

ADMINISTRATION OF JUSTICE AND KNOWLEDGE OF THE LAW:
THE FALLACY OF SECTION 7 OF THE KENYA PENAL CODE:

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Dissertation Submitted in Partial fulfilment of
the requirements for the degree of:

BACHELOR OF LAWS (LL.B.), Lecturer, Faculty

UNIVERSITY OF NAIROBI

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MAY 1981

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A C K N O W L E D G E M E N T

I would like to thank my supervisor Mr. Mweseli T.A.O., lecturer, Faculty of Law who guided me throughout the paper with very useful suggestions and without guiding hand the paper would not have come out the way it is.

I would also like to thank miss Karen Njoka who generously devoted her time to type the paper for me. Lastly, I would like to thank my friends who in their various ways contributed in the ideas in the paper of special mention is my friend Kiaba, whose "Msema Kweli" policy was of great inspiration and encouragement to me.

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MAY, 1981

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Dedicated to the unfortunate Kenyan Masses who
frequently fall victims of alien laws they
cannot understand.

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ADMINISTRATION OF JUSTICE AND KNOWLEDGE OF THE LAW:THE FALLACY OF SECTION 7 OF THE KENYA PENAL CODE:INTRODUCTION

"The citizen does not know what it is. He does not know where to find it. He probably would not understand it----- if he did find it. But he is bound by it all the same!"

This observation was made by no other than the eminent Lord Chief Justice Hewart in his book "The New Despotism". He made the observation when criticizing delegated legislation and this demonstrated that it is not fair to bind the citizen by laws that he is not aware of. His main argument was that since delegated legislation are too voluminous, it is not possible for the citizen to know all of them. He argues that by its very nature, it is almost impossible for the citizen to know that a certain by-law has been passed. Even if he knew that it had been passed and even found it, he most likely would not understand it and its relation to the other laws.

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Justice Hewart was only concerned with delegated legislation, but one can say that his observation holds good for all the laws of a state and not only delegated legislation. The point is that if it is almost impossible for a citizen to know all the by-laws in a certain country we should expect him to find it even harder to know and understand all the laws of the country since delegated legislation is only a small part of all the laws in a country.

Philip James in his book "Introduction to English Law" propounds the same argument when he says:

"It is in fact impossible for anyone to know all the rules of law in force in any given time, for they are far too numerous"

It is a cardinal principle of law that ignorance of the law is no defence to any act or omission that has been prescribed as constituting an offence by the state. Provided that one has indulged in a certain conduct prohibited by the state an offence, one cannot be heard to say that one did not know that one's conduct had been prescribed against.

This is the well known and frequently quoted Latin Maxim Ignorantia Juris non excusant.

The maxim is embodied in Kenyan law by section 7 of the penal code that says: "Ignorance of the law does not afford any excuse for any act or omission which would otherwise constitute an offence unless knowledge of the law by the offender is expressly declared to be an element of the offence"³

It is the intention of this paper to examine the maxim as applied in Kenyan law in the light of the above two observations by Justice Hewart and Phillip James. The contention all through will be that Justice is not done to the citizen when he is tried and convicted for offences³ that he did not know anything about or that they had been ^{against} prescribed for by the state. It is a mystery^e as to why the law should presume everybody to know it. The myth has long been exploded but the maxim still stands good. For instance, Justice Maule had this to say in the famous case of Martindale v Falkner

"There is no presumption in this country that everybody knows the law. It would be contrary to common sense and reason if it were so"⁴

It has even been admitted that even lawyers and judges, whom we can rightly call the masters of the law, do not purport to know all the laws in a state and are not bound to by their profession. Abott C. J. had this to say in Montrie v Jeffreys⁵.

"God forbid that it should be imagined that every attorney or a counsel or even a judge is bound to know all the law"⁶
(i.e to make him liable in damages if he does not)⁶

The main aim of this paper is to examine the maxim in the context of the Kenyan Society and the implication it has when applied to the Kenyan public. Section 7 of the Kenya penal code has been selected particularly as the basis of the study of the maxim because it is the section that expressly imports the common law presumption of knowledge of the law into Kenyan law. This is not to say that the presumption only applies to the criminal law. Far from it. Indeed, it is a rule of law even

in other branches of law such as the law of evidence and the law of contract. In fact every branch of law will say something to the effect that ignorance of the law will not be accepted as a defence unless otherwise stated. It is through

The study of the maxim will mainly be based on criminal law because of one main reason. It is through criminal law that an individual's freedom can be restricted by the state. Criminal law is the branch of law that an individual's basic rights can be interfered with mostly by the state if he does not know the criminality of his act or omission. The question here is whether the State is fair at all in punishing one who is ignorant of the law that the state machinery has passed and has not made it known to the individual. If the state has to make laws that infringe on one's freedom even if he was not aware of them, then the state is as well duty bound to bring the law to the notice of everybody. Otherwise punishing a morally blameless individual needs a greater justification than the mere presumption of knowledge of the law. Secondly the paper centres on criminal law because it wants to bring out the hard fact that Kenya was not wise to import foreign laws wholesale without first considering the implications that such a foreign law would have on the Kenyan society. There is the argument on the other hand that the foreign English law was imposed on the Kenyans by the colonialists without their consent. Nobody disputes that. However, such an argument can no longer be accepted as an excuse for having foreign law when we have our own legislature that has the full powers to make its own laws and to repeal those foreign laws that do not operate fairly to the society.

A lot of literature has been written by our own Kenyan scholars illustrating how unfairly the imported laws apply to the Kenyan society. However, the literature such as we have on the so called reception

of English law in Kenya is too general and does not give a clear insight into the actual ^{application} ~~appropriation~~ of the specific rules, principles and standards in Kenya. In this case therefore although the paper will discuss some aspects of the reception of English law in Kenya, it will mainly centre on the maxim that ignorance of the law is no defence and most of the examples will be cited from criminal law. It is appreciated that such an approach will entail original research as not much has been written on the particular rule and its implications in the Kenyan society.

Basically, two methods will be used for getting material for the paper. The first method will be reading what other people have said about the subject. It is accepted that this will not be an easy task due to the fact that not much has been written on the subject. The second method will be the writer's own opinions and ideas. It is common for people writing on a particular subject to pretend that they do not include their own opinions on the subject. The present writer thinks that, that is not possible. Someone decides to write on a particular subject to start with because there is a message that he wants to deliver or communicate. This may be due to merits and demerits he sees in the subject and he wants to point out. The merits and demerits essentially depend on his subject, ^{ive judgment} which he cannot prevent from influencing the way he analyses the subject.

The paper will be divided into four chapters. The first chapter will look at the origins of the maxim Ignorantia Juris non excusant and its development up to the stage which it becomes the equivalent of the present section 7 of the Kenya penal code. The same chapter will look at the meaning of the maxim and the justification put forward in its defence and the hardships that might be encountered if the maxim were to be removed from the realm of criminal law. The chapter will also examine the main ingredients of section 7 of Kenya penal code and the exceptions contained therein.

The second chapter will basically concentrate on the importation of English law to Kenya with special reference to criminal law and the section under scrutiny. This chapter will show that no attempt was made to adapt the maxim ~~into~~ the circumstances in Kenya. The chapter will show that the present criminal law in Kenya is basically alien and only few customary crimes have found their way into the statutes.

The third chapter will compare the English and the Kenyan societies and their different notions of crime. This chapter will try to indicate that legal norms have an aim that they want to achieve in a particular society. These aims depend on the particular society where the norms originate. That means that if the norms are to be transplanted and transferred into another society, certain conditions and factors must first be considered. If a norm originates from a society under a given cultural and social setting and is transferred to another with a different cultural and social setting, then it is imperative that the norm should be modified in order to be compatible with the new society's values and needs. This was not done with the English law that was imposed onto Kenya. This chapter will then show why the maxim is not justified in Kenya even if it may be justified in Britain.

The fourth chapter will be the conclusion. The issues to be discussed here, are the aims of penal legislation and whether these aims are achieved when people are presumed to know the law when they do not. This will be answered in the negative and the argument is that even if these aims are achieved ^{they are achieved} just coincidentally. Since the paper so far will have posed and analysed the problem, the conclusion will also examine the possible remedies.

CHAPTER 1THE ORIGINS, DEVELOPMENT AND MEANING OF THE MAXIM"IGNORANTIA JURIS NON-EXCUSANT"

Section 7 of the Kenya Penal Code states:-

"Ignorance of the law does not afford any excuse for any act or omission which would otherwise constitute an offence unless knowledge of the law by the offender is expressly declared to be an element of the offence"

This section is the incorporation into the Kenyan criminal law of the Latin maxim Ignorantia Juris non excusat that is, ignorance of the law is no defence. Indeed, this is a well known principle of law to the layman as well as the lawyer. It is the intention of this chapter to look at the origins and development of the maxim. It will also look at the rationale of the maxim, the argument put forward in its defence and the difficulties that are likely to arise if the presumption were to be removed from the realm of criminal law. The chapter will also discuss the general ingredients of the definition contained in section 7 of the Kenya Penal Code.

