THE VALIDITY OF THE APPLICATION OF IGNORANCE OF THE LAW AS NO DEFENCE IN TANZANIA

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CERTIFICATION

I have read this paper and found it to be in a form acceptable for examination

Signed.....08.....day of.....JUNE.....2010

.....

Supervisor

DECLARATION

I **Ibrahim K. Ndatulu** hereby declare that this research paper is the result of my own investigation and findings except where stated, and that this paper has not been presented and will not be presented to any other University for a similar or any other degree award.

Signature .....

Signed this.....7th.....day of.....June.....2010

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DEDICATION

I would want to dedicate this fruit of my hard and demanding work to my loved ones with speciality to my family for their support during my years of study.

ACKNOWLEDGEMENTS

The inscription of this paper and my education as a whole made a considerable demand on different and various people that I am more than obligated to extend my very appreciation for each and everyone's contribution of any kind given unto me. However, I am limited of my ability to mention everyone individually thus extend my sincere thanks to everyone who assisted me in every sphere of life regardless of its antiquity.

Special thanks to my loving family. It would render it unfair if I failed to acknowledge and appreciate their perpetual unconditional prayers and financial assistance regardless of sacrifices therein asked of them.

I am no short of appreciation to my supervisor **Dr. Fr. Katamba** for encouragements, comments and criticism which were a positive drive through the progression of the research and preparation of this paper.

More appreciation I send to my companions, classmates and all who made my academic and social life wonderful and memorable at Kampala International University (Kampala-Uganda).

So much I would want to offer but nothing outrages the value of our saying THANK YOU, YOU HAVE BEEN FAR TOO KIND.

ABSTRACT

This research paper consists of the examination of the validity of the criminal rule of "ignorance of the law is no defense" in Tanzania.

The first chapter defines and makes an analysis of the problem, its background, the coverage of the study, methodology along with the review of related literature to the study at hand.

Chapter two covers the rule of ignorance the law as no defense in its broad sense and coverage, its limitation and inclusion. It puts forth the application of the rule in Tanzanian courts of law and people's knowledge of it.

The third chapter discusses the issue of inaccessibility of the law in context of transitional online regulation at international level.

The discussion of the validity of the rule of ignorance of the law in Tanzania is made under the fourth chapter of this paper.

Chapter five discusses the impact of knowledge of law while chapter six concludes the paper and gives recommendations in respect to the problems illuminated in the work.

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ABBREVIATION OF TERMS

CAT - Court of Appeal of Tanzania

CURT - Constitution of United Republic of Tanzania

DPP - Director of Public Prosecution

HCD - High Court Digest

JALO - Judicature Application of the Laws Ordinance

LRT - Law Report of Tanzania

MCA - Magistrate Court Act

TLR - Tanzania Law Report

URT - United Republic of Tanzania

CHAPTER ONE

THE VALIDITY OF THE APPLICATION OF IGNORANCE OF THE LAW AS NO DEFENCE IN TANZANIA

1.1 INTRODUCTION

Ignorance of the law as no defense is based on criminal law and acts of criminal nature where in case one commits a crime the offender cannot claim not to have known such an act constituted into a crime as ***ignorance of the law is no defense*** but mistake of law can be used as a defense by the offender as the case may be. Since the British rule over the world, Britain had control over so many nations as it was a superpower and they used so many rules and regulation to oppress the people but also they introduced laws which could work in their favor.

The rationale behind the doctrine is that if ignorance was an excuse, persons charged with criminal offenses or the subject of civil lawsuits would merely claim they were unaware of the law in question to avoid liability, whether criminal or civil. Thus, the law imputes knowledge of all laws to all persons within the jurisdiction no matter how transiently. Even though it would be impossible, even for someone with substantial legal training, to be aware of every law in operation in every aspect of a state's activities, this minor injustice is the price paid to ensure that willful blindness cannot become the basis of exculpation. Thus, it is well settled that persons engaged in any undertakings whether outside what is common for a normal person, such as running a nuclear power plant, will make themselves aware of the laws necessary to engage in that undertaking. If they do not, they cannot complain if they incur liability.[1]

The doctrine assumes that the law in question has been properly published and distributed, for example, by being printed in a government gazette, made available over the internet, or printed in volumes available for sale to the public at affordable prices.

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[1] Wikipedia, 'Ignorantia juris non excusat' <http:www.bookrags.com/ignorance

NB: The exception to this rule that Ignorance of the law is no defense includes where the **MPC** (Model Penal Code) so provides that ignorance of the law is a defense if the law is unknown to the accused and has not been published or otherwise made available to the people.

The qualification to the rule that 'unless knowledge of the law by the offender is expressly declared to be an element of the offence' as provides in later part of Section 8 of the Penal Code,[2] is however unimportant as there is no offence in the code or else where which states knowledge of the law as an element of the offence[3].

At common law, it was reasonable to assume that the people knew the law as it was the law of common usage, that is, the law that found footing in the norms and customs of the English people which in turn means people's knowledge of the law was in large pace easy as it was the product of their customs and traditional beliefs.

It is from the insight of the above that it becomes significant to pose a question on the validity of the application of the rule in Tanzania with regard to the questions as to whether the laws in Tanzania are based in the traditions and customs of the Tanzania such that Tanzanians ought as the rule imposes, to be well acquainted of the law?

1.2 HISTORICAL BACKGROUND

The *"ignorantia juris non-excusat"* maxim draws its origin in the Roman Law during the times of Justinian, in which it was applied in civil matters only and was imported into the common law of England and there after to its former colonies to which Tanzania is inclusive. At this point it is vital to know the genesis of the legal principle at common law.

The statement that ignorance of the law is no defense in criminal law started from medieval time during the crown system under the common law where the king had the power to enact laws as he pleased together with his monarch where criminal law was used to oppress the poor as the feudal system was based on land therefore the King grabbed as much land as he could together

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[2] Cap.16 Vol.1 of the Revised Laws of Tanzania

[3] Karegero,K *'Ignorance of law no excuse for acquittal'* IPP Media LTD, Dar-es-Salaam, 2007

with his officials through the different laws they enacted in favor of their greediness, poor people were not to own land under any circumstance.[4]

The King during this time acted as the legislator, executor and adjudicator he controlled everything including the courts hence Britain during this time was full of injustices as the king was behind such decisions and he could interfere with government business whenever he liked hence dictatorship was widely practiced. This was until the House of Commons took over and striped the King of his duties and he became a ceremonial figure together with the queen and the doctrine of separation of powers was introduced. This did not change much in law sector particularly the criminal law as ***ignorance of the law as no defense*** was still operative.[5]

While the criminal law historically may have imposed punishment based on objective deviations without reference to personal culpability, contemporary scholarship and public perception generally embrace the conception that personal moral culpability and blameworthiness delineate modem criminal law. For over thirty years, the Model Penal Code has attempted to define and mold criminal law as a neutral condemnation of individual moral wrongdoing. In doing so, the Code has attempted to reinforce this moral model; nevertheless, it has in fact given more evidence of a regime grossly inconsistent with that notion. In short, criminal law is not explained by moral individual culpability, but utilizes the imagery of morality to define directional boundaries within society, even when the law requires punishing a blameless individual as a pawn in this broader agenda.

Ignorance of the law as no defense and its application in criminal matters had also extended to Africa together with the western problems which started during the Industrial Revolution era where Europe Fluctuated in their markets and currency, a need for material, cheap labor, and investment arose which finally led to the Scramble for African territories by Europeans and the marathon for becoming a world superpower which brought each European superpower to African territories together with their customs and laws that they used in their mother countries and one of the laws they introduced was criminal law.[6]

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[4] Chief Mkwawa Journal,Filikunjombe,P.H '*Ignorance of the Law is No Excuse: how relevant is this law to Tanzanians?*'pp.11

[5] *Ibid*

[6] http://www.torontocriminaldefence.com/clients.php

Criminal law during this time in Africa particularly East Africa the British and Germans in Tanzania, Uganda and Kenya used it to oppress the people as the locals were illiterate to European ways and their laws as we were governed with customary law. The statement that ***ignorance of the law is no defense*** was introduced where people were to be aware of the laws enacted by the Colonial masters in some cases these laws were made behind closed doors and most locals were prosecuted due to their lack of knowledge of these laws which they termed it as ignorance and thus non defensive in the eyes of their colonial masters..

1.3 STATEMENT OF THE PROBLEM

In Tanzania under Criminal law "***ignorance of the law is no defense***" forms part of our law thus applied in our courts of law in its administration of justice. This defense works against the offender in most criminal cases where the accused pleads not guilty and raises the defense that he/she did not know that such a law exists. In Tanzania the courts of law does not recognize such excuses from the accused and therefore barred with the law that states that "ignorance of the law is no defense" as is the duty of every citizen to know the laws that govern their country and the government ensures this through publishing its laws in the Government gazettes which are available to the people.

The Penal law is of the view that knowledge of the law is not an element to be negated as prosecutors do not have to prove that an accused or defendant knew the law, it is not an element of the crime to be proved.

Tanzania being an under developed country adopted the maxim of ***ignorance of the law is no defense*** blindly from its colonial masters. Tanzania lacks the necessary machinery in the application of the maxim and further more poverty is also found in the entire law system as they are a lot of problems associated with criminal and civil law procedures in Tanzania. Tanzania still tries to combat the problem of poverty, illiteracy, and gender issues which all make it almost impossible for the maxim to be valid.

Ignorance of the law as no defense in Tanzania under the criminal law and other related laws should be made into a valid accountable defense from the actor because most of the people in the rural areas particularly those in the villages have no access to the new enacted laws that are

passed in the capital areas. The Tanzania government has tried to put effort in providing the rural areas with the necessary infrastructure like roads, education, and hospitals but still there is much effort to be done in the transport sector of rural areas.

Due to the problem of transport via the availability of good accessible roads makes it difficult for the villagers to keep up to date with the current affairs happening in their country as they do not get their news on time especially the newspapers which are at least two days late coupled with the problem of electricity which is even bigger as most rural areas in Tanzania have no electricity therefore no electronic based ways of transmitting news or information like the television .This makes it difficult for the people in such areas to know of any new laws enacted as the government gazette and other newspapers are usually very late to reach the remote areas.

1.4 LITERATURE REVIEW

The issue at hand has been addressed in different researches and publications arguing for and against the application of the rule of ignorance of the law as no excuse in the discharge of justice in the court of law. ***Section 8 of the Penal Code,***[7]provides: 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.

The provision is based on the rather ill presumption that everyone knows the law such that should ignorance be a defense for crimes committed, every accused person would have pleaded it and the court as insinuated in the case of ***State v. Fox;***[8] would always have to decide it and it would be very difficult to prove in one way or the other that the accused did know the law and even more difficult to prove that he didn't as it is rather easier to prove knowledge than ignorance.[9]

Critical to the above, a balance need be made;[10] in Tanzania certain inquiries could be made in response to cases where ignorance has a face in defense of the accused. Questions like: was there the opportunity for the accused to find out whether the act was illegal? Was the accused capable

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[7] Cap.16 Vol.1 of the Revised Laws of Tanzania
[8] 124 Idaho 924 (1993)
[9] Rice A. '*Is ignorance a defense?*' <http: www.hsout.net/bigred/htm>march 2008
[10] *ibid*

of doing so? Did the accused try? If he failed, did he try again? Did he try hard and find nothing? Did the accused even suspect the act was illegal? Did he think it might be a little bit wrong?

The questions are based on the consideration of the accessibility of the law in question to the defendant, the efforts made by the defendant to attain knowledge of the said law and mens rea. Should the answers to the questions indicate innocence in part of the defendant then that is likely what he is; "*innocent*" thus ignorance of the said law as a defense should hold water as the essence of a criminality is "*intent*" and if one can prove non intension, that is certainly some defense .

Moreover as put to the effect by **Alissa Lea Jones (2003)** in her editorial psychoanalysis of the legal principle of "ignorance of the law is no defense" it may be inevitable for people to be ignorant of "that is the law" and ignorant of being the subject of it, but the ignorance of such fact by the legal administrators is in deed inexcusable[11] and hence need be corrected. This psychoanalysis suggests that the only inexcusable ignorance is that of the law administrator's of the fact that there times that it cant be helped for the non knowledge of the law by its subjects or even being the subjects of the law, such that the strict application of the legal principle defeats the ends of justice and its validity all together.

