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## **Papa I want to go to school**

Universal, free and compulsory primary education under the Children Act 2001: Some of the barriers to achieving substantive equal access for the girl child in Kenya – a case study at AIC Kajiado school

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United Nations Convention on the Rights of the Child

African Charter on Human and Peoples' Rights

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Universal Declaration of Human Rights

International Covenant on Civil and Political Rights

International Covenant on Economic, Social and Cultural Rights

Convention on the Elimination of All Forms of Discrimination Against Women

Beijing Declaration and Platform for Action

## **Table of cases**

**NB** all these cases were heard at a subordinate court. Decisions of a subordinate court are not binding. However, all of the cases were dismissed for want of prosecution.

*R v Topiya Kopina* PCR 322/2001 unreported

*R v Kaina Tukai* PCR 31/2002, unreported

*R v Letei Lusakai* PCR 3/2003, unreported

## **Foreword**

It was many years ago I remember, when I put my little hand into yours, looked you straight in the eyes, and pleaded as only a little girl could '*Papa I want to go to school*'.

I was under age, four years to be precise. The law was clear on school-going age, seven years no less. I did not understand and did not care. All I knew was that my papa was a 'big guy', a clever doctor who made people well, made things happen and all I needed do was ask. I looked at your eyes and saw the twinkle. A signal that I had touched the heart of a father, love that transcended all barriers, the law of the land made in far away England, included.

You put me on your knee and gave me my first ever lesson. 'A for apple or *Agikuuyu*, my people, my identity; B for boy or *bururi witu*, our land, our heritage, our prosperity; C for cat or *cucu*, my grandmother, my roots, my ancestry'.

The die was cast. You gave me an education and affirmed my identity. I would go to school, knowing who I was – a girl child, an African woman, a black person with a brain; a threatened species but with a right to live.

These many years you have been gone to the land of no return. But your memory lives on. My 8 still looks like a crippled B. Perhaps as you used to tease me, it needs a pair of crutches for support. But papa, I need no crutches. I am free and not disabled. Free from the shackles of ignorance, bigotry, illiteracy, inferiority complex and indecisiveness. Free to live as God intended me to – abundantly and with purpose.

I am now a grown woman, and with advancing years, my love for you grows stronger. I have fought many battles. Some have been won, others lost. But papa, I have won the war. For none can withstand the power of the pen and the alphabet. I owe it all to you, for you heeded your little girl's cry and sent her to school. Thank you for the gift of an education. In memory of your love, I will share it to the very end.

## Acknowledgements

In my Gikuyu language we say *kanya gatune ni mwamukaniro* which literally means many hands make light a heavy task. Many hands indeed made light my course at the Women's Law Centre, and subsequent field study in Kenya. I owe a debt of gratitude to each one of them. I will only name, in their representative capacity, a few, some of whom have already passed on.

My late Mother Phyllis Wairimu Kang'ethe who ensured that my siblings and I went to, remained in, and performed well in school; my great, great grandmother Naiku Kimana Wanjora Muriu, whose indomitable warrior spirit inspires the women of my clan; my siblings Wambui and Wanjiku without whose moral and material support I would not have extricated myself from home and hearth to come to Zimbabwe; my pupil master and mentor, Hon Justice Lee Gacuiga Muthoga, who not only gave me time off work to undertake this course but taught me by word and deed that justice does and can have a human face.

My friends, role models par excellence and architects of the girl child education initiative in Kenya and the African continent as a whole, Hon Dr Eddah Waceke Gachukia, Priscilla Nangurai, Mary Waithera Muito, Shiphrah Gichaga and June Koinange. Students, teachers, parents of African Inland Church Kajiado, Kenya Marble Quarry Primary School and district education board Kirwara, and all my key informants who provided an invaluable databank for my study;

My Supervisor, Mwalimu and inspiration, Dr Amy Shupikai Tsanga, also known as Dr T the Terrific – Brains, Beauty and Bounty all rolled into one; Prof Julie Stewart who directed the course; Rudo Bonzo, Blessing Tsomondo, staff and my classmates at the Women's Law Centre; and the Norwegian taxpayer, for underwriting my course.

Finally, all glory and honour go to God for the gift of life, the pen, the alphabet, a brain, and for making me a woman – the best of his creation.

## **Acronyms**

AIC	African Inland Church
DEB	District Education Board
FAWE	Forum for African Women Educationalists
KIE	Kenya Institute of Education
KMQ	Kenya Marble Quarry
MSINGI BORA	Swahili for firm foundation
TUSEME	Swahili for Let us reason together
UNICEF	United Nations Children Fund
UNESCO	United Nations Educational, Scientific and Cultural Organisation
WFP	World Food Programme



*The girl child today is the woman of tomorrow. The skills, ideas and energy of the girl child are vital for full attainment of the goals of equality, development and peace. For the girl child to develop her full potential, she needs to be nurtured in an enabling environment, where her spiritual, intellectual and material needs for survival, protection and development are met and equal rights safeguarded. .... Yet there exists worldwide evidence that the discrimination and violence against girls begin at the earliest stages of life and continue unabated throughout their lives. They often have less access to nutrition, physical and mental health care and education and enjoy fewer rights, opportunities and benefits of childhood and adolescence than do boys.<sup>1</sup>*

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<sup>1</sup> Article 39 of the *Beijing Declaration and Platform For Action*, United Nations, NY August 2001

## **Abstract**

This study will take the reader through my research journey. The introduction states the theoretical basis of my research. A detailed law and literature review coupled with my own experiential data give the reader some background to the research. This is followed by a detailed overview of the actual field research itself, laying emphasis on the methodology, methods of data collection and the limitations that I encountered. Thereafter, I take the reader through my research findings, analysis and discussion of the same and finally take the liberty to suggest a plan of action, a wish list of recommendations, that will hopefully point the way forward.

## CHAPTER ONE

### Introduction

This research was carried out to investigate some of the disablers that curtail, or at worst make access to free and compulsory primary education for the girl child in an economically and geographically disadvantaged region an unattainable dream, provisions under the Children Act 2001 notwithstanding.

### Background to the research

In Kenya generally, gross enrolment rate for girls in primary schools is much lower than that of boys. In arid and semi-arid land regions (which account for 69 per cent of the Kenyan territorial land mass), the rate is much lower than that of other parts of the country,<sup>2</sup> sometimes as low as 19 per cent. As the communities who live in arid and semi-arid land regions are generally poor nomadic pastoralists, socio-economic challenges and migratory trends have been cited as key culprits for this gender gap in education.<sup>3</sup>

On the international front, Kenya is signatory to the United Nations Convention on the Rights of the Child (CRC), the African Charter on the Rights and Welfare of the Child (ACRWC), and the Convention on Elimination of all forms of Discrimination Against Women (CEDAW), among many other international instruments.

Recently, Kenya enacted the Children Act, 2001 which in essence is the domestication of the Convention on the Rights of the Child. Section 7 of the Act provides for free and compulsory primary education for all children in Kenya and further places the obligation for its provision on the government and parents. This provision of the Act will be the axis around which my research rotates.

The position before the enactment of the Act is fully discussed under the literature review section of this dissertation.

The Children Act 2001 received presidential assent on 31 December 2001. It became effective on 1 April 2002. It is therefore too early to gauge with any degree of certainty the impact of the Act in so far as it provides for free and compulsory primary education. However, there are already indicators that although the number of school children enrolled in class one has increased

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<sup>2</sup> Okwach, A., 1994 *Household based factors as determinants of school participation in Kenya: The case of Nairobi and Siaya Districts*, Abridged Research Report No. 20 African Academy Of Sciences

<sup>3</sup> Bloch, M., et al (1998) *Women and education in Sub-Saharan Africa: Power, opportunities and constraints* Lynne Rienner Publishers, Boulder, London, UK

tremendously for both girl and boy children since the enactment of the Act,<sup>4</sup> the majority of primary school dropouts are girls, mostly within the first two years of school. One can therefore rightly assume that the girl child, particularly in an arid or semi-arid region, is still not reaping the full benefits of this statutory obligation.

### **The research problem**

This research is a case study of the African Inland Church Kajiado school (shortened to Kajaido school in the rest of this paper), in Kajiado district of the Rift Valley Province of Kenya, an arid and semi-arid land region. It seeks to investigate the disjunction between the *de jure* provision of free compulsory primary education as a resource for the girl child and the *de facto* glaring lack of substantive equality in accessing the same.

For the purposes of this research, substantive equality is looked at in the context of access to free and compulsory primary education for the girl child, and the disablers incidental thereto, vis-à-vis the comparative ease of access of the same by the boy child, all other factors being equal.

In addition to economic factors that underlie this disjunction, cultural practices such as female genital mutilation and child marriages, the HIV/AIDS pandemic, irrelevant/deficient school curriculum, and a not too effective government policy on girl child education are examined.

### **Justification for my research: Why African Inland Church Kajiado school?**

The reason for my choice of African Inland Church Kajiado School as my research site was fourfold:

#### **Geographical situation**

The Kajiado primary school, which is about 100 kms to the south east of Nairobi, the capital city of Kenya, is situated in the heart of an arid and semi-arid land region, in the Dalale Kutuk location of Kajiado district of the Rift Valley Province of Kenya.

#### **Historical background**

Kajiado school has a chequered human rights history. It was founded in pre-independence Kenya (1959) by African Inland Missionaries from the United States, as a centre for learning for young Maasai women who, because of historical administrative factors peculiar to their region as will be discussed in the literature review section of this write-up, did not enjoy as many developmental advantages as their counterparts in other regions of the country. In addition to giving Maasai girls some basic reading and writing skills, according to Nangurai<sup>5</sup>,

<sup>4</sup> According to a UNESCO Survey dubbed ‘Opportunity 21 for Kenya’ appearing in the *Daily Nation* of 12 July 2003, the number of primary school enrolment in Kenya shot from 5 million in 2002 to 7.2 million in 2003.

<sup>5</sup> This came out during an oral interview with Mrs Priscilla Nangurai, OGW, Principal of AIC Kajiado School

the missionaries' core reason for founding the school was to produce 'educated' wives for the emerging crop of mission-educated Maasai men. This was confirmed by Taama.<sup>6</sup> Thus education was not a right for a Maasai girl by virtue of her being a human being per se but was dependent on her relationship to the male of the species – as a future wife.

This was not a novel practice in Kenyan education history. As early as 1941, the then colonial secretary for education, sanctioned the building of a European only girls' high school, the Kenya High School, as a *boma* (paddock) for breeding educated wives for the white community, basically civil servants on her Royal Majesty's colonial service, and retired World War II soldiers turned farmers. To date, the Kenya High School, one of the best girls school in the country is called *boma* (and the inmates *heifers*), as a tribute to its genesis – male chauvinistic benevolence!<sup>7</sup>

This interplay of rights, gender and relationships is critical in my evaluation of the human rights framework within which access to education as a resource is mediated.

In the early 1970s the missionaries ceded control of the school to the Ministry of Education in accordance with the newly independent government's policy of taking charge of its own development plan for education<sup>8</sup> as provided for under Section 3(2) of the Education Act Chapter 211 of the laws of Kenya. This section empowers the minister from time to time to formulate a development plan for education, consistent with any national plan for economic and social development of Kenya. As will be discussed in the findings chapter, this devolution of power in management of education from the church, a semi-autonomous social field, to the centre of political power, the government, has an impact on the effectiveness of the government in discharging its obligation under the law in provision of education.

#### **A *suis generis* centre of excellence**

Today, AIC Kajiado, as it is popularly known is a *suis generis* learning institution. It doubles as a girls' primary day and boarding school and a rehabilitation centre for young girls rescued from early marriages, a traditional practice of the Maasai of Kenya. At the time of carrying out my research the school's population was 550 girls and 45 (10 per cent) of these are rescuees. This gave me an opportunity to observe the situation of the girl child in perspective.

It is a rural school that caters for girls from both fairly well-to-do families and from poor homes. This interplay between different socio-economic strata would act as a useful comparator *in situ*.

Kajiado school is a beneficiary of the Forum for African Women Educationalists' centres of excellence programme. The programme seeks to maintain girls in school by providing material and emotional support in terms of infrastructure, food, medical care and related amenities, and

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<sup>6</sup> This was confirmed by Bishop Jeremiah Taama of the Church of the Province of Kenya Kajiado Diocese during an oral interview held at the Bishopric. According to Bishop Taama there was a hue and cry in missionary circles because most of the educated Maasai men married outside the community, thus making it impossible for them to evangelise effectively amongst their peers.

