.

To study the volume of work flowing from traffic departments to courts and the traceability of errant motorists, a questionnaire was circulated to the traffic departments of South African cities of Cape Town, Johannesburg, Bloemfontein and Pretoria. The following tables show statistical data based on responses from those administrations respectively:

**Table 3(a) TRAFFIC DEPARTMENT : CAPE TOWN**

<b>STATISTICS</b>				
<b>Years</b>	<b>1990</b>	<b>1991</b>	<b>1992</b>	<b>1993</b>
Number of notices or citations issued: (Number of prosecutions)	357 725	386 940	364 940	336 702
Number of cases taken to court	67 373	65 087	65 663	56 734
Number of warrants of arrest issued	36 475	32 993	31 021	29 862
Number of warrants of arrest executed	2 895	1 934	2 295	2 179
Number of warrants of arrest unexecuted	7 754	7 789	8 749	8 786
Hours spent in courts by traffic officers	Impossible to assert			

**Table 3(b) TRAFFIC DEPARTMENT : JOHANNESBURG**

<b>STATISTICS</b>				
<b>Years</b>	<b>1990</b>	<b>1991</b>	<b>1992</b>	<b>1993</b>
Number of notices or citations issued: (Number of prosecutions)	480 525	519 046	405 095	465 540
Number of cases taken to court	172 480	130 557	199 585	283 156
Number of warrants of arrest issued	57 600	93 160	98 279	98 911
Number of warrants of arrest executed	84 203	81 051	77 438	40 935
Number of warrants of arrest unexecuted	3 397	6 970	12 841	46 233
Hours spent in courts by traffic officers				

**Table 3(c) TRAFFIC DEPARTMENT : BLOEMFONTEIN**

<b>STATISTICS</b>				
<b>Years</b>	<b>1990</b>	<b>1991</b>	<b>1992</b>	<b>1993</b>
Number of notices or citations issued: (Number of prosecutions)	154 134	162 864	108 718	117 370
Number of cases taken to court	37 277	44 704	53 570	46 534
Number of warrants of arrest issued	16 070	19 398	20 045	19 988
Number of warrants of arrest executed	10 932	8 992	11 023	9 069
Number of warrants of arrest unexecuted	3 340	4 121	3 216	2 799
Hours spent in courts by traffic officers				

**Table 3(d) TRAFFIC DEPARTMENT : PRETORIA**

<b>STATISTICS</b>				
<b>Year</b>	<b>1990</b>	<b>1991</b>	<b>1992</b>	<b>1993</b>
Number of notices or citations issued: (Number of prosecutions)	288 044	354 418	419 594	306 956
Number of cases taken to court	13 000	24 593	35 195	32 030
Number of warrants of arrest issued	6 500	Not available	7 400	9 150
Number of warrants of arrest executed	650	Not available	740	915
Number of warrants of arrest unexecuted	2 600	Not available	2 960	3 660
Hours spent in courts by traffic officers	Not available			

The statistics shown are a clear indication of problems facing traffic departments on the enforcement of traffic laws. Many warrants of arrest are issued but few are executed. The traceability rate of errant motorists is very low.

### 5.3 TRAFFIC CASES IN COURTS

A number of traffic cases in magistrates' courts are mainly based on notices issued in terms of s 56 of the Act. <sup>(5)</sup>

The following table shows a number of prosecutions made in terms of s 56 of the Act in 1989.

**Table 4 (1)**

Type of offence	No. of prosecutions in terms of s 56 of the Act	Percentage
Speed	742 279	34,3%
Other moving offences	499 898	23,1%
Defects in motor vehicles	486 913	22,5%
Registration and licensing of motor vehicles	82 234	3,8%
Driver's licences	75 742	3,5%
Parking	71 414	3,3%
Municipal by-laws on traffic	112 531	5,2%
Municipal by-laws not on traffic	38 953	1,8%
Other offences	54 100	2,5%

**Source: TJ Botha (1990) 5**

From this table it is clear that speeding offences are higher than other offences in respect of which prosecutions could be conducted in terms of s 56 of the Act. Second to speeding offences are other moving violations and defects on motor vehicles. The table also shows that 3% of prosecutions in terms of s 56 of the Act are parking offences. A large number of ss 56 and 341 of the Act offences are being dealt with administratively through admissions of guilt and compounded fines or withdrawals.

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5 op cit note 1 at 139.

Dr Botha <sup>(6)</sup> shows payment of fines for 1989 as follows:

**Table 4 (2)**

S 54 of the Act prosecutions	357 616
S 56 of the Act prosecutions	1 300 719
S 341 of the Act prosecutions	849 230
<b>TOTAL</b>	<b>2 507 565</b>

**Source: TJ Botha, 6**

In his thesis, <sup>(7)</sup> Dr Botha pointed out that approximately 60% of all criminal cases recorded in the criminal case register at the Department of Justice are traffic prosecutions. In more than 90% of these cases, the accused failed to appear, and therefore more than 95% of traffic cases are only dealt with administratively. He estimated that more than one third of all prosecutions in respect of traffic offences, are not finalised due to the untraceability of the offenders.

In his report, <sup>(8)</sup> Dr Botha showed that in 1989 traffic cases gave rise to about 126 000 cases in which court appearance on notice to appear, summons or arrest took place. But during the same year court appearances occurred in a further 261 000 traffic cases on warrants of arrest where the accused originally neglected to pay their traffic fines or to appear in court in the first instance, mostly pleading guilty with no evidence led by the state. Warrants of arrest had been authorised and issued in 950 000 traffic cases for non-appearance of which more than 613 000 were not executed

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6 op cit note 4 at 6.

7 op cit 88.

8 *Obstacles in the way of a point demerit or conviction count system in the RSA —The present total lack of driver control.* Road Transport Technology CSIR, Technical Note NB 449/91, Pretoria (1991) 8. (unpublished).



and cases ended unfinalised. More than 632 000 traffic prosecutions were withdrawn by public prosecutors in 1989. The above analysis shows the volume of traffic prosecutions flowing to courts.

To verify information obtained from the existing literature a questionnaire was circulated to few magistrates' courts. The aim of the questionnaire was to get statistics for traffic cases reaching our courts. The following tables show the impact of traffic cases on the volume of work in magistrates' courts.

**Table 4 (3) QUESTIONNAIRE  
MAGISTRATE COURTS : DURBAN**

<b>STATISTICS</b>				
<b>Years</b>	<b>1990</b>	<b>1991</b>	<b>1992</b>	<b>1993</b>
Number of traffic cases entered	20 749	21 207	23 851	27 768
Number of other cases entered	38 688	55 330	33 650	39 742
Total number of cases entered (Traffic cases included)	59 437	76 537	57 501	67 510
Number of court appearances on traffic	18 097	14 303	15 223	19 941
Number of admission of guilt entered (Traffic cases)	2 206	4 918	7 547	7 343

Table 4 (4)

**QUESTIONNAIRE  
MAGISTRATE COURTS : CAPE TOWN**

<b>STATISTICS</b>				
<b>Years</b>	<b>1990</b>	<b>1991</b>	<b>1992</b>	<b>1993</b>
Number of traffic cases entered	33 460	34 278	38 331	38 425
Number of other cases entered	21 997	20 987	23 565	22 883
Total number of cases entered (Traffic cases included)	55 457	55 265	61 896	61 308
Number of court appearances on traffic	7 113	7 203	7 901	8 530
Number of admission of guilt entered (Traffic cases)	62 567	62 389	58 491	57 556

Table 4 (5)

**QUESTIONNAIRE  
MAGISTRATE COURTS : BLOEMFONTEIN**

<b>STATISTICS</b>				
<b>Year</b>	<b>1990</b>	<b>1991</b>	<b>1992</b>	<b>1993</b>
Number of traffic cases entered	37 277	44 704	53 570	46 534
Number of other cases entered	17 571	7 961	17 764	7 286
Total number of cases entered (Traffic cases included)	54 848	52 665	71 274	53 820
Number of court appearances on traffic	Not available			
Number of admission of guilt entered (Traffic cases)	65 190	70 085	102 088	84 496

**Table 4 (6) QUESTIONNAIRE  
MAGISTRATE COURTS : PIETERMARITZBURG**

<b>STATISTICS</b>				
<b>Years</b>	<b>1990</b>	<b>1991</b>	<b>1992</b>	<b>1993</b>
Number of traffic cases entered	22 030	20 389	20 154	22 544
Number of other cases entered	16 792	15 635	15 198	12 802
Total number of cases entered (Traffic cases included)	38 822	36 024	35 352	35 346
Number of court appearances on traffic	Not available			
Number of admission of guilt entered (Traffic cases)	54 630	35 511	39 098	37 967

**Table 4 (7) QUESTIONNAIRE  
MAGISTRATE COURTS : PRETORIA**

<b>STATISTICS</b>				
<b>Years</b>	<b>1990</b>	<b>1991</b>	<b>1992</b>	<b>1993</b>
Number of traffic cases entered	Not available		44 676	52 228
Number of other cases entered	Not available		16 022	14 754
Total number of cases entered (Traffic cases included)	51 834	59 535	60 698	66 982
Number of court appearances on traffic	± 5%	± 5%	± 5%	± 5%
Number of admission of guilt entered (Traffic cases)	99 845	108 830	103 332	105 782

The above statistics show that the volume of work in courts is mainly increased by traffic cases.

A study was also made of the Annual Reports for the Department of Justice of the former Republic of South Africa for a period of four years. The following table shows the general statistics of cases for the years 1990 to

1993.

**Table 4 (8) DEPARTMENT OF JUSTICE ANNUAL REPORTS**

<b>STATISTICS</b>				
<b>Years</b>	<b>1990</b>	<b>1991</b>	<b>1992</b>	<b>1993</b>
Criminal cases entered	2 210 862	2 215 274	2 368 280	2 534 353
Admission of guilt entered	2 461 208	2 571 939	2 599 991	2 432 815
Processes issued by other bodies	2 360 017	2 251 183	2 281 738	2 151 533

The above table shows a high number of processes issued by other bodies, which in practice are mainly composed of traffic prosecutions.

The Department of Justice is considering decriminalizing minor statutory offences,<sup>(9)</sup> and on that basis one can only assume that the courts are now overloaded and that the time has arrived to relieve the criminal courts of part of their burden.

#### 5.4 ROAD SAFETY IN SOUTH AFRICA

Inefficiency in the law enforcement is one of the factors causing anarchy on the roads. The following tables show the national collisions and injuries figures arising from accidents on the road covering a period of ten years:

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9 AJ Middleton "Decriminalization of road traffic offences" (1991) SACJ 247 at 251.

**Table 5 (1) NATIONAL COLLISION FIGURES**  
**COLLISIONS PER DEGREE OF SERIOUSNESS**

YEAR	FATAL	SERIOUS	SLIGHT	DAMAGE	TOTAL
1985	7 692	17 034	46 572	297 887	369 185
1986	8 075	17 985	50 855	295 752	372 667
1987	8 431	19 168	53 235	306 314	387 148
1988	9 016	20 411	58 058	330 999	418 484
1989	9 061	20 815	59 383	345 504	434 763
1990	9 174	20 446	59 393	344 274	433 287
1991	9 222	21 711	60 495	353 113	444 541
1992	8 378	20 205	55 221	345 681	429 485
1993	7 936	20 445	56 291	349 357	434 029
1994	8 140	22 594	60 199	377 064	467 997

**Table 5 (2) NATIONAL COLLISION FIGURES**  
**INJURIES PER DEGREE OF SERIOUSNESS**

YEAR	FATAL	SERIOUS	MINOR	TOTAL
1985	8 972	25 998	67 715	102 685
1986	9 343	27 302	75 565	112 210
1987	9 905	29 282	78 506	117 697
1988	10 691	31 134	85 157	126 983
1989	10 877	32 227	84 281	127 385
1990	11 157	32 343	87 273	130 773
1991	11 069	34 765	90 612	136 446
1992	10 142	32 792	83 470	126 404
1993	9 470	33 555	85 130	128 155
1994	9 981	36 548	91 892	138 421

**Source:** Statistics compiled by the South African National Road Safety Council (NRSC) Pretoria 1995. (unpublished).

At a traffic safety conference in 1991, P O'Brien delivered a paper, <sup>(10)</sup> in

10 "The Institute of Traffic Officers' perception of the traffic safety situation — solutions to the problem". A paper delivered at the Traffic Safety Conference, Department of Transport June (1991) 2 (unpublished).

which he compared the statistics of collisions in 1989 with those of 1990.

The following table shows his findings:

**Table 5 (3)**

	<b>1989</b>	<b>1990</b>
All collisions	434 935	433 287 -
Fatal collisions	9 061	9 174 +
Serious injury collisions	20 816	20 446 -
Slight injury collisions	59 383	59 393 +
No injury collisions	345 675	344 274 -

**PERCENTAGE VARIATIONS IN COLLISIONS**

	<b>1989</b>	<b>1990</b>
Total		- 0,4%
Fatal		+ 1,2%
Serious		- 1,8%
Slight		0,0%
No injury		- 0,4%
Persons killed	10 877	11 154 +
Persons seriously injured	32 230	32 343 +
Persons slightly injured	84 281	87 373 +
Persons killed per 100 fatal collisions	20	21,62 +
Casualties	127 388	130 773 +

**Source: P O'Brien (1990) 10**

Road accidents are increasing at an alarming rate. Collisions on the roads are doing more harm to the welfare of the community. One need not lose sight of the loss of life, pain, suffering and a large scale of financial loss

engendered by accidents on the roads.

