

# Ignorance of the Law is no Defence: Street Law as a Means to Reconcile this Maxim with the Rule of Law

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## Abstract

*The age-long maxim, ignorance of the law is no defence, is a widely known presumption of law. This paper explains societal backdrops against which it has, from time to time, been contextualised. The aim is to prove that failure to present the law in a simplified and digestible form harms the rule of law. While the rule of law requires the capacity of the law to guide the layperson, the sheer number and complex nature of laws in modern States have made it virtually impossible for him or her to know the law. However, this paper does not seek to excuse ignorance of the law. Instead, it offers the street law programme as a panacea to reconcile this presumption with the rule of law. Further, with a particular reference to Kenya, it attempts to give a lesson for most African countries, where little or no attention has been paid to this programme.*

**Key words:** ignorance of the law, street law and rule of law

## I. Introduction

“The nature of the common law requires that each time a rule of law is applied it be carefully scrutinised to make sure that the conditions and the needs of the times have not so changed as to make further application of it the instrument of injustice”.<sup>1</sup>

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<sup>1</sup> *Surratt v Thompson* (1971) The Supreme Court of Virginia, United States of America.

When the author joined Strathmore Law School, he was encouraged to take part in the Strathmore Law Clinic. This is a student-run organisation which affords law students a practical learning environment enabling them to apply the legal knowledge, gained in class, to real-life social issues with the aim of promoting access to justice, through pro bono work.<sup>2</sup> To this end, the author took issue with the fact that a malpractice that he noticed in his country, the Democratic Republic of the Congo, occurs not only there, but also in Kenya, as well as many other developing countries in Africa. And although it is virtually impossible for the layperson to understand the sheer number of laws and the lawyerly language that pervades their craftsmanship, nevertheless a sacred allegiance has been accorded to the legal maxim ‘ignorance of the law is no defence’.

The idea that every branch of law is tailored, *inter alia*, along the lines of ancient maxims has existed from time immemorial.<sup>3</sup> It does not take much investigation to realise that legal maxims are phrases derived from various sources such as the rules of logic, the Bible and foreign languages.<sup>4</sup> However, these phrases might have been designed to communicate a truth or an exception but are mistakenly referred to as *all* truth or a general rule, respectively.<sup>5</sup> Hence a variety of arguments has emerged on the maxim ‘ignorance of the law is no defence’ (ignorance maxim).<sup>6</sup>

Several lines of evidence suggest that it has brought about injustice.<sup>7</sup> This view is premised on the presumption that all people are expected to know the law, though most of the time irrefutable, is both absurd and illogical.<sup>8</sup> The reason for this is that allegiance is still owed to the maxim even in cases where a fair warning on a certain proscribed behaviour or activity has not been issued to the layperson.<sup>9</sup>

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<sup>2</sup> Strathmore Legal Aid project, ‘Strathmore i-law grant proposal: Improving legal education and access to justice through the legal aid clinic and the law firm incubator’ Unpublished proposal, Strathmore Law School, Nairobi, 3.

<sup>3</sup> McQuade S, ‘Ancient legal maxims and modern human rights’ 18(1) *Campbell Law Review Ancient Legal*, 1996, 83.

<sup>4</sup> McQuade S, ‘Ancient legal maxims and modern human rights’, 76.

<sup>5</sup> Jeremiah S, ‘The use of maxims in jurisprudence’ 9(1) *Harvard Law Review*, 1895, 13 (Emphasis mine).

<sup>6</sup> Alter L, Kernochan J and Darley M, ‘Morality influences how people apply the ignorance of the law defense’ 41(4) *Law & Society Review*, 2007, 820.

<sup>7</sup> Cass R, ‘Ignorance of the law: A maxim reexamined’ 17(4) *William & Mary Law Review*, 1976, 688. See also Alter L, Kernochan J and Darley M, ‘Morality influences how people apply the ignorance of the law defense’, 820.

<sup>8</sup> Cass R, ‘Ignorance of the law: A maxim reexamined’, 691.

<sup>9</sup> Cass R, ‘Ignorance of the law’, 680.

The question of fair warning is also a much-debated issue. By drawing on the concept *nullum crimen sine lege*, no crime without law,<sup>10</sup> some scholars have been able to show that the ignorance maxim erodes the very purpose of criminal law, which is to punish only blameworthy members of society.<sup>11</sup> This is because, realistically speaking, in many a case, people are blamed for ignorance of the law, while having reasonable grounds to be ignorant.<sup>12</sup>

The academic literature on inculpable ignorance of the law has also revealed the emergence of several contrasting themes. The utilitarian perspective has recognised that it is a reality while rejecting simultaneously the fact that inculpable ignorance of the law should be afforded some leniency.<sup>13</sup> Utilitarians justify this position by proposing that as even the devil himself knows not the mind of man, it would result in a burdensome responsibility on the prosecution's side to assess an accused person's mind to bring clear and credible evidence that he or she was not indeed ignorant of the law.<sup>14</sup> Similarly, it has been argued that excusable ignorance will encourage ignorance.<sup>15</sup> Taken together, these views underscore the position that the principle of 'no mercy for the ignorant' is to promote the greater good of society in which every citizen ought to strive to know the law.<sup>16</sup>

In response to such propositions, legal moralism has postulated that the ignorance maxim should only be limited to cases involving heinous crimes such as robbery and murder; also referred to as *mala in se* crimes in that their criminality seems self-evident,<sup>17</sup> through the application of practical reasonableness.<sup>18</sup> Along the same lines, it should not apply to crimes such as talking on the phone while crossing the road, also referred to as *mala prohibita* crimes in that it is difficult for one to assess their criminality because they are only prohibited but not morally wrong.<sup>19</sup>

Despite the cogency displayed by this school of thought it remains narrow in focus, premising its conclusions only on a moral agreement which is to guide

<sup>10</sup> See—<[https://www.law.cornell.edu/wex/nullum\\_crimen\\_sine\\_lege](https://www.law.cornell.edu/wex/nullum_crimen_sine_lege)> on 30 May 2017.

<sup>11</sup> Alter L et al, 'Morality influences how people apply the ignorance of the law defense', 820.

<sup>12</sup> Grace R, 'Ignorance of the law as an excuse' 86(7) *Columbia Law Review*, 1986, 14-16.

<sup>13</sup> Alter L et al, 'Morality influences how people apply the ignorance of the law defense', 820.

<sup>14</sup> Alter L et al, 'Morality influences how people apply the ignorance of the law defense', 820.

<sup>15</sup> Kahan D, 'Ignorance of law is an excuse: But only for the virtuous' 96(127) *Michigan Law Review*, 1997, 127.

<sup>16</sup> Kahan D, 'Ignorance of law is an excuse: But only for the virtuous', 128.

<sup>17</sup> Cran F, 'Legal moralism considered' 89(2) *Ethics*, 147.

<sup>18</sup> Legarre S, 'Derivation of positive law from natural law revisited' 57 *Notre Dame Law School*, 2012, 109.