The origins of the maxim, it is generally accepted, are to be found in the Roman law². On the other hand Blackstone says that the maxim as to Ignorantia has origins in both the Roman law as well as the English law³. In Roman law the maxim in its initial stages has been treated by Roman law writers as solely applicable to civil cases⁴. However in Roman law, the maxim did not apply to certain classes of people because it was considered that these individuals by reason of their status would not have knowledge of the law. Those exempted were those under twenty five years of age, women, soldiers, peasants and other persons of small intelligence⁵.

Theodore and Plucknett writing on the history of common law

say=

Our earliest Anglo-Saxon 'laws' are modifications of detail and

obviously assume that the legal fabric is essentially customary. The communal courts which survived into historical times, especially Hundred and the Country, were customary in their origin and declared customary law whose sanction was delivered from custom⁶.

This would then seem to support the earlier contention that the maxim is equally of early Roman as of English law. Professor O. K. Mutungi in an article also supports the same view when he tries to explain the rationale of the maxim. He says:-

"The rationale of the maxim seems to lie in the common law, according to which, represents no more than the norms generated by the society itself, and the idea that if the law is to command the respect of the community, it is imperative that such laws reflect the ethos of the society⁷".

The earliest case reported perhaps applying the maxim was decided in Hilary Term 1231⁸. In that case, one Robert Waggehastr was summoned to answer one Wakelinus for a breach of a fine committed by entering a land that was in possession of Wekaliny's mother. Robert pleaded as a defence that he entered upon the land under the belief that the land belonged to him. This belief was founded on advice of a counsel. This was held by the court to be no defence and Robert was imprisoned for the breach of the fine. The case also illustrates the fact that the maxim still remains good even when a client is misinformed on a point of law by his advocate. He cannot be heard to say that he relied on his advocate to tell him the legal position. The case also illustrates how unfairly the maxim can operate at times. An individual goes to an advocate in the first place because he does not know the law and expects the advocate to give him the true legal position and he wholly relies on him. Such an individual can be said to have done everything within his power to act according to the law but the maxim will not excuse him despite his genuineness.

It is worth noting other early cases illustrating the early use of the maxim. Vennor's Case⁹ decided in 1505 was an action of trespass. The defendants justified themselves on the ground that they were brought against the defendants for carrying off the plaintiff's wife

The defendants justified themselves on the ground that they ~~were~~ accompanying the woman to Westminster to petition for a divorce to ease her conscience. Objection was raised in place that Westminster was not the proper place to take a woman to sue for a divorce but the plea was held good "for perhaps they did not have the knowledge of the law as to where the divorce should be sued".

The Doctor and Student Dialogues

Published in 1518 state the following rule-:

"Ignorance of the law (though it be invisible) doth not excuse as to the law but in a few cases, for every man is bound at his peril to take knowledge what the law of the realm is, as well as the law made by statute as the common law, but the ignorance of the deed may excuse in many cases¹⁰".

Thus according to the Doctor and Student Dialogues the maxim was regarded applicable both in criminal and civil cases.

In Brett v Rigden 1568 the issue involved was the construction of a deed. In the course of judgment Manwood J. observed-:

"It is to be presumed that no subject of this realm is ignorant of the law whereby he is governed, ignorance of law excuses no one¹¹".

In Mildmay's case 1584 an action was brought against the defendant for a debt. From the evidence, it appeared that by the terms of an agreement between the parties the defendant and his son were to sign a certain release to the plaintiff. The release was prepared by the plaintiff who demanded that the defendant and his son sign it. "because his son was not lettered and could not read the said John prayed the plaintiff to deliver it to him to be shown to some man learned in ^{law} who might inform him if it was according to condition¹²". The plaintiff refused this and brought action. The court held that the son was not entitled to time to consult a counsel but should have signed the release at once for Ignorantia Juris non excusant.

Sir Mathew Hale in his plea of the Crown published in 1680

said:- "Ignorance of the municipal law of the kingdom, or of the penalty thereby inflicted upon offenders doth not excuse any that is of age of discretion and Compos Mentis is bound to know the law and so presumed to know¹⁴".

This may as well be considered as the basic statement on ignorance of the law in England and is generally cited as a leading authority for the present law on the subject¹⁴". It is also the basic statement on the law embodied in section 7 of the Kenya Penal Code.

The general rule as contained in section 7 of the penal code is that ignorance of the law will not be pleaded as a defence. It is irrelevant whether or not the doer knows that his act constitutes a crime or not. All that needs to be proved is that the defendant intended to cause the state of affairs which is forbidden by law. This will be so even if it also appears that the defendant's ignorance was quite reasonable and even if it was impossible for him to know of the prohibition in question. One of the leading authorities on the subject is the English case of R v Bailey⁵. In that case, a captain of a ship had fired into another ship on the high seas and wounded a man in the latter ship. He was convicted of this though the statute making such conduct criminal had been passed while he was at sea before the end of the voyage and he had no means of knowing that such a statute had been passed. The defendant was convicted under the statute. However, the judges recommended a pardon which would strongly suggest that where the circumstances are such as to make it completely impossible to know the law, it can be relied on to reduce the sentence or as a very strong mitigating factor.

The East African Court of Appeal has had maxim occasion to examine in the Tanzanian case of Musa and Others v Republic¹⁶.

In that case a member of Parliament had addressed a public rally in his constituency. The subject of discussion was cattle rustling and according to the evidence adduced in court, those who heard him

thought or understood him to have meant that it was lawful to kill cattle thieves. He had told them that next time when there were cattle thieves they should chase them and kill them. The accused persons^{ie} soon after the rally ran after some cattle thieves and killed them. The court held that they were ignorant of the law since no such a law existed. They could not rely on the fact that they had been told so by their member of parliament. They were convicted. Perhaps this case illustrates how unfairly the maxim can operate. The accused here were poor simple peasants who relied on what they believed in good faith was the law especially when they were told by one of their leaders and a member of parliament for that matter. Yet their ignorance of law could not be taken as a defence and even what is more ironical, the author of the whole mischief, the member of parliament, was released even before the case went for appeal.

There are certain exceptions to the general rule as stated in section 7. The section says:- "-----Unless knowledge of the law by the offender is expressly declared to be an element of the offence". Therefore the general rule will not apply where the section of the law creating a crime expressly includes knowledge of the law as an element of the offence. In such a situation, the prosecution must prove knowledge of the law by the alleged offender before he can be convicted of that offence. An example can be found on section 14(2) of the Kenya penal code which says:-

"A person under the age of 12 years is not criminally responsible for an act or omission unless it is proved that at the time of doing the act or omission he had capacity to know that he ought not to do the act or make the omission¹⁷".

The section says that an infant over 8 years but less than 12 years can not be convicted of a criminal offence unless the prosecution proves that he knew that his conduct was criminal. In R v Gorrie¹⁸

an Infant of the equivalent age group in Britain contained in section 14(2) of the penal code was changed with the manslaughter of a school-mate who had died of a stab wound by the accused. Summing up to the jury Salter J. told them that they must be satisfied that when the boy stabbed the other, he knew that he was doing what was wrong" --not merely what was wrong but what was gravely wrong, seriously wrong". In such an instance however, the prosecution will have proved the knowledge of the wrongfulness of the act if they can prove that the accused knew that the act was morally wrong.

The other exception to the general rule that ignorance of the law is no defence is where a specific criminal intent as distinguished from a criminal mind is an element of the offence. If such a criminal intent is not present either by ignorance or mistake, then the accused cannot be convicted of the offence that he is charged with. An example can be found in section 3(2) of the prevention of the corruption act.

The section says:- "Any person who shall by himself or by or in conjunction with any other person corruptly give promise or offer any gift, loan, fee, reward, consideration or advantage whatever to any person whether for the benefit of that person or of another person as an inducement to ----(for) doing or forbearing to do--- anything in respect of any matter---- shall be guilty of a felony¹⁹."

In this section before the accused can be convicted, it must be proved that the transaction was corruptly excused. If the specific intent is not present there can be no conviction even if the lack of the specific intent was due to ignorance of the law or any other reason. The leading authority in Kenya on the section is Sewa Singh Madhia v Republic.²⁰

In that case the accused who was a magistrate was charged with corruptly giving a bribe to a police constable to forebear from taking any proceedings on a number of traffic offences committed by the driver of the vehicle in which the accused was a passenger. The accused admitted giving the money but because he "he had heard about these things and wanted

to know if it was real! In the High ^U court it was held that a corrupt motive was an ingredient of the offence under the Section and the accused's intent and motive was essential and material to the determination of whether he acted corruptly or not. This case shows that where a specific criminal intent is required that specific criminal intent must first be proved. This falls within the exception to the general rule in that if such a specific criminal intent is not present due to ignorance of the law, the accused can not be convicted of that offence with which he is charged.