JR Odendaal <sup>(11)</sup> correctly states that road accidents are common occurrences with millions of accidents being reported and observed annually throughout the world, yet there is still a lack of understanding amongst so-called road specialists, researchers and the public at large as to why accidents occur and what action is required to reduce them.

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11 Road accident causation, Road Safety Topics Course, Road Transport technology, CSIR, Pretoria, June (1974)1 (unpublished).

## CHAPTER 6

### ASPECTS OF THE LAW OF CRIMINAL PROCEDURE AS THEY AFFECT LAW ENFORCEMENT

#### 6.1 RELEVANT PROVISIONS

The Criminal Procedure Act, <sup>(1)</sup> provides means for instituting prosecutions and adjudication of prosecutions for traffic offences. To institute prosecutions for traffic offences, summons, <sup>(2)</sup> warrants of arrest <sup>(3)</sup> and the written notice to appear in court, <sup>(4)</sup> are issued.

Although traffic offences in South Africa are generally adjudicated as criminal offences in criminal courts, the Criminal Procedure Act provides for the payment of compounded fines <sup>(5)</sup> and the admission of guilt fines. <sup>(6)</sup>

##### 6.1.1 Prosecution for traffic offences

###### (i) Warnings

Although there is no statutory provision authorizing traffic officers to issue either verbal or written warnings to traffic offenders, traffic officers sometimes issue warnings. Warnings are usually issued for

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1 51 of 1977.  
2 S 54 of the Act.  
3 S 55 of the Act.  
4 S 56 of the Act.  
5 S 341 of the Act.  
6 S 57 of the Act.



less serious traffic offences and in places where a new project has been introduced in order to enlighten the public about the new procedures or legislation. <sup>(7)</sup> A study has shown that many traffic departments make use of warnings in verbal or in written form.

(ii) Arrests

Section 40 of the Act, provides that any Peace Officer is entitled to arrest an offender who committed an offence for which such a Peace Officer is authorised to be a Peace Officer. A traffic officer may arrest any offender in respect of any violation of the law. Where an accused commits an offence for which an admission of guilt is payable, no arrests are necessarily made, but a notice to appear in court may be issued.

A report <sup>(8)</sup> indicates that arrests are made only in respect of the more serious traffic offences such as driving under the influence of intoxicating liquor, car theft, offences for which no admission of guilt fines have been determined by the local magistrate, reckless driving, providing a false name and or address, possession of forged and counterfeited driver's licence, or in cross-border traffic cases between the various states where it would not be possible to secure the appearance of the accused in court through written notice.

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7 *A Synthesis of South African Practice in Traffic law Enforcement.* National Transport Commission Report, Division of Roads and Transport Technology, CSIR Pretoria, (1989) 25.

8 *ibid* 27.

(iii) Summons

Summons as a method of securing attendance of accused in magistrate's court is issued in terms of s 54 of the Act. The purpose of summons is to secure the attendance of the accused for a summary trial in a lower court. The issuing of summonses is formally the task of the clerk of the court at the request of the public prosecutor. In traffic cases, summonses are issued in cases where compounded fines have not been paid by the offender or where a fine is in excess of the amount determined by the Minister from time to time by notice in the gazette.<sup>(9)</sup> The Act requires that a summons be served on an offender personally or on someone older than sixteen years at the residential address or address of employment.<sup>(10)</sup> However, the Road Traffic legislation,<sup>(11)</sup> provides for summons or notice to be served either personally upon the person to whom it is addressed or be sent by registered post to the offender's last known address which could appear in a register of drivers' licences or in a register of motor vehicles.

The proper serving of summonses for traffic offences is one of the biggest problems facing traffic departments in South Africa due to shortage of manpower. The prescribed procedure entails that someone has to physically take each summons to the address of the accused. These physical actions are laborious and have become the

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9      ibid 26.

10     S 54 (2) of the Act.

11     The Road Traffic Act, 1989 (Act 29 of 1989) s 147 (1) thereof.

greatest burden on traffic departments in view of the vast number of prosecutions for traffic offences.

(iv) Warrants of arrest

Where an accused fails to appear either on summons or on written notice, a warrant of arrest is issued. <sup>(12)</sup> The Criminal Procedure Act provides for a two-phase-procedure for the accused who failed to appear. <sup>(13)</sup> The first phase is for the court to investigate whether the summons was properly served in which case the court will rely on the return of service of the serving official. Should the court doubt the accuracy or effectiveness of the service thereof, it may require further evidence before concluding that proper service took place.

In *S v Du Plessis* <sup>(14)</sup> it was held that if there is doubt in the court's mind that proper service of the summons occurred, the court issues a warrant of arrest to the accused. This happens in the absence of the accused.

The second phase comes into play when the accused appears in court under the warrant of arrest. The court now *mero motu* summarily enquires into the reasons for failure to appear. The onus is on the accused to show on a balance of probabilities that his failure was unattended by guilt on his part. If the accused admits receipt of the summons and offers no excuse for failure to attend, the

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12 S 55 of the Act.

13 S 55 (2) of the Act.

14 1970 (2) SA 565 (E) at 564E-F.

court will convict him and impose an appropriate sentence. It is therefore obvious that where a summons was sent by post, which is the practice of many traffic authorities in South Africa, a warrant of arrest may not easily be authorized and that in most cases, results in charges being withdrawn. Generally only warrants of arrest based on failure to appear in terms of s 56 of the Act are successfully authorized because the offender would have been issued with a written notice at the spot where the traffic offence is committed when he is present and available.

Warrants of arrest have to be executed by an authorized official who has to look for the accused and physically detain him. In view of the vast number of prosecutions for traffic offences, the task has become so extensive that it no longer can be properly executed. As a result, most errant motorists remain untraceable.<sup>(15)</sup>

(v) Written notice to appear in court

Written notices to appear in court are issued in terms of s 56 of the Act, by traffic officers on the spot where a traffic offence is committed and the offender is present and available. The written notice procedure is intended for minor offences. It is used in cases of offences where the traffic officer is of the opinion that a magistrate will not impose a fine in excess of the amount determined by the Minister from time to time by notice in the gazette.<sup>(16)</sup> All particulars

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15 National Transport Commission Report (1989) op cit 30.

16 The Minister of Justice has determined an amount of R1 500 in respect of s 56 (1) of the Criminal Procedure Act in the Government Notice R2332 in Gazette 15308 of 1 December 1993.

of the accused, the offence allegedly committed, and the date, time and place where the offender must appear in court should be reflected on the face of the notice. The notice offers the accused the option of paying a set of admission of guilt fine not in excess of the amount determined by the Minister in the gazette. A copy of notice, called "control document", is sent to the clerk of the court with jurisdiction and is upon production *prima facie* proof of service of the original upon the accused. A warrant of arrest is authorized and issued in respect of an accused who neither pays the admission of guilt fine nor appears on the date of the court hearing in accordance with the notice. Only a Peace Officer may issue a written notice to appear.

(vi) Written notifications in respect of compoundable offences

A notification in writing is issued by a Peace Officer in terms of s 341 of the Act for certain minor offences mentioned in schedule 3 of the act. The notification calls upon the person who has committed any of the listed offences to pay an amount of fine which a court trying such person would probably impose in respect of the offence committed. Such fine has to be paid within thirty days of the receipt of the notice. "Compounding consists in unlawfully and intentionally agreeing for reward not to report or prosecute a crime other than one which is punishable by fine only." <sup>(17)</sup>

## 6.1.2 Adjudication of prosecutions for traffic offences

### (i) Compounded fines

Compounded fines are paid in respect of notifications issued in terms of s 341 of the Act. Compoundable offences are mentioned in schedule 3 of the Act. They are determined by the Minister by notice in the gazette. Traffic violations constitute the highest percentage of compoundable offences. Compounded fines are mostly paid at local authorities under whose jurisdiction the offence was committed. Payment of such a fine upon receipt of such notification, has the effect that the offender is not prosecuted and the offence is not taken as a previous conviction against the offender. A person issued with a notification may within thirty days of the receipt thereof deliver or transmit the notification together with a sum of money equal to the amount determined therein to the magistrate of the district or area in which the offence is alleged to have been committed. In cases where such fine is paid at the local authority, a copy of notification relating to the payment of fine is within seven days forwarded to the magistrate of the district or area wherein the offence is alleged to have been committed.<sup>(18)</sup> The amount to be specified in any notification in respect of compoundable offences is determined from time to time for any particular area by the magistrate of the district within which that area falls.<sup>(19)</sup> If the magistrate, on receipt of the notification of payment, finds that the

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18 S 341 (2) and (c) of the Criminal Procedure Act.

19 S 341 (5) of the Act supra.

amount specified therein exceeds the amount determined for the offence in question, he notifies the local authority in question and the amount of such excess is refunded to the person concerned. <sup>(20)</sup>

In my view, although the payment of fines in respect of compoundable offences reduces the overload of the courts in traffic cases, the magistrate is still involved in determining the amount of fines, receiving payments made at local authorities and controlling the process administratively. In case of unpaid compounded fines, summonses are issued against defaulters in terms of s 54 of the Act. That would result in defaulter appearing in court in respect of the compoundable offences committed.

(ii) Admission of guilt fines

In terms of s 57 of the Act, an admission of guilt fine is payable on a summons or a notice to appear in court.

The general purpose of s 57 of the Act is to get rid of unnecessary and time-consuming court appearance of an accused who is prepared to admit guilt by paying an admission of guilt fine.

In *S v Shange*, <sup>(21)</sup> it was stated that the whole spirit of s 57 of the Act is the creation of a speedy and simple procedure to dispose of admission of guilt cases without engaging the attention of the courts.

The effect of paying an admission of guilt fine is that the accused is

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20 S 341 (2) (d) of the Act.

21 1983 (4) SA 46 (N) at 49E.

excused from court appearance. The offender is then regarded as having been found guilty of, and convicted for the offence and sentenced by the court in respect of the relevant charge and it may be regarded as previous conviction.

The magistrate of the district determines an admission of guilt fine which does not exceed an amount determined by the Minister from time to time by notice in the gazette. After an admission of guilt fine has been paid, the judicial officer presiding at the court in question shall examine the documents. Where he notices irregularities as regards the determination of the fine and the sentence, he may set aside the conviction and sentence and direct that the accused be prosecuted in the ordinary way.<sup>(22)</sup> In *S v Munro*,<sup>(23)</sup> it was held that where the judicial officer directs that the accused be prosecuted in the ordinary course, the case should be commenced *de novo* and the pleas of *autrefois acquit* or *convict* will not be available to the accused. This section grants to the presiding officer concerned a form of review to a certain extent.

Section 57 (4) of the Act empowers the public prosecutor to reduce an amount of admission of guilt fine on good cause shown through oral or written representations made by the accused. In *S v Luyt*,<sup>(24)</sup> the court indicated that s 57 (4) of the Act, does not authorize the public prosecutor to reduce a fine which is deemed to have been

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22 S 57 (7) of the Criminal Procedure Act.

23 1962 (4) SA 270 (N) at 270H.

24 1982 (4) SA 359 (C) at 361E-F.



imposed by courts in terms of s 57 (6) of the Act. Reduction of the fine should happen before that stage is reached.

In *S v Shange* <sup>(25)</sup> much emphasis was placed upon the fact that s 57 of the Act should be interpreted as being administrative in nature and that an accused is deemed to have been convicted and sentenced as a result of administrative act performed by a person who is not a judicial officer, that is, a clerk of the court who performs the duty of recording as required by s 57 (6) of the Act.

When a judicial officer examines the documents, he does not perform any judicial function in the true sense with regard to which he is required to arrive at any final decision. In *S v Marion*, <sup>(26)</sup> a full bench of the Transvaal Provincial Division concluded that in terms of s 57 (7) of the Act, the presiding officer concerned has a duty, in every case where the clerk of the court places before him the documents relating to the payment of an admission of guilt fine, to apply his mind to the matter and come to a conclusion as to whether or not the deemed conviction and sentence should stand or be set aside. In the nature of things, such decision would be presumably be manifested by no more than the return of the papers to the clerk of the court. Once a decision is made, a magistrate has exhausted his functions.

In *S v Miller*, <sup>(27)</sup> it was held that where an admission of guilt is paid

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25     *supra* note 21.

26     1981 (1) SA 1216 (T).

27     1981 (3) SA 561 (OPA).

by the accused and the conviction and the sentence is confirmed by the magistrate in terms of s 57 of the Act, the matter can be taken on review by the Supreme Court only. If the conviction and sentence has not been confirmed by the magistrate, the magistrate can review it himself in terms of s 57 (7) of the Act.