Aaron Rice[12] on the application of the rule as also pointed out in ***Fox's case*** supra, put forth the principle's overshadowing of the deterrent function of the penal sanctions. This is on the footing that one can not avoid that which he doesn't know. In a nutshell, the threat of penal sanctions can have no deterrent effect if the actor reasonably believes conduct to be lawful. That is to say when on one hand one is claiming ignorance which means if he knew it was wrong, he'd have abstained from it ab initio, the court in application of the principle ascribes "don't do it again" on the other hand which is logically not sensible and the only thing one is deterred from by the application is "ignorance" its self which in most cases is not the person's area of fault but the environment and other inevitable circumstances as the case my be.

Nearly half a century ago, **Hart (1958)** argued that the ban on the ignorance defense is based on an understanding that a person who engages in inherently wrongful acts is culpable for failing to

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[11] UMBR(a): A Journal of the Unconscious, special issue "*Ignorance of the Law*," 1 (2003): 4-7.
[12] Rice. A, '*Is Ignorance a Defense?*' <http: www.hsout.net/bigred/htm>march 2008

know about and abide by society's moral consensus[13]. Yet it is only fair to assume that a person who is ignorant of the law is also ignorant of morality as long as the law and morality are essentially consonant. Hart therefore warned that the maxim should only apply in cases of mala in se crimes where there is societal consensus about the wrongfulness of the prohibited behavior. Hart's admonition highlights the importance of societal norms for resolving the dilemma of the ignorance defense.[14]

Furthermore, commentators have long recognized that the ignorance maxim is potentially at odds with the principle that criminal law punishes only the blameworthy[15]. If a person is truly unaware that his or her conduct violates the law, then how can that person form the criminal intent necessary for conviction? This prospect of punishing the ignorant "stirs large questions-questions that go to the moral foundations of the criminal law"[16].

To overcome these "large questions," **Holmes** (1881) and **Davies** (1998) found many utilitarian justifications to have been proffered for denying the ignorance of law defense: the difficulty of disproving a claim of ignorance, the goal of encouraging citizens to know and obey the law, and the need to prevent an accused person's idiosyncratic interpretation from attaining the status of a legal rule[17]. Holmes (jurist) theorized, "It is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but... justice to the individual is rightly outweighed by the larger interests on the other side of the scales."[18]

However, these utilitarian justifications for denying the ignorance defense are persuasive as far as they go, but they ultimately fail to resolve the moral tension at the core of the maxim that "ignorance does not excuse."

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[13] H. M. Hart "*The Aims of the Criminal Law*," 23 Law & Contemporary Problems, pp. 401-414
[14] Alter, A L, Kernochan, J, Darley, J M '*Morality Influences How People Apply the Ignorance of Law Defense*' pp.6
[15] Holmes 1881 "*The Common Law*"
[16] ***United States v. Int'l Minerals & Chem. Corp.***, 402 U.S. 558 (1971), J. Stewart, dissenting
[17] Holmes 1881; Davies 1998: pp. 350-354
[18] *Ibid*

In United States of America as insinuated in "morality influences how people apply the ignorance of the law defense" (Alter, Kernochan, and Darley, 2007[19]). Notwithstanding the confidence with which courts and professors have cite the maxim as a blanket rule legal decisions have offered relief to individual defendants in cases where a rigid application of the ignorance maxim could create results that the courts judged intolerable. This is a response to the steadily rising moral tension between the ignorance maxim and the claim of criminal law to punish only wrongful acts.

Practically, The U.S. Supreme Court has never explicitly permitted the ignorance defense, but the Court has acknowledged and tried to ease the moral tension in several federal criminal appeals as was in the case of ***Liparota v. United States,***[20] the Court found that a statute criminalizing "*knowing*" possession of food stamps required the government to prove not only that the defendant knew he possessed food stamps, but also that the defendant knew this possession was illegal. The Court reasoned that, absent clear legislative intent to depart from the usual rule that mens rea is required for conviction; legislation could not be interpreted so as to "*criminalize a broad range of apparently innocent conduct.*"

Alter, Adam and others are to the effect that the rigid application of the maxim and the increase of the plausibility of an individual to commit a crime by doing an act that does not appear, according to his moral common sense, to be wrongful; result to moral tension thanks to the unrealisticness of the maxim's expectation of the citizens of the today's regulatory state to be aware of all the criminal rules in effect. This also cuts across the deficiency in the application of the rule of strict liability which means mens rea is not an element of the crime.[21]

Jefferson (1999)[22] wrote that where the accused has relevant *actus reus* and *mens rea* for the crime, he is guilty even though he did not know that the actus reus was forbidden by the criminal law.

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[19] http://findarticles.com/p/search?tb=art&qa=Darley,+John+M

[20] 471 U.S. 419, 424 (1985)

[21] Alter A. L., Kernochan, J., Darley J. M. '*Morality Influences How People Apply the Ignorance of law Defense*' pp.3

[22] Michael J. "*Criminal law*" Michael, J, criminal law, Pitman Publishing, 1999, London, pp.254

It is the view of the researchers of the proposed study that the unfair application of strict liability where the application of the principle that ignorance of the criminal law is not a defense is unacceptable in situations where the context provides no warning signals to the reasonably socialized individual that give the individual a fair opportunity not to become a criminal. The interpretation of Mens Rea terms where the Mens rea words have on occasion been interpreted to permit a defense in the case of good based grounds on the mistakes about the meaning of the criminal law.

Moreover, due Diligence Effort to Ascertain the Law should thus be made on some support for the proposition that a defense should be provided to a person who diligently tries to avoid criminal conduct by learning about the law in advance. Not in very many places, however.

As per **Dan M. Kahan**[23] "mistake of law doctrine gives individuals an incentive to be guided instead by their understanding of community moral norms, and condemns those who fail to learn and obey those norms even when they believe that their conduct is lawful."

Kahan talked of moral norms which are the presumed basis of the law that people are expected to be aware of. However these Moral norms knowledge is some what reasonable to be presumed; forms not the basis of the Tanzania's laws even though said to do so such that the condemnation from the failure to adhere to the implications of the rule of presumption of knowledge of law; is of justice and not what Kahan had in mind in his literature.

Michael Lee Hanks[24] said that "the American legal system was designed as an advocacy system for a simple reason: No other system of law delivers true justice on a consistent basis. An advocacy system requires, by definition, advocates. The only thing that prevent a party in legal dispute from being an effective advocate for his or her position are greed, self-interest, lack of objectivity, and ignorance of the law. Thus lawyers were born."

Hanks considers ignorance of the law as the basis of failure for proper advocacy for ones self. He talked of the case in United States of America, in Tanzania Hanks words hold water in the prospect that Tanzanians fail to represent themselves before the courts of law for the attainment

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[23] Kahan D. "*Political Economy of the Bankruptcy Reform Act of 1978*" October 2003
[24] Hanks, Michael, "*In Defense of Lawyers*", December 1999

of their rights due to their lack of the knowledge of the existence of laws to guide those rights as provided at their disposal. However, in part of ignorance of the law being cured by lawyers coming to existence as Hanks later words may suggest fall short of truth in Tanzania as there are few lawyers in practice and the service of lawyers are found by the poor majority population of Tanzania to be expensive and people are ignorant of the existence of the right to legal representation in Tanzania like other laws and hence the prevalence of ignorance of law in Tanzania mainland despite the existence of lawyers thence invalidity of the principle if presumption of law knowledge in Tanzania.

In the case of ***Paul v. Minister for posts and Telecommunications***[25] it was said that ignorance or mistake of the law is usually no defense although it may mitigate the punishment to be imposed. Ignorance of the law as no defense provided a defense as a general rule which was also discussed by **Harris** in the book **"Ignorance of the Criminal law" the 22nd Edition**[26] in this book **Harris** was of the view that ignorance of the law as no defense will as a general rule provide a defense incases where a person could not have possibly known about the new law as this case applied to seamen on high seas. Harris 's view not only being incorrect it was also shared by another writer known as **Michael J. Allen**[27] as with the introduction of ignorance of the law being no defense was applied very rigidly and it spread its rigidity to Tanzania so this view was incorrect.

1.4.1 DEFINITION OF TERMS

"*Ignorance*" implies a total want of knowledge in reference to the subject-matter.[28]

"*Common law,*" in its largest sense, refers to the whole body of legal principles and usages which is common to all parts of England.[29]

"*Mala in se*" mean acts bad or wrong in themselves. That is acts which are contrary to the law of nature or rules of morality like murder, theft and robbery to mention but a few.[30]

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[25] (1973) RTR 245
[26] Harris, "*Ignorance of Criminal law*" 22th Edition.
[27] Michael J. Allen; "***Textbook on Criminal Law,***" 8th Revised Edition, Oxford University Press, 2005.
[28] P. Ramanatha Aiyar, *CONCISE LAW DICTIONARY,*3rd Edition, Wadhwa and Company Nagpur Law Publisher, 2007, New Delhi, pp.542
[29] P. Ramanatha Aiyar, *CONCISE LAW DICTIONARY,*3rd Edition, Wadhwa and Company Nagpur Law Publisher, 2007, New Delhi, pp.214

"*Mala prohibita*" refers to acts which are prohibited by law but not otherwise wrong. [31]

1.5 SIGNIFICANCE OF THE STUDY

This work is primarily intending to reveal the problems encountered from the application of the legal principle of "ignorance of the law is no defense" in the contemporary Tanzania whose subjects are in the actual sense ignorant of the law resulting from the massive problems of illiteracy and poverty among other things that brings about the inaccessibility of the laws that are presumed to be known by their subjects.

Furthermore, this study will awaken the government of the United Republic of Tanzania specifically its judicial organ on the invalidity of the legal principle "ignorance of the law is no defense" and the need of its review and reformation along with the improvement of the laws accessibility so as to attain both transparency of the law and workability of such laws. Also, the government will be awakened on the problems of its citizens resulting from inaccessibility of the law especially in rural locales as opposed to commercial cities and urban areas.

Lastly, this study will further seek to research and suggest various means by which the legal principle can be reformed if at all cant be repealed and ways of improving the accessibility of the laws in Tanzania so as to attain the actual validity of the legal principle of "ignorance of the law is no defense"

1.6 SCOPE OF THE STUDY

The study is intended to cover the whole of the united Republic of Tanzania. However, due to the time limitation, the study will only be carried on Tanzania mainland particularly in the rural areas of Iringa region and Dar es Salaam.

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[30] P. Ramanatha Aiyar, *CONCISE LAW DICTIONARY*,3rd Edition, Wadhwa and Company Nagpur Law Publisher, 2007, New Delhi, pp.711

[31] P. Ramanatha Aiyar, *CONCISE LAW DICTIONARY*,3rd Edition, Wadhwa and Company Nagpur Law Publisher, 2007, New Delhi, pp.711

1.7 OBJECTIVES OF THE STUDY

The study is aimed at revealing the ignorance of the Tanzania's population; of the law, the reasons and why ignorance of the law should thus be made a defense in Tanzania courts in some instances if not all so as to allow justice to prevail its course as intended of law itself. The goal of the study is thus in a nutshell to understand what makes the principle of ignorance of the law as no defense unsuitable for Tanzania's subjects and thus unsuccessful in the carrying out of justice as was so intended ab initio.

1.8 HYPOTHESIS

This research study examines the aforementioned contention in light of the following hypothesis: That the majority of Tanzanians know not of the law to which they are subjects, have little if any access to it and can barely interpret and understand it thus the principle "ignorance of the law is no defense" is invalid in Tanzanian setting.

1.9.0 RESEARCH METHODOLOGY

This research is to proceed in two ways: first, an extensive and comprehensive library study at the National Library of Tanzania (Maktaba ya Taifa) for collection of secondary materials which stipulates the opinions, establishments, arguments and the likes in the field. A number of websites are visited and will further be visited to attain valuable information to be used in making critical comparisons that are necessary.