<sup>7</sup> Calderwood, A., *Kikuyu News* an educational journal published by Oxford University Press London 1961.

<sup>8</sup> Sessional Paper No. 10 (The Kenya Government Five Year Development Plan 1970-1975) , Government Printers

peer and role model counselling.<sup>9</sup>

Most importantly, the principal of the school, Priscilla Nangurai is an institution unto herself and a role model par excellence, of what an African woman can achieve in the context of her socio-cultural, socio-political and socio-economic situation.

### **Debt of gratitude to Koko Naiku Wanjora – a woman of substance**

According to family folklore and records constructed from it, my great, great grandmother (Koko) Naiku daughter of Laibon Kimana who later became Wanjora wife of Muriu was born a Maasai in Loitokitok, about 200 miles from African Inland Church Kajiado. She was married off to a Gikuyu Chief and Warrior Muriu son of Gatuku. Theirs was not a love marriage but was part of the consideration for a peace pact to ward off further aggression of the southern Maasai by their Gikuyu neighbours from Metumi in the Central Province. There are no written records of this history but it is estimated that the marriage took place circa 1845.

On marriage, Naiku acquired a Gikuyu name, Wanjora, which means daughter of the sword. She was the first feminist and women rights activist in living memory of the Gikuyus. For instance, she challenged the property ownership pattern of the Gikuyu by advocating by word and deed for her fellow women to own livestock, a thing that attracted the wrath of the Gikuyu elders but being the wife of a great ruler and mother of three illustrious sons, and being a swordswoman herself, she got away with it.

Despite her contempt for the white man's God and ways, she must have foreseen some benefit in education and will for ever be remembered for having sent her three sons Kinuthia, Kamau and Muchoki to the Church of Scotland Mission School at Kikuyu, where they acquired reading and writing skills.

Basing my research at Kajiado is, in a sense, going back to my roots and in many ways paying a debt of gratitude to Koko Naiku Wanjora.

As comparators, Kenya Marble Quarry (KMQ) primary school, a co-ed primary school neighbouring AIC Kajiado, and the District Education Board Kirwara primary school (shortened to Kirwara school later), another co-ed primary school in the Central Province of Kenya, were used. Kirwara primary school is in a more affluent area and is in the heart of the Gikuyu<sup>10</sup> country. It therefore was a useful geo-political comparator.

### **My personal experience: A walk down memory lane**

I am a child of three worlds. Being the third generation of mission educated folk, I was brought up a devout Presbyterian. In addition to practising some strange Scottish traditions such as taking

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<sup>9</sup> Welcome to FAWE Centres of Excellence website [www.fawe.org](http://www.fawe.org)

<sup>10</sup> The Gikuyu also known as the Kikuyu, are the largest ethnic group in Kenya and live in the Central Province east of the Rift Valley. They were instrumental in achieving independence from Britain and formed Kenya's first post colonial government. Their long contact with the Europeans, resulted in acquisition of formal western education, which, coupled with their ability to adapt to new realities, has resulted in them adopting many aspects of modern material culture.

porridge with salt, we practised both the Gikuyu and Maasai traditions, in so far as the dictates of these cultures did not offend the Christian faith and doctrine.

My mother, an ardent proponent of the *Spare not the rod* and *Bring up the child in the way it should grow* biblical doctrines, spared neither the rod nor the sharp edge of her tongue to ensure that my siblings and I went to, remained in, and performed well in school. To her, education was not only the key to prosperity but was synonymous with freedom from sin and other fetters that purportedly held Africans behind. Perhaps to keep the peace, my father, a college educated professional, supported my mother to the hilt. In our home, school for both girls and boys was a must, and a Christian duty to God and parents.

My first encounter with school dropouts involved a girl child and was a most traumatic experience for me. One of my childhood friends and classmate who will remain nameless, was sent away from the mission school we both attended. Her crime? During one of the Christmas holidays, her parents had her circumcised. One of the school's regulations then was that, on return to school from holidays, we would go through a thorough medical examination to ensure that we had not become pregnant or circumcised, thus becoming enemies of the faith and the Queen! My friend was found out and according to the school's policy then, she could no longer attend the mission school because she had abandoned the faith by practising a pagan rite, and would be a bad influence on the rest of us. As far as I can remember, we were never told either at home or at school what was not right about circumcision of girls, except that it was a sinful practice of the heathen, and would one day be punished with fire and brimstone.

As they put her and her small metal suitcase into the matron's car, I ran to her, held her tight, kicked and bit anyone who tried to separate us. In my innocence, I thought that if I held her long enough and fought hard enough, I could save her from expulsion from school. The chief, who by law had to accompany any expellee home, finally managed to separate us, but not before, with the confidence and tenacity of an eight year old, I promised my friend that when I grew up, I would bring her back to school and keep her there. Although her parents took her to a school in neighbouring Tanzania, perhaps to hide the shame of being ostracized from 'a civilised God-fearing society', she never quite recovered the trauma of her earlier expulsion. She became delinquent and never finished primary school.

I will never make good my promise. My friend died twenty years ago of a brain tumour – a silent but deadly protest by a brain that was never used to its full capacity. All these years later, the thought of a girl child dropping out of school for whatever reason, evokes in me memories of loneliness, fear, terror, betrayal and extreme anger.

## **Research assumptions**

Having identified the research problem, I formulated six assumptions that would guide my study as follows:

- 1 That with the enactment of the Children Act, 2001 which makes primary education compulsory and free, and Kenya having ratified The Convention on the Rights of the Child, The African Charter on the Rights and Welfare of the Child and CEDAW, many more children, both girls and boys will now go to school.

- 2 That due to factors other than economic, many of the children who will begin school at Kajiado will not remain in school. The majority of these will be girl children.
- 3 That some cultural practices such as female genital mutilation and child marriages are barriers to a girl child remaining in school at Kajiado.
- 4 That the HIV/AIDS pandemic that has hit Kenya with vengeance is also a hindrance to a girl child's continued education. If both parents succumb to the scourge, the girl child is the obvious choice of parent to her siblings and has to leave school to perform this role.
- 5 That as it stands now, the primary school curriculum lays greater emphasis on book learning and is deficient in providing life and people skills relevant to a girl's day to day struggle. Thus she is unable to meet the challenges of living in a gender discriminative world or to meet basic survival needs. Such an ethereal education is in itself a disincentive to remaining in school for the girl child.
- 6 That the government's education policy on girl child education is wanting in so far as its obligation to keep a girl child in school is concerned. Interventions from other players, for example, the Forum for African Women Educationalists, are critical in keeping the girl child in school.

### **Research questions**

For each research assumption, a matching question was framed as follows:

- What is the effect of the recently enacted Children Act, 2001 that makes primary education free and compulsory, on rates of enrolment for girls and boys?
- Notwithstanding the provision of free education, are there any dropouts from primary school in Kajiado area? If the answer is YES, what are the reasons? What is the boy:girl ratio of children dropout rates?
- What is the impact of cultural practices such as female genital mutilation and child marriages on the girl child's education? Are they, for instance, barriers to her remaining in school?
- What is the impact of the HIV/AIDS pandemic on the girl child's education?
- Is the primary school curriculum as it stands now relevant to a girl's day-to-day life? If not, what needs improvement? Content? Context? Format?
- What is the Kenya government's policy on education of the girl child? Does this adequately ensure that the girl child remains in school? What impact have other players, for instance the Forum for African Women Educationalists (FAWE) made in keeping the girl child in school?

## CHAPTER TWO

### Law and literature review and personal experience data

#### The law as is

The right to education is not only a fundamental human right, as articulated in Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), but is a right that has utility value. As a human developmental resource, education has an enabling effect, and in essence is the lynchpin around which access, appropriation and exercise of other rights rotate. Its acquisition is therefore critical in guaranteeing, enforcing and maintaining other fundamental human rights, be it in the municipal or in the international arena. It is therefore imperative that this right is accessed, appropriated and maintained from the earliest developmental stage of a human person – in childhood (Article 13(2)(a) of ICESCR). Access to education as a resource therefore becomes a socio-legal issue.

It is no wonder then that various international instruments and conventions place an obligation on states parties and, by extension, on governments to not only provide free and compulsory primary school education but to ensure that children who enrol in schools, remain in school. For instance, Article 28 of the Convention on the Rights of the Child (CRC) states in part:

State Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity they shall in particular  
(a) make primary education compulsory and available free to all;... (e) take measures to encourage regular attendance at schools and the reduction of dropout rates.

Article 11 of the African Charter on the Rights and Welfare of the Child (ACWRC) states in part:

1. Every child shall have the right to an education.... 3. States Parties to the present Charter shall take all appropriate measures with a view to achieving the full realisation of this right and shall in particular: (a) provide free and compulsory basic education (b) encourage the development of secondary school education in its different forms and to progressively make it free and accessible to all; (c) make the higher education accessible to all on the basis of capacity and ability by every appropriate means; (d) take measures to encourage regular attendance at schools and the reduction of dropout rates and (e) take special measures in respect of female, gifted and disadvantaged children, to ensure equal access to education for all sections of the community.

Taking cognisance of the underclass status of women the world over, Article 10 of the Convention on Elimination of all forms of Discrimination Against Women (CEDAW), prohibits discrimination against women in order to ensure to them equal rights with men in the field of education. It states inter alia:

State Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure on the basis of equality of men and women (f) the reduction of

female student dropout rates and the organization of programmes for girls and women who have left school permanently.

As stated at the beginning of this section, Kenya is a signatory to all these conventions, and as a member of the United Nations family, is bound to promote universal respect for and observance of human rights and fundamental freedoms. However, Kenya is a dualist state, a thing that *prima facie* renders international instruments and conventions toothless tigers with no force of the law, until and unless such instruments and conventions are domesticated by legislation at the municipal level. They are, at best only persuasive. This constitutional bottleneck poses a great challenge on the domestic front to the enforcement of rights of individuals as guaranteed under the international law.

In an attempt to comply with her obligations under international public law, the Kenyan legislature enacted the Children Act, 2001 which in essence is the domestication of the Convention on the Rights of the Child. Section 7 of the Act states:

- (1) Every child shall be entitled to education the provision of which shall be the responsibility of the Government and parents (2) Every child shall be entitled to free basic education which shall be compulsory in accordance with Article 28 of the United Nations Convention on the Rights of the Child.

This provision sounds good on paper but raises several pertinent questions. For instance, what parameters are used to gauge responsibility for provision of education? In the event that one of the parties, the government or the parents, does not meet their responsibility, who enforces performance? How far does this obligation extend? Does it cover factors other than economic? On whose motion is enforcement of this obligation left? To make my point for me, at the time of writing this report, although the procedures and rules of practice to the Act have been gazetted, they are not explicit as to the offence of not taking a child to school and no penalties are prescribed for this offence. The rules and procedures are in essence a set of precedents for applications for adoption, custody, care and criminal procedure where a child is the offender.

Another challenge to Section 7 is the ‘clawback’ effect of Sections 8 of the Act which provides:

- (1) Every child shall have a right to religious education subject to appropriate parental guidance. (2) The minister shall make regulations giving rights of children from minority communities to give fulfilment to their culture and to practise their own language or religion.

Typical of most provisions of human rights law that guarantee enjoyment of a community right, section 8 does not spell out, nor does it provide the ranking in priority of this right vis à vis the individual right to education as guaranteed under section 7. It is therefore to be assumed that both these rights rank *pari passu* (in equal priority). This in itself poses a danger in the event that the right to education is subsumed under the right to fulfil such cultural obligations as early marriages or female genital mutilation, which in essence are crucial elements in the culture and practice of the Maasai religion and traditions.

Apart from the Act, no other law in Kenya explicitly prohibits circumcision of the girl child. Section 14 of the Act then is a landmark provision in the sense that not only does it attempt to mitigate the claw back in section 8, but it explicitly prohibits female circumcision. It states:

No person shall subject a child to female circumcision, early marriage or other cultural rites, customs or traditional practices that are likely to negatively affect the child's life, health, social welfare, dignity or physical or psychological development.