The documents which the judicial officer has to examine are the summons or written notices issued and handed to the accused containing the admission of guilt form duly completed by the accused, evidence that accused paid fine (receipt number on the face of the document), the duplicate of summons or the notice marked "control document" and the admission of guilt register where the clerk of the court has entered relevant particulars.

Dr TJ Botha <sup>(28)</sup> has indicated that 80% of all admission of guilt fines paid are in respect of traffic offences. Although the legislature intended to avoid unnecessary court appearances by introducing this provision in the Act, in view of a large number of traffic cases, the presiding officer and the clerk of the court spend much of their time performing administrative duties in respect of admission of guilt fines.

In the final analysis of the scope of s 57 of the Act, one finds that its application has certain limitations. An admission of guilt fine can only be paid in two instances, that is, where a summons is issued in terms of s 57 of the Act and where a written notice in terms of s 56

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28 *Die vaartbelyning van die Strafprosesreg vir meer doeltreffende Verkeersadministrasie. Proefskrif ter vervulling van die vereistes vir die graad Ph.D aan die Universiteit van Kaapstad, September 1990*  
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of the Act is handed to the accused. An admission of guilt fine may not exceed the maximum of the fine prescribed in respect of the offence in question or an amount of R1 500, whichever is the lesser. A judicial officer has no power to cancel, suspend or endorse licences in cases coming before him on admission of guilt. As held in *S v Munro*,<sup>(29)</sup> his penal jurisdiction in such cases is limited to the monetary penalty which he is entitled to impose.

Section 57 of the Act cannot be used in respect of compoundable offences as listed in schedule 3 of the Act. This section can also not be employed where the only competent sentence is one of imprisonment.

Procedural rights which an accused could enjoy in the normal course of trial are waived when he elects to pay an admission of guilt fine. Most notably the accused's right to be convicted and sentenced only upon proof beyond reasonable doubt that he did commit the offence in question is waived. The right to confront his accusers, to testify in an open court and to call witnesses are also lost by electing to pay an admission of guilt fine. The question is whether the accused is thereby prejudiced. Section 57 of the Act has, however, provided machinery whereby the accused is given time after the issue of a notice or a summons to consider his position and exercise his options.<sup>(30)</sup> In addition to this, s 57 (7) grants to the judicial officer concerned a form of review and the intervention by

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29      *supra* note 23.

30      S 57 (2) (a) and 57 (2) (b) of the Criminal Procedure Act.

the Supreme Court where there is a factual basis for concluding that a failure of justice had occurred. Although generally the accused who elects to pay an admission of guilt fine is deemed to have admitted guilty, that is not always the case. Many motorists pay an admission of guilt fine, even if they feel they are not guilty, rather than submit to the inconvenience of multiple court appearances, particularly if the court is some distance away.

In *S v Matiya*,<sup>(31)</sup> a woman who was issued with a notice in terms of s 56 of the Act, decided to pay an admission of guilt of R300 because she did not want to spend the whole week-end in the police cells after being arrested. She, however, made representations to the magistrate who, as a result, pointed out that the accused paid R300 while not admitting her guilt. The magistrate requested that the conviction be set aside.

In *N G T Trading Stores (Pty) Ltd v Guerreiro*,<sup>(32)</sup> De Villiers JP pointed out that payment of an admission of guilt fine is 'very often and for various reasons' an option exercised by accused persons 'in order to be rid of the worry, inconvenience and expense attached to fighting a petty criminal charge and not because they consider that they are in fact guilty.'

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31 1991 (1) SACR 615 (E).

32 1974 (1) SA 51 (O) at 53H-54A.

## 6.2 REASONS FOR INEFFICACY OF THE CRIMINAL LAW SYSTEM IN TRAFFIC CASES

A comparative study on "Traffic law reform",<sup>(33)</sup> has revealed that the enforcement of our traffic law has been lacking in efficiency for a long time. The question is who is to blame for this inefficacy in the whole system.

According to RH Reeder,<sup>(34)</sup> the proper presentation and disposition of traffic cases require the co-ordinated effort of three separate public offices. They are:

- (1) The police or *traffic officers* (my italics) who detect violations, gather evidence to justify prosecution therefor, and to bring such evidence before the court so that the truth may be established;
- (2) the prosecutor whose duty it is to see that the evidence is properly presented to the court; and
- (3) the judge or the *judicial officer* (my italics), who must preside over the court, hear the evidence, determine the facts and make a just and proper determination of the case.

In my view, to put the blame solely on any or all three public officials would be unfair. The current law enforcement system on traffic cases leaves much to be desired.

In South Africa all traffic offences, even the most trivial ones are classified as

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33 *Traffic Law Reform, A Comparative Study*. Institute of Foreign and Comparative law of the University of South Africa, National Road Safety Council, November (1984) 3.

34 "The responsibility of a prosecutor in traffic court," The Traffic Institute, North Western University, (1972) 2.

criminal offences. A large number of traffic cases are brought to courts where they are tried in accordance with the same law of procedure and evidence which applies to serious crimes like robbery or rape.

AJ Middleton and others <sup>(35)</sup> correctly indicated that although traffic offences are classified as criminal offences, they do not receive the same treatment in our courts as other crimes, and in the course of attempting to accommodate them within the frame of the criminal law, the criminal procedure itself has suffered considerable violence.

In this chapter an attempt is made to identify three reasons for difficulties engendered by the present system on traffic cases, namely the evidential reasons, the administrative reasons and the procedural reasons.

### 6.2.1 Evidential reasons

#### (i) Privilege against self-incrimination

Section 203 of the Act provides that a witness in criminal proceedings need not answer any question which could incriminate him or expose him to a criminal charge.

A Committee of Inquiry established to investigate the efficacy of traffic law in South Africa <sup>(36)</sup> found that in traffic cases this privilege would cause evidential problems in that where there are no

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35 AJ Middleton, YM Burns and G Carpenter. *A proposal for the decriminalization of the traffic law*. National Road Safety Council, Confidential report, April (1978) 14.

36 *Report of the Committee of Inquiry into the Efficacy of Traffic law Enforcement in the Republic of South Africa*. PR 60/91, NRSC, Pretoria (unpublished) (1990) 34.

witnesses other than the two drivers involved in an accident, they cannot be compelled to make statements which could possibly incriminate them. It is, however, a cause for concern that the driver of a motor vehicle involved in a collision but not seen by the traffic officer often finds himself in a better position in regard to the traffic offence committed by him, than the driver who is not involved in a collision, but who is unfortunate enough to be observed by a traffic officer. Any investigation into the guilt of the parties is necessarily seriously hampered by the fact that neither of the drivers is obliged to make a statement. Moreover insurance companies actively discourage drivers from making statements which may incriminate them. For example if a collision occurs between vehicles driven by A and B respectively, and neither makes a statement, the police must rely on circumstantial evidence and the evidence of any passenger or bystander who may come forward. In my view, this leads to an extremely low percentage of prosecutions in collision cases.

(ii) Poor investigations

The Committee <sup>(37)</sup> also found that traffic officers do not obtain enough evidence to submit to prosecutors, resulting in cases being withdrawn. The training of traffic officers in this regard is inadequate. Another problem is the excessive duration of investigations, the insufficient completion of collision reports and witnesses' resistance due to, among other reasons, waste of time in

courts and the inconveniences due to the postponement of cases.

(iii) Single witness

In terms of s 208 of the Act the court may convict an accused of any offence on the evidence of a single witness. The criterion applied is that the evidence of a single witness may be sufficient if it is clear and satisfactory in every material respect.<sup>(38)</sup> On the other hand, irrespective of the number of witnesses, the standard of proof which is required in criminal matters is that which is beyond reasonable doubt.<sup>(39)</sup>

According to Middleton *et al*,<sup>(40)</sup> proof beyond reasonable doubt may be difficult to obtain when the only prosecution witness is the traffic officer who wrote the ticket. If his evidence is not clear and satisfactory in every material respect the motorist offender may well be acquitted, even though he is, on the merits of the case, probably guilty of the offence charged. A further difficulty is that the courts are somewhat reluctant to accept the accuracy of electronic and mechanical devices such as gasometers, and that a fairly large number of accused have escaped conviction as a result.

(iv) Matrimonial privilege

A rather more minor obstacle in as far as traffic offences are

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38 *R v Mokoena* 1932 OPD 79.

39 Hoffman LH and Zeffert DT, *The South African law of evidence* 4 ed (1988) 524.

40 Middleton (1978) op cit 37.



concerned is contained in s 195 (1) of the Act, which entitles a spouse to refuse to disclose a communication made to him or her by the other spouse during the subsistence of the marriage. This privilege is available whether a spouse is a witness for the state or for the defence. Such a privilege is confined to communication between the spouses and does not cover any other form of evidence.

AJ Middleton *et al*,<sup>(41)</sup> illustrated the application of this privilege by giving an example of a case in which the wife of an accused is testifying in his defence and is asked in cross-examination whether her husband had told her that the car's brakes were defective and that he should have had them repaired. In that case she may refuse to answer. If she is asked whether her husband did or did not drive through a red traffic light, she must answer. This illustration depicts technicalities inherent in the strict adherence to evidential rules and one wonders whether such rules were designed for traffic law which is regulatory in nature or for genuine crimes. My opinion is that such rules are ill-suited for general application in all traffic cases because in essence traffic law is concerned with safety rather than guilt of the offender.

(v) The *factum probandum* in traffic cases

AJ Middleton *et al*,<sup>(42)</sup> gave brief exposition of how this principle of the law of evidence applies in criminal cases and its impact on the traffic cases. The *factum probandum* is the legal term for the fact in

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41     *ibid* 42-43.

42     *ibid* 49.

issue or that which must be proved. In criminal cases the fact in issue is the guilt of the accused. The aim of the prosecution is to show that the accused contravened the rule or norm of the criminal law and nothing else. In order to prove guilt, the prosecution must prove:

- (1) that the accused committed the prohibited act;
- (2) that the required element of fault on the part of the accused was present; and
- (3) that the accused acted unlawfully.

In as far as traffic cases are concerned, it would mean the proof of the fact that accused committed the prohibited act, for example, that he did in fact fail to stop at a stop street and also the fact that he did so intentionally or negligently as the case may be and finally that his contravention was unlawful. In establishing whether an accused has been guilty of a traffic offence, the only evidence which is relevant to the enquiry is evidence which conduces to prove or disapprove the commission of the act, the unlawfulness thereof and the fault of the accused. All other evidence which may be necessary for road safety, no matter how relevant it may be to a collision which gave rise to the enquiry is deemed irrelevant.

In my view the principle of *factum probandum* limits the disclosure or consideration of evidence which would be necessary for the public safety and convenience on the road which is the protected interest envisaged by the road safety legislation. The current

criminal law system is designed to prove guilt and not to promote road safety.

### 6.2.2 Administrative reasons

HL Parker <sup>(43)</sup> indicates that criminal sanction is the law's ultimate threat. According to him being punished for a crime is different from being regulated in the public interest, or being forced to compensate another who has been injured by one's conduct or being treated for a disease. He went further to indicate that the criminal sanction is 'at one uniquely coercive and, in the broadest sense, uniquely expensive'.

Middleton *et al*, <sup>(44)</sup> pointed out that from the administrative point of view, we are vitally concerned with the expense of the criminal sanction. As motor vehicles are designed for travelling, a traffic offence could be committed at a distance far from home. In that case one may be obliged to pay admission of guilt fine to avoid expense in time and money for travelling to a distant court to defend the matter. Paying admission of guilt fine where one feels he could not be convicted is an unacceptable situation which brings the whole justice system into contempt.

Middleton *et al* <sup>(45)</sup> regard the recent attempts by certain local authorities in South Africa to collect traffic fines by refusing to re-issue motor vehicle licence until all the fines in respect of that vehicle have been paid as an administrative pressure compelling the accused to submit to criminal

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43 The limits of the criminal sanction, Oxford University Press, London (1969) 250.

44 Middleton (1978) *op cit* 31.

45 *ibid* 32.

punishment without any right of redress. This procedure is indeed conflicting with the criminal law principles where the accused is presumed innocent until the contrary is proved.

The South African Roads Board Research and Advisory Committee <sup>(46)</sup> highlighted problems which hamper the recording and use of traffic convictions.

In as far as driver's licences are concerned, the Board found that the number of unlicensed drivers on South African roads is abnormally high, the South African driver's licence holders in South Africa are in possession of multiple issues of their identity documents and therefore also their driver's licences. This makes the suspension or revocation of licences ineffective. On the question of previous convictions, it was also found that there is no system for the recording of previous traffic convictions in operation and the system whereby results of every traffic prosecution could be tracked, does not exist and as a result some may escape registration.

Many traffic offenders are consequently treated as first offenders when they pay admission of guilt fines and when those convicted are sentenced. The proof of previous convictions where admission of guilt fines were paid becomes a problem where the accused denies his record and it has to be proved. In terms of the latest court ruling, the original case record must be submitted in this connection. <sup>(47)</sup> Case records are destroyed by the

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46 *The Registration, employment and proving of previous traffic convictions including the implementation of a point or offence count system within NaTIS*. Project Report 192/90, South African Roads Board Research and Development Advisory Committee, Division of Roads and Transport Technology, CSIR Pretoria, (1990) 6.1.