It is important to note that ^{it is} only ignorance of the law, which we are basically concerned with here, and not ignorance of the fact. Ignorance of fact at times will be a defence but it is not the intention of this paper to examine how and when ignorance of facts will be a defence ^{20a}.

Various reasons have been given for the rule that ignorance of the law is no defence. The first reason is that everybody knows or is presumed to know the law because criminal law is basically concerned with public wrongs and everybody knows or ought to know what public wrongs are. Nobody will deny that such an argument is completely untenable and obviously untrue. Such an argument also assumes that law evolves from within the people like morality whereas this is not necessarily the case. Most crimes are basically what the ruling class wants to prohibit with penal sanctions and to refer to what a small section of the society wants to prohibit "Public" is clearly wrong. This is especially so in Kenya as will be shown in chapter three where the law was simply imposed on a society quite different from where the legal norms involved originated.

The second justification advanced for the maxim "Ignorantia Juris non excusant" is that it would be difficult to prove ignorance of the law if there were no such a maxim. An

A prominent exponent of this justification was Austin²¹ who actually said that it would be impossible to prove Ignorance of the law.

Holmes²² on the other hand points out that such an argument does not hold much water in that it cannot be said that proving ignorance would be more difficult than all the other facts proved in the course of a trial. He argued that since justice requires that facts be ascertained, the difficulty for doing so should be no ground for refusing to try. He further argued that the difficulty can be overcome by throwing the burden of proving ignorance to the accused and not the prosecution.

This is perhaps the better view to adopt to minimise the injustice caused by the maxim. It should not be forgotten that the maxim was still in force before the criminal evidence act of 1898 in Britain which allowed the accused to give evidence on oath in his own trial. Under circumstances where the accused is not allowed to testify in his trial, the only sensible thing is to presume knowledge of the law. Today an accused can give evidence on oath in his own trial. There is therefore no reason why he should not be compelled to prove ignorance of the law where he wants to raise it as a defence. This would mean only amending the Evidence Act to compel the accused to testify in his own trial since the law today is that an accused person is not a compellable witness in his own trial²³.

The other argument raised to justify the maxim is that if ignorance of the law were allowed as a defence, everybody would raise it everytime. It is further argued that it would also encourage people to be ignorant of the law. Lord Ellenborough in Bilbie v Lumley puts it in these words:-

"Every man must be taken to be Cognisant of the law, otherwise there is no knowing of the extent to which the excuse of ignorance might be carried. It would be argued in almost every case²⁴!"

It is not denied that if ignorance were allowed to be raised as a defence it would be argued in most cases. People always try to use any defence

that is available to them. But on the other hand, to accept such an argument in totality assumes a very high degree of moral turpitude. It is to assume that people will always lie to the court to exonerate themselves. It is to suggest that all people are never willing to accept liability where they know clearly that they are responsible, which is not the case. One of the offences in criminal law is perjury²⁵ and there is no reason why whoever raises the defence should not raise it at his own peril if it is proved that he was lying.

Holmes says that the true explanation of the maxim can be likened with the law's indifference to a man's particular temperament or faculties. Public policy sacrifices the individual for the general good. Those who make the laws assume that everybody is able as every other to behave as commanded. Everybody is assumed capable of behaving like the other one where-as everybody knows that this is not so and can never be so. So in essence the so called equality before the law becomes more of a myth than a reality in that the law treats unequals equally. The law-makers overlook the classic observation by Aristotle that "It is unjust to treat unequals equally as to treat equals unequally".

CHAPTER 11

THE IMPOSITION OF ENGLISH LAW TO KENYA

The year 1885 was crucial to the peoples of the African continent. In that year Western European powers met at the infamous Berlin Conference and decided on how to curb for themselves "spheres of influence" on the African Continent. They decided to acquire colonies in Africa which they did and exploited from then until mid twentieth century when the first of these colonies started attaining their independence. The Africans were not represented at the conference though it was their interests that were at stake. The African continent was divided into colonies without much regard to factors that ought to have been considered when placing a certain area under a certain colonial power. At times a tribe found itself divided between two regions each governed by a different colonial power. For instance the Masai who hitherto had been one cohesive "nation" found themselves divided some being in the present day Tanzania under the Germans and the other section in Kenya under the British. Naturally, when a people are bandied anyhowly to create colonies without any criterion as to why a certain colony, there were bound to be problems that would extend even to independent African States. On attainment of Independence, the African States formed the Organisation of African Unity that resolved inter alia to respect the former boundaries set by colonial powers. Some of the new states are not very happy about this and they claim that their state ought to embody all the people of the particular ethnic group. The most notorious exponent of this view is the Republic of Somali which had some of its Somalis divided between Ethiopia and Kenya. The 1967 Shifta war in Kenya and the 1978 Orgaden war in Ethiopia are well known examples when Somali has claimed that it ought to alienate the areas in those other countries where Somalis live as part of their country.

In order to exploit the newly acquired territories fully, it was essential for the colonial powers to administer them. In order to

rule them, there was established "law and order", According to the colonial master's notion of what law and order means. Thus suddenly, African peoples found themselves subject to a completely new system of government and laws all of which were alien to them. The colonial powers adopted systems that they knew and introduced their own systems with the pretence that what was good for the mother countries was equally good for the colonies. This was obviously untrue in light of the resistance that all the colonial governments faced from the Africans when they started introducing their rule and indeed throughout the period of their rule. What the colonial powers have never answered is who had ever invited them to come and "save" the Africans or who made them feel that they were their brother's keeper.

Kenya fell within the British sphere of influence and naturally they imposed their laws on Kenya. It is the intention of this chapter to examine the imposition of British ^{law} into Kenya. This is important because it will highlight the fact that throughout the reception period not much regard was given to the African concepts of crime. An alien law was imposed wholesale onto a people as if hitherto they did not have any laws to govern them. This can only be explained by the fact that the Europeans were only interested in having laws that would further their interests and not those of the people they were to operate on. If they had the Africans interests at heart, as they purported to, they would not have wholly disregarded the merits of some of the laws that existed in these societies before they introduced theirs. The chapter will look at the reception of English law in East Africa, generally and not Kenya particularly because in most cases and especially the early days of the colonial rule, most of the enactments were meant to apply to British East Africa which was originally the present day Kenya and Uganda. However where applicable, the reception of the law will mainly be based on Kenya. It will also try to focus on criminal

law and particularly the maxim under scrutiny.

Throughout Britain's colonial period she attempted to introduce her laws to the colonies. She argued that the white man carried his law with him because it was his birth right. In Africa, the law to be applied was stated as early as 1876 by the Gold Coast Supreme Court Ordinance as follows:-

"The substantive English law to be applied in African territories was the common law, the doctrines of equity and the statutes of general application in force on the relevant date of reception²."

This clause is almost identical in all the territories where English law was imposed. The only difference lies with the reception date which differed from territory to territory. During the early days of colonialism, the two territories comprising British East Africa were administered by the Imperial British East Africa Company from 1888 to 1895. The Company was mainly a Commercial Venture whose main aim was to trade and any laws that they made naturally were those that enhanced their commercial undertakings. With a working capital of just £250,000 and its affairs being mismanaged, it was soon evident that the company could not administer British East Africa and the foreign office took over the running of the area in 1895. Kenya was duly declared a British protectorate in June 1895 and it was from this time that the British government started enacting laws directly for the protectorate. *overseas domains from the Foreign Jurisdiction Act that gave British Parliament authority to legislate for* The British government obtained legal authority to legislate for the colonies. The enactment was done in the form of Ordinances and Orders in Council³.

The 1897 East African Order in Council stated:

"Her majesty's criminal jurisdiction in the protectorate shall so far as the circumstances admit, be exercised in the principles of and in conformity with the enactments--- of the governor of India--- and where inapplicable shall be exercised in accordance with common law and statutes in England in force in 12th August, 1897⁴!"

This was soon followed by the 1902 East African Order in Council which

stated that, "such criminal jurisdiction shall so far as the circumstances admit be exercised in conformity with the Indian penal code⁵".

However the 1902 Order in Council did not mention the application of English law in Kenya and the question was whether it had excluded the application of English law in Kenya. So an amending Order was passed in 1911 which stated:

"Such jurisdiction shall so far as circumstances admit ~~the law~~ be exercised with Indian penal code and the Indian Criminal procedure code--- and so far as the same shall ~~not apply~~ ^{not apply} ~~be exercised~~ ^{be exercised} in conformity with the substance of the ~~common~~ ^{common} law, the doctrines of Equity and statutes of general application in force on 12th August 1897--- and according to the practice and procedure followed in England --- the said shall only be in force so far as circumstances of the protectorate and inhabitants allow⁶".