Second, an intensive primary data will be amassed from the field through personal interviews and questionnaires that will aid in providing rigorous milieu of information from the respondents.

1.9.1 *Population and Sampling*

The population for this study is defined as all Tanzanians from the interior and exterior, literate and illiterate.

The sample population will be from Iringa region interiors specifically Mafinga in Ifunda district to present the interior population of Tanzania, and University of Dar es Salaam and Muhimbili University students in stand of the intellectuals population of Tanzania.

1.9.2 *Procedure and Time Frame*

The research will begin late April and end a month after in response to the time restriction. The participants will be handed questionnaires to which they will be asked to fill with honesty after having being explained the purpose for which their cooperation is needed. Permission will be sought for the interview from the respective leaders of the localities from which the study will be carried by presenting to the leaders our identifications and letters from the university seeking for cooperation in the facilitation of the exercise to be carried in their areas of leadership or management as the case may be.

1.9.3 *Types of Data*

The study will base in the collection of both primary data from the fields of study and secondary data from intensive study from both electrical libraries and physical libraries.

1.9.4 *Data Analysis and Interpretation*

The data collected will be analyzed to answer the earlier raised questions and thereafter they will be presented in a normal and narrative manner so as to fulfill the aim of the research paper. Only relevant data will be considered.

1.9.5 *Scope and Limitation of the Study*

This research study is to be carried out in Tanzania mainland .as can be gathered from the above stipulations, the study deals with the application of the rule of "ignorance of the law is no defense" in Tanzania and thus I will throughout the paper limit myself to the finding out as to whether the subjects of Tanzania's laws are acquainted of the law as presumed by the rule to thus render the application of rule of knowledge of the law presumption valid to the Tanzanian society.

In response to the limited time for the research conduction, I will be limited as to the amount of data to be collected and hence some data are bound to be left out.

The budget strikes another limitation as it is not enough to sustain the study to my satisfaction.

1.10 STRUCTURE OF THE WORK

The study will have five chapters, first of which will contain the general introduction of the study, second the rule of ignorance of the law as no defense in Tanzania, third the law making system of Tanzania and its publication, forth the impact of the application if the presumption of knowledge of law in Tanzania and five the findings and recommendations of the researchers in regard to the field findings.

CHAPTER TWO

THE RULE OF IGNORANCE OF THE LAW AS NO DEFENCE

2.0 Introduction

The presumption on the knowledge of the law in Tanzania is accommodated by the rule: ignorance of the law is no defense. There is also some restrictions which are normally excusable. In this chapter therefore there will be discussions as to what is ignorance of the law, the rationale behind the rule, its exceptions as well as justification. Furthermore the rule will look at the rule 'ignorantia facti excusat' and its restrictions.

Ignorance of the law as no defense is based on criminal law and acts of criminal nature where in case one commits a crime the offender cannot claim not to have known such an act constituted a crime as ***ignorance of the law is no defense*** but mistake of law can be used as a defense by the offender as the case may be. Since the British rule over the world, Britain had control over so many nations as it was a superpower and they used so many rules and regulation to oppress the people but also they introduced laws which could work in their favour.[32]

The rationale behind the doctrine is that if ignorance was an excuse, persons charged with criminal offenses or the subject of civil lawsuits would merely claim they were unaware of the law in question to avoid liability, whether criminal or civil. Thus, the law imputes knowledge of all laws to all persons within the jurisdiction no matter how transiently. Even though it would be impossible, even for someone with substantial legal training, to be aware of every law in operation in every aspect of a state's activities, this minor injustice is the price paid to ensure that willful blindness cannot become the basis of exculpation.

Thus, it is well settled that persons engaged in any undertakings whether outside what is common for a normal person, such as running a nuclear power plant, will make themselves

[32] Keregero K, "*Ignorance of law no excuse for acquittal*", IPP Media LTD, 2007

aware of the laws necessary to engage in that undertaking. If they do not, they cannot complain if they incur liability.[33]

At common law, it was reasonable to assume that the people knew the law as it was the law of common usage, that is, the law that found footing in the norms and customs of the English people which in turn means people's knowledge of the law was in large pace easy as it was the product of their customs and traditional beliefs.

It is from the insight of the above that it becomes significant to pose a question on the validity of the application of the rule in Tanzania with regard to the questions as to whether the laws in Tanzania are based in the traditions and customs of the Tanzania such that Tanzanians ought as the rule imposes, to be well acquainted of the law?

According to William[34] the words ignorance and mistake are words of ancient mintage where it is agreed that knowledge does exist and the contrary of it is ignorance unlike mistakes which occur. At the same time Story[35] distinguishes ignorance of the law from mistake of fact where he is of the opinion that ignorance may be without error but result in more want of knowledge or opinion while mistake of fact always supposes some error of opinion as to the real fact.

In the case of ***Hutton v. Edgerton,*** [36] it was said that ignorance implies a total want of knowledge in reference to the subject matter and in another case of ***Fowler v Padget***[37] mens rea was an added ingredient in considering either someone is ignorant or not therefore the aspect of mens rea will also be discussed in this chapter.

This doctrine tends to presume that every person has knowledge of his land and hence will not be entertained when he relies on his ignorance for; ignorance of the law is not a defence. The maxim that ignorance of the law draws its origin in the Roman Law during the times of Justinian, in which it was applied in civil matters only and was imported into the common law of England and thereafter to its former colonies to which Tanzania is inclusive. At this point it is vital to know the genesis of the legal principle at common law.

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[33] Wikipedia, '*Ignorantia juris non excusat*' en.wikipedia.org/wiki/Ignorantia_juris_non_excusat
[34] G. William S.; "*Text book on criminal law*," Stevenson Ltd, 1978, London, pp.106
[35] Story, Joseph; *Story'sEquity Jurisprudence*, Fred B Rothman & Co., Published in May 1988.
[36] (1875) 6 S.C 485
[37] (1798) 101 ER 1103

The statement that ignorance of the law is no defense in criminal law started from medieval time during the crown system under the common law where the king had the power to enact laws as he pleased together with his monarch where criminal law was used to oppress the poor as the feudal system was based on land therefore the King grabbed as much land as he could together with his officials through the different laws they enacted in favour of their greediness, poor people were not to own land under any circumstance.[38]

The king during this time acted as the legislator, executor and adjudicator he controlled everything including the courts hence Britain during this time was full of injustices as the king was behind such decisions and he could interfere with government business whenever he liked hence dictatorship was widely practiced. This was until the House of Commons took over and striped the King of his duties and he became a ceremonial figure together with the queen and the doctrine of separation of powers was introduced. This did not change much in law sector particularly the criminal law as ***ignorance of the law as no defense*** was still operative.[39]

While the criminal law historically may have imposed punishment based on objective deviations without reference to personal culpability, contemporary scholarship and public perception generally embrace the conception that personal moral culpability and blameworthiness delineate modem criminal law. For over thirty years, the Model Penal Code has attempted to define and mold criminal law as a neutral condemnation of individual moral wrongdoing. In doing so, the Code has attempted to reinforce this moral model; nevertheless, it has in fact given more evidence of a regime grossly inconsistent with that notion. In short, criminal law is not explained by moral individual culpability, but utilizes the imagery of morality to define directional boundaries within society, even when the law requires punishing a blameless individual as a pawn in this broader agenda.[40]

Ignorance of the law as no defense and its application in criminal matters had also extended to Africa together with the western problems which started during the Industrial Revolution era

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[38] A Manual on Constitutional Law by Mwaikasu J.
[39] Ibid
[40] Keregero K, "*Ignorance of law no excuse for acquittal*", IPP Media LTD, 2007

where Europe Fluctuated in their markets and currency, a need for material, cheap labour, and investment arose which finally led to the Scramble for African territories by Europeans and the marathon for becoming a world superpower which brought each European superpower to African territories together with their customs and laws that they used in their mother countries and one of the laws they introduced was criminal law.[41]

Criminal law during this time in Africa particularly East Africa the British and Germans in Tanzania, Uganda and Kenya used it to oppress the people as the locals were illiterate to European ways and their laws as we were governed with customary law. The statement that ***ignorance of the law is no defense*** was introduced where people were to be aware of the laws enacted by the Colonial masters in some cases these laws were made behind closed doors and most locals were prosecuted due to their lack of knowledge of these laws which they termed it as ignorance and thus non defensive in the eyes of their colonial masters. This injustice even justified slave trade.

2.1 Ignorance of the Law is No Defense

For a long time now there has been some difficulty in regards the meaning of ignorance. The term suggests a negative condition. It means the absence of knowledge in relation to a particular subject of the law. It is a state of being uneducated or uninformed about the law or lack of awareness of its existence.

A defendant who pleads that he did not know that his conduct was criminal, that he thought it was legal is said to be ignorant of the law as the doctrine further stipulates to hold innocent persons criminally liable and does so in reliance upon obvious fiction that everyone is presumed to know the law of the land he is concerned with.

In the case of ***Carter v. McLaren***[42], it was held that "... knowledge of the law...is irrelevant... the fact that man doesn't know what is criminal and what is not cannot save him from conviction if what he does satisfies all elements of the crime he is accused." Likewise when one

[41] Sir Charles Lucas, KCB, KCMG; *The Partition and Colonisation of Africa*, Clarendon Press, 1922, Oxford .
[42] (1871) LR 2 Sc. & D 120

manufactures a drug not knowing that it is illegal under the penal law, his ignorance cannot help him to avoid conviction.

Ignorance of the law is a presumption applied even if it is impossible for the accused to know the law. This is clearly seen in ***Bailey's case***[43] where a sailor at high seas committees an offence which was made into one when he was at the sea and they was no way of knowing that such a thing constituted into an offence.

In criminal law, ignorance of the law is no defense in Tanzania; this principle however opposes the fact that the crime is not committed unless mens rea is proved. Mens rea is a state of mind expressly or impliedly required by the definition of the crime charged. It is a culpable state of mind without which an accused cannot be convicted of the charged crime. Hence mens rea is a guilty mind accompanying the unlawful act. In the case of ***Sherraz v. Rutzen***[44], mens rea was said to be an evil intention or knowledge of a person's wrongfulness. It is an important element in every criminal offence.

Mens rea is categorized in into three .i.e. intention, negligence, and recklessness. In the case of ***DM Patel v. R***[45] the accused party called out to one of the witnesses '***wewe shahidi kaa huku***' (you witness sit over here) while the court was in session. He was charged with contempt of the court per section 114 of the Tanganyika Penal Code Cap. 16 of revised laws. In the accused defense he said that he was not aware that in order to speak in court one needed permission to do so. His defense was unacceptable on the ground that ignorance of the law is not a defense.

Not satisfied with the decision of the court, the accused appealed an indeed it was held tat his conviction was not proper due to lack of intention on his part. His defense of lack of knowledge was accepted due to lack of mens rea though the accused lacked knowledge on the relevant law.

In Tanzania The qualification to the rule that '***unless knowledge of the law by the offender is expressly declared to be an element of the offence***' as provides in later part of Section 8 of the

[43] Bailey v. Lumley (1802) 2 E.A 469
[44] (1895) 1 QB 921
[45] (1969) HCD 143

Penal Code[46],is unimportant as there is no offence in the code or elsewhere which states knowledge of the law as an element of the offence.[47]

Section 8 of the Penal Code,[48]provides: 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.

Furthermore it has been noted that ignorance or mistake of the criminal law is no defense even if a person could not possibly have known the law is still guilty. The reason is usually knowledge that the act is forbidden by law is no part of the mens rea. The principle is seen in provided in section 8 of the penal code. In the case of ***Maulid v. R*** [49] where the appellant was convicted of failure to prepare and maintain records of oral contracts in respect of his employees and failure to insure in terms of liability to pay minimum wages. The appellant pleaded ignorance as to the requirement and the court rejected the plea on grounds that ignorance of the law does not excuse a person from liability.