47 *S v Longdistance (Natal) Pty Ltd* 1990 (2) SA 277 (A).

Department of Justice after a period of between two months and seven years <sup>(48)</sup> and are thus not always available for the proof of previous convictions.

The Board also found that a high percentage of prosecuted traffic offenders do not react at all to the citations issued to them and remain untraceable. This occurs mainly where the motorists furnished false names to the traffic officers, and where the authorities are not notified of a change of address and the computerised driver information is outdated. The requirement that process documents be served personally has as a result of the large number of prosecutions become an unmanageable requirement. It has become physically impossible to serve court processes in certain places or residential areas.

A problem of identity also come to light due to the lack of measures that can properly link the identity of an offender to the prosecution instituted against him and record which is recorded against his name. When it comes to the case of camera prosecutions, the problem of identifying drivers becomes worse.

A report of the Committee of Inquiry released in 1991, <sup>(49)</sup> gave a number of illegal drivers licences in circulation in South Africa as 400 000. The Committee also found that South Africa is one of the few developed countries of the world where the suspension of drivers' licences for specific traffic offences is not compulsory. It is now upon the discretion of courts to

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48 Department of Justice's *codified instructions on correspondence*, provide the disposal instructions for admission of guilt records as after a period of 3 years.

49 Report on Committee of Inquiry (1990) op cit 21.

suspend or revoke a driver's licence. As a result, drivers' licences are suspended far less frequently than would be desirable. <sup>(50)</sup>

### 6.2.3 Procedural reasons

The traditional method of state redress against criminals is the prosecuting of crimes and offences by means of the law of Criminal Procedure and punish the guilt. During this century, however, the new types of punishment or state redress have been developed in many other countries for traffic offences. In chapter 2 of this work, a comparative study was made of experiences in other countries on the adjudication of traffic offences. In certain countries the new forms of punishment or state redress are administered mainly through the administrative process and are governed by the administrative law. This development has not yet taken place to any mentionable extent in the Republic of South Africa. Until now, the Republic of South Africa relies mainly on the criminal law and the law of criminal procedure for both adjudication of traffic prosecutions and for the punishing of the guilt. There are a number of procedural reasons for inefficacy when criminal law system is applied to traffic offences.

#### (i) Section 56 of the Act

This provision authorises the issue of a written notice to appear in court with an option for the payment of admission of guilt fine not in excess of the prescribed amount. The Committee of Inquiry <sup>(51)</sup> found that in practice there are various offences in respect of which

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50    ibid 23.

51    (1990) ibid 17.

the list of fines, as fixed by the local magistrate exclude the issue of a notice because the fine would probably exceed the prescribed amount. For example, speeding and overloading offenders are of particular concern in this regard, because where the amount exceeds the prescribed fine, the offender is either arrested or the relatively more expensive and cumbersome method of summoning the accused in terms of s 54 of the Act is resorted to. Section 56 of the Act does not apply where no admission of guilt fine can be fixed.

The effective application of the envisaged NaTIS<sup>(52)</sup> would require that drivers with various previous convictions not be allowed to pay admission of guilt, but that they appear in court in order that their previous convictions be taken into consideration for the purpose of sentence. With the institution of NaTIS it will be possible for the law enforcement officer to acquire information on a driver's previous record within seconds, and then to use his discretion on whether to allow an admission of guilt or not. Such a measure can only be employed if it could be made possible to issue a notice to appear in court without fixing an admission of guilt fine.

(ii) Section 341 of the Act

The procedure of the so-called 'spot fine' in terms of s 341 of the Act gives rise to many anomalies.

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52 The Department of Transport is planning to introduce the National Traffic Information System (NaTIS) comprising *inter alia* the registration of all vehicles and particulars of their owners : Project Report 190/92, CSIR Pretoria (1990) 1.2.

Middleton et al <sup>(53)</sup> found that where the offender pays the 'spot fine' and the prosecution is consequently not instituted, the offender cannot be regarded as having been convicted of any criminal offence. However if the accused fails to pay the 'spot fine', a summons may be issued and an admission of guilt prescribed, which may or may not be the same amount as the 'spot fine'. <sup>(54)</sup> If the offender pays his amount, he is regarded as having been convicted of a criminal offence and moreover this conviction can be regarded as previous conviction for the purpose of the Criminal Procedure Act. <sup>(55)</sup> Thus the offender's failure to pay the 'spot fine', regardless of the reasons, it therefore can cause him a criminal record. It is therefore no longer the gravity of the offence which determines whether the accused has a criminal record, but in this case, circumstances beyond his control and unconnected with his guilt, determine whether or not he has a criminal record.

The Committee of Enquiry, <sup>(56)</sup> also found that only offences contained in Schedule 3 of the Act may be dealt with in terms of this section. The Committee gave an example showing that some offences which are supposed to be included in the third schedule are not included. For instance, the driving of unlicensed vehicle as an offence is included in the schedule yet the alternative offence of neglecting to display a clearance certificate is not included in the

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53 Middleton (1978) op cit 22.

54 S 341 (5) of the Criminal Procedure Act.

55 S 57 (6) of the Criminal Procedure Act.

56 Committee of Inquiry (1990) op cit 19.



schedule. It was found that in practice, various prosecutions are instituted and 'spot fines' even allowed for offender not included in the third schedule. On the other hand there are various offences in respect of which it is inappropriate to allow a 'spot fine' in terms of this section, for example, offences such as over speeding detected by cameras which are at present often dealt with in terms of this section.

Where an offender was detected by a camera, a 'spot fine' ticket is issued some days or weeks after the offence has taken place. This does not appear to be the purpose for which this procedure was intended. In view of the envisaged NaTIS where offenders with previous convictions had to be identified for the purpose of sentencing, the Committee is of the opinion that notifications in terms of this section should not be issued with regard to speeding or other moving offences identified by a camera, but that a summons be issued in terms of s 54 of the Act.

(iii) S 54 of the Act

This section requires that a summons be served on an offender personally or on someone older than sixteen years at the residential address or address of employment. On the other hand s 147 (1) of the 1989 Road Traffic Act authorises the serving of summons by registered post to the last known address of the offender.

A study on the traffic law enforcement <sup>(57)</sup> found that many traffic

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57 National Transport Commission report (1989) op cit 26.

departments send their summons by post. This practice has been forbidden by certain magistrates' courts, thereby causing extensive problems to the traffic departments involved. There is a dire need for summonses in respect of traffic cases to be served through post. It was found that many authorities refuse to serve the summonses of other authorities, mainly as a result of the time factor and manpower which can be used more productively for law enforcement. Serving court processes through the messenger of the court was found to be uneconomical.

(iv) Section 55 of the Act

Warrants of arrest are issued against traffic offenders in respect of accused who failed to appear in court upon summonses or written notices to appear. The Committee of Inquiry <sup>(58)</sup> in its investigations found that approximately 70% of traffic offenders against whom warrants of arrest have been authorised cannot be traced as a result of false addresses, contempt of the process of law by not responding to court documents. Millions of rands of income in respect of traffic fines are thereby lost.

(v) Investigations of traffic offenders

The Committee of Inquiry, <sup>(59)</sup> took note of the low percentage of collision cases in which prosecutions are instituted. Only about six percent of all collisions are investigated because the South African

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58 Committee of Inquiry (1990) op cit 32.

59 ibid 18.

Police, due to a manpower shortage, only investigate cases where injury or death occurred. This state of affairs could also be ascribed to the fact that where no injury or death has occurred the case is only reported to the police. The parties involved are then asked whether or not they require prosecution. If both parties do not wish it, the investigation is abandoned. The result is that the prosecutor is not furnished with sufficient details to institute a prosecution. Worse still, it is not only in respect of the collisions that no prosecution is instituted, but also the traffic offences which led to the collision are ignored. This, in my opinion, leads to the disrespect of law enforcement on the part of the motoring public.

As the law of evidence and procedure is necessarily cumbersome and technical, many accused against whom good cases exist on the merits escape on technicalities. The evidential burden which the state is required by criminal law to discharge is unduly heavy when one considers the nature of the penalties imposed. <sup>(60)</sup> Middleton *et al* <sup>(61)</sup> also found that because of the great number of traffic offences and the consequent necessity of summoning the accused on the spot by means of the notice in terms of s 56 of the Act, there is generally seldom any further investigation of the offence. The result is generally a very inefficient application of the principles of criminal law.

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60 Middleton (1978) op cit 29.

61 *ibid* 20.

(vi) Territorial jurisdiction

Traffic officers are appointed in terms of s 3 of the Road Traffic Act to perform their duties within the boundaries of the areas for which they were appointed. The same provision of the Act empowers Administrators to permit traffic officers of local authorities to act beyond the boundaries of their areas. However in terms of s 334 (1) of the Criminal Procedure Act, traffic officers are appointed as Peace Officers for areas specified in the notice. They are appointed as Peace Officers only in respect of their own area of jurisdiction and as such they cannot prosecute outside their area of jurisdiction, but they may only do traffic control. In view of this problem, the Committee of Inquiry recommended that for efficiency in law enforcement, traffic officers of local authorities should be empowered by the Administrator to act outside the areas of jurisdiction of their authorities and that they be appointed as full Peace Officers outside the areas of their authorities.

(vii) Penalties in respect of traffic cases

Traffic cases which land in court are visited with a penalty of fine, alternatively a term of imprisonment. Middleton *et al* <sup>(62)</sup> pointed out that a term of imprisonment in respect of traffic cases is generally short and is regarded by the authorities as having nothing but negative effects. It is a generally recognised principle that criminal sentences be individualized in the sense that the personal attributes

of the accused should be taken into account. However, in as far as traffic offences are concerned, their majority are disposed of in accordance with a tariff system which takes no account whatsoever of the personal attributes of the accused. <sup>(63)</sup>

(viii) Proof of previous convictions

Convictions for serious traffic offences are recorded presently with the Criminal Bureau of the South African Police Services. Section 37 of the Criminal Procedure Act authorises the taking of fingerprints of the accused. The Roads Board Advisory Committee <sup>(64)</sup> found a number of reasons why fingerprints cannot be taken in the case of ordinary traffic offences.

The reasons given are:

- workload;
- the fact that payment of an admission of guilt fine by post is allowed, and
- the fact that it is unpractical to take fingerprints of all offenders when they are prosecuted for traffic offences.

The system that is applied to serious traffic offences cannot be extended to all traffic offences.

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63 S 57 (5) (a) and s 341 (5).

64 Roads Board Advisory Committee (1990) op cit 4.3.

In view of the fact that convictions for traffic offences, with the exception of a few serious offences, are not recorded and are not available to the courts or the traffic administration system, traffic offenders are mostly treated as first offenders. A very important element in determining proper punishment for the purpose of criminal sanction is the criminal or offence record of the convicted person. <sup>(65)</sup>

(ix) Delays and multiple appearances in courts

When a notice is issued in terms of s 56 of the Act, an amount of admission of guilt fine is endorsed on the notice assuming that the accused will pay the admission of guilt fine. The result is that if the accused does not pay admission of guilt and goes to court and pleads 'not guilty', the state witnesses are generally not present and the case will have to be postponed to some future date to secure the attendance of witnesses. This results in the evil of multiple appearances.

Middleton *et al* <sup>(66)</sup> found the criminal law approach to be extremely expensive, because apart from the question of multiple appearances, the average traffic case is exorbitantly expensive for the accused.

Even if the accused does not go to the expense of acquiring legal representation, the average accused will have to waste the better part of his time waiting at the court for a case which is generally

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65 *ibid* 4.2.

66 (1978) *op cit* 33.

disposed of in a matter of minutes.

Many people accused of traffic offences come to court merely in order to put mitigating circumstances with no dispute with the enforcement officer. In my view that matter could in all probabilities have been disposed of satisfactorily by correspondence, had the system been designed that way.

Examples were given of state organs such as Post and Telecommunication and the Receiver of Revenue which use administrative methods rather than the criminal law as far as possible. Each of these organs has been able to devise a regulatory system especially tailored to its specific needs. <sup>(67)</sup>

I fully agree with the views of Middleton *et al* <sup>(68)</sup> that the current system on traffic cases is simply not prevention-orientated and it can never become such, so long as the criminal sanction is the dominant means employed to counter road accidents. Criminal courts and the criminal procedure were never designed or intended for the purpose of accident prevention.

### 6.3 EVALUATION OF THE EXISTING PROCEDURAL LAWS ON TRAFFIC OFFENCES

The machineries for the institution of prosecutions and adjudication of prosecution for traffic offences under the current system have more disadvantages than

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67 Middleton (1978) *ibid* 33 (a).

68 *ibid* 35.

advantages.

### 6.3.1 Advantages

The South African Criminal Procedure Act contains certain provisions aimed at relieving the machinery of justice in as far as certain petty offences are concerned.