The same reception clause was reproduced almost word for word in the 1921 Kenya Order in Council⁷ and this can be said to be the basic reception of English law Clause into Kenya. The same clause continued by saving and amending clauses here and there until it found its way into the independent Kenyan law in the form of section 3(1) of the Judicature Act 1967 which states thus:-

"The Jurisdiction of the High Court and all Subordinate Courts shall be exercised in conformity with:-

- a. The Constitution.
- b. Subject thereto, all other written laws including the Acts of Parliament of the United Kingdom cited in part one of the schedule of this Act modified in accordance with part 11 of that schedule.
- c. Subject thereto and so far as the same do not extend or apply the substance of common law, the doctrines of equity and statutes of general ~~of general~~ application in force in England on 12th August, 1897 and the practice and procedure observed in courts of Justice in England on that date.

Provided that the said common law, doctrines of Equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary⁸".

This section shows that not only did Kenya import English law wholesale but also has strongly attachment to it in that where an Act in Kenya leaves some gap, resort has to be made to English law.

As has been shown in the early days of colonialism, it was the

Indian Criminal law that was applied in Kenya-- Subject to qualifications set for English law. Perhaps one might wonder, why the Indian law? India and East Africa, especially the East African Coast had been closely interlinked for a long time even before the European came to East Africa. This was due to the spice trade in India in which ships on their way to India, mainly from Middle East countries, called on ports in East Africa for fresh water and replenishment. So even before the Europeans came to East Africa there had been interaction between India and East Africa and even some Indian criminal and civil laws applied in East Africa especially along the Coast. The High Court of India at Bombay was a part of the jurisdictional hierarchy of the East African protectorate. The Zanzibar order in council 1866 provided that proceedings in criminal cases in certain circumstances would be sent to the High Court at Bombay which had power to confirm, vary or remit the sentences imposed⁹.

However, the colonial government had two main arguments for introducing Indian law in Kenya instead of English criminal law. First they argued that unlike the bulk of English law, the Indian law was codified and could be easily applied by lay magistrates. They appreciated the fact that they could not provide the necessary personnel to apply English law and had to depend on semi-trained magistrates. They thought that such magistrates could best dispense justice if they applied codified law instead of uncodified law. Secondly, they thought that Indian criminal law was better suited to the Africans because it had some offences such as adultery, enticement and insult that were recognised offences under African Customary law and were lacking in English law. There was also the argument that since the Indian Criminal law, which had in fact been a codification of English law with minor modifications, had succeeded in India, it would equally succeed in East Africa. This is not necessarily true. The mere fact that it had succeeded in India could not guarantee its success in East Africa. The conditions and circumstances in East Africa are quite different.

Africa are quite different from those that prevailed in India.

That was the colonial government's view as to why they preferred Indian law to English law in Kenya. However, there was a different group of whites in Kenya who thought differently. These were the settlers. From the very beginning of colonial rule in Kenya, the colonial administration wanted to make Kenya a white man's country. This policy was mostly encouraged by Ellicots who was the governor of Kenya in 1902. The settler community in Kenya was a force to reckon with by the British government. Because the British government wanted to retain the settlers in Kenya they more often felt than they were not conceded to their demands and indeed throughout the colonial rule, the settlers were a force that largely influenced the colonial policy. They opposed the application of Indian criminal law to the colony for various reasons. They argued that since there was no trial by jury in most cases, they were being denied their common law right of trial by jury. They also argued that the lay magistrates were given wide powers that they usually abused. One can also imagine that they could not have accepted a law that was basically meant for Africans because they thought themselves superior to the Africans. What they perhaps forgot was that the Indian law was basically a codification of the English common law. They also could not be bothered by laws that would protect all the different races in Kenya equally but only those that would protect them as a group. Nor could they appreciate that an imported law in Kenya could only work fairly if it allowed for modifications to suit the local circumstances. Thus they vehemently demanded a new code.

As usual with the colonial government, it conceded to the settler's demand of a new criminal code. In 1924 the three governors of East Africa were sent Model Codes of St Lucia and Gold Coast by the colonial office to consider them in the light of the conditions prevailing in East Africa. The drafting of the new code to be applied in East Africa

Africa was began in 1925 by Ehrhardt who was a former puisne judge of Nigeria. However, the new code did not reflect the Gold Coast's nor St. Lucia's codes but rather was based on the provisions of the criminal code of Nigeria. The Nigerian code was selected as the model largely due to the recommendations of R.M. Combes who was an ex-Attorney General of Kenya and who was in fact the man who had drafted the Nigerian code. He was thus thought to be the best positioned person to know the best code suitable for Kenya. The Nigerian code had been based on the Queensland code of 1899. The Queensland code itself had been based on the provisions of an 1880 English Bill whose aim was to codify the common law crimes even though the Bill was not passed due to organised opposition in the House of Commons¹⁰. The Code also contained some provisions of the Indian penal code.

When the drafting of the new model code was complete, the three governors of ~~the~~ East Africa held a conference where they discussed the importance of having a uniform criminal law in East Africa.¹¹ They adopted a resolution to assemble law officers to consider the introduction of a uniform system of criminal law in East Africa having in mind the model code. In fact, the law officers accepted the model code as the basic criminal law in East Africa.¹² Thus one can say that the model code accepted for East Africa was basically English even though it was based on the Nigerian model in that even the Nigerian model was based on a Bill that intended to codify the common law.

The Bill introducing the new code was presented to the legislature in 1929. The Bill generated so much opposition, as would be expected in a multi-racial Society like Kenya, because it largely compromised the European settlers' demands, without much regard to the other races. The opposition was mainly from the Asian community in the colony. The Asians were the majority at the time in the legal profession in colony and were well versed in the Indian law. They could not accept the idea of going back to ^{their} ~~least~~ a totally new law altogether. Their

main argument was that Indian criminal law was better suited for East Africa because it contained some crimes that were recognised by the customary law and lacking in the English law. The bench, and especially the magistrates, were also not keen to have to apply a different law. However, laws are not made by the legal profession or the bench. The majority of the legislators at the time were basically the whites and they had the final say. The new code was enacted and became law as it was destined to become from the very beginning. The penal code we have today, except for minor amendments, is basically the 1929 enactment that commenced on the 1st August 1930 and is the enactment that embraces the maxim under scrutiny in section 7 of the Act.

It should be remembered that when the various stages to produce a uniform criminal law was in progress, alongside the enacted law there existed the customary law and yet, there was no attempt made to incorporate the customary criminal law into the act. As early as 1897, the East African Order in Council¹³ had provided that every criminal charge against a native would be heard and determined in proper native courts which were set up by the 1897 Native Courts Regulations. The East Africa Native Courts Amendment Ordinance 1902 had provided that the laws to be applied in these courts were the laws in force in the protectorate at the time. It also included the following provisions,

"In all cases, civil and criminal to which natives are parties every court (a) shall be guided by native law so far as it is applicable and is not repugnant to justice and morality or any regulation or Rule made under any order in council or ordinance¹⁵".

This provision remained part of the law in Kenya and can be regarded as the only provision that provided for the application of customary criminal law in Kenya till it was formally repealed as will be shown shortly.

Much as the provision may have purported to apply customary law in actual practice it did not achieve much in that the saving provisions in the clause were so wide as to make it exclude almost all customary criminal laws. There was also the snag of a law being repugnant to justice and morality. The issue was, according to whose morality- Africans or European standards of morality? This simply meant European morality. In fact this was accepted by Wilson J. in Gwao Bin Kilimo v Kisunda Bin Ifuti¹⁶. In that case judgment was entered against a father because his son had committed a crime. Under customary law, the father was under a duty to meet his son's debts. Reversing the appeal Wilson J. said:

"The only standard of justice and morality which a court in Africa can apply is its own British system---"

Therefore even if the provision purported to apply customary law, it did not retain much customary law in Kenya statutes in that many of the customary crimes had been provided for by the written law according to the English version of crime and to try such a crime the African way would be contrary^{to} the provision. An example can be found in section 166 and 167 of the penal code which provide for the offence of incest. The offence as defined in the penal code is so narrow and embraces only the immediate family of the offender whereas according to the African customary law, incest was wider and in fact included the whole clan of the mother and the father's lineage. This means that the Native courts could not try one for incest after having carnal knowledge of one's cousin because this was contrary to the written law. The customary law held such an act as a very serious offence. Other written laws specifically prohibited some customary crimes. For instance, section 6 of the Witchcraft Act provides:

"Any person who accuses or threatens to accuse any person with being a witch or practising witchcraft shall be guilty of an offence"¹⁷.

This section was in fact inserted in the laws to protect witches.