<sup>19</sup> Kahan D, 'Ignorance of law is an excuse', 129.

the everyday life of people.<sup>20</sup> Yet, it is also unfortunately true that there is a lack of apparent consensus on the question of morality.<sup>21</sup> Thus, deriving the law from morality, it might be protested, would lead to a blurring of distinction between *mala in se* and *mala prohibita* crimes in the mind of right-thinking members of society, who may come from several cultural contexts dealing with morality in several ways.<sup>22</sup>

Against this background, Ashworth asserts that there is a need for the State to fulfil its part of the bargain, which is to ensure that the law reaches out to the layperson in a simplified and digestible form for him or her to be aware of it.<sup>23</sup> This paper casts a critical eye on whether modern States' reliance on this maxim comports with the rule of law. However, it should be borne in the reader's mind from the outset that, unlike before the eighteenth century, modern laws are now framed in a complex manner and the rate at which they have multiplied is astronomical. Consequently, their mere publicising cannot justify a State's reliance on the ignorance maxim.

A law clinic can and should help in this respect under the auspices of the street law programme. The street law programme fits a State's reliance on the ignorance maxim into the modern day context. It refers to the law which the layperson makes contact with in an everyday life setting.<sup>24</sup> It is a community model of the law clinic<sup>25</sup> which has a bearing on the layperson's understanding of the law in a manner adapted to his or her normal capacities and understanding; taking into consideration the complex nature and structure in which laws are framed.<sup>26</sup> This concept has connotations of a preventive form of legal education. It requires law students to engage the layperson involved in the various fields of law such as criminal, juvenile, consumer protection, housing, welfare and human rights law in order to make them aware of their rights and obligations before the law,<sup>27</sup> and therefore ensure that they are not left to swim or sink into ignorance

<sup>20</sup> Ashworth A, 'Ignorance of the criminal law, and duties to avoid it' 74(1) *The Modern Law Review*, 2011, 3-4.

<sup>21</sup> There is such a rampant divergence of understandings of morality that moral theorists hold contrasting convictions about what it is. See Posner R, 'The problematic of moral and legal theory' 111(7) *Harvard Law Review*, 1998, 1641.

<sup>22</sup> Posner R, 'The problematic of moral and legal theory', 1640-1641.

<sup>23</sup> Ashworth A, 'Ignorance of the criminal law, and duties to avoid it', 19 and 25.

<sup>24</sup> Arbetman L, McMahon E and O'Brien E, *Street law: A course in practical law*, 5ed, West Publishing Company, St Paul, 1994, 2.

<sup>25</sup> Winkler E, 'Clinical legal education: A report on the concept of law clinics', 21.

<sup>26</sup> Street law teaching and training manuals have been established and they are framed in a simplified language. See Winkler E, 'Clinical legal education: A report on the concept of law clinics', 22.

<sup>27</sup> Maisel P, 'Expanding and sustaining clinical legal education in developing countries: What we can learn from South Africa' 30(2) *Fordham International Law Journal*, 2007, 384.

of the law.<sup>28</sup> The impact of this programme is equally important for law students. It helps them understand what ought to be done in order to address the legal aspirations and needs of the layperson.<sup>29</sup>

We should further keep in mind that, unlike other clinical education programmes, what makes the street law fundamental to any discussion on the ignorance maxim is that its primary concern is to promote the rule of law by expanding access to justice,<sup>30</sup> from a legal-awareness angle.<sup>31</sup>

In contrast to the developed world,<sup>32</sup> most developing countries in Africa have failed to grease the wheels of this programme since African law students have been left out of promoting access to justice to a worryingly large extent.<sup>33</sup> Yet, an effective and successful tackling of this programme relies, in significant ways, on law students.<sup>34</sup>

In light of the above, this paper adopts the use of literature review, content and comparative analysis of the ignorance maxim, and the street law programme, and with Kenya as a case study. The author has given precedence to Kenya for the following reasons. Firstly, as a clinician, the Strathmore Law Clinic has ably crafted an instructive proposal aiming at helping African countries to appreciate the adoption of clinical legal education programmes such as the street law.<sup>35</sup> Secondly, and most important, issues related to the state of this programme in Africa vary from one country to another.<sup>36</sup> Therefore, tackling them from country

<sup>28</sup> McQuoid-Mason D, 'Street law as a clinical program: The South African experience with particular reference to the University of KwaZulu-Natal' 17(1) *Griffith Law Review*, 2008, 27.

<sup>29</sup> Iya P, 'Fighting Africa's poverty and ignorance through clinical legal education: Shared experiences with new initiatives for the 21st Century' 1 *Journal of Clinical Legal Education*, 2000, 25.

<sup>30</sup> United Nations and the Rule of Law, 'Access to justice' – <<https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/>> on 19 November 2017.

<sup>31</sup> Winkler E, 'Clinical legal education', 21.

<sup>32</sup> Countries such as the United Kingdom, the USA, and Canada have taken the lead in promoting the street law programme. See Winkler E, 'Clinical legal education', 21.

<sup>33</sup> Clinical legal education programmes are at odds with traditional ways of teaching law. See Pinder K, 'Street law: twenty-five years and counting' 27(2) *Journal of Law and Education*, 1998, 226. However, research shows that African law schools, with the exception of South Africa, suffer from relying on traditional ways of teaching. See Ndulo M, 'Legal education in an era of globalisation and the challenge of development' *Cornell Law Faculty Publications*, 2014, 3.

<sup>34</sup> Law students can, and should, play a central role in promoting access to justice and that is to be done through clinical programmes such as the street law. See Wizner S and Aiken J, 'Teaching and doing: The role of law school law clinics in enhancing access to justice' 73 *Fordham Law Review*, 2004, 997. Strathmore Legal Aid project, 'Strathmore i-law grant proposal', 22.

<sup>36</sup> The state of legal education in Africa varies from country to country and so do issues related to the street law programme. See Geraghty T and Quansah E, 'African legal education: A missed opportunity and suggestions for change: A call for renewed attention to a neglected means of securing human rights and legal predictability' 5(1) *Loyola University Chicago International Law Review*, 2007, 88.

to country would go beyond the scope of this paper. But, what is interesting about Kenya is that it has made great progress as far as access to justice is concerned,<sup>37</sup> and has recently enacted legislation to this effect.<sup>38</sup> However, this legislation has paid little attention to law students and, as a consequence, to the street law programme.

Part I of this paper is this introduction. Part II seeks to trace the historical evolution of the ignorance maxim by explaining societal backdrops against which it has been contextualised, from Athens to the modern day. This historical evolution will give some flesh and blood to the discussion that follows in Part III on the need to make access to law available to the layperson in a simplified and digestible form in order to avoid an erosion of the rule of law. Part IV goes ahead to recommend the street law programme as a panacea and as way of reconciling a State's reliance on the ignorance maxim with the rule of law. Finally, the discussion ends in Part V with an attempt to analyse the state of this programme in Kenya in order to advise developing countries in Africa on what path to follow in order to fully and effectively incorporate it into their legislations and policies.

## II. Historical Evolution of the Ignorance Maxim

This Part shows that before the eighteenth century, laws were fewer, and were connected with indissoluble ties to what was universal and objective. It goes ahead to bring to light the fact that this trend has lost its sharpness with the rise of legal positivism, which has brought about a multiplication of laws, and made it virtually impossible to derive them from the 'universal' and the 'objective'.

### *i. From Athens to the eighteenth century*

Awareness of the ignorance maxim is not recent, having possibly been first described by Aristotle in Athens,<sup>39</sup> the most important city-state of ancient

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<sup>37</sup> Kariuki M, 'Improving access to justice: Legislative and administrative reforms under the constitution' *Kariuki Muigua and co* (publications), 1-5.