Section 57 of the Act provides for the payment of admission of guilt fines for petty offences without court appearances being required, while s 341 of the Act allows the compounding of certain traffic offences. The court's task is reduced in that the case against the offender is disposed of before it could reach the court and the offender is consequently not tried. The aim here is to reduce the number of persons passing through the criminal justice system. All these remedies however, imply that criminal sanction is retained, although in most instances the offender is not processed through the normal channels of the criminal justice system.

If we look at s 149 of the Road Traffic Act we find a threat of imprisonment as a direct sanction or as an alternative sanction in the event of the fine not being paid for traffic offences committed. As already discussed above, by far the majority of traffic offences are in fact disposed by way of admission of guilt and 'spot fines' with the exception of serious traffic offences such as driving under the influence of liquor, reckless driving, culpable homicide, serious cases of negligent driving and failing to stop after an accident.

Fear of imprisonment could serve as a deterrent factor, but in practice it is rare that an errant motorist could be sentenced to a term of imprisonment



without an option of a fine. To address physical difficulties of summoning a vast number of traffic offenders in the normal course, s 56 of the Criminal Procedure Act, was introduced. This provision solves the administrative problem of issuing and serving a vast mass of summonses, thereby saving local authorities and provincial administrators a great deal of trouble and expense.

Since the Road Traffic Act was approved and kept in systematical implementation, attention has been given to a number of amendments that have extensive positive implications for orderly road traffic. One of these provisions is the creation of a national Road Traffic Law Enforcement Committee <sup>(69)</sup> for the purpose of advising the Minister of Transport of South Africa regarding law enforcement and other relevant issues. Changes that are recommended to the Minister are not arbitrarily made, but are undertaken after presentation to a consultative committee consisting of members of different organisations and institutions.

Another important amendment is the requirement that a driver is obliged to have a driver's licence available for inspection at all times. <sup>(70)</sup>

### 6.3.2 Disadvantages

Although the Criminal Procedure Act contains provisions designed to relieve the machinery of justice, there are many procedural disadvantages inherent to regarding traffic offences as crimes.

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69 S 7A, Road Traffic Act 29 of 1989.

70 S 15 of the Road Traffic Act supra.

Middleton *et al* in their report, <sup>(71)</sup> gave examples of procedural disadvantages which may be experienced by regarding traffic offences as crimes. The issuing of notices in terms of s 56 of the Act has contributed to a large extent to the problem of multiple appearances. Offenders who are issued with notices to appear may decide not to pay admission of guilt fine and when they appear in court there is no guarantee that witnesses would be available. Most cases are therefore postponed to secure the attendance of witnesses where the offenders who appeared plead 'not guilty' to the charges.

Sections 57 and 341 of the Act relieve the courts where the accused decide to pay admission of guilt fine or 'spot fine'. Should the accused decide not to pay admission of guilt fine or to compound the offence, the course of criminal justice follows its normal route through the courts.

Inordinate delays experienced in finalising traffic cases cause disrespect for traffic law and often create a situation where a traffic offender is apprehended for the same type of offence many times before being brought before the court for the first offence. At times a traffic officer is required to give testimony in the facts of a particular case after a considerable period of time, sometimes after months have passed. He must be able to recall in detail the fact concerning a specific case amongst numerous other cases he has prosecuted before and after that event. Very often the traffic officer is only a few minutes in the presence of an accused, but he is expected to be able to distinguish that specific case from all other cases he has prosecuted.

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71 (1978) *op cit* 18 (9).

The views of Middleton *et al* <sup>(72)</sup> are convincing, namely that the rules of evidence and criminal procedure are fraught with numerous technicalities which in many cases are entirely unrelated to the simple issues of the offence in question. Because of the great number of traffic offences and the consequent necessity of issuing notices in terms of s 56 of the Criminal Procedure Act, there is generally seldom further investigation of the offence by traffic officers. Road traffic offenders exploit the meticulous observation of rules of evidence and criminal procedure which leads to many acquittals on technical points or due to lack of sufficient evidence.

In *R v O'Linn*, <sup>(73)</sup> it was stated that the rules regarding admissibility of evidence is, and always has been, that in order to meet the primary test of competency, the party offering such evidence has the burden of showing that it is generally trustworthy and reliable that it can be depended upon to reflect the truth for which the law is ever seeking. According to Kriel and another, <sup>(74)</sup> this burden of proof applies to all kinds of evidence, mechanical, scientific or otherwise. This view is supported by the decision in *Rex v Harvey* <sup>(75)</sup> where on the issue of scientific instruments often used by traffic officers, the court indicated that for a scientific instrument to be accepted by courts it depends on them being sufficiently well-known for their trustworthiness to enable the court to take a judicial notice of their reliability.

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72    *ibid* 20.

73    1960 (1) SA 548 (N).

74    *Problems experienced by local and provincial authorities in the enforcement of road safety measures.* National Institute for Road Research - South Africa, Internal Report RU/11/74, October (1974) 121.

75    1969 (2) SA 193 (RAD) 200.

In my view the criminal procedure and law of evidence rules followed meticulously in traffic cases amount to a situation where one goes out of the way to use a large-bore shotgun to shoot a sparrow. The law has set a high standard of proof in criminal cases, that is proof beyond reasonable doubt. <sup>(76)</sup> This heavy onus on the part of the state applies to all criminal offences including any traffic offence brought to court. The standard of proof in criminal cases is far heavier than the onus which rests upon the parties in civil action, where, very frequently more is at stake than the amount of a traffic fine.

Evidential rules with regard to the compellability of witnesses are far more stringent in criminal cases than in other branches of the law. <sup>(77)</sup> The rule of criminal law and procedure against self-incrimination and the right to silence <sup>(78)</sup> operate very restrictively in criminal cases.

Another opportunity which is lost through treating traffic offences as crimes is the possibility of resolving simple disputes between the public and the law enforcement agencies. Members of the public may intend approaching the Chief Traffic Officer or Public Prosecutor with a view of resolving simple conflicts, but there is no formal and controllable procedure governing such actions. <sup>(79)</sup>

From the formal procedures of criminal law, once a summons or notice in terms of s 56 of the Act has been issued, the accused must be regarded as

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76 Hoffmann (1988) op cit 524.

77 ibid 370.

78 S 203 of the Criminal Procedure Act.

79 Middleton (1978) op cit 22.

having been formally charged and only the prosecutor has the right to withdraw the charge or adjust the admission of guilt. As a result, simple issues about which both the state and the accused are essentially in agreement, are kept in abeyance to be decided by the court.

Other procedural anomalies result from the "buy off" procedure in terms of s 341 of the Act, for compoundable offences such as parking violations whereby prosecutions are bought off immediately, the accused pays the so-called 'spot fine'. In the first place, the offender who paid a 'spot fine' cannot be regarded as having been convicted of any criminal offence. The anomaly occurs where the accused fails to pay a 'spot fine' and is issued with a summons with an admission of guilt fine fixed at an amount different from the original amount of a 'spot fine'.<sup>(80)</sup> On payment of such admission of guilt fine the offender is deemed to have been convicted and sentenced and such conviction may subsequently be regarded as a previous conviction for the purpose of the Criminal Procedure Act, with far-reaching repercussions.<sup>(81)</sup> The offender thereby ends up with a record of previous conviction which he would not have acquired had he paid the 'spot fine'.

In his paper on "The Road Traffic Safety Management System in South Africa",<sup>(82)</sup> E Wise pointed out that the courts in South Africa are currently hampered by an excessive workload as well as the fact that many traffic cases remain uncompleted. He further indicated that more often the law enforcement officer's testimony is unacceptable, which results in the

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80 S 341 (5) of the Criminal Procedure Act.

81 S 57 (6) of the Criminal Procedure Act read with *MGT Trading Store v Guerreiro* 1974 (4) SA 738 (A).

82 A paper delivered at the Prevention Routeres Internationale Annual General Meeting in Lisbon, 26 May (1993) 8.

inability of magistrates to convict offenders. Where an offender is found guilty it is often difficult for an appropriate sentence to be handed down as the magistrates are often unaware of the severity of the transgression.

The current system is to blame for the poor investigations and lack of in-depth inquiries of traffic cases when they are brought to court. Non-traceability of offenders leads to withdrawals of many cases. The non-availability of records of previous convictions leads to the imposition of an unreasonably lighter sentence.

When analysing the statistics in Chapter 5 of this work, it is clear that the rate of road carnage in South Africa is disquietening. Such statistics should be seen in the light of human loss, pain, suffering and astronomical financial loss. The question which is more often asked is, who is primarily responsible for the present road unsafety situation in south Africa? Is it the motorist, or is it the government or various levels of government? Dr TJ Botha, in his report, <sup>(83)</sup> identified 'cornerstone' problems with traffic safety measures in South Africa. He combined all the 'cornerstone' problems in a single concept, namely that there exists no driver control in South Africa. some of the 'cornerstone' problems identified are the following:

(i) Unlicensed drivers

A number of unlicensed drivers was found to be extremely high. A large portion out of an estimated one million unlicensed drivers, are in possession of forged and counterfeited driver's licences.

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83 *Obstacles in the way of a point demerit or conviction count system in the Republic of South Africa - The present total lack of driver control.* Technical Note NB/449/91, Road Transport Technology CSIR (1991) (Pretoria, 1-10.

Middleton *et al* <sup>(84)</sup> came up with an estimation of 400 000 forged and 'illegal driver's' licences alleged to have been in circulation in South Africa in 1990.

(ii) Unavailability and unreliability of records of suspended or withdrawn driver's licences

The suspension or withdrawals of driver's licences by the courts are often not recorded on the records of the Department of Home Affairs either because the Department has not received notification thereof or for other reasons. Neither is the suspension period always available. It is therefore difficult for a traffic law enforcer to establish whether a licence is suspended or revoked, and if so, whether that suspension or revocation is still of force and affect.

(iii) Permanent driver's licence

The driver's licence of South Africa is a permanent document and authority to drive once it is issued and it remains in force and effect until the licence holder dies. Forgeries and counterfeits of driver's licences obtain usefulness on permanent basis to the holder thereof. However if driver's licences were to be re-issued periodically, such forgeries or counterfeits would also have a face value for a limited period only, making it unusable after the expiry date.

(iv) Impossibility to administratively suspend or revoke a driver's licence

The Road Traffic Act does not allow or provide for the administrative suspension or revocation of a driver's licence due to an unacceptable history of prior convictions for traffic offences. Fear of the suspension of driver's licence as a deterrent factor is no longer there. This is believed to be the 'cornerstone' problem of traffic unsafety in South Africa.

(v) Discretion by courts to suspend or withdraw a driver's licence

In South Africa the suspension of driver's licences for specific traffic offences is not compulsory. The compulsory suspension and/or cancellation of driver's licences was abolished on recommendation of the Viljoen Committee of Inquiry into the Penal System of South Africa. <sup>(85)</sup>

As a result, driver's licences are now suspended far less frequently than would be desirable.

(vi) Driving under suspension or withdrawal not an offence in South Africa

In most states in the United States of America driving whilst a driver's licence is suspended or withdrawn is a separate offence and is a much more serious offence than driving without a driver's licence in cases where a licence had not yet been obtained before.



Such separate offence does not yet exist in south Africa. To make driver control more effective, such a step is important.

(vii) Many drivers in possession of multiple issues of driver's licences

The Department of Home Affairs has allowed many, if not most, of the licensed drivers to be in possession of more than one identity document, each containing a driver's licence. Under such circumstances it serves very little purpose if not none at all, for a court to suspend or revoke and cancel such a driver's licence in an identity document because drivers have spare copies of the identity documents with ostensibly valid driver's licences available to them and in their possession. This has the effect that, whilst the driver's licence is part of the identity document, it is impossible to effectively suspend or revoke a driver's licence or to properly enforce it. This situation makes the drive control impossible and may be regarded as a main reason of the lack of driver discipline on South African roads as the driving public is now aware of this serious deficiency in the system.

(viii) No register of prior traffic convictions

The South African Roads Board Advisory Committee, <sup>(86)</sup> indicated the objectives of recording convictions for traffic offences as:

- to identify offenders who have been prosecuted for repeated traffic offences to address the problem of traffic recidivists.

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86 Roads Board Advisory Committee (1990) op cit 4.1.

The most common measure is the threat that the driving privilege may be suspended or withdrawn by the authorities;

- to equate the punishment to be meted with the behaviour of the driver in question, and
- to analyse the statistics on prosecutions and convictions in order to determine the tendencies regarding traffic recidivism.

The unfortunate part of it is that there is no system for the recording of previous traffic convictions in operation in south Africa. Traffic convictions are not recorded against driver records at all, whilst only major offences mentioned earlier in this chapter are recorded with the criminal history records. This means that traffic offenders in respect of all other offences are always treated as first offenders. A person may therefore have any number of convictions per month or per year in respect of all types of traffic offences (the said major ones excluded) as long as he can afford the fines and does not disregard traffic citations altogether.