This was because of the European's belief that there was no witchcraft. Witchcraft to the Africans was a capital offence punishable by death.

When it became eminent that finally the colonies would get their independence, there was much concern as to the fate of customary law in Africa. In 1960, a conference met in London to discuss the future of customary law in Africa which agreed that general criminal law should also be written¹⁸. This prompted the Kenya government to start a research to ascertain and record customary criminal law offences with a view of incorporating them into the written law. The committee² was chaired by Eugene Cotran and soon came out with a report that was accepted by the government in principle but still remained a dead letter because no legislation was introduced to give them statutory effect¹⁹. This whole exercise was a sheer waste of public funds, a characteristic of the Kenya government to be so keen on appointing committees whose findings are never implemented. The final death blow to customary criminal law in Kenya was given by section 77(8) of the independent constitution of Kenya which provided that,

"No person shall be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law".

Since as we have seen, there was no attempt to incorporate the customary criminal laws into the statutes and customary laws are basically unwritten the effect of the section was to abolish all the customary criminal offences. The section was to take effect as from 1st June 1966 and we can say that as from that date, customary criminal law ceased to exist.

For the maxim under scrutiny, the above constitutional provision is important in that the idea behind it is that everybody has a chance to know the law. Since criminal law must be written, nobody should be allowed to plead ignorance because the law is at their disposal every time in the law books. This as chapter III will show is not enough justification to expect people to know the law when we simply know that they do not.

(2)

Having the law written acts as notice to all and the assumption is that everybody is aware of it. It should be noted that having law written as notice to all and thus the presumption of knowledge of the law had all through existed in the Kenyan laws. As early as 1893 the rules publication Act had provided that statutory instruments come into operation only after their publication. This was incorporated into the independent Kenya laws by the interpretation of General Provisions Act section 9(1) that provides:

"Subject to the provisions of subsection 3 of this section, an Act assented by the president shall come into operation on the day on which it is published in the Gazette"

The referred to subsection 3 of the same section provides:

"If it is enacted in the Act or any other written law, or is provided in the proclamation that act or any provision thereof shall come or be deemed to have come into operation on some other day, the Act or as the case may be, such provision shall come into operation accordingly²⁰."

The two sections mean that even if an Act is passed by parliament and assented to by the president, it will not come into operation until published in the Gazette. Section 9(3) refers to a situation where an act is passed and published but the commencement date is postponed. It cannot refer to backdating of commencement date because section 77(4) of the constitution bars criminal legislation with retrospective effect.

When read together section 77(4) and 77(8) of the constitution and sections 9(1) and 9(3) of the interpretation of General provisions Act constitute a protection to the accused in that one can only be convicted of an offence under a written law that has been published and such a law cannot be retrospective. The only crime allowed by the punishment prescribed beforehand is contempt of court²¹. A right is coupled with a duty. Because the accused has the right to protection against conviction under unwritten and retrospective laws, then he is also duty bound

to know the law and will not be allowed to plead ignorance of the law as a defence. In practice this protection is only academic. The assumption behind the protection is that everybody has access to the published laws, and even if they had, they would understand them. This is obviously untrue. It is common knowledge that much of the courts' time is spent trying to interpret sections of written laws. That means that even if a citizen were aware of a certain law and he obtains it and reads it, he may still be ignorant of the law because he may give it a different interpretation from the one that the court will give the same law. Thus the seeming protection that there is, is more mythical than real.

Thus we can say that both the independent constitution and the penal code we have in Kenya all disregard the customary criminal law. Those criminal offences we have in the penal code are mere adaptations of English law. One of such adaptations was the maxim Ignorantia Juris non excusant. Chapter III will endeavour to show that the Kenyan society is quite different from the English society. Since the maxim has its origins in common law, it cannot operate fairly in Kenya where none of the laws that evolved from within the society found their way into the statutes. This will be done by contrasting the English and Kenyan societies, the views that are held by the two societies on crime and why it is unfair to impose the maxim onto the Kenyan society, that is the factors that hinder the operation of the maxim in Kenya as contrasted with Britain.

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INTRODUCTION

Chapter II examined the reception of English law in Kenya with special reference to criminal law. The chapter brought out that the present criminal law of Kenya is alien and reflects the English criminal law. It is the aim of the present chapter to show that the imposition of foreign law to Kenya wholesale was not in the best interest of the Kenyans. It will bring this out first by comparing the English notion of a crime to the African notion. Then it will go on to compare the two societies; that is, the English and the Kenyan societies. The emphasis here will be that the two societies are quite different and any law within a specific society has to take the peculiar particular society's characteristics into consideration if it has to be good law. This is not the case in Kenya because a whole body of foreign law was transplanted into the Kenyan society which has quite different characteristics from the English society.

THE DIFFERENT NOTIONS OF A CRIME

It has been accepted that any attempt to define what a crime is will encounter serious problems and a classic definition of a crime has yet to be formulated if at all¹. This is because if any definition has to be true and correct, it should be able to point out specifically what acts or omissions constitute a crime. No definition has been able to do that. This perhaps can be explained by the fact that a crime will normally be what a particular society wants to prohibit. This will usually take the form of a legislation by that society's law making body backed by penal sanctions in case of contravention. The same body with the power to make laws normally has the power to repeal them. That means that conduct that is criminal today may not be criminal tomorrow if the law making the conduct criminal has been repealed though the conduct itself will remain unchanged.

Thus for instance in Britain suicide was criminal till August 3, 1961 when the Suicide Act was passed and came into operation to make it lawful for one to kill oneself.

Due to the difficulty of defining a crime, two eminent authors on criminal law, J.C. Smith and B. Hogan² have tried to show what a crime is, not by definition but by pointing out some certain characteristics that are generally found in acts that are crimes. This is the approach that will be followed in this paper and it will be taken to represent the English notion of crime. They hold that the first characteristic of a crime is that it is a public wrong. An act that generally has particular harmful effect to the public and does more than interfere with private rights is criminal. This public nature of crimes is evidenced by the contrast between the rules of civil and criminal procedure. As a general rule, any citizen can bring proceedings against a wrongdoer in the absence of provisions to the contrary, whether that citizen has or has not suffered any special harm over and above that suffered by the general public. Thus every member of the society stands to lose if a crime is committed because it is assumed to affect the whole public. This is in contrast to civil proceedings where one has to have Locus Standi to start proceedings. However this is not to say that all acts that are harmful to the public are criminal and that is why it is not enough to say that a crime is a public wrong. It is not uncommon to hear citizens urging that "There ought to be a law against it---". Even if that were the general opinion of the public, the act or omission will not be a crime unless it has been so condemned by an act of parliament or by a court decision.

The traditional attitude of the common law is that crimes are essentially immoral acts deserving punishment. This view equates a crime with an act that is morally wrong. Perhaps this was correct

in the early days when the number of crimes were relatively few and only the most outrageous acts such as murder, robbery and rape were prohibited. Today, many acts are prohibited not because of their immoral nature but on grounds of social expediency. On the other hand, there are acts such as adultery that are regarded as immoral yet they are not crimes^{2a}.

Writers and courts have also resorted to the nature of proceedings which may follow from the commission of an act in an attempt to define a crime. Lord Atkin in Proprietary Articles Association v A-G for Canada has this to say:-

"The criminal quality of an act cannot be discerned by intuition, nor can it be discovered by reference to any standard but one, is the act prohibited with penal consequences?"³

This brings the problem of distinguishing civil and criminal proceedings. This is because some torts are crimes while others are not and at the same time, some crimes are not torts while others are. Thus it is not in the nature of the act but in the nature of the proceedings that the distinction consists. The question as to whether a particular proceeding is a criminal case or a civil matter has frequently arisen. The test that is usually applied is whether the ^{conduct} ~~punishment~~ may result in the punishment of the offender. It is taken that if the proceeding results in the punishment of the offender then it is a criminal proceeding. However punishment in itself does not define a proceeding that is criminal or civil because the defendant who in a civil case is ordered to pay damages by way of compensation may feel that he has been punished.

The above English notions of crime are based on the idea that there are some wrongs that affect the public at large and as such ought to be prohibited by the state. Other wrongs affect only an individual and it is upon the affected individual to get the appropriate remedy due to him if any. Thus the English concept tries to distinguish between civil and criminal wrongs. That is not so under the African

customary law or at least the distinction between civil and criminal wrongs is not so clear-cut as in the English system. It is submitted that this is the better approach. If we accept that a crime affects the whole public at large, we should also accept the fact that the public is made up of individuals and a wrong that affects one individual in essence then affects the public.