Although one would argue that section 14 of the Act explicitly outlaws female genital mutilation, early marriage and other cultural rites, customs or traditional practices that negatively affect the child's life, health, social welfare, dignity or physical or psychological development, the phrase *that negatively affect a child's life ...* is too subjective and indefinite to be of any probity value, should a practice such as female genital mutilation be defended on the ground that it gives fulfilment to a child's culture as provided under section 8. As will be seen in the literature review section of this dissertation, female genital mutilation is central to the Maasai culture in the sense that it is the pivot around which every other facet of the Maasai life rotates. One might therefore argue that interfering with it threatens the core of the cultural life of the community, which might offend the provisions of section 8 of the Act.

The minister's powers are further confirmed by section 3 of the Education Act Chapter 211 of the laws of Kenya which states:

- (1) The minister shall promote the education of the people of Kenya and the progressive development of institutions devoted to the promotion of education, and shall secure the effective co-operation, under his general direction or control, of all public bodies concerned with education in carrying out the national policy for education. (2) For the purposes of carrying out his duties under sub-section (1), the Minister may from time to time formulate a development plan for education consistent with any national plan for economic and social development of Kenya.

On the one hand section 3(1) of the Education Act places an obligation on the minister to promote education of the people of Kenya but on the other, section 3(2) gives him a very wide discretion as to the *modus operandi* of promoting this education. Thus, it is left to the whims of whoever happens to be the Minister for Education to formulate a development plan for education. Even where a Minister for Education makes a plausible plan for education and every five years the government's plan for economic and social development is formulated and ratified, in a country that has a history of marginalization of some of its peoples, it takes very little imagination to predict the inequities that will, policy notwithstanding, be visited upon peoples who are geographically and socio-economically disadvantaged.

Some of the inequities are failure to make policy plans for issues that are peculiar to or specifically affect the minority communities. As will be seen in the literature review section, the bulk of the work in policy formulation and implementation on issues such as female genital mutilation, child marriages and girl child dropouts is by and large left to private players. This lack of centrality in policy making and implementation leaves a lacuna in the legal or administrative framework within which various concerns of girl child education are mediated. For instance, in

matters to do with female genital mutilation the Maendeleo ya Wanawake organization<sup>11</sup> acts as the main lobbyist while most of the activism surrounding the girl child education is left to Forum for African Women Educationalists.

For the purposes of my research, it was interesting to note that the claw back feature of Kenyan law generally, and the Act in particular, seems to be legitimized by the highest law of the land – the Constitution. It was also interesting to note that whenever a claw back situation arises, it is the women who are most disadvantaged. Section 82 of the Kenyan Constitution is a case in point. Whereas it prohibits discrimination on grounds of race, colour, creed, sex, among many other categories, it negates its positive message by lifting the guarantee to freedom from discrimination on matters of personal law, an area where women are most vulnerable. This section provides inter alia:

- (1) Subject to subsections (4), (5), and (8), no law shall make any provision that is discriminatory either of itself or in its effect. (4) (b) Subsection (1) shall not apply to any law so far as that law makes provision with respect to adoption, marriage divorce, burial, devolution of property on death or other matters of personal law.

Although Kenya is in the process of undergoing a constitutional review, there are indications that the Kenyan legislature and the citizenry at large suffer a chronic claw back syndrome. The ‘give some take some’ stance of both the Constitution and the Act is replicated in the proposed Draft Constitution which is in the final stages of debate. Sections 58 and 63 provide inter alia:

58 (1) Every person has the right to a basic education, including pre-primary, primary and secondary education. (2) The Government shall institute a programme to implement the right of every child to free and compulsory primary education.

63A(2) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community (a) to enjoy their culture, practise their religion and use their language; or (c) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

As can be seen from this discourse, the interplay between constitutional guarantees to basic human rights and the claw back effect of some of the provisions of the law in so far as cultural rights are concerned, results in a dichotomy that has far reaching effects. This will be discussed in detail in the discussion and analysis chapters.

## Literature review

In an editorial titled *Tough challenges ahead* appearing in the Daily Nation<sup>12</sup> issue of 21 July 2003, hardly a year after the Children Act 2001 was enacted, the paper decried the fact that girl

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<sup>11</sup> A Women’s Organisation registered as an non-governmental organization in Kenya and established in the 1950s to take care of girls’ and women’s concerns

<sup>12</sup> Daily Nation is a Kenyan daily owned and published by Nation Media Services. It is an authoritative newspaper with a circulation of 45,000 copies daily

children were already dropping out school for reasons other than economic ones. Several culprits were cited. These included but were not limited to the lackadaisical performance by the government, right from not developing enough infrastructure to inadequate budgetary allocation to education, implementing free and compulsory education too soon and without prior proper planning; chronic poverty on the part of the recipients of education; and school curricula that were irrelevant to the girl child's life.

At this point, it is important to step back in history and look at some of the salient factors surrounding access to and appropriation of education by children in post-independence Kenya generally, and the girl child in an arid and semi-arid land region in particular, before enactment of the Act.

After a protracted struggle for freedom, Kenya got her independence from Britain in 1963 and went quickly into the business of self governance, right from formulating her own national plan for economic and social development, to providing a legislative framework within which this plan would be mediated. Education was a critical component of this development plan and in 1964, parliament passed the Education Act Chapter 211 of the laws of Kenya. The Education Act provided inter alia a framework for: promotion of education; management of primary and secondary schools, regulation of non-government (unaided) schools; inspection, supervision and control of all schools; development of curriculum; and financing of education from the consolidated fund by establishing grants-in-aid, bursaries and scholarships.

Provision, management of and sustaining education was heavy task for the newly independent nation but Kenya had a lot in her favour in the earlier days. The government had the goodwill and support of the people and could therefore concentrate on developmental issues rather than on politicking. The economy was good and the world prices for coffee, tea and dairy, Kenya's major exports, were good. Tourism was thriving<sup>13</sup> and by and large, the government was able to finance many of its developmental enterprises, the key ones being education and health. On the political scene, Kenya embraced capitalism and this being the era of the cold war, she was found to be a useful friend by her former colonial master Britain and her allies. Some economic advantages such as donor aid attached to this relationship and subsidised the government's budgetary obligations.

Come 1990s things changed somewhat. With the lifting of the iron curtain, alliances changed. The west rallied round their blood cousins – Eastern Europe. The clamour for democracy and its attendant political pluralism hit Africa. This, coupled with a depressed world economy and a rapid population growth for Kenya, meant that the government had to make some changes or sink. Political pluralism, liberalization and structural adjustment programmes (SAPs) became core conditionalities for donor aid. In its efforts to face this economic challenge head on, the government gave second priority to the other challenges such as cultural practices that discriminated against the girl child and historical regional and gender disparities in provision of education.

To further counter these economic challenges Kenya liberalized the education sector by inviting both local and international strategic partners to invest in education. As will be discussed in detail in the findings chapter, the input by these strategic partners into education has been invaluable.

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<sup>13</sup> Government of Kenya (1990 - 1991) Economic Surveys, Nairobi, Kenya

Aware of its limitation in terms of finance and human capital, the government went further and mandated some of her strategic partners to play a key role in formulation and implementation of policy. For instance, Forum for African Women Educationalists was mandated to facilitate creation of positive societal attitudes and to reinforce policies and practices that promote equity for girls in terms of access, retention, performance and quality, through influencing the transformation of educational systems. As will be seen in the discussion and analysis section, to date, Forum for African Women Educationalists' advocacy role in influencing the formulation and adoption of educational policies on girls' education that increase access and improve retention and performance has made a great impact in the area of curriculum development and the readmission for girls who drop out of school because of pregnancy.<sup>14</sup>

The government also put in place cost-sharing policies. This placed the responsibility of part financing education onto an already poverty-stricken population. When choice had to be made as to whom to send to school, the more favoured male child would more often than not be the obvious choice, thus marginalizing the girl child further.

What did these challenges and opportunities translate into on the ground, more so as regards the Maasai girl child, the subject of this study?

In a study like this, one is tempted to give a detailed account of the woes that face a girl child in accessing and appropriating primary education. However, to fully appreciate the magnitude of the problem, one has to look at the education sector in its entirety and within a specified period of time. The *Government of Kenya: Education for all report*<sup>15</sup> for the year 2000 gives an insight into the constraints that faced the education sector immediately before the enactment of the Act:

- Continued poor economic growth, implementation of stringent structural adjustment programmes and servicing of international debts are top of a long list of constraints that face the government in achieving education for all;
- Many eligible school age children (about 11 per cent of children aged 6–13) are still out of school;
- 65 per cent of those out of school are children in the arid and semi-arid land region;
- 85 per cent of children out of school in the arid and semi-arid land region are girls;
- Gross enrolment rate (GER) has increased from 86.4 per cent in 1996 to 88.8 per cent in 1999; but
- Net enrolment rate (NER) is not more than 60 per cent. This discrepancy between gross and net enrolment rate means that there are factors such as wastage and dropout that are not accounted for;
- Primary school completion rate for the years 1994–1999 remained at a constant 46 per cent. Seventy-five per cent of those who do not complete school in arid and semi-arid land regions are girls.

It was against this background that the Act was passed.

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<sup>14</sup> FAWE News Volume 9 No 2 April-June 2001

<sup>15</sup> Lessons learnt as contained in The Government of Kenya/UNESCO EFA 2000 Report, August 1999, Nairobi Kenya

The role of a government or a state party as the prime mover and shaper of events in so far as access to and sustenance of education is concerned, cannot be over-emphasized. According to Beoku-Betts,<sup>16</sup> for this role to be effective, an integral part of the government's role must of necessity be to ensure gender equity by taking into account the gender dynamics that surround access to and appropriation of a human right as critical as education. There can be no substitute for strong commitment and action on the part of governments to promote more gender equitable educational policies if African societies are to be seriously competitive in the global economy of the future. African women should examine how to uncover and transform the existing patterns of inequality in their educational systems and to vigorously continue their efforts to create positive representations of their experiences and future prospects in the region.

Coming nearer home, one could ask whether the Kenya government has risen to the occasion, more so as it has an obligation under both the municipal and international law, to provide free and compulsory primary education. In his paper entitled 'Education in Kenya: What has been achieved and what remains to be done'<sup>17</sup> the Kenyan Minister for Education confirmed that by and large, the Kenya government is on course having put in place policies and strategies that seek to ensure universal free and compulsory primary education for all by 2005 (UPE, 2005) and education for all by year 2015 (EFA, 2015). The minister was quick to reassure his audience that core to the two policy plans, namely UPE 2005 and EFA 2015 were his government's commitment to quality education, access, retention, equity in terms of gender and region, relevance and finances.

The challenge that the government of Kenya must tackle head on therefore, is to translate these policies into tangible benefits for the girl child in an arid and semi-arid land region, more particularly for the purposes of this dissertation, at Kajiado. As mentioned at the beginning of this discussion, one of the challenges that must be addressed is the HIV/AIDS pandemic that has hit Kenya with a vengeance. According to a recent report by UNICEF,<sup>18</sup> 60 per cent of HIV-infected persons are young people between the ages of 16 and 24 years, 73 per cent of new infections are of girls between 15 and 18 years and 65 per cent of these are in sub-Saharan Africa. This, according to the report, is attributed to ignorance, harmful cultural practices such as female genital mutilation and child marriages, sexual violence against young girls and abject poverty. The epidemiology of HIV/AIDS on adolescent girls is outside the scope of my research but the effects of HIV/AIDS on a girl child as an affected person are critical. In most African households, girl children act as deputy mothers and in the event that both parents succumb to the scourge, the most likely substitute parent is the girl child. She can no longer cope with the demands of parenthood and continue with education. According to Stromquist<sup>19</sup>, girls are particularly vulnerable to changing conditions in the health and economic well-being of other household members, since they are expected to provide a variety of domestic services.

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<sup>16</sup> Supra 3

<sup>17</sup> Keynote Address by the Hon Prof George Saitoti, Kenya's Minister for Education during the opening of the National Conference on Education and Training held on 27<sup>th</sup>-28<sup>th</sup> November 2003

<sup>18</sup> UNICEF, *State of the World's Children 2002* - UNICEF Working Paper Series, Education Section Program Division, New York, 2002.