2.1.1 *Strict Liability On Ignorance Of The Law*

The rule of ignorance of the law as no defense as opposed to the principle of no criminal liability in the absence of "intent" that is, Mens Rea, imposes liability in the absence on intent. Mens rea being not an element of an offense as proposed bu the rule of ignorance of the law as no defense makes the rule imply strict liability to offenders that know not of having been offensive in their acts or omissions as the case may be.

The case of ***R v. Pontes***[50] is a good illistration of the implication of strict liability by the rule of ignorance of the law is no denfense. In this case a *Motor Vehicle Act* under section 92 provided that a person convicted of an offence under certain sections of the Act was "automatically and without notice" prohibited from driving a motor vehicle for 12 months. Hence imposed strict liability even in the ignorance of that law.

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[46] Cap.16 Vol.1 of the Revised Laws of Tanzania
[47] Keregero K, "*Ignorance of law no excuse for acquittal*", IPP Media LTD, 2007
[48] Cap.16 Vol.1 of the Revised Laws of Tanzania
[49] 1970 HCD 346
[50] [1995] 3 S.C.R. 44

The accused was charged with driving a motor vehicle at a time when he was prohibited from driving under s. 92 of the British Columbia *Motor Vehicle Act*, contrary to s. 94(1) of the same act which provides that a person who drives a motor vehicle on a highway while he is prohibited from driving under certain sections of the Act, including s. 92, commits an offence and is liable to a fine and to imprisonment. The accused was acquitted at trial. The trial judge found that s. 94(1), in combination with s. 92, created an absolute liability offence for which imprisonment was a penalty, thereby contravening s. 7 of the *Canadian Charter of Rights and Freedoms*. Pursuant to s. 52 of the *Constitution Act, 1982*, the reference to s. 92 in s. 94(1) was declared of no force or effect. The summary conviction appeal court and the Court of Appeal upheld the trial judge's decision.

Held (La Forest, L'Heureux-Dubé, Gonthier and McLachlin JJ. dissenting): The appeal should be dismissed.

Per Lamer C.J. and Sopinka, Cory, Iacobucci and Major JJ.: The fundamental aspect of the offence created by ss. 94(1) and 92 of the *Motor Vehicle Act* is that a person convicted of the underlying offence is "automatically and without notice" prohibited from driving a motor vehicle. The words "automatically and without notice" in s. 92 go far towards establishing that this is an absolute liability offence. The removal in 1986 of s. 94(2), which provided that s. 94(1) was an absolute liability offence, does not change the offence into one of strict liability since the situation has not been altered in any significant manner. Furthermore, the defence of due diligence must be available to defend a strict liability offence. When, as a result of the wording of the section, the only possible defence an accused could put forward is his ignorance of the fact that his licence had been suspended by the provisions of the provincial statute, which constitutes a mistake of law and therefore is not available as a defence, an accused is denied the defence of due diligence. Here, because the prohibition on driving in s. 92 is automatic and without notice, s. 94(1) effectively prevents an accused who is unaware of the prohibition from raising that defence. In those circumstances, the offence ought to be characterized as one of absolute liability.

Nevertheless the absolute liability offence created by s. 94(1) and s. 92 does not contravene the *Charter*. This conclusion flows from the application of s.4(1) and of s.72(1) of the British

Columbia *Offence Act*. These sections respectively indicate that, notwithstanding the provisions of any other Act, no person is liable to imprisonment for an absolute liability offence, and that the non-payment of a fine will not result in imprisonment. Thus, an accused convicted under ss. 94(1) and 92 faces no risk of imprisonment and there is, accordingly, no violation of the right to life, liberty and security of the person under s. 7 of the *Charter*.

To expand the defence of due diligence to comprehend a defence of ignorance of the law undercuts the mistake of law rule and will render many of our laws unenforceable; as a corollary, this Court's decision in *Molis* appears to be impliedly overturned without any explanation. Furthermore, the impugned prohibition is a regulatory offence incident to a licensed activity. A regulated actor is deemed to have voluntarily accepted the terms and conditions attaching to the privilege of participating in a regulated activity. As a result, he cannot be described as morally innocent when he commits a regulatory offence. Finally, a legislature may choose, as a matter of policy, to provide a defence of ignorance of the law in relation to some, all or none of the statutory conditions of engaging in a regulated activity. Such a policy decision remains a matter over which the relevant representative body is entirely sovereign.

2.1.2 *The Rationale Of The Rule: (Ignorance Of The Law Is No Defence)*

For every rule that is made there is always a reason behind, in other words the maker of such law has an intention as regards the effect of the rule. Though the rule ignorance of the law is no defense may cause some injustices to some people, like other rules it can be justified.
To allow for an individual not plead that he has a certain opinion of the law , which is different from the intended meaning in the statutes would also contradict the basic elements of a legal order , which according to Hall[51] include:

1. The rules of law express objective meaning
2. That certain person (the authorized competent officials) shall declare what their meanings are.
3. That these and only these interpretations are binding. Only these meanings are the law.

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[51] Supra

William[52] in his book of criminal law writes, "public policy sacrifices the individual to general good. To admit the excuse at all would be to encourage ignorance where the law maker has intended to make men know obedience."

A basic axiom of legal semantic is that the general rule does or do not include certain behaviour, or offences. Where a person fails to obey such rules and claims lack of knowledge, then entertaining his excuse will breach the aim of the lawmaker which is to ensure obedience so as to maintain peace, security and order within the society. As such would contradict the essential requisites of a legal system and the implications of the principles of legality. In other words, accepting such excuses of one being unaware of the law would violate the principle of legality.

Furthermore, ignorance of the law is no defense because to allow would permit individuals to substitute their own moral judgment for that represented in the law.

2.2 Exceptions to the Rule

Ignorance of the law is no defense like every other general rule has exceptions. One of this exceptions is insane persons and children between eight and fourteen years of age are exempted from the principle of ignorance of the law is no defense or excuse as these people do not know the consequences of their acts or what they are doing is right or wrong. In the case of ***Mcnaughtens***[53] judge Tindal was of the view that an accused person would be guilty if he knew that his action is in violation of the law of god or man.

Lack of intention or knowledge will result in ignorance of the law being a proper defense. In the case of ***Gaumont British Distribution ltd. v. Henry***[54] where it was statutorily provided that any person who makes gramophone records without the consent in writing is guilty of an offence .It was found that the defendants never applied their minds to the question whether the consent had or had not been given because; they were ignorant of the requirement of the Act. The defendants were acquitted by the court after finding absence of knowledge of the law on the part of the defendants.

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[52] G. Williams; "*Textbook on criminal law*," Stevenson Ltd., 1978, London, pp.112
[53] Jefferson , M; "***Criminal law***" Pitman Publishing , 1999, London , pp.255
[54] Richard Card; "***Criminal law***" Butterworths , 1998, Britain, pp.103

A secondary party can plead ignorance of the law relating to trade that he does not perform. He is therefore exempted from the general rule that ignorance of the law is no excuse as it would be absurd if an outsider becomes involved in an offence merely because he sold materials to a trader knowing what the trader was going to do with them but not knowing the law prohibits it.

Lastly they is an exception related to statutes and delegated legislation. In ***Johnson .v. Sergeant,***[55]Bailhanche J. held that legislation does not come into force until published hence ignorance of its publication would not be a defense where legislation is retrospective unlike the parent Acts direction according to the local government Act 1933 of England.

2.3 Conclusion

Despite various authors' attempts to defend of rationalise the rule of ignorance of the law is no defense, the fact of its punishing of innocent people cannot be overlooked even in its subjection to exceptions attributed therein it.

[55] ibid

CHAPTER THREE[56]

IS INACCESSSIBILTY OF THE LAW A DEFENCE? AN INTERNATIONAL PERSPECTIVE ANALYSIS IN CONTEXT OF TRANSITIONAL ONLINE REGULATION

3.1 Introduction

This chapter explores the interrelationship between legal normativity and transparency, or accessibility, of legal rules in the context of transnational online regulation. Starting from the widely accepted premise that a secret law is an anomaly, it will be examined whether the lack of accessibility of legal norms (beyond undermining their legitimacy) could provide a defense to legal accountability and, if so, what is the legal source of that defense: is there a human right or other enforceable legal right to accessible laws? The chapter then goes on to explore the more woolly issue of what accessibility generally, and more specifically in the transnational online context, actually entails. Where is the boundary between a secret and an open law; how much effort can law-makers reasonably expect from individuals to find out about his or her legal obligations? Is it enough merely to formally publish laws even if they are freely available on the Internet?

The background against which these issues are explored is that of the global village and transnational online regulation. Rightly or wrongly, there is a growing judicial and governmental consensus worldwide that online actors should not be accorded more lenient treatment than traditional transnational publishers and enterprises,[57] and should thus be subject to the laws of

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[56] This chapter is based on the presentation made at the 6th Conference on Computerisation of Law via the Internet in Paris in November 2004, first published in *Information and Communications Technology Law* Journal. It is available through www.frlii.org/IMG/doc/utakohl.doc

[57] There are a few notable exceptions to that consensus where States have opted for the country-of-origin approach. See, for example, EU E-Commerce Directive 2000/31/EC, *OJ L 178, 17/07/2000 P. 0001 – 0016.* Also see current UK *Gambling Bill 2003* and commentary at http://www.culture.gov.uk/gambling_and_racing/gambling_bill.htm.

the States which they 'enter' with their websites (which is not infrequently every State[58]) as, for example, in the high-profile French Yahoo case.[59] States have taken this stance across the broad spectrum of online regulation, ranging from public law regulation such as gambling, privacy, securities and obscenity regulation to private law matters such as defamation or contract law in the consumer context.[60] The question is what are the implications of this stance for the accessibility of domestic norms in the transnational context, and vice versa the implications of insufficient accessibility on this legal position. Do States owe an obligation to foreign online businesses and publishers to publish their laws for free on the Internet and, if so, is such online publication the end of the problem? What exactly are a State's obligations in the accessibility quest, and what happens if they fail to meet that obligation? To what extent does the changed profile of the transnational actor impact on the State's accessibility obligation?

3.2 A Legal Right to Accessible Laws?

3.2.1 *Rationales for Transparency*

Few would dispute that there should be no secret laws; that is, the very notion of law to some extent entails transparency. There are two reasons for this, the first focusing on the rights of the legal subject and the second on the objectives pursued by the law-maker.

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[58] Screening devices or selling or subscription policies often entail that only users from certain jurisdictions can either access the site or enter into transactions through the site. This in turn may mean that these users do not 'enter' the excluded jurisdiction for regulatory purposes.

[59] *LICRA & UEJF v Yahoo! Inc (Paris, 20 Nov 2000)* at http://www.cdt.org/speech/international/001120yahoofrance.pdf; for commentary and further material see Center for Democracy & Technology at http://www.cdt.org/jurisdiction/ ; Uta Kohl 'Yahoo! - but no Hooray! for the international online community' (2001) 75 *Australian Law Journal*, 411.

[60] For example, EU consumer protection: eg. European Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, No 44/2001 of 22 December 2000, OJ L 012, 16/01/2001 P. 0001 - 0023; US gambling regulation: *US v Ross* 1999 WL 782749 (SDNY); Dutch gambling law: *National Sporttotaliser Foundation v Ladbrokes Ltd* District Court, The Hague, 27 January 2003; Australian securities regulation: Australian Securities and Investments Commission, *Offers of Securities on the Internet*, Policy Statement 141 (10 February 1999, reissued 2 March 2000), PS 141.5, 141.14, 141.16; Australian defamation law: *Dow Jones & Co Inc v Gutnick* [2002] HCA 56; UK obscenity regulation: *R v Perrin* [2002] EWCA 747; German law on nazi propaganda: *R v Töben* BGH, Urt. v. 12.12.2000 - 1 StR 184/00 (LG Mannheim), reproduced in (2001) 8 *Neue Juristische Wochenschrift* (NJW) 624. These are all examples of the country-of-destination approach to regulatory competence, according to which online actors have to comply with the laws of the States where the effect of their activities is felt. States have been unmoved by the objections to this approach, which range from arguments based on the udesirability and impossibility of having to comply with the law of multiple or all States, to arguments about the illegitimacy of States imposing their laws on foreigners whose activity only marginally affects them.