<sup>38</sup> Sainna C, 'Access to justice: Reflections on the Legal Aid Act 2016' –<<http://www.icj-kenya.org/news/latest-news/87-access-to-justice-reflections-on-salient-features-of-the-legal-aid-act-2016>> on 19 November 2017.

<sup>39</sup> There is an apparent lack of academic literature showing explicitly the origin of the ignorance maxim. However, reliance on this presumption could already be seen in Greece from Aristotle teachings. See Hughes G, *Routledge philosophy guidebook to Aristotle on ethics*, Routledge, London, 2001, 126-127. See also –<<http://www.athensguide.org/athens-history.html>> on 15 August 2017.

Greece.<sup>40</sup> It is widely known that the theoretical groundwork for modern-day democracy was laid to a large extent by the guidelines of the Athenian version.<sup>41</sup> Athenians were far ahead of today's democratic societies' involvement in State affairs.<sup>42</sup> Each citizen was often paid to attend public assemblies where laws and matters of communal concern were being decided.<sup>43</sup> For instance, Thucydides, an Athenian historian and general,<sup>44</sup> maintained the view that an Athenian who did not participate in politics was not only selfish, but also useless.<sup>45</sup>

Along with the Athenians, the Romans are one of the two ancient civilisations that have hailed the ignorance maxim.<sup>46</sup> Roman law had the *ius gentium* (law of nations), comprising a set of principles believed to be of universal knowledge.<sup>47</sup> It was derived from customs and was thought of as being easily discernible from the use of practical reason.<sup>48</sup> This is further featured in one of Cicero's major works,<sup>49</sup> where the law was referred to as right reason, known by virtue of being human.<sup>50</sup> There are various ways to spell out this belief; one thing to note is that the *ius gentium* was based on principles of natural law.<sup>51</sup>

Roman law excused ignorance of the *ius civile*,<sup>52</sup> the civil law, which was derived from statutes rather than customs,<sup>53</sup> as is the case with most modern-day laws. This excuse was extended to women, males under twenty-five years of age and soldiers who were away when a particular statute was passed.<sup>54</sup> It is worth

<sup>40</sup> See – < <http://greece.mrdonn.org/athens.html> > on 1 June 2017.

<sup>41</sup> See – < <http://www.athensguide.org/athens-history.html> > on 1 June 2017.

<sup>42</sup> Purhouse L, *Plato's Republic*, 1ed, Bloomsbury Academic, London, 2010, 6.

<sup>43</sup> Purhouse L, *Plato's Republic*, 6-7.

<sup>44</sup> Lloyd J, 'Thucydides' Ancient History Encyclopedia, 19 April 2012 – < <http://www.ancient.eu/Thucydides/> > on 2 June 2017.

<sup>45</sup> Cartwright M, 'Athenian democracy' Ancient History Encyclopedia, 13 October 2014 – < [http://www.ancient.eu/Athenian\\_Democracy/](http://www.ancient.eu/Athenian_Democracy/) > on 2 June 2017.

<sup>46</sup> Meese E and Larkin P, 'Reconsidering the mistake of law defense' 102(3) *Journal of Criminal Law and Criminology*, 2012, 726.

<sup>47</sup> Black's Law Dictionary, 4ed.

<sup>48</sup> Cass R, 'Ignorance of the law', 685.

<sup>49</sup> Fott D, *Cicero's 'On the Republic' and 'On the Laws'* Cornell University Press, < <http://www.cornellpress.cornell.edu/book/?GCOI=80140100395300> > on 4 June 2017.

<sup>50</sup> Kastely A, 'Cicero's *De Legibus*: Law and talking justly toward a just community' 3(1) *Yale Journal of Law and the Humanities*, 1991, 1.

<sup>51</sup> Davies S, 'The jurisprudence of willfulness: An evolving theory of excusable ignorance' 48(3) *Duke Law Journal*, 1998, 351. For more information, See Giorgio P, 'The place of legal positivism in contemporary constitutional states' 18(5) *Law and Philosophy*, 1999, 532.

<sup>52</sup> Cass R, 'Ignorance of the law', 685.

<sup>53</sup> Black's Law Dictionary, 4ed.

<sup>54</sup> Cass R, 'Ignorance of the law', 685. See also Davies S, 'The jurisprudence of willfulness', 350-351.

emphasising that any citizen could claim ignorance of the law insofar as he did not get a proper explanation of its content from an expert.<sup>55</sup>

The fact that the laws continued to be based on self-evident, rational and objective principles<sup>56</sup> and that there were fewer predicates the basic notions of fairness that States' reliance on the ignorance maxim has perennially displayed;<sup>57</sup> both in civil and criminal law.<sup>58</sup> This is likely to justify the claim that there was a lack of active academic debate to counterclaim this maxim for a long period.<sup>59</sup>

It was not until the modern-day jurisdictions that the foremost legal minds considered the ignorance maxim worthy of scholarly attention.<sup>60</sup> This mainly ties in with the fact that from the eighteenth century, principles of natural law on which law was substantially premised had failed to step up the fight against legal positivism, which in turn generated a large number of complex laws to govern States' affairs.<sup>61</sup>

The Anglo-American common law, defined as the law based on customs and reason, tried, helplessly, to withstand this fight. It was bereft of its meaning in the nineteenth century.<sup>62</sup> Consistent with this argument is the Declaration of Independence of 1776. While framing it, the American founding fathers had, fresh in mind, the principles of natural law.<sup>63</sup> Levin echoes this in the following quote: 'America's founding principles are eternal principles...born of intuition, faith, experience, and right reason. They are the foundation on which the civil society is built and the individual is cherished; they are the basis of freedom, moral order, happiness, and prosperity'.<sup>64</sup> However, this trend has been caught in

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<sup>55</sup> Cass R, 'Ignorance of the law', 685.

<sup>56</sup> The *corpus juris civilis*, which is a body of law that originated in Rome, was largely made of customs and influenced societies that came after the fall of the Roman Empire, from the twelfth century, through the Middle Ages and beyond. See Tamanaha Z, *On the rule of law: History, politics, theory*, Cambridge University Press, New York, 2004, 13. For more information, see also Cass R, 'Ignorance of the law', 686.

<sup>57</sup> Cass R, 'Ignorance of the law', 685.

<sup>58</sup> Cass R, 'Ignorance of the law', 685-686.

<sup>59</sup> Cass R, 'Ignorance of the law', 686.

<sup>60</sup> Cass R, 'Ignorance of the law', 686-687.

<sup>61</sup> It is worth noting that from the eighteenth century it became difficult to derive laws from natural law owing to the multiplication of laws that was brought about by legal positivism. See Tamanaha Z, *On the rule of law: History, politics, theory*, 27.

<sup>62</sup> Tamanaha Z, *On the rule of law*, 28.

<sup>63</sup> Tacoma T and Arnn L, 'A call to action: Rediscovering Americanism and the tyranny of progressivism, by Mark Levin' *Threshold Editions*, 2017, 259.