<sup>19</sup> Supra 3

Another challenge is a school curriculum that is inadequate in the sense that it places a high premium on text book learning and passing of examinations, as opposed to offering a holistic education complete with life and people skills. Mutunga<sup>20</sup> opines that this kind of education is in itself a disincentive to a girl child remaining in school.

The greatest challenge comes from cultural and traditional practices such as female genital mutilation (FGM) and early child marriages. Although the Act itself outlaws these practices, they are so integral to the culture under review, that it is virtually impossible to extricate, isolate and outlaw them. This might to some extent explain why law enforcement officers, judicial officers and the public at large have neither internalized the provisions of the law, nor are they willing to disengage themselves from the shackles of cultures and traditions within which they live. More importantly as discussed in the law review section, the Act has provisions that would appear to contradict each other that sends out conflicting messages.

#### **The Maasai: A brief overview of the people and their culture**

The key subject of this research is the Maasai girl child. Of critical importance to her going to and remaining in school, at least for the purposes of this study, is the impact on her personal growth and development of the Maasai traditions and cultural practices in general, and female genital mutilation and child marriage in particular. It is therefore imperative that at this initial stage, this study addresses itself to the question: who are the Maasai and, more importantly, what is their culture?

The Maasai belong to the eastern Nilotes ethnic grouping, and are said to have migrated into Kenya from the north of Lake Turkana in the first half of this millennium. By the second half of the seventeenth century, they had moved well into the southern rift valley where they occupy about 160 thousand square kilometres of land. They are a nomadic pastoralist minority tribe with a population of about three million, which is roughly 10 per cent of the total Kenyan population. They speak the Maa language<sup>21</sup>.

Like many African societies, the Maasai live their religion, thus making the line between social and religious life very thin. However, one can say with a fair degree of certainty that Maasai culture is predicated upon their religious and social life, and has three key features.

The first is their belief system. The Maasai believe in one God, Enkai, literally translated as the Sky God, the giver of all good things, the most important being children and cattle.

Secondly, the Maasai who are semi-nomadic look to the family as the key to the survival of the community. Children, both girls and boys, therefore are a vital component of the family as they ensure continuity and prosperity. They are a loved and most treasured possession of a community. Bringing up children is a communal duty and parental responsibility for upbringing and nurturing of a Maasai child transcends the umbilical cord.

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<sup>20</sup> Mutunga P. et al (2003) **What's (Not) Happening in our Schools? An Exploratory Study From Kenya** Weaver Press 0 Women's Law Centre, Harare, Zimbabwe

<sup>21</sup> Statistics contained in **The Kajiado District Atlas** 2003, a publication of the Ministry of Land Reclamation and Arid and Semi Arid Areas and Wasteland

Finally and equally important, is the belief that cattle are a sacred gift sent down from the sky by Enkai when he first created the earth. Cattle have divine attributes in that they give and sustain life. It is cattle that provide milk, blood and meat, the staple diet of the Maasai. Hides provide mattresses, sandals and clothing. Live cattle are an instrument of exchange for money's worth, bridewealth and fines for various crimes. Wealth is measured against the number of cattle one owns. Cowdung is an important fuel, disinfectant and building material. Cattle are an integral part of religious ceremonies. They are offered as thanksgiving on the birth of a child, on victory over an enemy, on transition from one stage of growth to another, and as sacrifices to Enkai in order to bring peace and harmony to the people. Therefore, for the Maasai, pastoral life is a vocation and any other pursuit is considered sacrilegious and demeaning. Ordinarily, the Maasai will not break the ground even to bury their dead.<sup>22</sup>

For the Maasai then, life, and by extension the culture and traditions of the people, rotate round the three pillars, that is observing the faith, the family and taking care of cattle. All these cultural activities are role-oriented.

Roles and functions are differentiated along gender and age lines but the most distinct demarcations are based on age grouping, hence the importance of rites of passage. For instance, the very young children, both girls and boys, play within the *manyatta* (homesteads) and mind the cattle herds nearby. After circumcision at puberty, the young women are married off to start their role as wives and mothers. It is the young mothers who build homes using cowdung and thatch. During war or when the able-bodied men move to look for greener pastures and water for the animals, women are generally left behind as caretakers of the homestead and caregivers to the very young and aged. For the Maasai, homemaking is a divine duty only second to looking after cattle, because it frees the men to look after cattle, to fight the enemies of the Maasai and Enkai, and to perform religious ceremonies and rituals. It is taboo therefore for a woman under a curse, for instance, an *entruput* (an uncircumcised woman) to look after a home or to bear children for the community. In fact, children of an uncircumcised woman were an abomination and would, in infancy, be thrown out of the *manyatta* to be eaten by wild animals before they brought a curse onto the whole community.<sup>23</sup>

On circumcision, the young men go into *moran* (a pupillage of sorts) away from the rest of the people, where they are tutored by older men on the survival skills of the tribe, such as hunting, war, cattle rustling from neighbours and protection of the family honour. This may take anything from two to twelve years. On graduating from *moranism* the young men qualify to be elders and to sit at clan councils as decision makers and wise men from whom the younger generation may seek counsel. Leaders and soothsayers are chosen from elders.

As can be seen from the foregoing, circumcision for both girls and boys is a most important *rite du passage* and any interference with it, has a ripple effect on the entirety of the Maasai cultural life.

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<sup>22</sup>Mol, F A *Dictionary of Maasai Language and Folklore*, Marketing and Publishing Ltd, Nairobi, Kenya, 1978.

<sup>23</sup> This was told to me by a Maasai Elder, Ole Koiyaki during an oral interview at Kiserian, Kajiado District

It is critical therefore that this vital link between culture as a whole and the traditional practice of circumcision, be understood right from the outset. Only then does one appreciate that although circumcision is not the only cultural practice of the Maasai, it underpins every other cultural practice and tradition by virtue of its centrality as a physical, sociological and religious *rite du passage*. The import of this has already been highlighted in the law review section, but will be become clearer in the findings and discussion and analysis chapters.

### The geo-political reality of the Maasai

Finally, in order to fully appreciate the cultural, economic, religious and political dynamics surrounding access to and appropriation of education by the Maasai girl child, the geo-political reality of the Maasai people to whom Kajiado district is home must be looked into. Since colonial times, the Maasai have had an uneasy relationship with virtually every governmental regime. On the political scene, Thairu (2003)<sup>24</sup> aptly calls the Maasai Treaty of 1911 which alienated large tracts of prime grazing land from the Maasai for the white settlers as ‘an accident of history’, whose way was paved by three imported disasters. According to Leys (1925)<sup>25</sup> the first ever attack of rinderpest, a cow plague that decimated the Maasai cattle and caused a devastating famine in Maasailand in 1890 is believed to have been introduced into the country by the European settlers. In those days ships were not fumigated and were most effective vectors of the strange disease-causing organisms. The second imported disaster was smallpox which not only took a heavy toll on the Maasai but wiped out half of their Gikuyu neighbours as well. Finally, the 1918 influenza took a heavy toll on the same people (Meinertzhagen, 1957).<sup>26</sup>

It is against this background of imbalance in socio-economic power that the infamous 1911 Maasai Treaty between the colonial government and Maasai people was signed. According to Thairu,<sup>27</sup> the then Maasai Leader, *Oloibon*, on his deathbed signed an agreement he could not read and unconstitutionally handed over the Maasai prime rangelands north of the Kenya–Uganda railway to white settlers. This comprised of some of the best pastures on the floor of the rift valley and Laikipia plateaus.

Years later, when the Maasai realised what had happened and tried to repossess their lands, the then colonial secretary herded them into an arid unproductive zone with only one river Ole Kejuado and declared it a ‘closed district’. This is the present day Kajiado (corrupted version of *Ole Kejuado*). This closed district syndrome has survived both the colonial government and the Kenyatta and Moi regimes, as exemplified by the inequities in development.

The injustices visited upon the Maasai by the colonial authorities and the apparent inability to rectify this by subsequent independent governments, have had an impact on the community psyche, making them distrustful of any governmental authority, right from the law-making processes of the legislature, the enforcement arm of the executive and the arbitration function of

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<sup>24</sup> Thairu, K (2003) **The African and AIDS Holocaust: A Historical and Medical Perspective** Phoenix Publishers, Nairobi, Kenya

<sup>25</sup> Leys, N (1925) **Kenya** London School of Economics, London, UK

<sup>26</sup> Meinertzhagen, R (1957) **Kenya Diary (1902 – 1906)** Oliver Boyd, Edinburgh

<sup>27</sup> Supra <sup>15</sup>

the judiciary. This, as will be discussed in the findings, is perhaps the reason why the Maasai people are conservative and seemingly averse to change.

This mistrust of authority by the Maasai is partly to blame for the low rates of school enrolment over the years. Education was introduced in the Maasai land in the 1890s by missionaries and the white settlers. By teaching young Maasai men basic reading and writing skills, the colonial authorities were able to develop a cheap but literate labour force for the white settler coffee and sisal plantations and for the railway line. This went against the grain of the Maasai who looked down upon paid labourers (*el dorobo*) and who saw education, rightly so, as part of the plan by the imperialist to further alienate them from their land, culture and religion.<sup>28</sup>

In 2001, before enactment of the Act, there were 58 069 school age children in the Kajiado district. Out of these, only 37 735 were enrolled in school (65 per cent). Of these, 16 047 were girls while 21 688 were boys<sup>29</sup>. An enrolment rate of 65 per cent is quite low, more so as no figures were recorded for wastage and dropouts. This means that many more Maasai children are out of school. According to my observations and field research, girl children drop out of school from age 13 when they reach puberty due to circumcision rituals and early marriage.

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<sup>28</sup> supra 21

<sup>29</sup> supra 21

## CHAPTER THREE

### Methodology

My research methodology was a two-tiered process, comprising the formulation and implementation phases.

#### Formulation stage

Most of the work done during the formulation stage was the pre-fieldwork and was basically the abstract and intellectual component of the work:

#### Conceptual framework

Education is a resource that elicits a lot of interest in Kenya. It has been researched by, among many others, economists, donors, social scientists, educational psychologists and theologians. It was therefore critical that right from the outset, I demarcated the conceptual framework from which I would carry out my research.

As a women's law lawyer and researcher, I would wear the lens of a feminist, a lawyer, a communicator and an activist. As a feminist, I would look at the gender dynamics that surround access to and appropriation of education as a resource, all the time being conscious that the world over, a woman enjoys an underclass status not because of her biological make-up per se but because of discriminative societal gender role or function constructs. As a communicator and activist, it was imperative that I capture these constructs, articulate them and come up with a plan of action as to how to rectify the situation. Finally as a lawyer, I would of necessity take a legalcentric and an egocentric stance as well. This would entail thorough research, analysis and critique of the law and legal issues incidental to access to and appropriation of education, and stating my position as a lawyer, juxtapose these with existing human rights frameworks, and suggest a way forward.

This feminist/lawyer/communicator/activist stance would all the time be informed by my personal creed that education as a resource is an enabling right in accessing and exercising other rights, and further that redemption for Africa generally, and for her womenfolk in particular, must come from within her ranks.

#### In-depth frequent SWOT analysis on self

Having both a law and media background, and taking into account the varied and complex nature

of both the subject and field of my research, it was important for me to regularly evaluate my personal strengths and weaknesses, and see whether in these, there were windows of opportunity or threats to my research. This ‘mirror, mirror on the wall who is the fairest of us all?’ approach was a most invigorating, revealing and at times humbling experience. As will be discussed in the limitations challenges and opportunities section of this write-up, this SWOT exercise helped me avoid many pitfalls.

#### **Administrative ‘mumbo jumbo’**

On the face of it, administrative matters may appear inconsequential but if unattended to, or left till the last minute, they can cause panic and compromise one’s research. I am grateful to the Women’s Law Centre for providing letters of introduction/authorization to various persons and organizations, and a research stipend in good time. Prior personal visits, telephone calls and emails to research sites and to some key informants proved invaluable. As I was researching outside of my organization, I had to arrange with my employer to work flexitime in good time.

#### **Research design – A most useful compass or template**

My research topic, assumptions, research questions, objectives and demarcation in terms of people, places, time and space, were discussed at length and agreed on by my supervisor and I, prior to undertaking the field research. These are annexed to this dissertation.