It should not be mistaken that the African customary law did not distinguish civil and criminal wrongs absolutely. Rather the wrongs that the customary law regarded as affecting the whole public were more extended and included some wrongs that the English system would strictly refer to as civil. Thus it is erroneous for writers on African law to assert that there was no distinction between civil and criminal wrongs. The usually cited examples by such scholars are such offences as murder and theft that are clearly criminal offences according to the English law. Many African societies regard them as matters for private redress by the affected individuals. This is true to some extent but is not wholly accurate. The myth that African law did not distinguish between civil and criminal wrongs has long been exploded and the younger generation scholars on African law have shown that there existed a distinction. One of such exponents is the eminent justice T.O. Elias who has shown clearly that the distinction was clearly discernible⁴. He cites the Kamba example where if a wrong was too serious to be atoned for by a fine, the elders would condemn the guilty person to be executed in a bush rendezvous or for him to be hanged by the neck from some tree in a public thoroughfare "as a warning to other potential wrongdoers"⁵. He further stresses the fact that the class of offences that the English regard as criminal is different in marked respect from that recognised by other laws such as the French law. Thus we should not expect the African law to classify crimes under the same classification as that we get in English law. But a distinction between civil and criminal wrongs to the customary law there was and there were some wrongs that

that were punished by the whole society and others left to the affected individual.

Thus the basic attitude between the African and English notions of crime are essentially similar in that both systems distinguished between civil and criminal wrongs. However there is one major difference. The African customary law stressed much on compensation to the wronged party even in criminal cases as opposed to imprisonment of the criminal as in English law. This is perhaps what prompted the erroneous assumption that customary law did not *differentiate* civil from criminal wrongs. For instance the late President of Kenya, Mzee Jomo Kenyatta wrote:

"All criminal cases were treated almost in the same way as civil cases. The chief aim in proceedings was compensation for the individual or the group whom the crime was committed. Since there was no system of imprisonment, the offenders were punished by being made to pay heavy figures to the 'Kiamu' and compensation to right the wrong done".

According to the English system except in exceptional cases compensation to the victim of a crime is unheard of. The criminal is punished, in most cases by paying a fine to the state or by being imprisoned to work for the state. Nobody bothers with the victim of the criminal. He is not even thanked by the judge even if more often than not, he is a key witness without whose evidence the conviction of the criminal would have been impossible. The victim of the crime is left without any remedy while the state benefits from the victim's suffering in terms of the fine paid by the offender or the services rendered to the state in case of imprisonment. Is this justice to the victim of the crime? It is submitted that the African system was the better approach. The law should aim more at compensating the victim of the crime than merely punishing the criminal. Only then would everybody see justice to be done. Take the theoretical case of a young man imprisoned for setting fire on an old widow's hut. What justice is done to the old widow? The widow is left to suffer with no shelter whereas things would have been better if the young man had been forced to build another house for the

Widow. Again, it is submitted that the African system was the better approach because the victim of the crime was compensated for the wrong done to him. Punishing the offender is justified in that it is aimed at retribution, deterrence and rehabilitation of the offender. There is no reason to suppose that forcing the offender to compensate the victim of the crime will not achieve the same objectives. It is appreciated that in England and America today victims of violent crimes get compensation from a fund set aside by the state for that purpose. A young country like Kenya has no money for such a fund and as such, victims of violent crimes are left completely remediless.

Having looked at the English and the African notions of crime, it is important to ask ourselves whether there were any instances where the maxim under scrutiny applied in African law for the maxim embodied in section 7 of the Penal Code is basically imported into Kenya from English law. Were there any instances when the accused was allowed to plead ignorance of the law under African customary law? Professor Mutungi answers the question in the negative⁷. He goes to great pains to show that even under the customary law, there was no instance when the accused was allowed to plead ignorance of the law. That means that the maxim Ignorantia Juris non excusant is not strange to customary law. He explains why the maxim applies to the customary law as the very rationale^L of the maxim. He says that according to the common law, law represents nothing more than the norms generated by the society itself. If the law has to command the respect of the community, it is imperative that such laws reflect the ethos of the society. He goes on to argue that that being the case every properly socialised person will know the norms of his society which in turn constitute the law. For our purposes it is not disputed that everybody knew the customary law and no high school was needed to teach one the customs of ones people.

R. B. Seidman addresses himself to the same question when he says:-

"---- If one assumes that criminal law represents no more than the common morality of every properly acculturated person, then there would be little need to communicate it. Under such circumstances, to plead ignorance as a defence would be tantamount to an admission that the accused was improperly socialised into the community".

It is accepted that even under customary law, ignorance of the law was not allowed as a defence. However, that cannot be the basis for justifying Section 7 of the Penal Code because as we saw in chapter III, the Kenyan criminal law is wholly foreign. The notion that law is an expression of the social morals of a society is not applicable where the law is imported. The law was imposed on a people with complete disregard of their social morals. The criminal law that was imposed to Kenya is not suited for Kenya because it works under different conditions and circumstances that make the maxim unjustifiable in Kenya. The differences that there are between the Kenyan society and the English society account for the unfair operation of the imported law in Kenya.

The first major difference between the African and the English society is that the former is basically socialist whereas the latter is mainly capitalist. To the English, the individual's rights and duties are paramount whereas to the African, the society's rights and duties are more paramount than the individual's. An example to illustrate this can be obtained from the idea of land ownership. To the English land is "owned" by the individual whereas to the Africans, land was owned by community. The Africans were grouped into small social groups like the tribe, clan or family. In either case, land belonged to the whole social group for the benefit of everybody in the group. An Englishman owns land as an individual and can even eject his only son from the land as a trespasser.

Tied to ownership is the idea of social responsibility to the English as contrasted with the African ideas. To the English the individual is responsible for his rights and obligations. To the African the whole social grouping was responsible for its members' rights and obligations.

The idea comes out clearly in cases of responsibility in criminal matters. If an individual committed a crime and was ordered to pay compensation the whole social grouping came to his assistance to pay the compensation. So for that matter, if a Masai moran killed somebody from another tribe and it was considered better to compensate for the deceased rather than going to war with the other tribe, the whole tribe would contribute towards payment of the compensation. If a member of one family killed a member of another family, the whole family of the murderer contributed towards payment of the compensation. To the English, responsibility is strictly cast on the individual and a father is not bound to bail his son out of a small problem.

Group responsibility by the Africans has been criticised with the argument that the real offender goes unpunished? However, this is not really true because in most societies, the group helped if the offender could not raise the compensation asked for. In most cases it was the close relatives of the offender who actually paid the compensation. It was only when the offender and his relatives could not afford the compensation asked that the whole clan or tribe came to his assistance. This was only a manifestation of group solidarity and not that the Africans condoned wrongful acts as such. It has been pointed out that in most cases, the society would pay the compensation and then punish the offender individually¹⁰. And if one persistently indulged in criminal activities, one faced the ultimate danger of being expelled from the society as an outcast. This deterred the would be criminals because nobody would have liked to be declared an outcast by his own society.

The African society was grouped into different tribes all of which had different ways of life. The English society is made up of one group with the same culture, language, government etc. If there are any differences, they are only minor ones such as are brought about by

geographical factors. This was not so with the Africans in Kenya. The Kenyan society was made up of different tribes under different governments. Each tribe had its own way of life and a different language. Some like the Meru were agriculturalists while others like the Masai were pastoralists. The laws that existed in Kenya before the white man came differed from tribe to tribe and very few applied throughout the country. In fact when a committee was selected in Kenya to ascertain and record the customary laws in Kenya with a view of incorporating them into written law, it found out six crimes only that applied throughout Kenya.¹¹ The Europeans introduced uniform criminal law to the whole country disregarding the fact that hitherto, the laws differed from tribe to tribe. This means that suddenly, the people found themselves governed by totally different set of laws that were alien to them. No attempt was made at all to make sure that they knew and understood them. Yet, Section 7 was included in the Penal Code that ignorance of the law is no defence.

The only attempt made to communicate the law to the people was by sections 9(1) and 9(3) of the Interpretation of General Provisions Act¹² read together with Sections 77(4) and 77(8) of the Independent Constitution which, as we have seen purports to protect the citizen in that criminal laws come into operation only after they are published and they will not operate retrospectively. Having the laws published is thought to be a protection to the people because as it is argued everyone would know the law if they wanted to. This is no protection to the Kenyan African because before the whiteman came the Africans were used to unwritten laws which emanated from the people and everybody knew them. So it was absurd to tell an African for instance from the rural areas of Kakamega that a certain law had been passed which governed him and he could get it from the Government printer in Nairobi.

Secondly the laws were written in English and not the vernaculars of the people involved. Unfortunately this sad state of affairs has continued and even today, all our laws are written in English.

Today swahili is the National language in Kenya and it is unfortunate that nothing much has been done by the government to promote the use of the language and ~~and~~ especially in the legal profession. This is not to say that by having the laws written in Swahili everybody will know them. There has been much talk of Swahili being the indigenous language of the majority in Kenya. Apart from being the national language, it is submitted that swahili is not the language of the majority in Kenya. Mutungi O.K.¹³ has ably shown that apart from being used at the coast and major towns, swahili like English is foreign to the majority of Kenyans and especially in the rural areas.