<sup>64</sup> Tacoma T and Arnn L, 'A call to action: Rediscovering Americanism and the tyranny of progressivism', 260.



the trappings of legal thinkers such as Rousseau, Hegel, Marx and Comte,<sup>65</sup> some of whose writings have been influential in paving the way for legal positivism.<sup>66</sup>

Africa was not immune to the fight between legal positivism and natural law. Just like the Athenian and the Roman, the African had been deriving laws from customs until the imposition of legal positivism via colonisation.<sup>67</sup>

## ii. *From the eighteenth century to modern day jurisdictions*

In view of all that has been mentioned so far, one may safely assert that the Athenian, the Roman, and the societies that came after them as well as the pre-colonial African had all the reasons to conform to the ignorance maxim. Not only were laws fewer but they were learnt from customs and through objective reason.

It is now well established from a variety of studies that modern trends of law revolve around legal positivism, a school of thought that disagrees on the connection between law and morality,<sup>68</sup> connoting that law does not necessarily base its validity on accepted moral values and truths but is rather the result of a consensus between the rulers and the ruled.<sup>69</sup>

The consequences of this approach are monumental. Evidence is mounting to show that it has given birth to a labyrinth of laws, only known to the elite and in which the masses have lost their way.<sup>70</sup> For instance, in a case centred on the ignorance maxim in the United Kingdom (UK), Lord Justice Toulson brought to light the following facts to explain the reason why it is difficult for the masses to know the law. First, although laws are passed by parliament, the main body of laws that govern the day to day life of the masses is derived from delegated legislation.<sup>71</sup> Second, over the last half century, laws have multiplied tremendously and in a report revealing this multiplication, the Law Commission's

<sup>65</sup> Tacoma T and Arnn L, 'A call to action', 259. See also Lumb R, 'Natural law and legal positivism' 11(4) *Journal of Legal Education*, 1959, 503.

<sup>66</sup> Tacoma T and Arnn L, 'A call to action', 259.

<sup>67</sup> Okoth-Ogendo H, 'The tragic African commons: A century of expropriation, suppression and subversion' *Programme for Land and Agrarian Studies*, 2002, 7-8.

<sup>68</sup> This is known as exclusive legal positivism. See Shapiro S, 'The 'Hart-Dworkin' debate: A short guide for the perplexed' Michigan Law School, Working Paper Number 77, 2007, 20-21. See also A Dictionary of Law, 6ed.

<sup>69</sup> Coleman J and Leiter B, 'Legal positivism' in Patterson D, 2ed, *A companion to philosophy of law and legal theory*, Blackwell Publishing Ltd, New Jersey, 2010, 228.

<sup>70</sup> Arbetman L, McMahon E and O'Brien E, *Street law: A course in practical law*, 2.

<sup>71</sup> *Regina v William Chambers* (2008), England and Wales Court of Appeal.

Report on Post-Legislative Scrutiny, showed that in the year 2005 alone nearly 21,000 pages of laws had been passed in the UK, that is, nearly 1,750 pages on a monthly basis.<sup>72</sup> Third, laws related to a single issue are so scattered in the various pieces of legislation that it is difficult for the masses to know about them to consolidate them.<sup>73</sup> Fourth, the *searchability* of laws on databases is inadequate as the search is by means of the name of the legislation and not the information that is being looked for.<sup>74</sup>

Given this setting, it is impossible for the layperson to derive all the laws from morality. Since utilitarians stress the separation of law and morals,<sup>75</sup> it may be rightly said that legal positivism justifies States' reliance on the ignorance maxim from a utilitarian approach.<sup>76</sup> The purpose of this approach is to adapt the law to the demands of industrialisation, which have shaped the everyday life of the layperson with the effect that a number of laws cannot be deduced from reason or based on objective universal values.<sup>77</sup> Further, it is to help shake off incidents of bogus claims of ignorance of the law<sup>78</sup> stemming from the difficulty of proving whether one was indeed ignorant of the law or not.

However convenient this approach seems to be, utilitarianism is not weighed against the educational and cultural values of any given community,<sup>79</sup> which are a prerequisite for a better understanding of the way in which knowledge of law should be imparted to the layperson.<sup>80</sup> Freeman writes: 'We have reason to question the validity of a moral conception such as utilitarianism if it demands conduct of us that is beyond our normal capacities to regularly comply with'.<sup>81</sup>

The quotation highlights the fact that utilitarianism imposes an unfair burden on citizens by expecting them to achieve goals that are utopian in tone and purpose.<sup>82</sup> This could rightly be premised on the presumption that each person knows the law while the way in which laws are framed is all Greek to the

<sup>72</sup> *Regina v William Chambers* (2008).

<sup>73</sup> *Regina v William Chambers* (2008).

<sup>74</sup> *Regina v William Chambers* (2008).

<sup>75</sup> Hart H, 'Positivism and the separation of law and morals' 71(4) *Harvard Law Review*, 1958, 594.

<sup>76</sup> Lumb R, 'Natural law and legal positivism', 503.

<sup>77</sup> Lumb R, 'Natural law and legal positivism', 509. See also Cass R, 'Ignorance of the law', 687.

<sup>78</sup> Kahan D, 'Ignorance of the law is not an excuse', 128.

<sup>79</sup> McQuade S, 'Ancient legal maxims and modern human rights', 95.

<sup>80</sup> It has been argued that legal discourse should be inclusive to achieve justice. Therefore, ones educational and cultural backgrounds have to be considered in order to engage them in legal discourse. See Kastely A, 'Cicero's *De Legibus*', 31.

<sup>81</sup> Freeman S, *Justice and social contract: Essays on Rawlsian political philosophy*, Oxford University Press, New York, 2007, 75.

<sup>82</sup> Freeman S, *Justice and social contract*, 75.

layperson.<sup>83</sup> Further, even those who have tackled the upper reaches of the legal profession are unaware of the whole bulk of laws.<sup>84</sup>

At this point of the paper, one cannot help but admit that in this era of legal positivism, reliance on the ignorance maxim, without giving the layperson access to law in a simplified and digestible form, adapted to their normal capacities and understanding, brings about an erosion of the rule of law.

### III. The Ignorance Maxim and the Rule of Law

The claim that solely relying on the ignorance maxim without giving the layperson access to law in a form he (or she) understands brings about an erosion of the rule of law is further elaborated in this Part.

There is such a divergence of understandings of the rule of law that many people hold contrasting convictions about what it is.<sup>85</sup> Despite this divergence, modern scholars have in common the view that among the canons of the rule of law is legal awareness,<sup>86</sup> a facet of access to justice, which is the capacity of the law to guide the layperson, who should, therefore, be able to understand it.<sup>87</sup> Gardner noted:

‘According to the ideal of the rule of law, the law must be such that those subject to it can reliably be guided by it, either to avoid violating it or to build the legal consequences of having violated it into their thinking about what future actions may be open to them. People must be able to find out what the law is and to factor it into their practical deliberations. The law must avoid taking people by surprise, ambushing them, putting them into conflict with its requirements in such a way as to defeat their expectations and frustrate their plans’.<sup>88</sup>

What could catch the eye, however, of any keen observer of the rule of law — the guardian of human rights —<sup>89</sup> is that the right of access to justice, on its

<sup>83</sup> Arbetman L et al, *Street law*, 2.

<sup>84</sup> Husak D, *Overcriminalisation: The limits of criminal law*, Oxford University Press, New York, 2008, 624.

<sup>85</sup> Tamanaha Z, ‘On the rule of law’, 3.