As my research was a case study of a particular school against which comparators were looked at as ‘controls’, formulating the research design was critical in keeping my study focused. Taking the interactive nature of this kind of research, where assumptions, questions or objectives were likely to change in consonance with circumstances on the ground, the research design remained an invaluable template around which changes could be made.

### **Implementation stage**

This was the actual data collection phase of my research. Of particular importance are the methods of data collection that I used:

#### **Law and literature review and experiential data**

As discussed in chapter two, an in-depth law and literature review was carried out. This, coupled with my personal experiential data, formed a useful vantage point from which my interrogations and findings were put into perspective.

#### **Discipleship at the feet of the masters**

I live and work in Nairobi the capital city of Kenya, East Africa. In addition to being the headquarters of the United Nations Environmental Programme (UNEP), Nairobi hosts several major UN agencies, diplomatic missions, international organizations and regional bodies. This

has made Nairobi a ‘conference city’ where many meetings, conferences, seminars, workshops and retreats are held.

The first three weeks of my field research were spent at conferences, workshops, seminars, and meetings – literally learning and listening at the feet of the masters in various disciplines that had to do with education and human rights. I attended the 13<sup>th</sup> ICASA(HIV/AIDS) Conference, Forum for African Women Educationalists/Plan International/UNICEF Teachers Day Workshop and the Kenya government-sponsored National Conference on Education and Training.

This was an eye opener for me because I was able to hear and see first hand what was happening in the area of education and the girl child, both on the local and international scenes, and more importantly, from world-renowned experts.

#### **Piggy backing – more than child’s play**

Attending international conferences as a private participant or observer can be costly in both time spent getting through governmental and organizational bureaucracy, and in registration, accommodation and conference fees. This would have been a great handicap for me, especially as I was researching outside of my organization and was literally on my own. However, I was able to break through by piggy-backing on organizations that I am a member of, such as Forum for African Women Educationalists (FAWE), Media Associates International (MAI) and The African Network for Prevention and Protection Against Child Abuse and Neglect (ANPPCAN), and on friends in high places.

#### **Brief interview guides**

I had various categories of key informants, for example, pupils, teachers, parents, rescuees, police officers, judicial officers, government officers, church leaders, UN and non-governmental organization representatives, among many others. It was imperative that I draw up interview guides from which methods of interviewing and questions would be formulated. This kept changing in accordance with the demands in the field. A case in point is the questionnaire method discussed in below.

#### **Questionnaires**

Questionnaires were basically used in schools for pupils, teachers and parents. My reason for doing this was twofold. One, I needed to test the validity or otherwise of the statistics that Kenya had an 81 per cent literacy level<sup>30</sup> at the time of my research. Secondly, as the schools were far apart, this would save on time and cost of transport. I had three sets of questionnaires, for parents, for teachers and for pupils.

I realised midair that although I was able to get useful information without my physical presence, questionnaires were not the most effective method of interrogation because of, among many other constraints, the cultures of the interviewees. Both the Giikuyu and Maasai are oral communities and culture demands that a good conversation should contain value loaded statements and opinions, rather than factual answers. For instance to the question: *If you were to make a choice*

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<sup>30</sup>**Educational Statistics 1990 – 1998** Ministry of Education Science 0 Technology, 1998

*as to who to send to school, would you choose your boy or girl child?* The answer may be: *I love my children equally.*

In addition to the cultural problem discussed above, the questionnaires posed several challenges to both the interviewees and I. Some of the questions were too open-ended which resulted in ambiguity. Some interviewees did not fully comprehend the questions. Some of the questionnaires were never returned. Some interviewees remained anonymous and it was difficult for me to verify details when the need arose.

#### **Focus group and one-on-one discussion and personal observation**

Because of the challenges discussed above, after the initial interviews in all three schools, I dispensed with the use of written questionnaires and adopted focus group and one-on-one discussions for parents, students and teachers. The format was easy and user-friendly for both the interviewees and myself. We would hold a focus group discussion in the morning, and depending on the direction the interviews took, graduate into a one-on-one in the afternoon. This exercise would usually take a whole day, punctuated by a lunch break.

Breaking bread together is a sign of peace in virtually every African culture. I found this a useful icebreaker and entry point with the parents and members of the community, most of whom would have walked long distances to the interview venues. I am grateful to my sister who provided delicious lunchboxes, and a friend whose company donated fruit juices and clean drinking bottled water. Water is a precious commodity in Maasailand and sharing it with my informants made them realize that they were more than just mere ‘subjects’ of my research. We were partners seeking solutions to accessing education, a resource, which, like water, sustains life.

As we shared a meal, I was able to observe several things. One, women would eat separately from the men and would never eat until the men had eaten their fill. Men grouped themselves in *rikas* (age groups). Older women were more at home with men than with younger child-bearing women. These gender/age dynamics informed my future interviews and I realized that women would talk more freely when they were by themselves, while older women could hold their own in a male-dominated gathering.

#### **Records**

As I talked to rescuees, teachers and parents, it became apparent to me that although some attempts had been made to enforce the Act by instigating arrests, most of the cases either never saw the light of day in court due to procedural technicalities, or the police were not keen to follow up reports of suspected forced marriages. It was imperative then that I inspected school, police and court records. In a non-computerized set-up this exercise took a lot of time but I am most grateful to the deputy principal of African Inland Church Kajiado School, the officer commanding at the police station in Kajiado and the resident magistrates, both at Kajiado and Thika for giving me access to their records and answering my questions. The results of my sleuthing into official records are discussed in detail in the findings chapter.

### **Key informants**

Appointments were sought and given by key Governmental and non-governmental organization officers. These were the Minister for Education, assistant ministers and directors of various Ministry of Education departments, the UNICEF and PLAN International country directors, the executive director and the national co-ordinator of Forum for African Women Educationalists, Kenya Chapter, among many others. Those who could not see me directed me to their deputies.

### **Walking on ‘hallowed ground’**

Since colonial days, the church in Kenya has played a vital role in provision of and management of education. Even after most churches ceded direct control of schools to the government, the church remains a formidable semi-autonomous social field in various communities’ social life and in the case of African Inland Church Kajiado, has been instrumental in the rescues from child marriages. Some of my key informers were church leaders and it was imperative that I got to observe them ‘off camera’ as it were, from their own pulpits. I therefore made a point of attending Sunday worship services in several churches at Kajiado and the vicinity of the Kirwara school. This gave me insight as to how to couch my questions in order to reap maximum benefits.

### **Seeking counsel of the wise**

I had to resort to specialists to confirm or discard some of the theories that I formulated as a result of my findings. I interviewed a trauma consultant, an educational psychologist, a gynaecologist/obstetrician and a retired permanent secretary.

### **Limitations, challenges and opportunities**

By and large the limitations and challenges that I encountered in the field turned out to be opportunities to better my research, communication and negotiation skills. Most of these have been mentioned in the formulation and implementation sections of this chapter. However, a few of these need to be highlighted.

#### **Economic**

I was researching outside of my organization and, as stated elsewhere, I was literally on my own. African Inland Church Kajiado School is 100 kms from the city of Nairobi where I live and work. Commuting such long distances had a cost implication in terms of fuel, wear and tear on my car, and time spent on travel. Sometimes I would hire a part time driver especially when visiting the interior parts.

Airtime is expensive in Kenya and internet research and telephone consultations meant enormous telephone bills.

Since I did not have much money, I became extremely innovative. As stated above, I piggy-backed to meetings and conferences, and used my family and friends as donors for refreshments. I negotiated a quid pro quo flexitime with my employer which meant that I could work nights and weekends to pay for time spent out of station without loss of benefits.

### **Sins of my youth**

One of the greatest hindrances to free flow of information in Kenya, particularly as pertains to governmental activities, were the draconian provisions of the Official Secrets Act that binds civil servants to keeping even the most mundane activities of the government secret, and making a bogeyman of the media. Despite the transition to a more democratic government, this piece of legislation has not changed and civil servants still suffer from the Official Secrets Act hang-over.

Most of my key informants in government circles have neither forgiven nor forgotten my two bylines *On hallowed ground*<sup>31</sup> and *Jokes aside*<sup>32</sup> a social commentary and political satire respectively, both of which poked holes in governmental and political smokescreens of the day, and various other investigative pieces authored at the height of multi-party activism in Kenya. They were therefore not forthcoming with information or ‘doctored’ their answers to be on the safe side.

In a country where there are hardly any centralized databanks, this would have made my research difficult. However, thanks to my daily SWOT analyses, I was able to evaluate every situation on its merit and know when to use the ‘hard-nosed investigative’ stance, or when to turn on my ‘big-eyed-Alice-in-Wonderland’ charm.

### **Timeframe**

This research was undertaken from September 2003 to January 2004. I therefore had to contend with a school calendar that gets extremely busy at year end. There were three major interruptions during this time. The national Kenya Certificate of Primary Education (KCPE) which took place in November and the Christmas and New Year holidays.

To add insult to injury, there was a protracted nationwide strike by public university lecturers which kept the people at the top of the Ministry of Education occupied. Most of those interviewed were caught between meetings and press conferences making it impossible to have quality time with them.

### **Confidentiality**

Because of the real threat to the security of the rescuees, it was imperative that any information they gave remained anonymous and confidential. Interviewees were code named, a thing that made meaningful follow-up virtually impossible. This hurdle was overcome by my spending a lot of time with the girls, joining in their holiday activities and getting to know them a little more intimately.

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<sup>31</sup> A weekly socio commentary on *Sunday Times 1990 – 1993*

<sup>32</sup> A weekly political satire in the *Sunday Standard 1993 – 1999*

## CHAPTER FOUR

### Findings: Blow or burst the bubble?

By and large, my findings vindicated my assumptions. However, in some instances, the assumptions only just held while in others, they pointed to a totally different direction, an emerging theme that had to be verified further.

At the risk of being accused of being pedantic, and for clarity and coherence's sake, my findings will be juxtaposed with my assumptions. This is because, although some findings may on the face of it seem to echo each other, on close scrutiny most of the 'mimics' would point to a new direction which needed to be looked at on a stand-alone basis.

#### The impact of the law on girl child enrolment

My first assumption was 'That with the enactment of the Children Act 2001 which makes primary education compulsory and free, and Kenya having ratified the Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child and CEDAW, many more children, both girls and boys, will now go to school.' The findings for Kajiado school nearly burst my bubble. As shown in Table 1 below, there was a 15 per cent and 25 per cent decrease in class one enrolment in the years 2003 and 2004 respectively, as compared to the years before the enactment of the Act.

According to the deputy principal of the school, although tuition is now free, there is a Kshs.1,000 nominal lunch and boarding fee (for boarders), which most Maasai parents cannot afford. Those who can afford it, do not know that tuition is now free. No effort, governmental or otherwise, has been made to disseminate this vital information to prospective parents of the school. Perhaps the decrease was as a result of parents opting to take their children to schools that were completely free, no lunch money, no boarding fee.

As Kajiado school is a girls only school, the boy:girl ratio of enrolment was irrelevant.

**Table 1 – Class one enrolment for Kajiado school YR 2000 – 2004**

	YR 2000	YR 2001	YR 2002	YR 2003	YR 2004
No of Students enrolled	28	29	28	<b>24</b>	<b>18</b>

The findings at Kenya Marble Quarry primary school, a co-educational, rural, arid and semi-arid land primary school 30 kms away from Kajiado school vindicated my assumptions. As a result of the enactment of the Act, enrolment shot up by 188 per cent with a girl:boy ratio of approximately 1:3.

According to the headmaster of the school and my own personal observation, the school has no running water, no ablution facilities for girls and female teachers and has only four pit latrines. There is no new infrastructure and the classrooms are bursting at the seams.

Because of its being in an arid and semi-arid land region, the school is on a World Food Programme school feeding scheme whereby hot lunches are provided by a partnership initiative between the United Nations and the Ministry of Education. The cooking area is a makeshift corrugated iron sheets shed and firewood is used for cooking.

Table 2 below shows both the enrolment rates for Kenya Marble Quarry and the girl:boy ratio:

**Table 2 – Class one (gender disaggregated ) enrolment for Kenya Marble Quarry primary school for the YR 2000 – 2004**

	YR 2000	YR 2001	YR 2002	<b>YR 2003</b>	<b>YR 2004</b>
No of Students enrolled					
Girl:Boy	58	56	78	<b>155</b>	<b>150</b>
	28:30	20:36	32:46	<b>51:104</b>	<b>48:102</b>

There was an interesting finding at district education board Kirwara primary school. Although this is a rural school in the Central Province, increase in enrolment was negligible and the girl:boy ratio remained at a constant 1.