(ix) Proving of prior traffic convictions nearly impossible

Because of the court's ruling that the proof of previous conviction through court records <sup>(87)</sup> should be done through the use of the original court records, in most traffic cases where fingerprints are not always taken, the proving of previous convictions would be

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87 *S v Longdistance (Natal)* op cit 277.

impossible where court records have already been destroyed in accordance with the disposal instructions in the Department of Justice. Court records are destroyed by the Department of Justice after a period between two months and seven years.

(x) Flooding of courts and traffic administrations with traffic cases and the reduced deterrent value

It was found that 75% of criminal cases that are recorded by the Department of Justice's criminal courts per year relate to traffic offences ranging from parking, where compound fines are paid, to homicide, by vehicles that require a court hearing.

Such a high percentage of traffic prosecutions in South Africa chokes:

- the court's administrations;
- the courts with hearings in mitigation of sentences or explanation of non-appearance;
- the courts in respect of issuing arrest warrants, and
- enforcement agencies with the serving of summonses on offenders personally and execution of arrest warrants for non-appearance. As a result, arrest warrants become inexecutable in certain areas and many cases are withdrawn. The ultimate result would be a large indifference to traffic prosecutions and a much reduced deterrence of enforcement

to the motoring public.

(xi) Information system

In addition to some of the 'cornerstone' problems identified by Dr TJ Botha, there is presently no national information system for traffic matters. One of the major differences between the Ordinances of 1966 and the Road Traffic Act of 1989, was the introduction of the Road Transport Quality System (RTQS). This relates to the registration of business operation of all taxis and nearly all road transport trucks and buses, the replacement of public driving permit by a professional driving permit for all drivers of the affected vehicles, the introduction of regulated driving hours and the periodical testing of vehicles for roadworthiness. <sup>(88)</sup>

The road safety re-regulation of road usage by the class of vehicles mentioned above, will be based *inter alia* on recording convictions for traffic offences in order to evaluate the so-called road safety performance of the driver of such vehicle and, on a different plane, the compliance with the road traffic legislation by the carriers (operators) who are responsible for these vehicles. <sup>(89)</sup>

In view of the fact that there is no national information system in operation in South Africa, the Department of Transport is at present planning to introduce the "National Traffic Information System" (NaTIS) in South Africa. <sup>(90)</sup> In broader terms NaTIS will comprise

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88 National Transport Commission Report (1989) op cit 8.

89 Roads Board Advisory Committee (1990) op cit 1.2.

90 *ibid.*

*inter alia* the registration of:

- all vehicles;
- statutory owners of such vehicle and in the case of non-RTQS vehicles, for furnishing the names and addresses of the drivers of such vehicles from time to time, if required to do so;
- the common law owner's particulars where such vehicles have been financed on credit sales agreement, and
- the particulars of the operator's carriage in terms of RTQS vehicles, and of the operator who will be primarily responsible to ensure compliance with the road traffic legislation of such vehicles.

The introduction of the NaTIS will alleviate the problem of connecting the accused, his offence, the collision in which he was involved and the motor vehicle which he drives. Such connection can only be possible if the identity numbers of the accused are obtained. Without identity numbers it would be virtually impossible to prove with certainty or beyond reasonable doubt that the offences and collisions entered on the record of a driver of a motor vehicle were in fact committed or caused by him.

From the above discussion it is quite clear that the current system on traffic law is fraught with more disadvantages than advantages. For safety on our roads, a reform of the present system is of utmost importance.

## CHAPTER 7

### CONCLUSION

#### 7.1 INTRODUCTION

The gravest problem in relation to traffic law enforcement today is probably the difficulties in relation to the service of criminal summonses and the execution of criminal warrants.

A criminologist called L Barit <sup>(1)</sup> made a valid point when he indicated that problems relating to traffic criminology date back to the first mechanically powered vehicle at the end of the nineteenth century. The laws and regulations which soon emerged to be applied to this new branch of criminology had to be continually adapted and modified to meet the changing circumstances.

Most authorities who embarked on research in the field of traffic accident prevention had by 1950<sup>s</sup> already arrived at the conclusion that the programme of achieving traffic safety rested on a foundation of sound traffic regulations made effective by proper enforcement. <sup>(2)</sup>

In view of problems encountered in the law enforcement on traffic offences from prosecution to adjudication stages in South Africa, I directed my research towards seeking mechanisms whereby:

— the errant motorist would be successfully traced and brought to book

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1 *A Criminological investigation into unlicensed drivers.* MA Verhandeling, University of South Africa, Pretoria, November 119.

2 RH Reeder: *Vehicle Traffic Law.* Published by the Traffic Institute, North Western University, Evanston, Illinois (1974) 28.

without delay;

- our courts would be relieved of the existing burden when traffic cases overcrowd court calendars;
- sanctions equated with the conduct of drivers on the roads could be imposed;
- the fastest, economical and efficient way of dealing with traffic offenders could be found; and
- the criminal stigma attached to traffic violations could be removed.

Like other proponents for the decriminalization of traffic offences, it is not my contention that all traffic offences be summarily banished from the realm of the criminal law. There are serious traffic offences which have a definite place in the criminal law.

Decriminalization of minor statutory offences, traffic cases in particular, has been in the South African legal thinking for the past twenty two years. <sup>(3)</sup> The proponents of decriminalization have realised that the attempted regulation of road traffic by means of the criminal sanction has met with remarkably little success.

## 7.2 OBSERVATIONS

### 7.2.1. TRAFFIC LAW ENFORCEMENT IN OTHER COUNTRIES

Most developed countries have succeeded in removing certain traffic

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3 AJ Middleton made proposals for the decriminalization of road traffic law in (1974) *THRHR* 159 "Road Traffic and abuse of the criminal law".

offences from the sphere of the criminal law and procedure. They have created a special procedure to deal with traffic offences. <sup>(4)</sup> For parking offences, they have introduced immobilisation, wheel clamping and removal of vehicles and for the rest of traffic offences, they have introduced a “point demerit” system. These measures proved to be effective because after their introduction there was a remarkable decline on the commission of traffic offences. <sup>(5)</sup> Studies carried out after wheel clamping was introduced in the United Kingdom have shown that wheel clamping had an important deterrent effect on illegal parking. For instance in some areas occupancy of yellow lines fell by as much as 40%, illegal use of residents bays fell by 30% and motorists are far less likely to exceed their time limit at parking meters.

#### 7.2.2 TRAFFIC LAW ENFORCEMENT IN SOUTH AFRICA

In South Africa all offences are still adjudicated through the criminal courts of law: As pointed out in chapter 5 of this work, traffic law violation cases in South Africa mount up to frightening proportions in the lower courts, seriously affecting the dignity of the courts and encouraging the public to perceive adjudication in a distorted manner unrelated to its formal objectives. Measures introduced to relieve the machinery of justice in terms of ss 57 and 341 of the Criminal Procedure Act are only helpful when the offender decides to pay an admission of guilt fine, because should he fail

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4 Pure administrative approach in New York with effect from 1970: *Traffic Law Reform, A Comparative Law Study*, University of South Africa (1984) 8.

5 Wheel clamping in London proved to be effective: *Traffic in London, Traffic Management and Parking guidance* (1992) 48. Immobilization in Columbia was a deterring factor to potential errant motorists: *Motor Vehicles and Traffic Code, District of Columbia Code* 1981 Title 40. Point demerit system in Ontario reduced driving violations by half: South African Roads Board Research and Development Advisory Committee Report 192/90, CSIR, Pretoria (1990) 2.1 to 2.3.



to pay the fine, the course of criminal justice follows its normal route through the courts.

The move by the Department of Justice to consider decriminalizing minor statutory offences in terms of the Decriminalization Act of 1991 is a clear indication that the courts are now overloaded and that the time has arrived to relieve the criminal courts of part of their burden.

A weakness in the present enforcement system in South Africa is that it tends to emphasize the apprehension of the individual violator rather than concentrating on the manipulation of driver-behaviour and improve road safety. The South African traffic law enforcement practice lacks a system that makes provision for the training of offenders and the removal of habitual traffic offenders from our roads. Other countries rely on the points demerit system to get rid of habitual traffic offenders. The non-availability of a central register and countrywide communication system to provide accurate and easily accessible information on previous violations and convictions and outstanding summonses limited the effectiveness of enforcement. Dr TJ Botha testified before the Hoexter Commission that recommendations in favour of the national traffic register were made as far back as in 1948 and have not yet been implemented. <sup>(6)</sup> It is, however, interesting to note that the Department of Transport is now in the process of introducing and implementing the National Traffic Information System (NaTIS).

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6 *Die Kommissie van Onderzoek na die struktuur en funksionering van die howe onder die Voorsitterskap van sy edele Regter Hoexter.* Die getuienis van Advokaat TJ Botha in sy private hoedanigheid, National Institute for transport and road research, CSIR, South Africa TU/2/81 April 1981 14.

With reference to the literature, it is disturbing to note that many of the problems in the field of traffic-law enforcement that existed in South Africa for more than 22 years ago are still prevalent and that many of the recommendations to alleviate these problems made at that time have still not been implemented. AJ Middleton made proposals for the decriminalization of the road traffic law as early as in 1974.<sup>(7)</sup> His proposals were followed by a more comprehensive study of traffic law in 1978.<sup>(8)</sup> Although Middleton's proposals were subjected to severe criticism by the Viljoen Commission,<sup>(9)</sup> he stood his ground, and in response to the criticisms, he continued to advocate for the replacement of criminal sanctions by administrative sanctions, stressing that the administrative system selected must be tailored to cope with the work in a more efficient manner than the criminal law system.<sup>(10)</sup>

Dr TJ Botha summed up the cornerstone problems with traffic safety measures in South Africa as "a total lack of driver control."<sup>(11)</sup> It may correctly be said that no driver control exists in South Africa at all. These problems are primarily responsible for the present road unsafety situation in South Africa. Some of the cornerstone problems identified are:

— a large number of unlicensed drivers who possess forgeries or

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7 (1974) *THRHR* op cit 159.

8 AJ Middleton *et al* : *A proposal for the decriminalization of the traffic law*, NRSC Pretoria 1978.

9 *Verslag van die Kommissie van Ondersoek na die strafstelsel van die Republiek van Suid-Afrika*. Viljoen RP78/76 (1976) 16.

10 AJ Middleton "Decriminalization of road traffic offences" (1991) (4) No. 3 *SACJ* 247.

11 *Obstacles in the way of a points demerit or conviction count system in the RSA. The present total lack of driver-control*, Technical Note NB/449/91. Road Transport Technology CSIR (1991) 2.

- counterfeits of driver's licences;
- permanent driver's licences;
  - multiple identity documents with driver's licences;
  - the unavailability of a register of prior traffic convictions;
  - the ever increasing number of traffic offences flooding our courts and traffic administrations; and
  - the fact that accident causation is not punished as only few motor collisions are prosecuted and many go unpunished.

When the driver's licence has a permanent validity as is the case in South Africa, driver-control is virtually impossible. It would be very difficult if not impossible to suspend a driver's licence administratively and attach such a licence under such circumstances. As has already been indicated in the previous chapters, a large number of forged and illegal driver's licences are in circulation in South Africa. The periodical re-issuing of driver's licences appears to be desirable and necessary to combat the possible falsification of such licences.

Road carnage in South Africa cannot be attributed to the size of road vehicle population. The rate of road accidents in the United States which has the biggest size of road vehicle population is lower than that obtaining in South Africa. As an example, the statistics taken in 1987 <sup>(12)</sup> show that with 180 million road vehicles in the United States, 46 056 persons died as a result

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12     ibid 1.

of road accidents whereas with 4,8 million road vehicles in South, 9 905 persons died as a result of road accidents. The enforcement of traffic law system seeks to change human behaviour directly, individually and constantly. Limited success is achieved in controlling the ever increasing number of road vehicle accidents in South Africa, an indication that the enforcement component is not operating effectively. This situation calls for an extensive reform in the traffic law system which could bring about an efficient enforcement system.

### 7.2.3 PROPOSED MEASURES TO ADDRESS TRAFFIC LAW ENFORCEMENT PROBLEMS IN SOUTH AFRICA

It is heartening to note that authorities do not watch problems in the traffic law system with their arms folded. There is a process set in motion to remove certain traffic offences from the realm of criminal justice through decriminalization. The aim is to replace criminal sanction with administrative sanctions. The Minister of Justice has in terms of the Decriminalization Act, after consultation with the Minister of Transport, established an Advisory Committee for the Decriminalization of Road Traffic Offences. <sup>(13)</sup> The task of the committee is to enquire into and advise the Minister of Justice on the necessity or desirability of replacing certain offences in terms of the Road Traffic Act and regulations with an administrative sanction.

Interested institutions and authorities were invited to submit comments or representations by not later than 26 February 1993 on traffic offences which

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13 The appointment of the Committee was announced in a press release on 1 February 1993 and in Notice No. 119 of 4 February 1993 in Government Gazette No. 14567.

could be considered for decriminalization.<sup>(14)</sup>

Draft regulations to provide for the decriminalization of certain traffic offences were drawn up by the committee and published for comments by interested parties.<sup>(15)</sup> Draft regulations were published in compliance with s 11 (1) of the Decriminalization Act.