<sup>86</sup> It is largely agreed that the rule of law is a historical ideal. See Fallon H, ‘The rule of law as a concept in constitutional discourse’ 97(1) *Columbia Law Review*, 1997, 43. As such any discussion on the rule of law should comport with its historical lenses, which require that the law should be *knowable* to avoid anarchy and official arbitrariness. See Fallon H, ‘The rule of law as a concept in constitutional discourse’, 42-43.

<sup>87</sup> Fallon H, ‘The rule of law as a concept in constitutional discourse’, 8.

<sup>88</sup> Ashworth A, ‘Ignorance of the criminal law, and duties to avoid it’, 4-5.

<sup>89</sup> Preamble, *Universal Declaration of Human Rights*, 10 December 1948.

legal awareness aspect, falls under the ambit of socio-economic rights, precisely because it requires a State's responsiveness, unlike civil and political rights which require its forbearance instead.<sup>90</sup> Therefore, the State should put in place policies and programmes in order to observe, respect, promote and fulfil the realisation of this right.

Fallon argues that the rule of law is an ideal that cannot be fully realised.<sup>91</sup> For this reason, strictly speaking, it is impossible for the State to ensure that a simplified and digestible form of the law reaches out, with mathematical exactness, to all laypeople. Consequently, what is of relevance is that the State should give a well-thought and organised response, depending on the resources available, as far as safeguarding, preserving and guaranteeing this right is concerned.<sup>92</sup> A critic might as well conclude that failing to comply with this requirement would put its reliance on the ignorance maxim at odds with the rule of law.

This is arguably the position of the England and Wales Court of Appeal. While conforming to the traditional allegiance accorded to the ignorance maxim, and being aware of the layperson's difficulty in accessing the law, the court made the argument that qualified bodies are in place to remedy this malady, such as putting in place a comprehensive database 'to ensure that the related provisions of primary and secondary legislation should be capable of being accessed in a coherent fashion by a straightforward and freely available electronic search'.<sup>93</sup>

Although this appears to look like a step in the right direction, the mere publicising of laws, as mentioned in the preceding Part, does not guarantee legal awareness and cannot, therefore, justify States' reliance on the ignorance maxim. It is for this reason that many scholars in the developed world, mainly, have realised that the rule of law could easily have been brought to naught if the mere publicising of laws was not taken one step further. It is with this in mind that their attention and attraction have been drawn to the street law programme.<sup>94</sup>

<sup>90</sup> Lumumba P and Franceschi L, *The constitution of Kenya, 2010: An introductory commentary*, Strathmore University Press, Nairobi, 2014, 132-133.

<sup>91</sup> Fallon H, 'The rule of law as a concept in constitutional discourse', 43.

<sup>92</sup> Article 2, *International Covenant on Economic, Social and Cultural Rights*, on 16 December 1966, 993 UNTS 3.

<sup>93</sup> *Regina v William Chambers* (2008).

<sup>94</sup> Many scholars have advocated and promoted the street law programme: to mention just but a few, we can cite: i) Arbetman L, McMahon E and O'Brien E, *Street law: a course in practical law*, 5ed, West Publishing Company, St Paul, 1994. ii) McQuoid-Mason D, 'Street law as a clinical program: The South African experience with particular reference to the University of KwaZulu-Natal' 17(1) *Griffith Law Review*, 2008. iii) Ashbrook A, *Street law's classroom guide to mock trials and moot courts*, 1ed, Glencoe/McGraw-Hill, 2005. iv) McGraw-Hill, *Street law: Understanding the law and legal issue, students' edition*, 1ed, McGraw-Hill Education, 2011.

The street law programme promotes the right of access to justice since it epitomises legal awareness. It creates an environment in which access to law in a simplified and digestible form can be enjoyed, because it takes into consideration the normal capacities and understanding of the layperson. Therefore, one may maintain that it is a means to reconcile the ignorance maxim with the rule of law.

#### **IV. Street Law as a Means to Reconcile the Ignorance Maxim with the Rule of Law**

The history of the street law programme can be traced to Georgetown University (in the USA) at a time when,<sup>95</sup> despite laws being properly publicised, the language in which they were written was too complicated for the layperson to make sense of them.<sup>96</sup> It was in light of this drawback that the street law programme was crafted as a means to foster law awareness-building through the lens of legal literacy.<sup>97</sup> From there, it transcended national boundaries and has today gained international momentum.<sup>98</sup>

For the street law programme to reach its full potential, it is crucial that law schools, the State at all levels of government, the legal profession industry and the wider community, embark on a joint effort to provide it with adequate funding and resourceful people.<sup>99</sup> To offer a few attractive examples, law schools, the judiciary, law firms, and the national and federal bar associations in the USA have taken the lead in promoting this programme.<sup>100</sup> Mandela made it a political goal from the very outset of his first term,<sup>101</sup> and the Russian government as part of State policy.<sup>102</sup>

This programme works smoothly through the lens of interactive methods of teaching that make it more interesting and adapted to a given audience.<sup>103</sup> A law student, for instance, can organise a competition between high school boys and girls, declare the girls winners though they have lost, and then go on to ask

<sup>95</sup> McQuoid-Mason D, 'Street law as a clinical program', 29.

<sup>96</sup> Winkler E, 'Clinical legal education', 20-21.

<sup>97</sup> Winkler E, 'Clinical legal education', 21.

<sup>98</sup> O'Brien E, 'Democracy for all: Human rights and street law legal literacy programs; Reflections after 20 years of democracy in South Africa' *New York Law School Law Review*, 2011, 3.

<sup>99</sup> Winkler E, 'Clinical legal education: A report on the concept of law clinics', 22.

<sup>100</sup> O'Brien E, 'Democracy for all', 5-14.

<sup>101</sup> Iya P, 'Fighting Africa's poverty and ignorance through clinical legal education', 25.

<sup>102</sup> Winkler E, 'Clinical legal education', 13-14.

<sup>103</sup> O'Brien E, 'Democracy for all', 4.

the boys for money to declare them winners. After complaints have been made, students come to learn the basic principles of constitutional law, affirmative action, corruption and democracy which have permeated the competition. This has been tried for the first time in the USA and the impact was clear and immediate.<sup>104</sup>

To reach out to virtually all the community, street law books have been made available, covering almost all fields of the law in a simplified version,<sup>105</sup> often with images reflecting experiences familiar to the layperson.<sup>106</sup> Further, one could arguably state that the street law has the motto '*Training the trainer*'. This concept connotes that a trainee can contribute to an exponential dissemination of legal information.<sup>107</sup> For this reason, high school teachers, strategic people in trade unions, non-governmental organisations and youth, are taught effective ways in which to apply interactive methods of teaching specially selected audiences.<sup>108</sup>

There is a further point to be considered. The origins of the learning pyramid theory are unknown,<sup>109</sup> which opens it to telling criticism.<sup>110</sup> However, this theory may help us understand the relevance of the street law programme in order to appreciate the adoption of the ignorance maxim in the modern day. It maintains that by engaging the layperson in a discussion on the law, the average retention rate is fifty percent.<sup>111</sup> This rate increases by twenty-five percent if the layperson happens to know the law through some experience and by forty percent when the layperson teaches what they have been taught.<sup>112</sup> However, the average retention rate is only ten and twenty percent when it comes to reading what has been published, and through audio-visuals, respectively.<sup>113</sup>

At this point, it is appropriate to admit that the street law programme makes a strong case for State reliance on the ignorance maxim in the modern day as it brings out a fair interaction between the State's presumption that every person knows the law and the layperson's access to law in an understandable

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<sup>104</sup> O'Brien E, 'Democracy for all', 2.