This is a highly developed agricultural area where by and large, parents can afford to take their children to school and place a high premium on education for both girl and boy children. Parents subsidise government efforts by pooling their resources together and helping themselves as a community to build classrooms and other infrastructure. This is what is called *harambee* in Kenya.

Table 3 shows class one enrolment rates for district education board Kirwara primary school for the period under review.

**Table 3 – Class one (gender disaggregated ) enrolment for district education board Kirwara primary school for the YR 2000 – 2004**

	YR 2000	YR 2001	YR 2002	<b>YR 2003</b>	<b>YR 2004</b>
No of Students enrolled	70	74	72	<b>83</b>	<b>80</b>
Girl:Boy	34:36	38:36	35:37	<b>41:42</b>	<b>42:38</b>

As said from the outset, it is too early to gauge with any degree of certainty the impact of the Act on the girl child enrolment in school. However, in light of my initial findings on rates of enrolment at the three schools, one needs to ask a few questions.

What in essence is universal free and compulsory primary education? In Kajiado school, for instance, the number enrolled in class one was lower even after education was declared free. This is because, although tuition was free, there was a lunch and boarding fee payable. Is education free to a Maasai girl child who is denied the opportunity to study at a good school simply because she cannot afford lunch money? Should the government's obligation to provide free and compulsory primary education extend to picking the tab for extras such as lunch?

The inequities in infrastructure and amenities between district education board Kirwara and Kenya Marble Quarry primary schools were glaring. Granted, parents at district education board Kirwara, a more affluent area, have been subsidising education for their children for a long time. In comparison, parents at Kenya Marble Quarry can be aptly described as 'the wretched of the earth'. Does the government's obligation extend to lifting them to a level playing field? Does the obligation extend to providing quality education in sanitary and safe conditions?

### **'Woman be thou loosed!'**

My second assumption was 'that due to factors other than economic, many of the children who will begin school at Kajiado will not remain in school. The majority of these will be girl children.'

This assumption held but as will be shown in the findings, girls drop out of school in the upper primary classes – from class 5 onwards, when they reach puberty. The dropouts during the period under review are those who enrolled before enactment of the Act. Therefore the value of this assumption and corresponding finding is futuristic. It predicts what is likely to happen if the status quo is maintained.

At Kajiado school, there were three dropouts in 2000, three in 2001, three in 2002, three in 2003 and none in 2004. All girls dropped out because of pregnancies except one in 2003 who went

back to her husband. She was a rescuee. All the dropouts were in upper primary school, that is Class 5–8.

Twelve dropouts in four years may look quite low but assuming that these are replicated in the 175 schools in the area, it would work out to 2 100. African Inland Church Kajiado is a special school and as discussed elsewhere in this study, has advantages that deter dropouts. The other schools in the area are not so endowed and it can be safely assumed that the dropout rates will be higher. To make my point, it was instructive to note that except for the one who returned to her husband, none of the dropouts was in the rescue programme. Thus the rescue programme seems to have deterred dropout.

At Kenya Marble Quarry primary school there were five dropouts in 2000, four in 2001, five in 2002, five in 2003 and none in 2004. Sixteen of these were girls who got married while three were boys who went to harvest sand, an economic activity in this area. It was not clear whether or not these girls were forcefully pulled out of school by their parents because they just did not turn up for school. According to the headmaster:

This is a hardship area and once a child misses school, you keep hoping that one day he or she will turn up. If they turn up, well and good, if they do not, so be it. Life continues for the rest.

At Kirwara school there were three dropouts in 2000, three in 2001, four in 2002, four in 2003 and none in 2004.

Ten of the dropouts were girls, seven of whom dropped out due to pregnancy while three went to look for jobs at a nearby horticultural farm. Four boys left to be employed at the same farm. According to one of the parents in the school, there was no real economic need for the boys and girls who left to be employed. She blamed the dropout on delinquency encouraged by the horticultural industry:

The government should do something about these flower farms. They do not respect the law (labour laws?) and they seduce little children with money and employ them as farmhands. The young girls are later introduced to prostitution to service the appetites of degenerate foreigners who work on the farms.

My attempt to verify this accusation was met with hostility by the management of the farm and I was not granted any audience.

The parents know that the law prohibits child labour but none has instigated any action against the flower farm because they feel that justice in Kenya is for the highest bidder, and are cowed at the thought of taking an economic giant to court.

None of the girls who dropped out of school because of pregnancy has returned to school.

According to the principal of Kajiado school, heads of schools are reluctant to take back to their schools the ‘bad eggs’ and as the Return to School Policy for Pregnant Girls has no force of the law, no action is taken against such heads.

According to the Director of Education, the Return to School Policy for Pregnant Girls is ineffective because:

- The policy document is still in draft and is basically just a set of guidelines without force of law;
- The policy does not cater for child brides;
- The policy does not provide maternal or child care support or facilities, for example, a crèche or baby formula. Most of the girls who fall pregnant are from poor families who cannot afford to feed an extra mouth. Such girls will therefore be hard put to remain in school when the baby is crying of hunger at home;
- The policy has no provision for counselling schoolgirl mothers. They succumb to pressure and contempt from ‘untarnished’ contemporaries. Thus schoolgirl mothers exhibit a higher level of delinquency and truancy than their contemporaries;
- The policy does not provide for governmental or other authoritative follow-up to ensure that schoolgirl mothers return to and remain in school
- The policy does not provide for dissemination of information

## Cultural practices

My third assumption was ‘that some cultural practices such as female genital mutilation and child marriages are barriers to a girl child remaining in school at Kajiado.’ Each facet of this assumption was looked at separately.

### Female genital mutilation: The cut or the curse?

At Kajiado school, out of the 45 rescuees, only 4 (8 per cent) were uncircumcised. Three of the uncircumcised girls ran away before they reached puberty, the age for circumcision, and one comes from a community that is ambivalent about female genital mutilation. All the girls are still in school.

Seventy-five per cent of the rescuees felt that circumcision was not good but they did not pinpoint what the ‘not good’ was.

Fifty per cent said that they would circumcise their own children because that is the way of their people. The other 50 per cent condemned female genital mutilation as a practice that had lost meaning and was an unnecessary burden on a young woman.

All the rescuees were shy to describe in detail what circumcision entailed but there was consensus as to it being painful and occasioning loss of blood. None suffered any infection as a result of the cut but a few said they knew friends who became sick but were now well.

All 14 female teachers at Kajiado school, most of whom belong to the Maasai Women's Lobby Group<sup>33</sup>, felt that the cut was outdated and an alternative rite of passage must of necessity be developed to initiate young girls to womanhood. They are all circumcised.

At Kenya Marble Quarry school, all the parents confirmed that their daughters were circumcised – and still in school. Both men and the women (these were older matrons who qualify to sit with men) agreed that circumcision is a ritual with a spiritual connotation. An uncircumcised girl *entruput* would invite the wrath of Enkai (God – Maasais are monotheistic) on the girl, her family and the clan.

When I told the discussion group that I was not circumcised, the *Ilkishili*,<sup>34</sup> dropped his *fimbo* (traditional walking stick cum club) in horror and retorted:

*Kwani iko nini mbaya na wazazi wako? Hawaogopi Mungu? Umeolewa? Uko na watoto?*(What is the problem with your parents? Don't they fear God? Are you married? Do you have children?)

When I told them that I was single, childless and that my parents have passed on, there were unanimous knowing nods and murmurs of confirmation – I had invited the wrath of Enkai into my life and I got what I deserved.

All the elders are aware that the new law prohibits circumcision and that they risk arrest. In fact the chief of the area was in this particular group. However, according to 75 per cent of the parents interviewed at Kenya Marble Quarry school, a law that prohibits circumcision is a bad law and must be resisted. One male elder said:

Elimu ni nzuri na lazima wasichana pia waende shule. Lakini hii mambo ya kuingilia boma ya wenyewe ni upusi wa wakoloni.(Education is good and we must send our girls to school. However, this business of the government poking its nose into our personal affairs is nonsensical and a colonial mentality.)

According to my personal observation, this hostility to the law, and conservatism was more a symptom of unresolved anger at their colonial experience rather than resistance to change. *Upusi ya wakoloni* is a phrase that was frequently used to describe any suggestion to change.

According to Dr Kwayera a retired obstetrician/gynaecologist who has worked in the Kajiado area for a long time, female genital mutilation in Maasailand involves complete excision of the clitoris together with adjacent parts of the labia minora. This is not as extreme as the type practised by the Somalis and Ethiopians which involves surgical removal of the clitoris, both labia minora and majora and infibulation. However, it causes pain, bleeding, discomfort, shock and infections, including the dreaded HIV/AIDS infection. The scar tissue formed on the wound makes childbirth difficult.

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<sup>33</sup> A group of educated, progressive Maasai women who lobby for the rights of the girl child e.g. education and protection from harmful cultural practices such as female genital mutilation and early marriages. Most of the rescues at AIC Kajiado are instigated by this Lobby Group

<sup>34</sup> *Ilkishili* is an Elder, usually the leader Of a *rika* (age-group) and is a respected opinion leader

I interviewed the younger women by themselves. Teresia, a traditional birth attendant and a mother of three girls and two boys, postulated that circumcision does not pose any danger to women. According to her, it makes childbirth easier, because a circumcised woman is cleaner down there. The only reason why circumcised women suffer at childbirth is because the white man's hospitals do not know how to manage birth for African women. They do not know the secrets of herbal or water treatment.

Most of the mothers agreed with Teresia and confirmed that they are circumcised and had no difficulties at the birth of their children. All their adolescent daughters are circumcised.

The mothers know that there is a law that outlaws circumcision. But they also know that the law now allows communities to practise their own culture. As discussed in the literature review section, to the Maasai, circumcision is synonymous with culture. This set-up in the law is the reason why they will continue making decisions for their young daughters to be circumcised. To them there is no human right that subsumes the right to belong to one's people and to practice one's culture.

Out of the 25 mothers that I interviewed, there were only two dissenting voices. One said:

Kutaharisha ni desturi yetu wa Maasai. Lakini sasa mambo inabadilika na ni lazima tuangalie kama iko njia ingine ya kuwafanya wasichana wetu wawe watu wazima bila uchungu (female genital mutilation is core to our culture as Maasai. But things are changing now and we must look for ways to go through a rite of passage that is not as painful as female genital mutilation).

At Kirwara primary school there was no record of female genital mutilation. This, according to the majority of teachers and parents interviewed is because the Gikuyu of the Central Province embraced Christianity many years ago and among the many cultural traditions that they discarded was female circumcision.

On the face of it, it would appear from my findings that circumcision per se, is not a culprit in school dropout rates for girls in the Kajiado area. However, there is a nexus between circumcision and school dropout in that circumcision is a precursor to marriage, a *rite du passage* that has expectations – a value tag.

Thirty-eight of the rescuees that I interviewed are survivors of forced marriage and trouble began for them immediately after circumcision at around age 13. According to one of the rescuees:

When you are circumcised, you are expected to behave like a grown woman. You may no longer sleep in the same house with your parents and you have to spend nights with cousins or friends. This puts you at risk and you can get pregnant easily. This is also the time when men come to seek your hand in marriage and we are always afraid when a visitor calls at our homes.

One can safely assume that for the girls that were not so lucky as to be rescued, circumcision put paid to their education career. This assumption was confirmed by the rescuees themselves, who

knew girls who were married off immediately upon undergoing circumcision. The following section on early marriages vindicates my assumption.

#### **Early marriages: The veil or papa's blanket?**

At Kajiado school, out of the 45 rescuees interviewed, 38 are survivors of child marriages. According to the girls, their rescue was instigated by mothers of the girls, friendly neighbours, the church and members of the Maasai Women's Lobby Group.

All the rescues were made prior to the enactment of the Act which in essence means that the rescuers acted against the existing law then, and offended the Penal Code Chapter 63 of the Laws of Kenya that prohibits child abduction. However, no arrests were made.