The problem of illiteracy is important when considering why the presumption does not apply fairly in Kenya. As early as 1895 the British had started enacting laws and having them written down, thus presuming everybody to have notice of them. Perhaps it is not far-fetched to say that at that time few, if any at all, Africans could read and write. Then how could they be expected to read the laws? The situation today has changed but not so substantially as to expect everyone to be able to read and write. The total population of Kenya today is about 15.3 million people and out of the total population about 15% has never had any schooling at all. And of the 50% that have been to school only 15% has gone beyond primary school level¹⁴. That means that illiteracy is a problem in Kenya and even if the laws were written in a language that everybody would understand the bulk of the population would still not read them.

The presumption of knowledge of the law also presumes clarity and certainty of the law. That is not so and everybody familiar with the legal profession will bear this out. Indeed, very few sections of the law, if any are endowed with the virtue of being clear and certain. It needs no elaboration that much of the courts' time is used in trying to interpret various sections and words used in statutes. We also know

that one of the reasons why we have appellate courts in our judicial hierarchy is for the higher courts to supervise the lower courts and to "correct" them where they go wrong. It is not uncommon to find a judge when allowing or dismissing an appeal from a lower court saying that the judge in the lower court 'misdirected himself' or 'erred' on a point of law. If judges and magistrates are given an allowance to err on a point of law, how much more would we expect a layman? It appears a contradiction of the law to allow the custodians of the law to err on a point of law and yet expect a layman to be perfectly cognisant of the law.

All in all, one can say that the maxim Ignorantia Juris non excusant is not justified in Kenya. Since the laws that we have in Kenya are basically imported, the notion that the law is an expression of the social mores of a society is not applicable in this case. Laws were imported from a different social setting and taken to quite a different one. And yet, the imported laws were not adapted to suit the circumstances prevailing in Kenya. That makes the maxim completely undefendable in Kenya.

WHY IS THERE PENAL LEGISLATION?

As we have seen whoever breaks a criminal rule is subject to some form of punishment either in the English or the African society if found out. The question that arises frequently is, why is there criminal law in the first place? Why do we have some conduct branded as criminal law so that those who break them are subjected to punishments? Should not people be left to behave the way they want without some restrictions imposed on their behaviour by the government?

Several reasons have been given as to why there are penal legislation. The first is that criminal law is there to safeguard public interests. As earlier said it is assumed that every conduct that is criminal affects the whole society and thus the society must protect itself by punishing the wrongdoers so that they may not repeat their conduct and for others to know their fate if they wanted to behave the same way. The state comes in to prescribe against criminal conduct as an agent of the whole society because of the society's desire to protect itself. This is true to the extent that such crimes as murder and theft are concerned. But it is debatable as to whether the state should govern some other conduct especially where law overlaps with morality. No doubt two consenting homosexuals would wonder in what way at all they threaten the society.

The second reason given is that criminal law is there to encourage good conduct and discourage bad conduct. No doubt everybody would agree that such conduct as killing others or stealing are bad. However criminal law does not wholly discourage bad conduct and encourage good conduct. Badness and goodness are relative terms and depend on the context in which they are used and why one wants to use them. For instance, the Africans in Namibia who are fighting for independence are doing a very bad thing according to the Pretoria government and are branded as terrorists. To the other people who believe in a people's self-determination and self rule, they are nationalists and doing a very good thing when they

fight for their independence. So in essence the so called bad conduct that is prohibited with penal sanctions is basically what the ruling ^{CLASS THINKS} ~~N~~ enacted and repealed according to what those in the power want to be the laws and hence we cannot talk of criminal law prohibiting bad conduct and encouraging good conduct in total.

The main reason why people are interested in criminal law is self preservation. People want to be confident that should others interfere with them, the state will come in and punish those who wronged them. If self-preservation were reduced in a society crime definitely would be reduced. Only mad people would like to hurt the society where they have no self interest behind their conduct and all their conduct is aimed at benefiting the society. That is why scholars of the Marxist Leninist school believe that there will be no laws in the communist stage of development-- if the stage is ever reached at all.

Having seen the main aims of criminal law, there is still the question whether these aims are achieved when the maxim under scrutiny is employed in a society where we clearly know that people do not know the law. Are the aims of criminal law achieved when people are told that ignorance of the law is no defence whereas we clearly know that they are ignorant of the law? Definitely these aims are achieved in that whoever breaks a law is arrested and convicted. But it is strongly submitted here that even if these aims are achieved, they are achieved by mistake and not because the maxim is best suited for Kenya to achieve these aims. The majority conduct themselves the way they do not because they know that the contrary is criminal but because of their sense of what they think ^{is} good. That means that even if people comply with the law, they do it by accident but not because they know the law. Conversely many of those who are caught as having committed a crime are only victims of the law because they did not know that their conduct was prohibited by the law. It has nowhere been asserted that the aim of criminal law is to trap people and punish them because they have done what the law

prohibits. But we know that in Kenya due to the maxim that ignorance of the law is no defence, criminal law traps some people and punishes them who would not have been punished if they knew the law. The aim of criminal law is not to punish people and more so ^{those} who are morally faultless. So it can only be concluded that the maxim works injustice in Kenya.

RECOMMENDED REMEDIES.

As earlier pointed out, the presumption of knowledge of the law hinges on the assumption that since the law is written everybody has notice of ^{"the law"} it and ought to know it. It has also been shown that the literacy rate in Kenya is very low. Before people can be assumed to have notice of law because they are written, the people must at least be able to read and write. What the government should do is to see that everybody in the country is literate. At present, Kenya can boast of free primary education and also the government has embarked on mass adult education. So far so good. But that is not enough. For our purposes here standard seven level of education is not enough for anyone to be able to read the law. Anybody who is familiar with statutes will bear this out and agree that statutes are drafted in such complicated language that one wonders whether in fact it is not a deliberate attempt to have them incomprehensible to the layman.

What the government should do is to introduce free education up form four level and make it compulsory. It is appreciated that there might not be the funds to do this overnight but it can be done gradually. That way there would be more reason to assume that because law is written people can read it. Even if people can read the law, there should be a kind of forum where they can be advised of their legal rights. In Nairobi there is the Legal Advice Centre at Shauri Moyo where citizens go for advice freely on their legal rights. However the centre is only accessible to Nairobi residents and only those who know that such a centre

exists. The centre also does not run full time because the lawyers who give free advice there have their own businesses and other duties to do and cannot afford to be there to give free advice throughout the day. What the government should do is establish such centres throughout the country at the district level and if possible at the division or location level. And the lawyers in such centres should be full time government employees so that citizens can go to them for free legal advice any time they have problems. Such lawyers could also organise public meetings and inform citizens of new Acts if they are enacted. They could also be used by the government to gather the views of the citizens if it proposed to pass a new law. That way people would participate directly in the making of their laws. It is not enough to say that people participate in making of their laws through their representatives. It is common knowledge that some laws are passed against public outcry even if they are ^{re-}presented.

To try and make people aware of their legal rights, the voice of Kenya today runs a thirty minute program once a week where various issues are discussed. Tied up with this is a column on the Sunday Standard where legal issues are discussed and readers questions answered. Those lawyers who take it upon themselves to explain ^{to} citizens their rights either over the radio or on the papers are doing a good job and ought to be commended for that. However these are half measures in themselves. Newspapers as a medium to communicate the law to people with ^{are} ~~is~~ rather inadequate because at the present rate of literacy, very few people find the worth of reading a newspaper. Secondly these newspapers never reach the rural areas where the advice is needed most. That applies to the radio programme also. Perhaps it is not far fetched to say that not many people own radios and more so in the rural areas. And even those who do ^{the} majority do not bother to listen to educational programmes apart from listening to entertainment programmes and the news.

The problem is aggravated by the fact that both media use English as the language to communicate the law to the people. So in essence those who benefit from them are the few educated, and mostly in the urban areas, who in any case are in a better position to know the law through other sources. However the venture is a step forward and should continue if only to save one more from being victimized by laws that he can not understand. However one gets no reason why such programmes over the radio are not translated and broadcast in the vernaculars which would certainly reach more people.