<sup>105</sup> McQuoid-Mason D, 'Street law as a clinical program', 30. See also Winkler E, 'Clinical legal education', 22.

<sup>106</sup> O'Brien E, 'Democracy for all', 6.

<sup>107</sup> McQuoid-Mason D, 'Street law as a clinical program', 31-32.

<sup>108</sup> McQuoid-Mason D, 'Street law as a clinical program', 33.

<sup>109</sup> Letrud K, 'A rebuttal of NTL institute's learning pyramid' 133 (1) *Lillehammer University College*, 2012, 118.

<sup>110</sup> Letrud K, 'A rebuttal of NTL institute's learning pyramid', 122.

<sup>111</sup> Letrud K, 'A rebuttal of NTL institute's learning pyramid', 118.

<sup>112</sup> Letrud K, 'A rebuttal of NTL institute's learning pyramid', 118.

<sup>113</sup> Letrud K, 'A rebuttal of NTL institute's learning pyramid', 118.

form. It, therefore, reconciles State reliance on the ignorance maxim with the rule of law.

A great deal of importance has been attached to this programme in the developed countries.<sup>114</sup> This justifies the claim that reliance on the ignorance maxim in these countries is in tune with the rule of law. However, most developing countries in Africa are still caught on the wrong side of the rule of law.

The reason for this is that African legal education, which would allow this programme to reach its full potential, has been left out of promoting access to justice, a salient feature of the rule of law. For instance, clinical legal education programmes such as the street law are at odds with traditional ways of teaching law.<sup>115</sup> Yet, this is still the teaching style in most African law schools.<sup>116</sup> Further, since the early 1990s, the role of African legal education in promoting the rule of law has been given lip-service as far as large-scale foreign aid is concerned.<sup>117</sup> This is why today there is a considerable decrease in funds from foreign governments, foundations and banks with regard to encouraging interactive methods of teaching and the relevance of clinical legal education programmes, such as the street law, in African law schools.<sup>118</sup> This contrasts starkly with the overwhelming support that legal education in Africa used to get from foreign aid in the 1980s and early 1990s.<sup>119</sup>

While calling to action international donors with a keen interest in the rule of law, the genius of pointing this fact out lies in our understanding that the promotion of the street law programme in Africa and therefore access to law in a digestible form, will depend largely upon the government's responsiveness in terms of funding as well as organising this programme.

The following Part provides an analysis of this programme in Kenya in order to advise African countries on the path to follow in order to incorporate it into their legislations and policies.

<sup>114</sup> Countries such as the United Kingdom, the USA, and Canada have taken lead in promoting the street law programme. See Winkler E, 'Clinical legal education', 21.

<sup>115</sup> Pinder K, 'Street law: twenty-five years and counting', 226.

<sup>116</sup> Ndulo M, 'Legal education in an era of globalisation and the challenge of development', 3.

<sup>117</sup> Geraghty T and Quansah E, 'African legal education', 94 and 96.

<sup>118</sup> Geraghty T and Quansah E, 'African legal education', 97.

<sup>119</sup> Geraghty T and Quansah E, 'African legal education', 96.

## V. Analysis of Street Law in Kenya

What Kenya, like its African counterparts, is now undergoing regarding access to legal information is analogous to what the Romans underwent under Emperor Caligula. Caligula would pass a law and post it in a corner such that the public were unaware of its existence and could not make copies of it.<sup>120</sup> Perhaps this justifies why many ancient historians firmly maintained that he was a madman.<sup>121</sup>

The analogy between what happened in Rome centuries ago and what is happening in Kenya lies in the fact that complaints have been made that the laws of Kenya are framed in such difficult English that excludes the layperson from understanding his or her rights and obligations before the law. This claim is premised on the fact that it borrows from foreign languages and uses technical terms unknown to lay people most of whom lack the basic skills to make sense of them.<sup>122</sup>

While courts of law continue to state eloquently that ignorance of the law is no defence,<sup>123</sup> settings that are in place have proven to be inadequate to provide the layperson with an understanding of what the law entails.<sup>124</sup>

Since a well-thought and organised response to these hurdles lies in an efficacious street law programme, as one may safely maintain at this point of the paper, below is discussed the state of this programme in Kenya, and a way forward is provided.

### i. The state of street law in Kenya

Admittedly, there is a relatively small body of literature concerned with clinical legal education programmes in Kenya.<sup>125</sup> In a study investigating the

<sup>120</sup> Cass R, 'Ignorance of the law', 688.

<sup>121</sup> Robert K, 'The illness of Caligula' 65(7) *The Classical World*, 1992, 223-224.

<sup>122</sup> Bowry P, 'Simplify the language used by lawyers' *The Standard*, 27 January 2015 – <<https://www.standardmedia.co.ke/article/2000149473/simplify-the-language-used-by-lawyers>> on 13 June 2017.

<sup>123</sup> The Kenyan Supreme Court, which is the highest court in the land and whose decisions bind all the courts in the country, accords sacred allegiance to the ignorance maxim as seen in *Daniel Kimani Njibia v Francis Mwangi and another* (2014) eKLR.

<sup>124</sup> The few movements that contribute to awareness-building of the law in Kenya were proven to be inefficacious in 2000. Since then no great change has occurred because legal aid providers do not work in cooperation with each other to ensure that the law reaches out to virtually all laypeople. See Iya P, 'Fighting Africa's poverty and ignorance through clinical legal education', 19-20.

<sup>125</sup> Arguably, there are three scholarly articles available online tackling clinical legal education in Kenya. These are: 'Law clinics and access to justice in Kenya: Bridging the legal divide' by Ouma Y and Chege E, 'Clinical legal education: The Kenyan experience' by Ouma Y and Kotonya A and



subject, Ouma and Chege reported that these programmes have been established in the various law schools across the country, either implicitly or explicitly,<sup>126</sup> and have led to several activities falling under the province of the street law programme, such as prisons projects and law awareness campaigns.<sup>127</sup> However, they are law-student models of the street law programme, with little or no support from law schools, the State at any level of government, the legal profession and the wider community. Therefore, owing to the lack of adequate support, they face a range of issues in terms of quality delivery.<sup>128</sup>

This lack of adequate support may have occasioned the fact that the street law programme in Kenya has not yet embraced the motto '*training the trainer*', as is the case in countries with the most advanced street law programmes, as was noted in the preceding Part. This is especially relevant with regard to broadening and deepening the dissemination of legal information. For instance, law students and high school teachers are not trained to teach high school students their rights and obligations before the law, and street law books, covering most branches of law and devised in a language and form suitable for the layperson's understanding, are still non-existent.

Aside from lacking support, it has been submitted that this may also be due to the fact that the focus on legal providers is not oriented to a preventive form of legal education,<sup>129</sup> which requires informing the layperson of the content of the law and what to do if a breach ensues,<sup>130</sup> instead, the focus has been on dispute resolution.<sup>131</sup>

There is a consensus in the few studies that have been carried out on clinical legal education in Kenya. These studies postulate that for clinical programmes to fare well in the country, they should be institutionalised into the law school curriculum.<sup>132</sup> Institutionalisation arguably would take the street law programme

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'Reflections on the implementation of clinical legal education in Moi University, Kenya' by Ojienda T and Oduor M.