Bishop Jeremiah Taama of the Diocese of Kajiado, a Maasai himself, is one person who has fought early marriages almost single-handedly since the early 1980s. He takes credit for having instigated most of the rescues. He has never been arrested for undertaking 'illegal' rescue missions. He attributes this to the buffer effect of the church and the fact that society is not keen to enforce a law that might result in injustice:

Although there were threats from parents no one dared arrest us. The church may have acted as a buffer but I believe I was protected by the Highest Power on earth and heaven, because I was doing a divine duty. In any case, I do not think anyone would be keen to enforce a law that perpetuates injustice.

Now that the Act is in place, one would think that the girl child's troubles were over. Not according to Bishop Taama who critiqued the Act as follows:

This Act was passed in a great hurry, without any consultations whatsoever. We the Maasais are a special community with a special culture. We have for a long time, thanks to our colonial masters, been a closed district which of course makes us a closed people. The Act cannot be slapped on us wholesale. It has many loopholes. With one hand it allows a community to practise its culture and traditions. With the other, it disallows some of the traditions that are core to a particular community. We need education. What the Act should have done, would for instance be to return management of the schools in this area to the church.

During term time, the rescuees are integrated with the rest of the school community. However, because of the fear that the parents of the girls may force them out of school, the rescuees do not go home during school holidays. With financial assistance from Forum for African Women Educationalists and individual friends of the school, the school set up a holiday home for the girls.

Some of the girls have already been reconciled with their parents and are free to go home during school holidays. There is no history of non-return to school.

Reconciliation, which is the brainchild of Mrs Nangurai, the principal of the school, has a cultural slant to it.

According to Ms Sanare an old girl and now a teacher at the school, reconciliation involves a symbolic visit to the rescuee's parents, the father in particular, to ask for forgiveness and atone for the sin of denying him a blanket in old age by running away from a proposed suitor. (The gift of a blanket to the father of a girl in Maasai culture is a crucial part of the marriage negotiation and signifies an engagement between the girl and her suitor). The principal of the school acting as a 'suitor' buys a blanket for the father of the rescuee 'the bride' and accompanied by a few of her teachers as 'clan elders' and a government officer such as the chief or district commissioner, visits the father and gives him the blanket. The rescuee makes an appropriate plea for forgiveness and the father, now pacified that a blanket has been brought, forgives and blesses the errant daughter. Forgiveness involves allowing the daughter to remain in school and a promise in the presence of a government official to never interrupt her or her sisters' education. This promise has a quasi judicial character and is enforceable.

This respect for culture has endeared Mrs Nangurai to the community. I interviewed relatives of the rescuees. Most of them felt injured that the government had interfered in their private lives. They think Mrs Nangurai is doing a good job more so as she respects the culture but her only problem is working in cahoots with a government that sits in faraway Nairobi and behaves like the colonial master of yesteryears. An uncle to one of the rescuees said:

*Huyu Mama ni mkali kama simba. Ukidhubutu kucheza na elimu ya wasichana uitaono cha mtemakuni. Lakini pia yeye ni mzuri sana na anaheshimu mila. Tunapenda yeye sana na tutaendelea kusaidia yeye kuleta maendeleo hapa. Lakini hatutaki kuingiliwa na serikali. Wacha wao wakae Nairobi.(This lady is like a suckling lioness. If you play around with the education of the girl child, you won't know what hit you. But she is a good person and respects our culture. We will continue helping her to bring progress in our area. What we do not want is interference by a government that does not know anything about our culture.)*

Over 50 per cent of the rescuees interviewed have gone through this reconciliation ceremony and are happily reconciled to their parents. They go home during school holidays.

The other 50 per cent who cannot go home expressed the desire to be reconciled with their parents so that they can join the rest of their families during school holidays. However, according to the deputy principal of the school, this will take a little more time, as the concerned parents are still 'blacklisted' by the authorities because of their conservative outlook to early marriages and any attempt at reconciliation would jeopardise the rescuees' chances of completing school.

Does this separation from kith and kin have an adverse effect on the psycho-socio development of a girl child? According to June Koinange, a stress trauma consultant:

Separation from a 'significant other' in whatever circumstances causes stress. If not managed, this stress can manifest itself later on in life as a psychosomatic ailment. The trick is to rehabilitate the girls as soon as they are separated from home in an atmosphere of love and acceptance. One also needs to weigh the two evils, that is being separated from home in order to get an education and better prospects for the future, or to remain with kith and kin and lose an opportunity for education and make a decision based on this.

On looking at class grades, it was apparent that separation from home had no effect on the performance of the rescuees. They all were in the top third slots in their various classes.

On looking at Kenya Marble Quarry school, the male parents were hesitant to talk about child marriages but were quick to point out that such marriages were an economic reality.

Ten of the women who I spoke to separately revealed that their girl children had been promised to older men, and as soon as they reached puberty had been married off. The women were angry at this because they wanted their daughters to complete school. They saw no link between female genital mutilation, which they supported, and early child marriages which they abhorred. However, they did not report their daughters' forced marriages to the chief because they believe that the chief secretly supports the men in perpetuating this practice.

The chief who has a track record for being in the forefront of the battle against female genital mutilation and child marriages denied this allegation.

According to ten of the parents at Kenya Marble Quarry school, a Maasai boy child may also fall prey to forced early marriage but unlike his female counterpart, a boy child has the right to refuse to marry, and even if he marries because of gender differentiated domestic roles, his chances of returning to school are much better than a girl's.

One of the younger men that I interviewed went back to school after undergoing a forced marriage. It was difficult for him but he finished school and is now a teacher. He has sent his own wife back to school but I never met her because all the time I visited, she was away nursing a sick child. With such heavy responsibilities, her chances of completing school are slim indeed.

The Gikuyu do not practise forced early marriages and there were no cases of child marriages at Kirwara school. However, most of the parents and teachers decried the declining moral values which they blamed for the rampant teenage pregnancies in the area.

### **Effects of HIV/AIDS pandemic: O death where is thy sting?**

My fourth assumption was 'that the HIV/AIDS pandemic that has hit Kenya with a vengeance is also a hindrance to a girl child's continued education. If both parents succumb to the scourge, the girl child is the obvious choice as parent to her siblings and has to leave school to perform this role.'

As stated in chapter two, epidemiology of HIV/AIDS is out of the scope of my research. My investigation therefore focused on the effects of loss of parents to HIV/AIDS on a girl child's education, rather than on the effect of infection on the girls themselves.

Because of the confidentiality that surrounds HIV/AIDS in Kenya, and the absence of a centralized authoritative databank on health issues, cause of death of orphaned children's parents in all the three schools and adjacent areas was not established, although AIDS was suspected.

Several interviewees confirmed that many more people are dying nowadays to diseases that never used to kill before, thus leaving many orphans behind.

One elderly woman laid the blame on loose morals, especially by heads of the family who, in spite of having several wives, visit houses of immorality in the town where they spend proceeds from sale of livestock on prostitutes. Not only do they succumb to the illness but they infect their wives and concubines thus annihilating whole *bomas* (homesteads).

Kuna mzee mwengine jirani yangu. Akiuza ngombe anatembelea wenyewe kuvaa sikati. Sasa amemaliza boma. Hakuna amebaki! Ni mbwa tu na watoto. (A neighbour of mine, a livestock dealer, was in the habit of visiting the skirt wearers in the city when he has money. Now he has finished everybody in his homestead! There is no one except the dogs and little children)

However, an integral part of the Maasai culture, is the extended family. Children are not allowed to take care of their siblings. Orphaned children are the responsibility of the clan – the extended family.

On this finding, my assumption would appear to have fallen on its face. To borrow from St Paul's song of victory,<sup>35</sup> death due to AIDS had indeed lost its sting; and the grave its victory over the girl child at Kajiado.

However, on close scrutiny, one finds a link between loss of parents to AIDS and school dropouts for the girl child. About 50 per cent of the parents that I interviewed at Kenya Marble Quarry school have at one time been foster parents to orphaned children. They feel that added mouths to feed in the prevailing economic hardship are a tough reality and sooner or later these children find themselves out of school and engaged in sand harvesting or married off as an economic necessity.

Six of the rescuees that I interviewed are orphans and they felt that one of the reasons why their relatives tried to marry them off was that they had become an economic liability. According to these girls, their brothers were tolerated by the relatives but the girls were seen as a nuisance, albeit a potentially lucrative nuisance, and the sooner they were married off, the better.

There was no data on AIDS orphans for Kirwara school.

### The school curriculum

My fifth assumption was ‘that as it stands now, the primary school curriculum lays greater emphasis on book learning and is deficient in providing life and people skills relevant to a girl’s day to day struggle. Thus she is unable to meet the challenges of living in a gender discriminative world or to meet basic survival needs. Such an ethereal education is in itself a disincentive to remaining in school for the girl child.’

By and large, the Mckay Report of 1981 which gave birth to the 8-4-4 system of education in Kenya was accused of introducing a long and heavy primary school curriculum. This is a system of education whereby a child takes eight years at primary school, four years at secondary school and four years at the university as an undergraduate. Previously a child would take seven years at primary school, four years at secondary school, two at higher secondary school and three at the university.

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<sup>35</sup> 1 Cor: 15:55 *The Holy Bible, King James Version*

At Kajiado school, the majority of the girls interviewed, sampled from class three through to class eight felt that although the curriculum was quite heavy, the things they learnt in school would enable them to compete favourably in the labour market. They were happy that the original curriculum had been revised thus giving them fewer examinable subjects.

The national co-ordinator of Forum for African Women Educationalists Kenya Chapter had a contrary view. She felt that the 8-4-4 system was revolutionary and came before its time because it deconstructed gender. Boys learnt home science and craft while girls were taught carpentry and metalwork. The only problem is that the curriculum was not well researched prior to implementation and has had to undergo a lot of revision. According to the Director of Curriculum Development at the Kenya Institute of Education, the 1999 Koech report which sought to rectify the errors of the earlier McKay Report is yet to be implemented, partly because of political considerations and partly because of lack of funding.

Key governmental players in the field of education were accused of placing a much higher premium on textbook learning and passing of examinations as opposed to a holistic education complete with the acquisition of people or life skills, by making the latter non-examinable subjects. This relegated such important people or life skills such as public speaking, peer counselling, asserting one's rights, role modelling, cultural values, human rights and family life, to extra-curricular activities. The Ministry of Education does not allocate funding or personnel for these extra-curricular activities and they are left to neighbouring players such as Forum for African Women Educationalists, UNICEF and the church.

At Kajiado school and Kenya Marble Quarry Primary school, 55 per cent of the parents interviewed felt that the curriculum was not useful as girls were not taught useful life saving skills such as animal husbandry, herbal treatment, traditional midwifery and child care, all skills that are vital for existence in a nomadic pastoral community.

According to the Director of Curriculum Development, the Kenya Institute of Education cannot cater for every community's specific needs. Kenya Institute of Education applies the 'greater good' principle and develops an all-encompassing primary school curriculum.

The majority of the girls at Kajiado school felt that the time spent in primary school under the 8-4-4 system was too long for a girl. By the time one reaches university they are too old and tired to start a family and join in the community's life.

This assertion was confirmed by Professor Mugambi, a consultant educational psychologist who reckons that taking too long a time in primary school has a social cost to a girl. A girl matures earlier than a boy and finds adolescence and the rigours of a primary school life daunting. By the time she gets to university, pressure to marry mounts and she has of necessity to study a discipline that takes a shorter time to accomplish. This, according to Professor Mugambi might explain why sciences and technical subjects do not attract many women.

At Kirwara school, the majority of the pupils were happy with the curriculum but felt that practical science subjects should be introduced at the primary school level.

## **The government: key player or overwhelmed spectator?**

My sixth and final assumption was ‘that the government’s policy on the girl child education is wanting in so far as its obligation to keep a girl child in school is concerned. Interventions from other players are critical in keeping the girl child in school.’ Four factors were looked at:

### **Political will**

According to the Minister for Education, the recently elected NARC government is totally committed to providing universal free and compulsory primary education (UPE) by 2005 and education for all (EFA) by 2015. The passing of the Act and consequent provision of free and compulsory primary education are evidence of the government’s commitment. A core complement to these two government policies – UPE 2005 and EFA 2015 – is the government’s commitment to quality education, access, retention, and equity in terms of gender and region.

Echoing his boss’ sentiments, the Assistant Minister for Education elaborated that one of the tangible benefits for the girl child, is that the government is taking extra care to ensure that primary schools are sited as far away as possible from bars and other dens of iniquity in order to provide a conducive learning environment and to protect girls from marauding ‘sugar daddies’.