Kenya's official language today is Swahili but it is a sad affair to see that despite that, all our laws are written in English, even newly enacted laws are still enacted in English. If the law has to keep up with national aspiration, it is high time it was written in Swahili. In fact one wonders why since 1897 there has never been any attempt to have the law written in any other language other than English. It was understandable during the colonial days because the colonialists were not bothered with people knowing the law. In fact they wanted it to remain a mystery to the Africans so as to not as many as possible. Otherwise, if that were not the case, how can one explain the fact that they were able to translate the bible into almost all the local vernaculars within no time after the missionaries came to Kenya? The missionary was the other arm of the colonizer and the bible was used to ^{S pacify} pacify the Africans by telling them that they must obey all authority because authority came from God. And those who disobeyed God were promised everlasting fire in hell. Hence it was necessary to the colonialists to translate the bible in the language that people could read and understand even if they had only two years' schooling. It is not here suggested that the law should be translated into vernaculars, This may be a bit too late for that because most of these vernaculars will finally lose their value if we could manage to educate everybody. The few educated ones will

bear this out and agree that they rarely read anything written in their mother tongue and others, especially of the younger generation, even do not know it. It is also important to encourage one national language for national unity and that is why the sooner laws are written in the national language-swahili, the better.

If any paper produced and published in Kenya is rare it is the Act of Paliament. In Kenya it is only the Government printer that has authority to print the Acts of Paliament. The nasty thing is that even when they are published they do not spread enough. They are only sold by the Government Printer's bookshop and may be a few others in Nairobi. Go to a book-shop in the rural towns and ask for chapter sixty three of the laws of Kenya and the proprietor will think you are talking Greek or *are* mad. That means that even ^{if} the few who can read wanted to buy them, they will not get them. Certainly very few people, if any at all would move all the way from for instance Meru to Nairobi to buy an Act of Paliament for the sake of trying to update themselves with the law and for no other reason.

Secondly Acts of Paliament are rather expensive for the common man and this is the reason why even those who can read them never buy them. The buying is left only to those who make a fortune out of them when they go to a court to say what one would have said if one had bought it. What the government should do is to subsidise statutes and sell them at prices that the ordinary citizen can afford. The question of ^aavailability of funds should not come in where an individual's freedom is at stake. This should be considered a priority in national development. In any case if the missionary who lives on his congregations' charity can afford to circulate the bible at a very low price why not the government with all tax they get by force from the citizen? If the state has to tell people not to be ignorant of the law then it is as well duty bound to see that the law gets to the people. It is common to hear that the arm of the

government is long and those who break the law will finally be caught. one would expect the same arm to be equally long in communicating the law to the people. So long as there is no effective way of making the law known to the people the presumption that everybody knows the law and that ignorance of the law is no defence is unfair in Kenya and brings untold injustice.

FOOTNOTES

INTRODUCTION

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2. Philip James Introduction to English Law London Butterworths J. Wildy and Sons 10th Ed. 1979 pg. 3.
3. Section 7 Penal Code: Chapter 63 Laws of Kenya.
4. Justice Maule in Martindale v Falkner 2 C.B. Pg. 719.
5. Abott C. J. in Montriole v Joffreys (1825) 172 ER 53.
6. Emphasis mine.
7. For further study of the transferability of legal norms see law in social context Edited by Thomas W. Bechtler (Tulvez The Netherlands 1978) Pg. 131-136.

FOOTNOTES

CHAPTER I

1. Section 7 Penal Code Cap 63 Laws of Kenya.
2. Greenleaf Ev 16 Ed. s-20
3. Blackstone 4 Commentaries on the English law London Dawson's of Pall Mall 1966 p27.
4. See Hunter Roman Civil Law 3Ed 660, Domant Civil law S.1224-1240
5. Digest 22:6:9 and 49:14:2:7: respectively quoted by E. R. Keedy
Ignorance and mistake in the criminal law. Harvard Law Review 22 1908
22 1908-1909 Pg75
6. Theodcle & Plucknett A concise History of the Common Law (5thEd) London
Butterworth 1956 ch:3 pg 307
7. O.K. Mutungi The Communication of law under Conditions of Development
The Kenya case. (1973) 9 E.A.L.J.11
8. Reported in Blackton's note book Maitlands' Ed:pg496 Quoted by E.R.Keedy
Footnote 5 above.
9. Y. B. 20 Henry VII f2 pg4
10. The Doctor & Student dialogues. Dialogue XI C.46
11. I Plowd 342
12. ICo. Rep. 175
13. Sir Mathew Hale pleas (1680) I Hale P.C. pg42.
14. Broom H. A Selection of legal Maxims 10th Ed, London, Sweet & Maxwell
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17. Section 14(2) Penal Code: Cap 63 laws of Kenya.
18. (1919) 83.J.P. 136
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20. 1966 E.A. 315
21. John Austin (1790) Lectures on Jurisprudence 5th Ed. London : Murry 1885

22. O.W. Homes Jr The Common Law, Boston, Little Brown (1881) 48, Macmillan London, Melbourne (1968) pg 41
23. S127 (2)(1) Evidence Act Cap 80 laws of Kenya. This is also a constitutional Provision Section 77(7)
24. Bilbie V: Lumley 2 East 469,472.
25. Section 108 Penal Code: Chapter 63 laws of Kenya.

CHAPTER II

1. For a full account of the Berlin Conference See Y.P. Ghai and J.P. Mc Auslan Public Law and Political Change in Kenya. (Oxford University Press, Nairobi)1970 ch.1
2. Gold Coast Supreme Court Ordinance S14 quoted in Allot A. New Essays in African Law (London Blutterworths 1970) pg16
3. Foreign Jurisdiction Act 1843. For a further discussion on the three foreign Jurisdiction Acts and Ordinances and Orders in Council see Ghai and Mc Auslan Supra.
4. Article II East African Order in Council 1897 quoted in Allot A Supra page 15.
5. East African Order in Council 1902 Article 15(2)
6. East African Order in Council 1911 Article 15(2)
7. Kenya Order in Council 1921 section 4(2)
8. Judicature Act section 3(1) Cap 8 laws of Kenya.
9. Zanzibar Order in Council 1866. Zanzibar laws and Statutes.
10. Okonkwo G.O. and Naish M.E. Criminal law in Nigeria 1964 pg 5
11. Conference of the Governors of the 3 East African Dependencies (London Waterlaw and Sons Ltd. London Hall)
12. Morris & Raad Indirect Rule & Search for Justice: Essays in East African Legal History (Oxford, Clarendon Press. 1972) pg 126
13. East African Order in council 1897 Article 51.
14. Native Courts Regulations No 15 of 1897 Article 4.
15. East African Order in Council 1902 No. S.20. quoted in Ghai & Mc Auslan

15. East African Order in Council 1902; No 30 S. 20 quoted in Ghai & Mc Auslan Public law and political change in Kenya (Oxford University Press NAIROBI 1970 page 133.
16. I T.L.R. 403
17. Witch craft Act Section 6 Cap 67 Laws of Kenya.
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19. Cotran E. Report on Customary Law Offences 1963 (Government Printer)
20. Sections 9(1) and 9(3) respectively. Interpretation of General Provisions Act. Cap 2 Laws of Kenya.
21. Proviso to Subsection 8 of Section 77 Constitution of Kenya.

CHAPTER III

1. For instance see Smith and Hogan Criminal Law (4th Ed. London Butterworths 1965) Chapter II WILLIAMS The Definition of Crime 1955 8 C.L. Pp 107, Hughes The Concept of Crime An American View (1959) CRIM. L.R. 239
2. Ibid Chapter II
- 2a. Ibid Smith and Hogan For a full account of Ignorance of facts See J.C. Smith and B. Hogan Criminal Law 4th Ed. Pg 148-152 Cross and Jones Introduction to Criminal Law 7th Ed. pg 61-65. Frooms Legal Maxims pg 169.
3. (1931) A.C. 310, 324
4. Elias T.O. The Nature of African Customary Law (Manchester University Press. Butler and Tanner Ltd. Frome and London 1956) Ch.VII
5. Elias T.O. (Ibid) Pg 113
6. Jomo Kenyatta Facing Mount Kenya (London Secker and Warburg 1938) Ch.IX
7. O.K. Mutungi 9 E.A.L.J. 1973 pg 11 Supra.
8. R.B Seidman The Communication of Law and the Process of Development Wisconsin Law Rev. 3(1972) 686,689, quoted in O.K. Mutungi Ibid Pg15.

- 9. See Elias T.O. Supra Pg 87.
- 10. Ibid
- 11. Cotran E. Report on Customary Criminal Law Offences (Government Printer 1963.
- 12. Cap 2 Laws of Kenya.
- 13. Mutungi O.K* pg 25 Supra
- 14. Kenya population census. Not yet published at the time of writing. The information was got from the statistics Department. Ministry Finance, Treasury House. The breakdown is as follows:
 - Total population 15327061
 - Those who have never been to school 7853494
 - Those who have been to school but not beyond standard seven 6130533

1. ... London ... 1885.

2. ... London ... and ... 1900

3. ... London ... 1910

4. ... London ... 1920

5. ... London ... 1930

6. ... London ... 1940

7. ... London ... 1950

8. ... London ... 1960

9. ... London ... 1970

10. ... London ... 1980

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13. ... London ... 2010

14. ... London ... 2020

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