Firstly, the need for transparency arises to protect the individual from being punished or made liable for something s/he could not have known about – this is a matter of fairness and fundamental justice. This is not to say that individuals need actually to have known about the law as a precondition for being made accountable for their non-compliance. Generally speaking, ignorance is no defense[61] - a maxim that encourages individuals to familiarize themselves with their legal obligations. The rule against secret laws ensures that individuals could – if they wanted to - find out about their legal obligations prospectively. Whether they actually do so, is up to them.

Secondly and perhaps at times overlooked,[62] transparency of legal norms is generally also necessary in terms of making laws efficient, that is achieving the outcome they are designed to achieve. This requires not one hundred percent compliance but widespread compliance. Such compliance presupposes that people know about the law. For example, the law in the Tanzania prohibiting drivers from using their mobile phones whilst driving is designed to reduce the number of accidents caused by distracted drivers. This aim can only be achieved if most drivers comply with the law, which in turn depends on them knowing about the prohibition in advance.[63] 'Ex post facto' State action in the form of prosecuting non-compliant drivers is likely to affect the particular driver's future behaviour but unlikely to have a ripple effect on the wider driving population (which is one of its main functions), unless again it is accompanied by publicity.[64] Accordingly publicity or transparency of a new law, and of any actions taken to enforce it, is critical to achieve its objective. The accessibility of laws is not something the individual has to assert against an otherwise totally unmotivated State: the State itself has a self-interest in

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[61] But note David Luban, The Publicity of Law and the Regulatory State' (2002) 10 *The Journal of Political Philosophy* 296, 299ff, citing a number of cases when ignorance of the law was a successful defence, also note Tom McMahon, 'Improving Access to the Law in Canada with Digital Media' (March 1999) 16 *Government Information in Canada*, at http://www.canadalegal.com/gosite.asp?s=3364, part 2.

[62] But mentioned, for example, in Peter W Martin, 'Legal Information – A Strong Case for Free Content, An Illustration of How Difficult "Free" May be to Define, Realize, and Sustain' (2000) at http://www4.law.cornell.edu/working-papers/open/martin/free.html , at para II.A.: ' whatever goals the law is pursuing and through whatever immediate means, the prime instrument is communication. Efforts to make law more accessible, more understandable, more clearly expressed are ultimately efforts to make law more effective and in a democracy, more accountable.'

[63] At times a law's objective may also be achieved by leaving margins of safety for undercompliance which penalises those who comply with a law at the expense of those who do not.

[64] It has been observed before that people often obey the law 'not because they know it directly, but because they follow the pattern set by others whom they know to be better informed than themselves', Lon Fuller, *Morality of Law* Yale University Press, 1967, New Haven, pp. 49. As will be discussed below, these patterns may be seen as an indirect way of publication upon which the legislator can legitimately rely to some extent.

ensuring it.[65] This applies less in respect of those rules which are facilitative or excusatory rather than restrictive; also it applies less to those rules which regulate conduct indirectly rather directly. An example of the former is the rule that the victim of a nuisance may resort to self-help to abate it. Here the law seeks to condone retrospectively or validate certain 'natural' or customary behaviour as opposed to trying to prospectively shape it[66] - which makes transparency of the rule far less significant. Similarly, the transparency of norms is less significant in the case of indirect regulation. An example is allowing councils to build road bumps near schools. These bumps affect the behaviour of drivers regardless of their knowledge or ignorance of the relevant law on speed restriction or on building road bumps.[67]

While few would question the general undesirability of secret laws, the following sections explore whether individuals enjoy a *legally enforceable* right to accessible/transparent laws. Could online publishers successfully argue that foreign laws are not binding on them when inadequately accessible to them, despite perhaps being sufficiently accessible to local people?

3.2.2 *A Rule-of-Law Requirement - An Enforceable Legal Right?*

Generally the starting point here is the rule of law. According to Raz, a proponent of a formalist meaning of the rule of law:

> 'the literal sense of the 'rule of law'... has two aspects: (1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it... it is with the second aspect that we are concerned: the law must be capable of being obeyed. A person conforms to the law to the extent that he does not break the law, but he obeys the law only if part of his reason for conforming is his knowledge of

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[65] Cf David Luban, above n 6, pp.299, where the discussion appears to be based upon the assumption that the State has an interest in 'burying every regulation in a mountain of other regulation.'

[66] Most facilitative rules are also to some extent restrictive as they impose conditions upon which the law validates or condones the action. For example, in respect of self-help to abate a nuisance, the victim needs to give reasonable notice of the intended actions to the perpetrator. This condition then becomes a restriction on the person exercising self-help. Note also, that it has been argued that 'it is better if most people do not know exactly what criminal defences the law makes available, because knowing the full range of defences might create perverse incentives to commit the crimes.' Luban, above n 6, pp.313.

[67] On indirect regulation see Lawrence Lessig, *Code and Other Laws of Cyberspace* Basic Books, 1999, New York Ch 7.

> the law. Therefore, if the law is to be obeyed it must be capable of guiding the behaviour of its subjects. It must be such that they can find out what it is and act on it.'[68]

From this it follows *inter alia* that '[t]he law must be open and adequately publicized.'[69] But could reliance on this concept be used to make a law, otherwise properly passed by parliament, non-binding 'just' because, let us say, it lacks clarity or was inadequately accessible? If one were to follow Fuller's opinion on this subject-matter the answer appears to be yes:

> 'Lon Fuller argues that the rule of law rests on a kind of social contract between lawgivers and those they govern... Like any contract, this *rule-of-law* contract is valid only if it satisfies the basic conditions of feasibility and comprehensibility... Without publicity, citizens cannot know what the law requires, and then the rule-of-law contract cannot bind them.'[70]

The problem with this argument is that it is not supported by the legal reality where laws which blatantly offend the rule of law and therefore - according to Fuller – are not binding, are still routinely enforced against citizens. So, although these laws *should not* be binding, in fact they are. Perhaps Fuller acknowledges this when he notes that 'there can be no rational ground for asserting that a man can have a *moral* obligation to obey a rule that does not exist, or is kept secret from him...'[71] But morality and law do not always coincide. In the case of ***Merkur Island Shipping Corp v Laughton*** – where the law was clearly inaccessible because of lack of clarity - the House of Lords acknowledged that 'absence of clarity is destructive of the rule of law; it is unfair to those who wish to preserve the rule of law; it encourages those who wish to undermine it.'[72] Lord Diplock went on to state that the law under consideration which the court had 'to piece together into a coherent whole... can, in my view, only be characterised as most regrettably lacking in the requisite degree of clarity.'[73] Yet no matter how regrettable it was, there was no question of the defendant being absolved from liability on the basis of the law's

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[68] J Raz, 'The Rule of Law and its Virtue' (1977) 93 *Law Quarterly Review* 195, 198. Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) *Public Law* 467. Note 'access to law' activities of the Council of Europe, at http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Law_making/Access_to_law/.

[69] Raz, ibid.

[70] Luban, above n 6, pp.296. See also Fuller, above n 9, pp. 49.

[71] Fuller, above n 9, pp.39 [emphasis added].

[72] *Merkur Island Shipping Corp v Laughton* [1983] 2 AC 570, pp. 612.

[73] *Merkur Island Shipping Corp v Laughton* [1983] 2 AC 570, pp. 612.

obscurity or inaccessibility. So is there any other legal jacket which the transparency or accessibility requirement can wear?

3.3 When is Accessible Accessible Enough?

3.3.1 *One-Size-Fits-All Once-and-For-All?*

What is and what is not adequately accessible is relative and time-dependant. It is argued below that regulation which may be easily accessible to certain subjects may be inaccessible to others; or whatever was reasonably accessible at some point may not stand the test of time. Making a law accessible requires 'more than merely formal publication of law...'[74] - what exactly is required depends on the circumstances.

When laws are written, they are not and should not be written with the intention of being only applicable to particular persons[75] - which is what the principle of equality before the law, non-discrimination and indeed the very notion of law demands. But that does not mean that different laws do not distinguish at all between different characteristics of persons or their activities: some laws are applicable only to doctors or only to drivers, those earning money or only to mentally handicapped people or artificial persons.[76] Only within these groups are the rules aimed at the abstract doctor or abstract driver rather than at Mr. Jones or Ms Davies in particular. The same notion of the abstract person with special characteristics is also fundamental to the issue of fair notice of, and reasonable access to, legal rules. New laws are published through governmental publishing services[77] and propagated by government departments,[78] professio nal bodies and associations and the media to bring them to the attention to those to whom they pertain, but not to bring them to the attention of anyone in particular. So whether Mr. Jones is able and willing to

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[74] Luban, above n 6, pp.302.
[75] *Polyukhovich v The Commonwealth of Australia* (1991) 172 CLR 501, para 30: 'The distinctive characteristic of a bill of attainder, marking it out from other ex post facto laws, is that it is a legislative enactment adjudging a specific person or specific persons guilty of an offence constituted by past conduct and imposing punishment in respect of that offence. Other ex post facto laws speak generally, leaving it to the courts to try and punish specific individuals.'
[76] Lord Wright, 'Liberty and the Common Law '[1945] *Cambridge Law Journal* 2, 4: 'all are equally subject to the law, though the law as to which some are subject may be different from the law to which others are subject.'
[77] See Her Majesty's Stationary Office at http://www.hmso.gov.uk/about/hmso.htm.
[78] Department of Trade and Industry on the use of a hand-held mobile telephone whilst driving, at http://www.dft.gov.uk/stellent/groups/dft_rdsafety/documents/page/dft_rdsafety_025216.hcsp.

inform himself of the new rules is irrelevant, provided the abstract reasonable person is given adequate access. But again that is not to say that the law-makers can disregard special characteristics of the group subjected to a set of rules.[79] This idea, that different laws require different approaches in bringing them home to their intended subjects, is reflected in the words of Lord Donaldson in *Merkur Island Shipping Corp v Laughton* in the context of clarity of legal norms:

> 'My plea is that parliament, when legislating in respect of circumstances which directly affect the 'man or woman in the street' or the 'man or woman on the shop floor' should give as high a priority to clarity and simplicity of expression as to the refinements of policy...'[80]

So, a law which is aimed at large corporations with in-house legal departments would require a different approach to making it accessible than one which is aimed at small businesses or consumers. Similarly, the subject-matter of a law may dictate different approaches to publicity: a law which coincides with clear domestic moral values[81] is likely to require less publicity than one which is not accompanied by, or is even contrary to, established values. Generally though, it may be concluded that the textual differences in the application of different laws mean that there cannot be a one-size-fits-all approach to the transparency/accessibility of legal norms.

It is, of course, tempting to argue that what was good enough before the Internet era should be good enough now. So, for example, if a person chooses to publish on the Internet and thereby becomes a transnational publisher or entrepreneur, he or she must be taken to have implicitly accepted the legal framework applicable to traditional multinational enterprises. Consequently it is up to them to adjust rather than expect national law-makers to put in a greater effort to make their laws accessible to them. And this is the legal fiction upon which law-makers or judges

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[79] *Incorporated Council of Law Reporting for England and Wales v. AG & Anor* [1971] 3 All ER 1029, pp.1034, where Russell LJ noted: 'in many instances the ordinary member of the public either does not attempt to, or cannot by study, arrive at a true conclusion of their import, or because the true understanding is largely limited to persons engaged professionally or as public servants in the field of any particular enactment or otherwise interested in that field...'

[80] *Merkur Island Shipping Corp v Laughton and Others* [1983] 2 AC 570, pp. 595.