<sup>126</sup> Clinical legal education programmes in Kenyan law schools have been explicitly referred to as such or by other names. See Ouma Y and Chege E, 'Law clinics and access to justice in Kenya', 124.

<sup>127</sup> Ouma Y and Chege E, 'Law clinics and access to justice in Kenya', 123-125.

<sup>128</sup> There are various types of the street law programme. See Winkler E, 'Clinical legal education', 23.

<sup>129</sup> On the right to access justice the 2010 Constitution of Kenya focuses on the amount of money that the layperson should pay for his or her case to be taken care of. This implies that the layperson's breaking of the law was (fresh) in the minds of the drafters instead of making him (or her) aware of the law. See Ouma Y and Chege E, 'Law clinics and access to justice in Kenya', 111.

<sup>130</sup> Winkler E, 'Clinical legal education', 21.

<sup>131</sup> Article 48, *Constitution of Kenya* (2010).

<sup>132</sup> Ouma Y and Chege E, 'Law clinics and access to justice in Kenya', 107. See also: Ouma Y and Kotonya A, 'Clinical legal education: The Kenyan experience' International Journal of Clinical Legal Education Conference, Toronto, 10 to 12 July 2016, 24.

one step further by either making it a credit-bearing model of street law as a compulsory unit run by the law schools through organising street law sessions,<sup>133</sup> or as community service.<sup>134</sup>

To that effect, the Strathmore Law Clinic has suggested a systematic way of greasing the wheels of this programme through some of its important projects. One is the Human Rights Project. Its purpose includes but is not limited to providing refugees with legal services in order to equip them with a general understanding of their rights and obligations in Kenya, their hosting country.<sup>135</sup>

The clinic has also set up the Right to Education Project, which aims at engaging high school students in the various fields of law through the lens of interactive ways of teaching such as group and whole class debates, and discussions.<sup>136</sup> It is a clear-cut manifestation of the street law motto '*training the trainer*' as its ultimate goal is to enable high school students to acquire a lawyer's practical reason and consequently to embark on disseminating legal information.<sup>137</sup> Further, it seeks to help them appreciate the law so that once at the university level, they can embrace this field of knowledge and promote the street law programme.<sup>138</sup>

Another project is the Community Enterprise Clinic, whose targeted audiences are innovators and entrepreneurs involved in ventures touching on copyright law, patent and trademark issues, web domain names, electronic commerce law and data protection law. A lack of this knowledge would otherwise have frustrated their business ventures by putting them in conflict with the law.<sup>139</sup>

Although the three above-mentioned proposed projects seem to cater for everyone in society, the clinic did not confine its reach. It went ahead to propose a Criminal Justice Clinic project. The aim of this project is to provide remandees with a general understanding of the criminal procedure through lessons prepared and delivered by clinicians. It is also concerned about setting up law clinics in all prisons so as to promote prisoners' awareness of their rights and obligations before the law.<sup>140</sup>

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<sup>133</sup> Winkler E, 'Clinical legal education', 23.

<sup>134</sup> Winkler E, 'Clinical legal education', 12.

<sup>135</sup> Strathmore Legal Aid project, 'Strathmore i-law grant proposal', 7.

<sup>136</sup> Strathmore Legal Aid project, 'Strathmore i-law grant proposal', 8.

<sup>137</sup> Strathmore Legal Aid project, 'Strathmore i-law grant proposal', 8.

<sup>138</sup> Strathmore Legal Aid project, 'Strathmore i-law grant proposal', 8.

<sup>139</sup> Strathmore Legal Aid project, 'Strathmore i-law grant proposal', 8-9.

<sup>140</sup> Strathmore Legal Aid Project, 'Strathmore i-law grant proposal', 9.

While institutionalisation would be a step in the right direction, we should not lose sight of the fact that even in countries with the most developed street law programmes; institutionalisation-related issues are still existent.<sup>141</sup> However convenient institutionalisation may prove to be, the efficacy and successful tackling of the street law programme lies in its evaluation.<sup>142</sup>

Whether this programme's evaluation meets its purpose, which is to ensure that the law reaches out to the layperson in a form that suits his or her understanding, can only be determined by a well thought and organised response to this programme with respect to its supervision. This supervision is to be done at two levels.

At the law faculty level, supervision is to sustain the capacity building of clinicians. To achieve this, the Strathmore Law Clinic suggests an assessment of each of the above-mentioned projects to be conducted on a once-every-three-months basis. The focus should be on successes and failures in order to spot areas which require further attention.<sup>143</sup> Furthermore, the clinic went ahead to propose reliance on clinical legal education conferences, which may be local, regional or international, in order to learn from a wider range of clinical experiences from around the world.<sup>144</sup>

The purpose of supervision at the national level is to ensure that the street law programme is established in all law schools countrywide for it to reach out to the greatest number of laypeople. South Africa is an attractive example and may be taken as a yardstick. In South Africa, the Association of University Legal Aid Institutions Trust (AULAI) has been established to supervise and monitor law clinics from all the twenty-one universities in the country.<sup>145</sup> It is the link between law clinics and both national and international sources of support.<sup>146</sup> AULAI allocates resources among law clinics proportionally according to the various tasks assigned to them.<sup>147</sup> Even in the absence of institutionalisation, this body has been able to influence law clinic programmes in general, and the street law

<sup>141</sup> South African law schools faced challenges related to the funding of the street law programme. See Maisel P, 'Expanding and sustaining clinical legal education in developing countries', 399. Similar challenges were experienced in the USA where there was a resort to graduates to help getting law clinic programs running. See Geraghty T and Quansah E, 'African legal education', 103.

<sup>142</sup> McQuoid-Mason D, 'Street law as a clinical program', 46.

<sup>143</sup> Strathmore Legal Aid project, 'Strathmore i-law grant proposal', 15.

<sup>144</sup> Strathmore Legal Aid project, 'Strathmore i-law grant proposal', 24.

<sup>145</sup> Maisel P, 'Expanding and sustaining clinical legal education in developing countries', 392.

<sup>146</sup> Maisel P, 'Expanding and sustaining clinical legal education in developing countries', 391-392.

<sup>147</sup> Maisel P, 'Expanding and sustaining clinical legal education in developing countries', 393.

specifically, in all the twenty-one South African law schools.<sup>148</sup>

The 2016 Legal Aid Act in Kenya, which takes cognisance of law clinics,<sup>149</sup> provides for a body similar to AULAI of South Africa, namely, the National Legal Aid Service.<sup>150</sup> Part of its mandate includes managing the Legal Aid Fund.<sup>151</sup> Not only is this body to regulate law clinics, but also, all legal aid providers in the country,<sup>152</sup> whose speciality may not be, as is the case with the street law programme, awareness-building of law, but dispute resolution instead. In light of the Legal Aid Act, a legal aid provider is:

‘An advocate operating under the pro bono programme of the Law Society of Kenya or any other civil society organisation or public benefit organisation; a paralegal; a firm of advocates; a public benefit organisation or faith-based organisation; a university or other institution operating legal aid clinics; or a government agency, accredited under this Act to provide legal aid’.<sup>153</sup>

From the above, one may infer that the Legal Aid Fund’s support for law clinic programmes in general, and the street law specifically, will inevitably be shallow owing to the complexity of the National Aid Service-funded projects with regard to all the above-mentioned legal aid providers. Ouma and Chege maintain that if the Legal Aid Fund is properly allocated among the various legal aid providers, it will be of considerable benefit to the street law programme as well.<sup>154</sup>

However, the Botswana experience is telling. In Botswana, funding law clinics together with the department of law has handicapped the effective working of law clinic programmes in that they are not more generously funded than other areas run by the department.<sup>155</sup> This suggests that there has to be an amendment to the Legal Aid Act if the layperson is to be enabled to access the law in a digestible form through the lens of the street law programme.