#### 7.2.3.1 The draft decriminalization regulations

The draft decriminalization regulations provide for *inter alia* the following:

- (i) **Draft Regulation 2:** Appointment of a representations officer.

Each responsible authority (which could be a local authority, provincial authority, state department or statutory board or body) appoints a representations officer from the ranks of magistrates, prosecutors, persons qualified to be admitted as advocates or attorneys. The responsible authority has to remunerate that officer at a rate of R35 per quarter an hour or approximately R240 000 per annum.

- (ii) **Draft Regulation 3:** Notice of infringement.

When an infringement has been committed, an officer issues

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14 Government Gazette No. 14567 supra.

15 Published under Notice No. 1068 of 22 October 1993 in Government Gazette No. 15230.

a notice setting out the particulars regarding the infringement and the fine that is payable.

(iii) **Draft Regulation 4: Representations by an infringer.**

If the person does not wish to pay the fine he may make representations to the representations officer.

(iv) **Draft Regulation 5: Handling of representations by the representations officer.**

Representations together with a copy of a notice and written comments of the officer who issued a notice are submitted to the representations officer. Oral representations may on the request of the infringer be made before a representations officer.

(v) **Draft Regulations 6: The decision of the representations officer.**

The representations officer can remit the fine, reduce it or dismiss the representations. If the representations are unsuccessful, the person concerned must (if he has not already done so) pay the fine plus costs to the representations officer at the rate of R35 per quarter hour, up to a maximum of R70.

(vi) **Draft Regulation 7: Failure to make representation, lodge an objection or pay a fine.**

If no representations to the representations officer or objection to a justice of the peace are received and no fine has been paid within the prescribed period, the infringer will be deemed liable for the amount specified in the notice.

(vii) **Draft Regulation 8:** Handling of objections by a Justice of the peace.

If the infringer is dissatisfied with the decision of the representations officer, he may object to a Justice of the peace. The objection will ordinarily be on the basis of existing documents, although further written comments by the objector and authority will be allowed. The decision of a Justice of the peace, or where no objection was lodged, that of the representation officer will be final and no appeal shall lie therefrom. <sup>(16)</sup>

(viii) **Draft Regulation 9:** Ascertaining the decision of the representations officer or a Justice of the peace by the infringer.

There will be an onus on the person making representations or objection to establish the result of his representations or objection.

(ix) **Draft Regulation 10:** Determination of limits of fines.

The magistrate of each district shall determine the maximum fines that may be imposed for infringements in his district.

(x) **Draft Regulation 11: Immobilization of vehicles.**

If a traffic officer issued a notice in respect of an infringer and reasonably suspects that the person charged will evade payment of the fine or where there are outstanding fines noted against the registration record of the vehicle concerned, then the officer may summarily immobilize the vehicle concerned if the vehicle would not present danger to other road users or hamper the flow of traffic. The infringer will have to pay the fine concerned plus immobilization costs before the vehicle is released. After payment the infringer can make representations in accordance with the procedure outlined. If the fine and costs are not paid within 24 hours (excluding week-ends and public holidays) the authority can impound the vehicle.

(xi) **Draft Regulation 12: Failure to pay fine.**

If a person fails to pay a fine and costs, this will be noted against the registration record of the vehicle concerned. The amount of the fines and costs together with interest at 20% per annum, will be added to the licence fee for the year concerned. The Registration authority can then refuse to re-license that vehicle, or license any other vehicle of the owner unless the fines and costs have been paid.



Where the vehicle is sold or repossessed, no other vehicle of the seller or person from whom the vehicle was repossessed will be registered unless the outstanding fines and costs are paid.

(xii) **Draft Regulation 13: Recovery of fines and administrative levies.**

The registration authority must notify the owner, seller or the person from whom the vehicle was repossessed of any fine and costs which are owing in respect of a vehicle. The person concerned can then lodge a written objection to the representations officer who will then supply the person concerned with particulars and the responsible authority from which it originated. If the person concerned approaches the representations officer to adjudicate the matter, the officer must investigate the matter and prescribe a reasonable procedure for the adjudication of the matter. If the person concerned does not pay the amount outstanding within 90 days of receipt of notification of the outstanding fines and costs, the authority can lodge an affidavit with the clerk of the civil court, stating the amounts concerned and the date on which the amounts became payable. The affidavit concerned shall have on its being filed with the clerk of the court concerned, the force of law and the effect of a civil judgment granted in favour of the registration authority for a liquid claim for the amount specified therein.

**7.2.3.2 The draft notice in terms of the draft decriminalization regulations**

The advisory committee compiled a draft notice which was published for comments in terms of s 2 of the Decriminalization Act. In terms of the draft notice, the Decriminalization Act was declared to be applicable to the provisions of the Road Traffic Act as follows:

- (i) By suspending the provisions of s 149 of the Road Traffic Act (this section provides for offences and penalties) in so far as they apply to:
- s 88 of the Act (power of local authorities to collect parking fees);
  - s 97 (d) of the Act (stopping of vehicles in contravention of any road traffic sign);
  - s 98 of the Act (parking of vehicles); and
  - s 114 (8) of the Act (vehicle left or abandoned on a public road for a continuous period of more than seven days).
- (ii) By suspending the provisions of s 133 (5) of the Act in relation to the local authority by-laws in respect of stopping with and parking of any vehicle on a public road or portion thereof, promulgated under s 133 (1) (b) of the Act.

In short, the draft notice categorizes the traffic offences to be decriminalized into:

- parking and stopping offences created by provisions of the Road Traffic Act; and
- parking and stopping offences in terms of the local authority by-laws made under the Road Traffic Act.

### **7.2.3.3 Summary of the envisaged procedure contemplated in the Decriminalization Act**

*If a person commits a decriminalized offence, an administrative sanction is imposed, for example, a fine. If that person feels aggrieved by the sanction, he may make written representations to a representations officer. If that person, after the decision by the representations officer, still feels aggrieved he may lodge a written objection against it with a Justice of the peace. The decision of the Justice of the peace is final and cannot be appealed against. No legal representation is allowed.*

## **7.2.4 ANALYSIS OF THE CONTEMPLATED PROCEDURE IN TERMS OF THE DECRIMINALIZATION ACT AND THE DRAFT REGULATIONS**

### **7.2.4.1 Criticism of the enabling act (Decriminalization Act of 1991)**

There are two major shortcomings of the enabling Act observed in my study. These are:

- the independence or impartiality of the representations officer; and
- the powers and functions of the Justice of the peace charged with adjudicating objections to the decision of the representations officer.

**(i) The independence or impartiality of the representations officer:**

The Act provides that a representations officer will be an employee of a responsible authority. <sup>(17)</sup> In the present set-up the responsible authority would be the provincial administrations and local authorities. The representations officer will be working for the same institution as the officer who will charge the infringer with the infringement. The representations officer will therefore be the judge in his own cause, which is contrary to the principle *nemo debet esse judex in causa propria sua* (literally means that no one shall be the judge in his own cause). This principle is applicable to all bodies which adjudicate questions of fact and law.

It will be difficult to convince the public that such a representations officer could be impartial and objective, given the structure of which he is a part. It is very much important that justice must not only be done, but must also be seen to be done.

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17 S 1 of the Decriminalization Act supra.

The Decriminalization Act <sup>(18)</sup> provides that the representations officer will execute his task in accordance with the principles of natural justice. The right to be heard by an impartial tribunal is one of the principles of natural justice. By appointing a representations officer from the responsible authority is in conflict with the intention of upholding the principles of natural justice. The Decriminalization Act is therefore flawed in this respect.

**(ii) The functions of a Justice of the peace**

Hearing objections to the decisions of a representations officer as provided for in the Decriminalization Act, <sup>(19)</sup> amounts to a statutory form of appeal. It could also be regarded as a review procedure because the Justice of the peace will have to consider whether the principles of natural justice have been complied with. <sup>(20)</sup> Section 8 of the Decriminalization Act empowers the Director-General for Justice to designate a panel of justices of the peace for each province. Such panel will be from Justices of the peace already appointed under s 2 (1) of the Justices of Peace and Commissioners of Oath Act. <sup>(21)</sup> While the draft regulation 2 (2) lays down stringent requirements for the appointment of

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18 S 11 (1) (b) and (11).

19 supra s 9.

20 S 9 (2) (9).

21 16 of 1963.

a representations officer, there is no criteria for the appointment as a Justice of the peace laid down either in the Decriminalization Act, in the Justices of the Peace and Commissioners of Oath Act or in the draft regulations. There is therefore no guarantee whatsoever that the person who considers an objection under s 9 of the Decriminalization Act will be a legally qualified person as the person who is entrusted with the task of determining whether the principles of natural justice have been complied with in terms of s 9 (2) (a) of the Decriminalization Act, it is of uttermost importance that he be armed with legal qualifications and experience.

The justice of the peace will also be confined to the record of proceedings kept by the representations officer. He is specifically precluded from hearing oral evidence in terms of s 9 (b) (ii) of the Decriminalization Act. An infringer may also not be represented by legal counsel, which is against the current trend of allowing representations in most cases.

#### 7.2.4.2 Criticism of the draft decriminalization regulations

Section 11 of the Decriminalization Act provides that regulations made by the Minister should be consistent with the enabling Act. However, certain provisions of the draft regulations appear to be *ultra vires* the enabling Act. Regulation 6 (4) of the draft regulations provides for a penalty to the maximum of R70-00 to cover the hearing costs should the representations made by an infringer be dismissed by the representations officer. The

provision is both unreasonable and unjust. The effect of the provision will be to discourage infringers from making representations for fear of having to pay a penalty should their representations be dismissed. This provision is not explicitly authorized by the enabling Act. The legislature could never have intended such a grossly unreasonable provision. This provision, it is submitted, appears to be *ultra vires* the enabling Act.

Regulation 7 of the draft regulations provides that if the period within which the infringer may make representations has expired and no representations have been received by the representations officer and no fine paid, the infringer is deemed to owe the amount. This position is unreasonable because of the following reasons:

- No provision is made for the possibility that the infringer was not aware of the infringement, where, for instance, the notice did not come to his personal attention;
- no provision is made for covering circumstances beyond the infringer's control that could prevent representations to reach the representations officer. There could be a postal strike or mailbag being stolen; and lastly
- the provision allows for a "conviction" without a prior hearing.

This provision appears to be inconsistent with the principles of natural justice (the *audi alteram partem* rule) which has been

provided for in s 9 of the Decriminalization Act.

The same applies to the provisions of Regulation 12 of the draft regulations where, in case the infringer is not the owner of the vehicle concerned, the owner is penalized without first being afforded a hearing. This provision does not comply with the principles of natural justice advocated for in the enabling Act, and therefore is *ultra vires* the enabling Act.

The purported civil liability to recover unpaid fines as provided for in Regulation 13 of the draft regulations is not explicitly authorized by the enabling Act. In the absence of such authority, the regulation is therefore *ultra vires* the Act. The provisions of this regulation allow the representations officer to usurp the powers and functions of a civil court. The effect is to suspend the provisions of the Magistrate's Court Act <sup>(22)</sup> and rules in regard to claims of this nature. The provisions allow one party to the civil dispute (the responsible authority) to adjudicate on the matter through the representations officer. He is also authorized to *prescribe a reasonable procedure for such adjudication*. This procedure amounts to a violation of the principles of natural justice. The matter becomes worse when the procedure affects the owner of vehicle who was not an infringer who would be held liable without proof of liability or access to an independent forum. These provisions are *ultra vires* the enabling Act. The Decriminalization Act, does not authorize the interference with



the civil process. the process also does not comply with the principles of natural justice for the other party is not afforded the opportunity to be heard.

**7.2.4.3 Provisions of the Decriminalization Act, the draft regulations vis-a-vis provisions of the interim constitution on fundamental rights**

The question here is whether the Decriminalization Act and the draft regulations comply with the rights laid down in Chapter 3 of the interim Constitution of the Republic of South Africa. <sup>(23)</sup>

The provisions of chapter 3 of the Constitution which are relevant to my discussion are:

s 22 (access to court);

s 24 (administrative justice); and

s 25 (3) (a), (c), (d), (e) and (h) (rights of accused persons)

**(i) Section 22 (access to court)**

This section guarantees access to the courts. Even if the matter is placed before another forum, that forum must be independent and impartial. The representations officer from the responsible authority cannot and will never be regarded as an independent and impartial forum.

**(ii) Section 24 (administrative justice)**

This section guarantees lawful, fair and justified administrative action and the supply of reasons pertaining to any administrative action. The procedure purported in the draft regulations does not give room for the other side to be heard before any final decision is taken. This practice will render the whole administrative process unfair especially when a civil judgment is granted against the owner of the vehicle on the strength of an affidavit from the responsible authority.

**(iii) Section 25 (3) (the right of accused persons)**

This section guarantees a fair trial to the accused, the presumption of innocence in favour of the accused, legal representation, recourse by way of an appeal or review to a higher court.