[81] In respect of some types of activities State regulation is reasonably foreseeable eg. law against murder or theft, or areas in which States have traditionally taken a regulatory interest eg. drugs, firearms), see Luban, above n 5, 297, where the author also explains why there has been a massive increase in the type of regulation which is not easily predictable.

worldwide rely.[82] But a fiction it is and one which is neither legitimate nor wise. The profile of the abstract transnational actor has significantly changed since the Internet dawn: transnational trade is no longer the prerogative of the giant resource-rich multinational company.[83] The down-sizing of the transnational actor goes hand in hand with a smaller capacity to access a wide variety of legal norms. The changing demographic make-up of transnational publishers and the changing technology available to law-makers cannot but affect the content of the law-maker's obligation to provide access to their law. Otherwise we might as well go back to town criers:

> 'In medieval times the law was a public process. It was disseminated from the pulpit or by means of the town crier to a largely illiterate public. Because of the size of communities, juries were self-informing bodies. The invention of the printing press was of advantage only to those who were literate. The demise of the village and rural communities during and after the Industrial Revolution raised concerns about access to law.'[84]

As the demise of the village raised new imperatives for ensuring the accessibility of law, so does the rise of the global village create new imperatives for making at least certain domestic legal norms accessible world-wide.

3.3.2 *Notice of Domestic Laws in The Global Village*

It would be over-simplistic to state that the new 'accessibility' imperative in the global village simply arises by virtue of the fact that more and smaller actors have to comply with many more national sets of rules. Such description would fail to acknowledge the reality that the global village lacks key 'notice' mechanisms – such as the common knowledge and knowledge hotspots

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[82] Explicitly, for example, in *Dow Jones & Co Inc v Gutnick* [2002] HCA 56, para 39: 'It was suggested that the World Wide Web was different from radio and television because the radio or television broadcaster could decide how far the signal was to be broadcast. It must be recognised, however, that satellite broadcasting now permits very wide dissemination of radio and television... However broad may be the reach of any particular means of communication, those who make information accessible by a particular method do so knowing of the reach that their information may have. In particular, those who post information on the World Wide Web do so knowing that the information they make available is available to all and sundry without any geographic restriction.'

[83] See, for example, statistics in OECD, *Measuring the Information Economy* (2002) 40f at http://www.oecd.org/dataoecd/16/14/1835738.pdf.

[84] DJ Harvey, 'Free Public Access to Law: The Problem & the Solution' at http://www.law.auckland.ac.nz/learn/itlaw/Freepub.doc, pp.1.

- which in the domestic context play a critical role either in bringing rules to the attention of their subjects or in relieving them of knowing them. Any realistic governmental attempt to make domestic norms accessible to foreign online actors – in an effort to achieve greater compliance - must be sensitive to these more subtle concerns.

Whether though it can really be expected of a judge to take these concerns into account when dealing with the question of whether a legal restriction was sufficiently accessible not to breach an individual's human right, is doubtful. It would seem that, in the name of certainty, the judiciary is likely to view accessibility as requiring no more than the formal publication of the law. Having said that, there are at least some US precedents that might be used to support the contrary conclusion. For example, in the case of ***Staples v US***[85] the US Supreme Court had to deliberate on the issue whether owning an assault rife is conduct that should have put the accused on notice about the possibility of State regulation. It concluded that 'buying a shotgun or rifle is a simple transaction that would not alert a person to regulation any more than would buying a car.'[86] This case is noteworthy, firstly, because the common knowledge, or the lack thereof, provided in the eyes of the judges an excuse for non-compliance. Secondly, this ruling is utterly remarkable from a European perspective where the common knowledge would have rung alert bells, not to say alert sirens, as to the possibility of regulation. It is not difficult to see how in the transnational online context this approach could frequently absolve online content providers from liability under foreign law. But whether it would meet judicial approval is another matter.

3.3.3 *Making Domestic Laws More Accessible Globally*

The final issue that remains to be addressed is what can and should be done to make certain domestic legal norms adequately accessible to foreign online publishers, businesses or other actors. Three preliminary points can usefully be made. The first point is that, no matter how accessible domestic laws are made to foreigners, there is a ceiling as to what States can legitimately expect from them. Ultimately regulatory restraint is an imperative in respect of online activity originating abroad, particularly if States are serious about creating an orderly,

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[85] *Staples v US* 511 US 600 (1994), discussed in Luban, above n 6, at 303ff.
[86] *Staples v US* 511 US 600, 614 (1994).

legally compliant global village.[87] The second point is that, although States often lack the ability to enforce their laws over foreign providers,[88] many respectable foreign businesses and publishers are still likely to make an attempt at legal compliance if that is a realistic option. The third point is that not all, or even most, domestic legal norms are of interest in the global arena and thus it would make sense to be selective in terms of the regulation requiring greater exposure. For example, planning and land laws, traffic or municipal regulations would appear to be of minimal interest to the transnational online actor, while advertising, sale of goods, intellectual property and consumer protection regulation are invariably relevant.

This then brings us to the accessibility of domestic legal norms to foreign online providers. The starting point must be that there is already a massive amount of law, especially of developed countries, out there on the Internet and it is continuously increasing. Many sites are accessible for free - an attribute hailed by many commentators.[89] These include government and court sites, semi-public sites such as Austlii or the Legal Information Institute,[90] and private sites such as Findlaw. In addition there are the giant subscription sites, such as Westlaw or Lexis or juris.de in Germany.[91] In fact, for the interested English-speaking legally trained person it probably has never been easier to access laws and court decisions from around the globe. So the law is there, but is it indeed accessible? It is in terms of sheer physical access. Nevertheless to the average online actor much relevant law remains firmly behind closed doors. It is like giving a book to the blind or the illiterate. How easy would it be for the owner of a small gambling site or site offering alternative medicines to find out which States are legally hospitable and which are not, from which States it is safe to have customers and from which one it is not. Could these goods and services be delivered to France or Britain without rebuke?

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[87] Such restraint is shown, for example, in adopting the targeting or directing approach to jurisdiction, i.e. only those sites which target a State, must comply with the State's laws, as opposed to all websites that can be accessed in the State.

[88] Under international law, while States may extend their laws to foreigners and foreign activities in certain circumstances, they can never take enforcement action on the territory of another State. But note private parties may approach a foreign court for the enforcement of a civil judgment.

[89] For example Harvey, above n 29. But note also Peter W Martin, above n 7, para V, where the author explains the barriers to free access.

[90] See http://www.austlii.edu.au and http://www.law.cornell.edu.

[91] See http://www.westlaw.com, http://www.lexis.com and http://www.juris.de/jportal/index.jsp.

For all but the legally trained and a few other professionals, the problem with much online law is that it is still far too 'raw' – although raw to varying degrees.[92] At one end of the scale there are sites such as the official Tanzanian government[93] and court sites[94] which simply post cases or legislation in chronological order. At the other end of the scale are those sites providing updated legislation, powerful search engines, a variety of metadata and categorisation by topics, such as Saflii,[95] the Legal Information Institute, Findlaw or the subscription giants. Some may object to the classification of these latter sites as raw-data sites given that they provide many value-added services. Indeed for most lawyers, academics, students, public servants and certain professionals these sites provide excellent collections of well-ordered raw material.[96] However for many online actors, these sites can hardly be said to make the law accessible.

So the solution would appear to be the greater provision of digested legal data[97] - into practical solutions, guidelines and check lists. In the UK there are certainly some relevant sites. For example, the Department of Trade and Industry provides a regulatory site specifically targeted at businesses,[98] and further sites giving guidance for businesses on specific rules, such as distance selling rules or e-commerce regulations ,[99] as well as a one stop site for consumers.[100] A similar site is provided by the Australian Competition and Consumer Commission entitled 'eBusiness – doing business on the internet',[101] which provides a one-point access to regulatory concerns for online businesses. Yet, in terms of the transnational element its commentary remains vague and rather unhelpful:

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[92] For a discussion of why 'access to law' should generally mean more than 'access to raw data' and what it may entail see McMahon, above n 6, part 6.
[93] See http://www.parliament.go.tz/bunge/index.php
[94] http://www.saflii.org
[95] See http://www.worldlii.org/catalog/33.html
[96] See for example statistics on Austlii in Michael Kirby, 'Free the Law – beyond the "Dark Chaos" – Launch of the National Law Collection of AustLII' (1999) at http://www.austlii.edu.au.
[97] Kirby, above n 41, also suggests more legal education for the average citizen: 'Providing undigested legal material is not enough. It is essential that we provide citizens with the tools of thinking through problems, finding the applicable legal rules and deriving from legislation and case law any principle that must be obeyed... a huge mass of undigested legal data will not truly make the law free and more accessible.' It is doubtful how realistic that solution is.
[98] See http://www.dti.gov.uk/for_business.html and for guidance on regulation see http://www.dti.gov.uk/for_business_regulations.html. See also http://www.businesslink.gov.uk (IT & E-Commerce)
[99] Seehttp://www.dti.gov.uk/ccp/topics1/ecomm.htm
http://www.dti.gov.uk/industry_files/pdf/smallbusinessguidance.pdf
[100] http://www.consumer.gov.uk/ccp/topics1/ecomm.htm,
[101] http://www.accc.gov.au/content/index.phtml/itemId/54056/fromItemId/3669

> 'What about my competitors in other jurisdictions, are they subject to the same laws? This will depend on the circumstances. If your online competitors are carrying on a regular business in selling goods or services to customers within Australia, then they are *likely to be subject* to Australian competition laws. *Don't forget that if you are carrying on a business in other countries, you may need to comply with those laws as well.*'[102] [emphasis added]

The main problem with these sites is that they are invariably aimed at local businesses. Also, often the focus is on domestic and EU regulation as if the Internet did not reach beyond it. These sites do not inform local online providers about their possible legal obligations abroad (or outside the EU), nor do they provide foreign online actors with easy access to their legal rights and obligations under domestic laws. Ideally there should a single access point which alerts foreigners to their possible legal duties, with links to more specialised sites.

An international site in several languages which explicitly caters for the needs of transnational online consumers is the econsumer.gov,[103] a multi-state initiative adopted in 2001. The site is primarily reactive to the needs of cross-border actors in that its primary focus is disgruntled consumers and their complaints. It is only very mildly proactive by providing some legal information or links to such information[104] for online businesses. This is perhaps appropriate, judging by its complaints statistics, according to which roughly 50% of the complaints in the first half of 2004 concerned either non-delivery of goods or services or misrepresentations.[105] So the agency appears to be dealing with complaints concerning mainly rough businesses which are unlikely to be too concerned about their legal obligations anywhere.

Perhaps the most promising attempt to make 'online' laws accessible internationally so far has been made by the Council of Europe with its *Convention on Information and Legal Co-operation*

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[102] ACCC, *Dealing with my competitors online* (2003) at http://www.accc.gov.au/content/index.phtml/itemId/54070/fromItemId/54056

[103] See http://www.econsumer.gov.

[104] For information on the Member States of the International Consumer Protection Enforcement Network ICPEN (http://www.imsnricc.org/), http://www.econsumer.gov (Member Countries Information).

[105] Other common complaints: the merchant cannot be contacted, the unauthorised use of identity/account information, the billing for merchandise or services not ordered, see http://www.econsumer.gov/english/contentfiles/pdfs/PU15%20-%20Jan-Jun%202004.pdf.

concerning "Information Society Services" (Moscow, 2001)[106] which – broadly modelled on the EU regulatory transparency directives[107] - was signed in March 2004 by the European Union and is open for signature internationally.[108] Although the primary aim of the Convention is to foster co-operation in the drafting of domestic laws affecting online content providers[109] (and implicitly harmonisation or at least convergence of domestic laws) it also envisages the creation of a central database of adopted domestic regulation. Article 4(7) states:

> 'Upon receipt of the text of the adopted domestic regulations ..., the Secretary General of the Council of Europe shall make them available, where practicable by electronic means, and shall keep this information in a single database within the Council of Europe.'

Such a database would certainly ease the accessibility of foreign domestic laws. The Convention has not yet entered into force, and the online database is disappointingly empty.[110] From the perspective of this article, a definite shortcoming of the Convention is that it excludes 'rules which are not specifically aimed at the Information Society Services.'[111] So it excludes all technology-neutral rules (as, for example, the defamation law) which may be numerous and are likely to vastly outnumber the technology-specific rules. So even if the envisaged database was

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[106] See http://conventions.coe.int/Treaty/en/Treaties/html/180.htm and http://www.coe.int/T/E/Legal%5Faffairs/Legal%5Fco%2Doperation/Information%5FSociety%5FServices/

[107] See for example *Explanatory Report* to the Convention, para 7, at http://conventions.coe.int/Treaty/en/Reports/Html/180.htm. For a summary of the EU legislation on the information procedures regarding technical standards and regulations and regulation on information society services see http://europa.eu.int/scadplus/leg/en/lvb/l21003.htm. Of particular relevance are Directive 98/48/EC which amends Directive 98/34/EC (laying down a procedure for the provision of information in the field of technical standards and regulations) and extends the application of the information procedures to information society services, i.e. the services rendered against payment, electronically and at the individual request of a services recipient. In the EU which for the purposes of many online activities has established the country-of-origin approach to regulation, the need for the accessibility of foreign norms is reduced.