Alternatively, Kenya would resort to the Danish approach towards funding the street law programme. In Denmark, an adequate amount from the national budget has been legislatively allocated to support this programme separately.<sup>156</sup>

<sup>148</sup> Maisel P, ‘Expanding and sustaining clinical legal education in developing countries’, 407.

<sup>149</sup> Section 2, *Legal Aid Act* (Act No 6 of 2016).

<sup>150</sup> Section 5(1), *Legal Aid Act* (Act No 6 of 2016).

<sup>151</sup> Section 7(1) (p), *Legal Aid Act* (Act No 6 of 2016).

<sup>152</sup> Section 7(1) (o), *Legal Aid Act* (Act No 6 of 2016).

<sup>153</sup> Section 2, *Legal Aid Act* (Act No 6 of 2016).

<sup>154</sup> Ouma Y and Chege E, ‘Law clinics and access to justice in Kenya’, 120-121.

<sup>155</sup> Geraghty T and Quansah E, ‘African legal education’, 103.

<sup>156</sup> Winkler E, ‘Clinical legal education’, 15.

The Russian approach, as mentioned in the preceding Part, is equally important in that it has made this programme part of State policy.

## ii. *The way forward*

The Legal Aid Act is a major achievement deserving of preservation and praise. It provides a promising point for the future of clinical legal education in Kenya<sup>157</sup> as it unifies and exercises control over all law clinic programmes in the country.<sup>158</sup> As was noted, this has been the path taken by countries such as South Africa to promote clinical legal education as a whole and the street law programme in particular. But, as demonstrated in the preceding sub-Part, this Act should place an emphasis upon the role of law students in promoting access to justice, through clinical programmes such as street law, with respect to funding, supervising and monitoring.

Given the tremendous benefits of the street law programme, it is important for it to be institutionalised in the law school curriculum. This calls for a review of the law school syllabus. It is, therefore, important to take cognisance of the various Strathmore Law Clinic proposed projects as far as an efficient institutionalisation is concerned. Furthermore, the one and a half years Kenya School of Law curriculum<sup>159</sup> should be reviewed so as to send out law graduates to help supervise the street law programme of the various law schools in the country. This programme is time-consuming,<sup>160</sup> a fact which may explain why law schools have been reluctant to adopt it. In the meantime, deans of law schools should take the lead in promoting clinical legal education programmes such as this one.

As discussed earlier, the layperson's access to law in a digestible form finds expression in socio-economic rights. Traditionally, it has been argued that a right is that which is justiciable, enforceable in courts of law.<sup>161</sup> Judges face a range of issues when it comes to enforcing socio-economic rights. For instance, with respect to enforcing the layperson's right to access law in a digestible form, one issue is that this right compels the State to invest in areas suitable for the awareness-building of law in society. It is, therefore, crucial not to lose sight of the fact that

<sup>157</sup> Ouma Y and Chege E, 'Law clinics and access to justice in Kenya', 122.

<sup>158</sup> Section 7(1) (o), *Legal Aid Act* (Act No 6 of 2016).

<sup>159</sup> See here – <<http://www.ksl.ac.ke/>> on 2 July 2017.

<sup>160</sup> McQuoid-Mason D, 'Street law as a clinical program', 44.

<sup>161</sup> Kwame A, 'The justiciability of the right to development in Ghana: Mirage or possibility' 1(1) *Strathmore Law Review*, 2016, 85.

State responsiveness implies budgetary implications.<sup>162</sup> Thus, any attempt by the judge to decide on the allocation of the national budget or any interference with policymaking, in order to promote techniques of spreading awareness of law, would be *ultra vires* as it would result in a breach of the separation of powers since this decision is peculiar to the executive and the legislature.<sup>163</sup> Another issue to be faced is giving redress to parties not present before the court.<sup>164</sup>

In light of this conundrum, the Kenyan judge, just as his or her African counterpart, should be keen and clever in their duty to enforce the layperson's understanding of the law in a simplified and digestible form. This is an integral part of their right to access justice. To respect, promote and fulfil its realisation, the judge should compel the government, depending on available resources, to create an enabling environment where this right can be enjoyed.<sup>165</sup>

The street law programme is a preventive form of legal education which, if properly guaranteed, may be the solution to the backlog of cases that the Kenyan judiciary is suffering from.<sup>166</sup> The time has come for this reality to be internalised in the Kenyan, and generally in the African, political spirit and the legal profession at large.

## VI. Conclusion

This paper has argued that reliance on the legal maxim 'ignorance of the law is no defence' should live up to its context. This maxim was a product of circumstances. The conditions and the needs of the environment in which it was birthed were such that one could not reasonably claim ignorance of the law as a defence. The reason for this is that laws were fewer and connected, with indissoluble ties, to what was universal and objective. This was the case in Athens, in Rome and in societies that came after them as well as in pre-colonial Africa.

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<sup>162</sup> Lumumba P and Franceschi L, *The constitution of Kenya*, 2010, 133-134.

<sup>163</sup> Lumumba P and Franceschi L, *The constitution of Kenya*, 2010, 133-134.

<sup>164</sup> Roach K, 'The challenges of crafting remedies for violations of socio-economic rights' in Langford M (ed) *Social rights jurisprudence: Emerging trends in international and comparative constitutional law*, Cambridge University Press, Cambridge, 2008, 46.

<sup>165</sup> Article 2, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966.

<sup>166</sup> Makau J, 'Factors influencing management of case backlog in the judiciary in Kenya: A case of the courts within Meru and Tharaka Nithi counties' Published LL.M Thesis, University of Nairobi, Nairobi, 2014, 2.

This situation had run its course for centuries. However, past the eighteenth century, there was a rise of legal positivism, which made it virtually impossible to derive a number of laws from the ‘universal’ and the ‘objective’. Legal positivism has brought about an excessive multiplication of laws which are framed in such a complex nature and structure, falling far beyond the layperson’s understanding.

This paper has faulted the State for failing to bring its reliance on the ignorance maxim to the modern day context by ensuring, depending on its available resources that the layperson knows what the law requires of him or her. This is a loud and clear detraction from one of the core underpinnings of the rule of law: access to justice, under its aspect of legal awareness.

To bring the ignorance maxim in tune with the modern day context, a recurring theme in this paper has been the street law programme. This programme has facilitated the layperson’s understanding of the law in a simplified and digestible form. However, it is striking how its relevance has been downplayed in most African countries, where the role of legal education has been left out of promoting access to justice for far too long. Yet, to smoothly run clinical programmes such as street law, the contribution of the African law student cannot be overlooked. In sum, reliance on the legal maxim ‘ignorance of the law is no defence’, without taking reasonable steps to make the law knowable, can only achieve the breaking of the law and the jailing of the layperson.