Section 9 (2) (b) (ii) of the Decriminalization Act does not allow legal representation, and s 10 of the same Act does not allow a recourse by way of a further appeal against the decision of the Justice of the peace, and therefore substantially violate the rights contained in this provision of the Constitution.

The Decriminalization Act and the draft regulations may, as a result, be challenged on the basis of their constitutional

invalidity.

## 7.3 RECOMMENDATIONS

### 7.3.1 THE DECRIMINALIZATION OF MINOR TRAFFIC OFFENCES

As an initial step towards an efficient and fair enforcement of our traffic law, it is recommended that all minor traffic offences be decriminalized. Decriminalization of minor traffic offences would require their re-classification as mere administrative violations or infringements. To re-classify traffic offences, there must be a criterion on the basis of which minor traffic offences could be identified. It is also important that an administrative adjudication system be established to deal with decriminalized offences.

#### 7.3.1.1 **Criteria for the re-classification of traffic offences**

As already discussed in Chapter 3 of this work, a comprehensive literature study produced no clear answer as to the criteria for criminalizing or decriminalizing conduct. Concepts such as moving and non-moving, serious and less serious criminal and non-criminal offences have been used along with distinctions such as "offences" as opposed to "infringements". There is no authority which provides a rational and objective basis for the delimitation that must necessarily take place prior to the processing of any decriminalization.

It is recommended that the application of the criminal law be confined to such forms of road behaviour which seriously affect

road safety, that is, offences which involve serious injuries or fatalities, leaving the scene of an accident, alcohol or drug related traffic offences or reckless driving.

Traffic offences, the commission of which would not create a dangerous situation on the road in the normal cause and those which will not result in damage or loss for the other party should be redesignated as mere administrative violations or infringements. On the basis of these criteria, the following traffic offences are recommended for decriminalization.

(i) Traffic offences under the Road Traffic Act of 1989:

s 26 - licence holder to give notice of change of place of residence.

s 62 (1) - operating an unroadworthy vehicle on a public road not allowed.

s 84 (1) - failure to obey a road traffic sign.

s 85 (4) - failure to observe the speed limit.

s 89 - vehicle to be driven on left side of the road.

s 90 - driving on a divided public road.

s 91 - passing of vehicle.

s 92 - crossing or entering a road or traffic lane

s 93 - driving signals.

s 94 - right of way at certain road junctions

s 95 - procedure when turning

s 96 - turning of vehicles.

s 97 - stopping of vehicles.

s 98 - parking of vehicles.  
s 101 - general duties of drivers and passengers.  
s 103 - vehicle causing excessive noise.  
s 104 - use of hooter.  
s 109 (2) and (4) - pedestrians' right of way.  
s 115 - damage to public road by dragging wheels.  
s 117 (2) (c) and (d) and 117 (5) - special provisions relating to freeways.  
s 101 (1) (k) - excessive smoke.  
s 101 (1) (m) - oil leaks.  
s 14 (2) - no clearance certificate on vehicle.

(ii) Offences under the consolidated road traffic regulations in terms of s 132 of the Road Traffic Act:

Reg 307 - defective reverse lamps

Reg 19 (1) (a) - no registration number on vehicle

Reg 35 - registration plate colour not as prescribed

Reg 19 (2) (c) - obscured registration plate

Reg 38 (1) (9) - display motor trade plate not as prescribed

Reg 300 (1) (a) - defective rear lamps

Reg 319 (1) and 323 - no reflectors

Reg 324 (2) (a) - no chevron reflectors

Reg 326 (1) and 333 (7) - defective indicators

Reg 336 (1) (9) - defective hooter

Reg 342 (1) - failing to wear crash helmet

Reg 345 - door handles defective

Reg 339 (1) (b) - obscured/no rearview mirror

Reg 348 (1-6) - safety belts  
Reg 349 (2-4) - no emergency warning signs  
Reg 357 - 359 (3) - offences relating to illegal projections  
Reg 436 - offences relating to flags on projections  
Reg 340 (c) - battery wiring creating a source of danger  
Reg 25 (5) - operate contrary to motor trade number  
Reg 26 (1) - conveying passengers whilst operating under a special permit  
Reg 337 (3) - windscreen not fitted  
Reg 338 - windscreen wipers defective  
Reg 398 (1) - no fire extinguisher in vehicle  
Reg 340 (b) - no fuel cap fitted to vehicle  
Reg 251 (1) - no public driving permit in vehicle  
Reg 267 (1) no certificate of fitness in vehicle  
Reg 8 (1) unlicensed motor vehicle  
Reg 20 (1) (a) - failing to notify the local authority of change of address within 21 days  
Reg 17 - operating a motor vehicle without supervision whilst in the possession of learners licence

#### 7.3.1.2 **The establishment of an administrative adjudication system**

The decriminalized offences would need an improved traffic adjudication procedure which does not require the burdensome and inappropriate criminal procedure requirement. There should be a more simplified informal and administrative type of procedural machinery for traffic infringements, adjudication and sanctioning. The procedure of handling decriminalized traffic

offences created by the Decriminalization Act and the draft regulations discussed earlier in this chapter has since been overtaken by time and events and if implemented would bring more confusion rather than solution. The procedure contemplated in the Decriminalization Act offends against the basic legal principles of the modern legal system.

The administrative adjudication of decriminalised traffic offences should meet certain minimum requirements namely:

- (i) the forum which replaces the court should be independent and impartial and should be perceived to be so by the general public;
- (ii) the simplified procedure desired should conform to the following:
  - the presumption of innocence should remain paramount,
  - the hearing should afford everyone an opportunity to be heard,
  - the infringer should be allowed to appear in person before the forum at no cost to himself,
  - the infringer should be allowed to cross-examine the witness,

- the infringer should have the right to put the prosecuting authority to the proof of the allegations against him,
- the infringer should be permitted to call a witness, and
- the infringer should not be refused legal representation.

(iii) there should be an appeal forum consisting of more than one member,

(iv) every convicted motorist should be provided with an immediate and inexpensive right of judicial appeal,

(v) there should be a right of further appeal or review by a higher court, and

(vi) the forum should not be bound to appoint counsel on behalf of an indigent infringer.

To conform with these recommendations, the following organs should be involved in the process of administrative adjudication:

a **traffic officer** who should be the employee of the responsible authority charged with the duty of issuing notices to infringers,

a **representations officer** who should not be the employee of the



responsible authority, with both legal and traffic safety background to be charged with the duty of making decisions on the written or oral representations from the infringer,

an **Administrative Adjudication Board** consisting of three experience lawyers with special training in traffic law and road safety principles to hear appeals against the decision of the representations officer,

the **Supreme Court** to deal with appeals and to review the decision of the Administrative Adjudication Board, and

a **traffic adjudication system Administrative Manager** at the national level whose duties will be to develop and supervise a uniform system and train traffic cases adjudicators and administrators. He should also collect and evaluate adjudication data on annual basis and recommend improvements to the appropriate judicial and legislative authorities.

### 7.3.1.3 **Administrative adjudication system in operation**

The administrative approach of New York discussed in chapter 2 of this work has influenced my recommendations because of its success. I therefore recommend the following procedure:

When the offender hereinafter called an infringer has committed a decriminalized traffic offence, hereinafter called an infringement, the traffic officer should issue him with a notice

giving the infringer three plea options, namely, plea of "guilty", plea of "guilty with an explanation" and a plea of "not guilty".

An infringer who pleads guilty should mail the notice with the prescribed fine within a prescribed period on the notice to the responsible authority.

If the infringer feels that he has an explanation which could serve as a mitigating factor, he should mail written representations through the responsible authority concerned to the representations officer. The responsible authority should forward a copy of notice concerned, written comments by the traffic officer who issued the notice and the representations of the infringer to the representations officer. The representations officer should have a right to call the parties for oral evidence if he so wishes. On the basis of evidence presented to him, the representations officer must make a decision and impose an appropriate sanction. If the infringer is not satisfied with the decision of the representations officer, he may lodge an objection by appealing to the Administrative Adjudication Board.

In case of a plea of not guilty, the infringer should appear before the representations officer together with the traffic officer who issued a notice. The traffic officer should present the case for prosecution under oath and be subjected to questioning by the representations officer and cross-examination by the infringer. The infringer should thereafter testify and be subjected to questioning by the representations officer and the traffic officer.

An infringer should be allowed legal representation if he so wishes. The evidence should be tape-recorded. After listening to both sides, the representations officer should make a decision on the basis of evidence presented. The standard of proof should be of "clear and convincing evidence" which lies somewhere between the civil standard of "preponderance of probability" and the criminal one of "beyond a reasonable doubt."

An infringer who is not satisfied with the decision of the representations officer should lodge his objection with the Administrative Adjudication Board. Further appeal and judicial review of an adverse appeal should be allowed and be handled by the Supreme Court.

The successful implementation of an administrative adjudication as contemplated earlier, will depend on the existence of a country-wide national information system that is accessible to the responsible authority, the representations officers, the motor vehicle licensing authorities and the appeal forum (the Administrative Adjudication Board). The National Traffic Information System NaTIS, which is currently being implemented by the Department of Transport will meet this need.

The Administrative Adjudication Board should be established for each province and should provide guidelines on the sanctions to be imposed on the infringer. There should be a uniform sanction schedule providing for sequential sanctions based on the driver record. Sanctions should include monetary payments, warning

letters, driver improvement training and licence suspension and cancellation. Each infringement should have its own demerit points. The points demerit system to be discussed later in this work will guide the representations officer on the appropriate sanction to be imposed to the infringer. The Board should determine the maximum limits of fines that may be imposed. Such fines should be revised annually depending on the ravages of inflation. Responsible authorities should receive fines for infringements committed within their operational areas. Outstanding fines should be recovered by adding the fines due to the motor vehicle licence fee when the licence is renewed. An infringer should first pay the outstanding fines before renewing the motor vehicle licence.

Immobilization of vehicles is recommended if there are outstanding fines noted on the record of the owner of the vehicle concerned, when the traffic officer reasonably suspects that the infringer would evade paying fine and if the vehicle has been reported stolen, or bears a false number plate or licence disc or if it is registered in another country.

### 7.3.2 STEPS TO EFFECT DRIVER-CONTROL

The weakness experienced in the traffic law enforcement in South Africa is also attributed to the lack of driver control. The following steps are recommended as an attempt to effect driver-control.

### **7.3.2.1 Periodical re-issuing of driver's licences**

It is virtually impossible to exercise effective driver-control when driver's licences have a permanent validity as is the case in South Africa. There is a bad record of a high number of forged and illegal driver's licences in circulation in South Africa. To curtail forgeries and counterfeits, the periodic re-issuing of driver's licences is necessary. Consideration should also be made to the separation of the licences from the identity documents and re-issue them in a credit card format without retesting. It is recommended that all drivers currently holding driver's licences be issued with new licences bearing a definite expiry date.

### **7.3.2.2 Central register**

The lack of a central register and country-wide communication system to provide accurate and easily accessible information on vehicle registration, vehicle licences and permits, driver's licences, previous violation and convictions and outstanding summonses, limit the effectiveness of enforcement.

An ultimate electronic driver record data processing system within the direct input and retrieval terminals at law enforcement, licensing authority and adjudication facilities is essential. With the National Traffic Information System (NaTIS) which is a national computer network that facilitates the identification of offenders and vehicles anywhere in the country, the activities of the registration and licensing officials will become much more

prominent. The registration and recording of previous convictions is necessary for the introduction of the points demerit system which is needed for effective driver control.

### **7.3.2.3 Introduction of the points demerit system**

One of the most important deficiencies in South African traffic law enforcement practice is the lack of a system that makes provision for the removal of habitual traffic offenders from our roads. The introduction of a points demerit system to pinpoint habitual traffic offender is recommended. As a method of driver improvement, this system operates on the principle of allotting a number of points to certain traffic offences according to their gravity. After a predetermined number of points have been accumulated an action is taken against the offender. The idea is to get rid from the roads of those people who are unable to improve their driving behaviour. This system can only be put into operation when there is a national computer network as the link between the identity of the driver and his record. It is critically essential to introduce the points demerit system in South Africa as it has proved to be an effective driver control system in other countries, examples of which are in chapter 4 of this work.

## **7.4 CONCLUDING REMARKS**

In conclusion I would advise that if we are to make any progress with the decriminalization of the road traffic law, it is important that the Decriminalization Act and the draft regulations be amended considerably to conform with the current

trend in the legal system. Administrative sanctions, if properly applied, constitute a better, cheaper and faster way of achieving respect of law and safety on our roads.

The implementation of the recommended traffic adjudication system would offer a higher probability of contributing to the reduction of traffic accidents and fatalities than the traditional court adjudication process presently in operation.

The recommended administrative adjudication system is conceived to protect the constitutional rights of the driving public, improve driver behaviour and enhance society's interest in road safety. Concurrent by-products would be to unclog the lower courts cases, enable magistrates to devote their valuable time to serious traffic and criminal cases and to enhance the promotion of traffic adjudication justice.

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