[108] Sabina Gorini, 'Council of the European Union: EU joins Council of Europe Convention on Notification of Rules on Information Society Services' (2004) 5:3 *IRIS*, at http://merlin.obs.coe.int/iris/2004/5/article3.en.html. The Convention is open for signature to the 45 Member States of the Council, observer States such as the US and Canada as well as the EU.

[109] See Art 1(1) '... the Parties shall exchange texts, where practicable by electronic means, of draft domestic regulations aimed specifically at "Information Society Services" and shall co-operate in the functioning of the information and legal co-operation system set up under the Convention.' Art 2(a) defines Information Society Services as 'any services, normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services'

[110] See http://www.coe.int/T/E/Legal%5Faffairs/Legal%5Fco%2Doperation/Information%5FSociety%5FServices/Texts%20and%20summaries.asp#TopOfPage

[111] Article 2(b) of the Convention.

fully updated, it would only ever reveal the tip of the regulatory iceberg to the online services providers.

In short, while there is certainly a lot of law out there on the Internet, it is inadequately packaged and thus inaccessible to many. Such packaging is particularly critical in so far as States expect foreigners to comply with their domestic laws.

3.4 Conclusion

To make law workable and efficient it sometimes has to rely on legal fictions. One such fiction is the presumption that everyone knows the law – a presumption driven by the need to give subjects an incentive to inform themselves of their legal obligations and which is justifiable and fair in so far as everyone could know about it as it is published. But of course even the latter fact is to some extent a fiction, given that many people could not find out about the law, at least through its official sources, since much law in its technical detail is inaccessible to the ordinary person. Nevertheless this fiction is, in the domestic context, hardly troublesome as people can know about their legal obligations and in fact do broadly know about them - either through the media or common knowledge. This article sought to show why this fiction becomes a real fairy tale in the transnational context, particularly now in the online context given the very limited existence of a global common knowledge. This then sits very uneasily with the expectation by States of legal compliance by foreign online actors. In fact, this paper has shown that online actors, for example, could argue that - unless the restrictions imposed by States on their online activities are adequately accessible - such restrictions are in breach of their human right to freedom of expression. And again, just because these restrictions are adequately accessible to domestic subjects does not make them adequately accessible to foreigners or generally to the new breed of 'poor' transnational enterprises. This paper has sought to make the above case by relying on legal sources from different jurisdictions which, of course, are only binding in limited circumstances. Yet, the underlying assumption supporting this approach was that most States would, as part of their commitment to the rule of law, concur with the substance of the arguments.

In practical terms, States essentially have two options. The first option is to scale back their regulatory claims, for example, in favour of self-regulation or the country-of-origin approach to regulatory competence. This option provides a clear example of how practical limitations may at times inform legal developments. Nevertheless so far it has only to a very limited extent been taken up by States. The other option is for States to cater far more explicitly for their foreign clientele and find substitutes for the domestic notice mechanisms. This then would perhaps dictate the need for an online one-point regulatory stop, provided in a number of languages, which would at the very least alert foreign actors to the potential regulatory pitfalls arising out of online activity in that State. In addition, given the difficulty faced by online actors in locating relevant material in foreign jurisdictions, an international point of access to the various national sites might also be asked for. Of course, at the end of the day States could also just stick to their current policy of keeping their heads firmly stuck in the sand.

CHAPTER FOUR

THE VALIDITY OF THE APPLICATION OF IGNORANCE OF THE LAW AS NO DEFENCE IN TANZANIA

4.1 Introduction

The validity of the application of ignorance of the law as no defense in Tanzania depends upon the fulfillment of the underlying factors footing the rule.

The rule presumes the knowledge of law of the people. This presumption is based on the fact that laws are from the society's customs and values and practices or that the laws are well published for people to be unreasonable to say they didn't know the law.

It is in the footing of the above that this chapter will generally cover the issue of the validity of the rule application in Tanzania. To attain the correct foundation on the question, the knowledge of the law in Tanzania, the basis of laws in Tanzania is inevitable to be discussed.

4.2 The Knowledge of Law in Tanzania

Basing on the research during the study, Tanzanians cannot be said to know the law as they lack even the basic knowledge of it. Many depend on the authority for the knowledge as they expect their rights to be attained from them and thud those rights to be known by such authority. This poses a problem in separation of powers as it suggests the judiciary to be the administrator of every ones' dues in part of the law when it is moved to do so but people seek this administration from local authorities as due to their ignorance of the law and even the right places to go in first instances.

The lack of knowledge of the law in Tanzania can be outlined from the hereunder discussed factors in relation to Tanzania.

4.2.1 *Economic Status*

Tanzania is still named a third world country. Nevertheless, poverty as encountering most of the Tanzanian gets in the way of their accessibility of the law and their knowing of duties and rights as imposed to them by the nation's law. This can be insinuated in consideration of the price of acts that provide various laws which is relatively high in comparison to the poor majority population standard of living. For instance, it is too much to be expected for one who barely affords his family's daily meal to buy and therefore attain the constitution of the United Republic of Tanzania for 8000/= that it costs; yet that is the mother law of the country that one needs to know of so as to be at the better side of he law and also acknowledge his rights so as to defend them and exercise them respectively.

4.2.2 *Infrastructure System*

Kasanga division in Mufundi District is a good example of this rural areas or rural towns where its newspapers on current affairs of the country and laws that have been enacted are not easily accessible or reachable to the people and a big reason being the means of transport and system of transport available to transport this information and other goods, mostly being the train which is slow and most of the time breaks down in the middle of the journey.

Due to mechanical problems as they have been used for a long time and the government cannot afford to buy new ones as the problem of poverty is still at large and there are a lot of areas that need government assistance hence its considered not a problem, the same can be said to Mufindi District and its surrounding villages where the roads from Mafinga going to the heart of the villages is almost inaccessible during the rainy season hence such people are usually not lucky enough to get the luxury of newspapers and other necessaries from the capital. Therefore it would be very fair for the maxim "***Ignorance of the law is no defense***" to be used as defense in Tanzania.

4.2.3 *Literacy*

Literacy rate:---------- 67.8% of total population, (Males: 79.4%, Females:56.8%)[112] Illiteracy is widely spread in Tanzania as many people have not had an education due to poverty in our country. Most laws in Tanzania are written in English which is a defect among the Tanzania people where up to recently all primary and secondary schools the students were taught in Kiswahili making the learning process a little more difficult for the students who continue to higher learning.

Hence most people in the rural areas of Tanzania do not understand English even some of those who went to school up to University level haven't grasped the language properly to interpret what the laws say and some they can't completely make anything out of these laws. This causes the people of Tanzania not to understand the law and when these laws are interpreted in Kiswahili they are still a lot of people who cant read and write, literacy is still a major problem among the society .In this case it would be very fair for the maxim "*Ignorance of the law is no defense*" to be used as a defense in Tanzania.

4.2.4 *Language Barrier*

Tanzania uses two languages consecutively one being the National language that is Swahili and the other being an official language (English). Most laws in Tanzania cannot be translated to Kiswahili as the government has tried to translate some laws like the constitution to Kiswahili but they are other laws like environmental law which the government has found it difficult to translate from English to Kiswahili.

This problem has become difficult among the people as most people do not know and under the English language well or at all this is because Tanzania tries to advocate for Kiswahili a lot as it is the language that unites all Tanzanian people plus some time back the government had made Kiswahili the major teaching language at school. This makes the law inaccessible to the people even though they are brought to them, one has to be able to read English and understand the rights and duty to him and towards the society in fulfilling the law.

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[112] 2002 National Demographic Survey of Tanzania

The government should work hard on translating the Laws which govern the Tanzanian people from English to Kiswahili so that people can be able to know the language. Therefore up to know the maxim ***ignorance of the law as no defense*** should be used as a defense due to the above factors.

4.2.5 *Basic Knowledge of the Law*

For example it was found by the use of questionnaires that 78.85% of Tanzania does not know even their mother law of the country, 7.69% of these people were university students and 99% others that know the mother law has never seen it.

It was further found from the findings of this research based on the fifty questionnaires we distributed at Mafinga (village) where each had fifteen questions it was discovered that 99% of the people that know the mother law of Tanzania have never laid eyes on it. Another 99% not only have they never seen the constitution but reading it also. In this case how would these people know their rights? since only 1% have and read the Constitution which leaves the majority in a loop hole.

75% of the people that know the government gazette, have heard it, and actually seen the alleged gazette seem to have a misconception of it as most who have heard of it seem to think of the local newspapers that the government own like "Mwananchi". At the same time 100% of the people that have heard of the government gazette don't know where to find them. Therefore it can be said most Tanzanians do not know the basic laws of their countries which one needs to know.

4.3 Conclusion

The validity of the application of ignorance of the law as a no defense in Tanzania is unjustly applicable due to the above reasons and also adaptation of rules which do not meets the needs of the society due to economic pressure applied by super powers but the invalidity of this rule is clearly seen in the Impact of the presumption of knowledge based on the maxim.

This however, tremendously affects the society in addition to the effects they suffer from their lack of the knowledge of law.

CHAPTER FIVE

IMPACTS OF THE PRESUMPTION OF KNOWLEDGE OF LAW

5.1 Introduction

Ignorance of the law is a problem facing Tanzanians such that the examination of various cases has revealed massive exertion suffered by Tanzanians from both ignorance of the law and the presumption of knowledge of law.

This chapter will cover the direct and indirect effects of ignorance of the law and the presumption of knowledge of law by the people.

5.2 Impact of Ignorance of the Law

Ignorance of the law as defined in the earlier chapter refers to the absence of knowledge in relation to a particular subject of the law. It is a state of being uneducated or uninformed about the law or lack of awareness of its existence. Lack of knowledge of the law result to a number of problems to both the subjects of the law, and the country at large.

In Tanzania due to ignorance of the law, people have sought to enforce their rights and settle their disputes through organs of the government like the district commissioner office, minister's office and CCM offices to mention but a few; in ignorance of the fact that only the judiciary[113] has the duty to settle disputes in interpretation of the law of land.

Moreover, people of Tanzania due to their ignorance of the law have sustained the grasping of their right by authority without the people knowing that it is their right and shouldn't be beheld from it by any one inclusive of the authority. For example a research in the knowledge of the law in Iringa Municipality in 2003 revealed that most people believed in the government's and Police's inability to be sued such that people leave the later (police) to assault them without any

[113] P.J. Fitzgerald; *Salmond on Jurisprudence* , 12th Edition., 1966, pp. 110

case of resistance in the part of the sought to be arrested which would be a good cause for biting up a person to surrender to an arrest.

Furthermore, ignorance of the law has also led to the loss of property or the right to it by people. It is common for government departments or public corporations to take over land and leaving the people helpless as was in ***R v. Ephata Lemi***[114]. Had people know the law, they would not entertain this but rather fight for their rights to such property.

Also, a lot of time is being lost by people in attaining their rights resulting from their ignorance of the law and procedures. For example, in the case of ***Solomon Lufunda v. The Shree Hindu Mandal Hospital***[115] where the plaintiff's wife died in labour after being attended by the defendant's employee, a doctor. Instead of suing for damages in the court of law after having realized that the doctor wasn't registered by the Tanzania Medical Board, the plaintiff went to the board, the prime minister's office, then the state house and also the permanent commission of inquiry. All this process took him four years. He finally filed a case in the high court and was awarded damages. So much time he wasted due to his ignorance of the law.

Nevertheless, ignorance of the law propound people to seek less relieves then the actual higher remedies available. For instance, the dominance of the idea in people's minds that the government is above all other bodies and hence can make an order in their favour; has resulted to their seeking of administrative rather than judicial remedies against the government.

Not only that but also, ignorance of the law has led to people's lost of cases that they could have won hence lost of their right. For example people are ignorant of the law pertaining to civil law such that they loose cases for ignorance of what is contained in the civil procedure code, the Magistrate court Act and other legislations. The case of ***Hati Mali v. EAPT Corporation***[116] stands as a witness of this where the plaintiff relied on the preamble of the constitution and hence lost the case instead of the constitution itself which was the relevant law in question.

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[114] Criminal Appeal No.22/1992 (unreported)

[115] Civil case No.28/1991 (unreported)

[116] (1973) LRT 6

5.3 Impact of Presumption of Knowledge of Law

The effects brought by the rule "ignorance of the law is no defense" can be seen through various cases as here under presented:

The presumption of knowledge of law result to people's lost of their rights to attain remedies due to their actual ignorance of the presumed to be known by them laws. For instance, the assumption of knowledge of law of limitation make people lose their rights to sue after the lapse of certain planned time such that people are presumed to know of such law while in reality they (people) are ignorant of that law. In the case of ***Goodchild v. Greatness Timber Co LTD***[117] is a good illustration of this as the plaintiff who was presumed to have known that he had to bring action within three years, lost his right to sue when he brought action in the lapse of the three limited years.

The major impact of presumption of knowledge of law is the punishing of innocent persons for not knowing the law that the government makes no effort to bring to their knowledge as was In the case of ***Maulid v. R***[118] where the appellant failed to prepare and mention records of oral contracts in respect of his employees. He pleaded ignorance of such requirement. The court rejected his plea on the ground that ignorance of the law does not excuse a person from liability. Hence the person was punished for a wrong he did not know existed thence defeating the deterrence and reformatory point of punishment as most probably had the punished person known the act to have been wrong, would not have committed it in the first place.

The case of ***DM Patel v. R***[119] also illustrates the punishment of people for things they hadn't the knowledge of their being offences in the eyes of the law; as an impact of the presumption of knowledge of law by its subjects. In this case the accused called out to one of his witnesses "*wewe shahidi kaa huku*" (you witness sit over here) while the court was in session. He was charged with contempt of court as per section 114 of the Tanganyika Penal code[120]. When

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[117] (1968)2AER255
[118] (1970)HCD346
[119] (1969) HCD 143
[120] Cap 16 of the revised laws of Tanzania

defending himself, he claimed that he had not known that he was to seek court's permission to speak. His defense was not accepted on the ground that ignorance of the law is not a defense.

Another relevant case is that of ***Carter v. McLaren***[121] where it was held "...knowledge of the law...is irrelevant... the fact that man does not know what is criminal and what is not cannot save him from conviction if what he does satisfies all elements of the crime of which he is accused. Likewise, where one manufactures a drug not knowing that it is illegal under the penal law, his ignorance cannot help him avoid conviction if found guilty."

5.4 Conclusion

The presumption on the knowledge of law, therefore tremendously affect the society in addition to the effects they suffer from their lack of the knowledge of law.

The society is burdened with the loss of their rights that they strive so hard to know they have in the first place and by the time they know the existence of such right, the realisation is blocked by the ignorance of another right claw-backing the initial given right.

The major misfortune attributed to the presumption of knowledge of law is the punishment of innocent people in the absence of their intension to be in the wrong side of the law. Most people are found to be unaware of the laws of the land both criminal and civil; such that the presumption bears unripe fruits from the Tanzanian society hence further question the validity of its application in this given society.

[121] (1871) LR 2 Sc. & D. 120

CHAPTER SIX

RECOMMENDATIONS AND CONCLUSION

6.1 Recommendations

Despite the fact that most Tanzanians know their duty and right to know the laws, 22.5% of them the use of the laws in their existence or lives while the reminder know nothing on the use of the law as subjects in a given locality, society or their country.

The problem of the rule that ignorance of the law is no defence has impacts to the society and should be immediately dealt with. It would be unfair to assume that people have knowledge on the law when in fact, there are no sources provided from which they are to acquire the specific knowledge. Though they have been attempts by the judiciary, government, the parliament and the civil society to raise awareness as regards knowledge on law, such attempts have not been effective to the extent of solving the problem.

The following are recommendations that may be helpful:

- It should be noted that there is no requirement in any law that demands for anybody or institution to provide knowledge of the law to the people. If such a law existed it would have been at least fair to assume that knowledge of the law does exist on the part of the society. Henceforth I recommend the law appoints out a body which will have a duty to pass knowledge to the society.

- Educate the people about the law from the lowest level as possible. The lowest level being the people in remote villages, through speeches conducted in village meetings and written handouts to those people who can read so that the people may know their rights and therefore not be ignorant on the Knowles of the law as this would also make them understand the law and eradicate fear which is brought about by not knowing the law.

- The government should make the law available to people cheaply or even freely when possible considering how poor our society is as this would make people have easy access

to knew laws. This can be done through public meetings and the media especially radios and newspapers depending on how quickly the newspapers can reach the people.

- The law should be transmitted to the people by verbal means as most people in Tanzania are illiterate and they cannot write, read and understand English. Hence the laws should be translated into Kiswahili as it is the mother language of the country and ninety nine percent of the Tanzanians speak and understand the language therefore it is easier if people would get the laws in Kiswahili as this would benefit the public because if members of the public can read a statute written in Swahili, it would save him the cost for legal aid.

- Members of parliament should communicate laws to their subjects. It is the duty of the members of parliament to bring development to their respective constituencies and this development also includes education on the knowledge of law to their subjects and not just the basic infrastructures. Members of parliament should not only enrich themselves but their people also and the best way is giving them knowledge on the law which will enable them to know their rights and fight for justice.

- The government should make programs of making sure that the laws reach the intended subjects once they are in the care of the local leaders. They should allocate time and make follow-ups as to when and how the local leaders like the district commissioners and local governing board should educate people on the law and the proper channels of how those laws reach the subjects once they are in the care of the local leaders. This should not be a matter of discretion to the local leaders.

- The government should offer training to the various NGO's in the country especially in the areas of the organisation systems and procedures, project design and strategic planning. The organisation should also find ways to limit donors from imposing their own program objective as this may blur out the already set objectives of the organisation. This is because funds from donors come with conditions therefore the government should be able to provide funds for these organisations so as to be able to spread the knowledge of the law more easily and quicker as their time is bent on reaching people.

- Newspapers, newsletters and journals should be widely distributed all over Tanzania. Newspapers articles should not be vague on the law but should be precise, clear and widely written so as people can understand more on the law enacted or the particular law discussed. Articles concerning the law should be written by lawyers or students taking law at the University so as to bring clarity and certainty of the published position of the law as they are in a better position to know more about the said law than an ordinary author.

- I recommend that Authors of articles on law in newspapers should not be changed as this disturbs the flow of the idea one had intended to write, the message becomes distorted. It would be much easier to deliver the knowledge from one author who has a plan of what should be the priority and what shall come after that. There should be a general plan for any such author to follow. I also recommend that other bodies or institutions to write articles such as the faculty of law of Universities in the country, legal aid organisations and other bodies.

- Therefore when newspapers articles are being written it should always be on the mind of the author that the people who are going to read the article are illiterate on the matter written hence the author writing the article on law should be precise, use ordinary language as much as possible and avoid any legal jargon and scientific terminologies based on law as this creates confusion and misunderstanding among readers.

- Television and radio programs should be aired for a longer time than they are, for instance an hour is plenty of time for people to understand the issue being discussed and at the same time more programs concerning the law should be aired on this too. The media and people should be given a chance to ask questions, and recommend on the said topics. More so, the programs should be aired during the times when most people are at home, preferably evening hours and not during the day as this will reach more people hence more will know about their rights and duties to the society and also have the knowledge of the law on different angles of the law.

- I recommend and urge the society to create government libraries in every locality especially in the villages which will have in store the laws that they have enacted and

incase of new laws, they shall be put in the said library which will be accessible to the local people of the area therefore enabling them to know and have the knowledge of the law. This library should be free to all the people in the local areas and if costs are to be incurred, they should be as cheap as possible so that the people in that particular area can afford to be able to read these laws.

- The society should have experts for the purpose of educating the people on the law. These people should be given the funds and support by the government and allowed to travel all over the country especially the remote areas and be able to educate people on the laws of the country. At the same time these experts sole work should be only to educate, inform, find out areas which most people do not know anything about the knowledge of the law through asking questions and linking the government to the people of the society by giving information to them on what areas of the law should be emphasized and how much their people know.

- The Government should provide an online national website which provides a detailed information on the domestic laws of the country so that foreigners who are interested in doing any sort of venture in Tanzania can be aware of what is expected of them.

6.2 **Conclusion**

The aim of this paper was to examine the role and effect of the presumption on the effect on the knowledge of the law. In Tanzania, this presumption is carried by the rule: ignorance of the law is no defense. This rule, as it was earlier explained, prohibits the defense of ignorance on the part of the accused persons and those tried in civil proceedings.

There are various effects brought about by the rule of ignorance of the law is no defense. At the same time it is important to note that there are exceptions to the general rule of the same. For instance children are excused from criminal liability where they did not know of the relevant law. Insane persons are also allowed to plead ignorance since they are not expected to have the knowledge of the law due to their disease of the mind. In cases where they was no intention

displayed also becomes an exception to the general rule and the accused may be excused in criminal liability, a secondary person is excerpted from liability where he pleads ignorance for the illegal trade he does not perform.

The rational behind the rule is mainly to avoid flood of cases. Every man must be taken to be cognizant of the law; otherwise there is no knowing of the extent to which the excuse of ignorance of the law might be carried.

The plea of ignorance is always denied since it would be difficult to prove that the accused did in fact know of the law. Another reason is that most offences are based on moral wrongs hence the society is expected to know the law.

From the findings of this research based on the fifty questionnaires I distributed at Mafinga (village) where each had fifteen questions it was discovered that 99% of the people that know the mother law of Tanzania have never laid eyes on it. Another 99% not only have they never seen the Constitution but reading it also. In this case how would these people know their rights, since only 1% have and read the Constitution which leaves the majority in a loop hole?

75% of the people that know the government gazette, have heard it, and actually seen the alleged gazette seem to have a misconception of it as most who have heard of it seem to think of the local newspapers that the government own like "Mwananchi". At the same time 100% of the people that have heard of the government gazette do not know where to find them.

Despite the fact that most Tanzanians know their duty and right to know the laws, 22.5% of them know the use of the laws in their existence or lives while the reminder know nothing on the use of the law as subjects in a given locality, society or their country.

This problem is largely to the lack of proper channels to transmit these laws. For instance in Mafinga some of the villages get their newspapers three days after the news is out due to inaccessible roads that lead to the villages and farness therefore rendering the people ignorant on some of the latest news on the laws.

The same applies to radios in remote areas sometimes is difficult to get news on the air especially at night and during the rainy season. It becomes impossible for the people to learn

about the law or even know the new laws enacted as in most rainy season the roads are completely inaccessible and no services can reach such places and radio-frequency-waves are also disrupted for those using the radios. This adds to people not knowing anything that is happening in the outside world therefore rendering them ignorant of the law as this rainy season can last up to six months.

Therefore most people in Mafinga are not aware of the basic law nor principles based on the findings. Some of these people were not even able to differentiate between civil and criminal law. They were also unable to identify the major branches of law, hence the people are not knowledgeable on the laws of the land as was stated in the hypothesis instead a great fear has settled among the people as they associate the law with mistreatment (jail time).

I hereby conclude that the majority people of Iringa, Mafinga and Dar es Salaam do not have the knowledge on the law and hence to assume that they do is nothing far from fair, this also applies to the literate group of students in the University where most do not know the knowledge of the law and it's even more surprising to find some law students do not know the most basic principles of law. Furthermore there is no set of mechanism that is adopted for the purpose of ensuring that the society is equipped with the basic knowledge of the law as the rule has more negative impact than positive to the people of the society.

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