Be that as it may but on close scrutiny one sees that the government is beginning to buckle under the sheer weight of financing, managing and maintaining free education.

According to a private entrepreneur with immense interests in education, the transition from cost sharing to free and compulsory education was made too quickly and without much thought. It was done more out of political expediency by a government too keen to please the electorate, rather than as implementation of a well thought out and planned government education policy.

If this is the case, then the government’s role as a key player in provision of quality education is compromised. This leaves the girl child, more particularly for the purposes of this study, a girl child at Kajiado, an arid and semi-arid land region, in a most vulnerable position.

### **Budgetary allocation**

Budgetary allocation for education shot from a meagre 4 billion in 2002 to a 10 billion in year 2003, ostensibly to finance free and compulsory education. Despite this increase, there are glaring deficiencies in provision of infrastructure, facilities, textbooks, stationery, salaries of teachers and food.

The government just cannot cope and has of necessity to lean on strategic partners and the donor community to finance the education sector.

Kajiado school is a Forum for African Women Educationalists Centre of Excellence and enjoys special privileges as a result of their patronage. They have built and furnished classrooms and a computer lab and provide personnel and training materials for extra-curricular activities such as *Tuseme*(Let us reason together) and *Msingi Bora* (Firm foundation) clubs. The UN World Food Programme subsidises hot lunches. UNICEF supplements the government’s efforts in providing

clean drinking water. Since Kajiado is an arid and semi-arid land region, water is difficult to come by.

The role of the government's partners in development cannot be over-emphasised. According to Mrs Nangurai, the principal of the school:

The government has tried its best to provide quality education and cannot be faulted. However, it just cannot cope. I do not know what I would do if it were not for the friends of the school such as UNICEF, FAWE, WFP, World Vision and private persons who are committed to see this school live on.

Kenya Marble Quarry primary school does not enjoy as much patronage as Kajiado school does, except for World Food Programme that provides hot lunches for the pupils. With the introduction of free primary education the strain of the influx of pupils is beginning to show. Classrooms are bursting at the seams, there are only four pit latrines, no recreation facilities and ablution facilities are still a pipe dream. According to the parents teachers association chairman of the school:

We have seen a lot of change here since the Government introduced free and compulsory primary school education. Many more children are coming to school and the government provides text books and writing materials. It does not matter that there are not enough classrooms. Education is the key thing and children can learn under the trees if need be. By and by we will build toilets but this is a hardship area and this may take a long time. Surely education is more important than separate toilet facilities for girls and boys?

Despite these obvious hardships, the government continues to enjoy the goodwill of the citizens. At Kenya Marble Quarry primary school all the parents and teachers interviewed were full of praise for the government. One elderly man said:

Hii serikali ya Kibaki si kama zile nyingine. Hii inaangalia masilahi ya wananchi. Sisi waMaasai tulikuwa tumesahauliwa lakini sasa wanatuangalia na sisi”(President Kibaki’s is a good government and is not like its predecessors. This government is mindful of the citizen’s welfare, even that of the Maasais who had been forgotten by the previous governments.

At Kirwara school, teachers, parents and pupils were happy with the government's performance. Some of the parents expressed the need to partner with the government. A retired school teacher who is a parent at the school and a civic leader said:

The government has done its part and we are grateful. It is foolhardy to expect the government to provide free education, facilities and amenities. We the Gikuyu have never been a hand-out society and we must do something to supplement the government's efforts. Before you pointed it out to us, we never thought that ablution facilities were critical to a growing girl's remaining in school. By the time you visit us again, we shall have put these in place.

### **Government bureaucracy**

I had a first hand experience of the frustrations of dealing with government departments. All my attempts at making appointments to interview key government officers were unfruitful basically because of the level of red tape involved. I resorted to unorthodox methods such as using friends in high places or catching such officers at press conferences and other meetings. This may have somewhat compromised the quality of my interviews.

Bureaucracy is one of the greatest hindrances to timely provision of services or meritorious performance of tasks.

According to the Forum for African Women Educationalists Kenya Chapter programmes officer, there is need to consolidate departmental responsibilities in order to make it less cumbersome for the government to meet its obligations under the Act:

Although there is political will to provide free, compulsory, and quality primary school education, the government is more often than not hampered by its own systems and processes. A case in point is the provision of water and medicine, both vital for keeping a child in school, more so in an environment as difficult as an arid and semi-arid land region. Provision of medicine is the responsibility of the Ministry of Health. Water is the responsibility of the Ministry of Water Development. The schools fall under the Ministry of Education which must co-ordinate provision of the two commodities. These three tasks, by the same government mind you, must be sanctioned by the Ministry of Land Reclamation and Development of Arid and Semi Arid Areas under which Kajiado district falls.

On the face of it, this way of doing things would appear to relegate the government from its rightful position – that of a swift-footed mover and shaper of events in provision of education to that of a preponderate mighty tortoise reeling under the weight of unnecessary bureaucratic baggage.

However, according to experts, the government must retain some measure of bureaucracy and the trick is to strike the very delicate balance between performance and maintenance of this identity. A friend who is a retired permanent secretary said:

You must realise that the government is not a tuck shop where you run to when you run out of tea, sugar, salt or aspirin. It is the heartbeat of a nation and must of necessity maintain its identity. Underneath the veneer of bureaucracy lie the governmental instruments of control, checks and balances.

### **Transparency and accountability**

As the sole provider of education and manager of educational services, the government's role is facilitative, regulatory and implementive. Unfortunately, these functions are slowed down by corruption which results in lack of transparency and accountability.

Many of the key informants (who requested anonymity) from the non-governmental organization sector and other development partners of the government interviewed said that their work has

been hampered by corruption on the part of government officials and other key governmental players. An operations officer with a UN Agency said:

The government must get its act together soon especially in its procurement of goods and services. The culture of kickbacks must die if this country is to recover.

A building contractor in private business said:

Ordinarily the government is the best contractor. It pays for and gives you jobs that are worth your time. Unfortunately, it has in its ranks, vermin, corrupt officials who make it very difficult to work. I am happy that the NARC government is doing something to eradicate corruption from within its ranks.

Passing of the Public Officers Ethics Act 2003, and the ongoing purge at the Kenyan judiciary are hoped to go a long way in eradicating corruption, but their effects are yet to be seen.

#### **Law enforcement mechanism**

There is very little case law on forced early marriages, female genital mutilation or refusal by parents to send a girl child to school. This is partly because, although arrests are made, most of the matters are sorted out before they reach a court of law and those that do are heard at subordinate courts.

I looked at police and court records and asked questions.

At Kajiado police station there were no arrests made in 2004. Out of 1 117 arrests for criminal offences made in 2003, only one matter was in respect of forced marriage. The case was eventually dismissed for want of prosecution.

In 2002 out of 1214 arrests for criminal offences made, only one was a case of forced marriage. Again this was dismissed for want of prosecution. There were no cases of female genital mutilation or early marriages in 2001 and 2000.

When I asked the officer commanding the station at Kajiado why there were very few arrests despite the fact that female genital mutilation and child marriage according to reports at the schools went on unabated, he said:

As you very well know the burden of proof in a criminal case is very high. Prosecuting a matter which involves family members has a social cost. It is difficult for a girl child, or the mother of the girl child, who usually are the complainants to sustain a case. There is a lot of family pressure to drop the case.

These sentiments were confirmed by the court registry officers at both Kajiado and Thika resident magistrate's courts.

## CHAPTER FIVE

### Discussion and analysis

As stated in chapter four, my assumptions were vindicated by my findings. In essence therefore, my hypothesis, the central theme of this study that the various disablers discussed in the dissertation are to a great extent to blame for the disjunction between the *de jure* provision of education under the Children Act 2001, and the *de facto* situation on the ground, was sustained to the very end. Bravo!

Of greater value to this study however, are the emerging themes that became apparent as the study progressed. This chapter takes a critical look at the findings with a view to seeing what these emerging themes are, and what implications for change there are, if any.

Since education is a human right, this analysis will of necessity address itself to the law first, and then move outwards to other areas of concern.

#### The 3-Cs of the law: Claw backs, conflicts and contradictions

In the law review section of this write-up, an attempt was made to discuss in some detail the law surrounding provision of education as a human right. By and large, it was discovered that, although on paper the law would appear to adequately provide the requisite human rights frameworks in which access to, appropriation and maintenance of education could be sustained and enforced, the law generally, and the Act in particular, has various shortcomings that make it inadequate and at best a most cumbersome tool of social re-engineering. Special mention was made of constitutional bottlenecks, the ‘give some take some’ claw back effect of some sections of the Act, and the consequent conflicts and contradictions that make it difficult to enforce, thus compromising the very human rights it was intended to guarantee and protect.

#### How did some of these shortcomings manifest themselves in my findings?

A case in point is what I call the great paradox, where the interplay between three critical human rights, that is the individual right to education, the community right to fulfilment of culture and religion, and the individual right of a child to freedom from harmful practices, brought into perspective the cracks in the showpiece that is the human rights law.

The Act in Section 8(2) guarantees fulfilment of culture and religion for children from minority communities while Section 14 outlaws female genital mutilation, child marriage and other harmful cultural rites. As discussed in detail in the literature review, circumcision, and by extension female genital mutilation, is a *rite du passage* that has a spiritual, socio-cultural, political and religious value and is therefore central to the Maasai culture. It goes back hundreds of years.

The mothers that I interviewed challenged the law on this premise. They said that although ‘the new law’ prohibits female genital mutilation, they understand that the government has now given the go ahead to minority communities to protect and practise their cultures and traditions. Any

serious scholar of anthropology ought to know that to the Maasai, female genital mutilation is virtually synonymous with culture. In addition to it being central in the order of things in the Maasai culture as detailed elsewhere, circumcision for the Maasai has a spiritual connotation and outlawing it, is tantamount to challenging a whole people's belief system. The men threatened civil disobedience. They said that a law that prohibits circumcision of their girls is a bad law and will be disobeyed. The Maasai are proud, law-abiding and principled citizens. One therefore needs to look behind the veil of apparent stubbornness and see what it is in the law that elicits such negative emotions.

These sentiments were echoed by the officer commanding the police station at Kajiado when he lamented that it is difficult to enforce a law that contradicts itself by prohibiting an act on the one hand and allowing the same act on the other, albeit using different language. Perhaps this explains why the police have made very few arrests and why these cases are not prosecuted to their logical conclusion in the courts of law.

Culture is dynamic and it grows. It undergoes natural evolution and what is unacceptable today, may evolve into a gem tomorrow. Like the Maasai, the Meru of the Mt Kenya region practise female genital mutilation. Thanks to lobbyists and community educators, the physical cut has been replaced by an alternative rite where girls are counselled in the ways of womanhood and upon graduation are declared 'circumcised' signifying transition from one developmental stage to another.

The law on the other hand is slow and sure footed, a thing that makes it not the most efficient tool of social re-engineering, especially in the area of human development such as culture. What then should be given first place, cultural evolution or the law? To counter this egg and hen scenario, perhaps the law should be reviewed in order to give the Maasai a second chance. Outlawing cultural practices as fundamental as female genital mutilation should be undertaken in phases and interspersed with community-based education and Maasai-friendly activism to allow natural evolution of culture from that which is repugnant and injurious to health, to that which is acceptable.

To complicate things a little further, the Kenyan Constitution, the mother of all laws of the land itself, legitimises this claw back syndrome. Section 82(4) of the Kenyan Constitution, like Section 23 of the Zimbabwe Constitution, allows discrimination on matters of personal law, thus clawing back any gains made by the constitutional guarantee against discrimination on colour, creed, sex, and so on. As discussed in the law review section, more often than not, when the claw back syndrome of the law strikes, it is women who suffer the most. Kenya has gone a little further and sanctified this claw back position by providing in section 58(1) of the Draft Constitution the guarantee to the right to education, and in section 63A(1), the right for minority communities to instruct their children in accordance to the dictates of their culture, traditions and language.

As stated elsewhere in this study, the Act is in essence the domestication of the Convention on the Rights of the Child, and apart from a few phrases here and there to give it local flavour, it was lifted straight from the convention. As one of my Kenyan classmates commented in passing, it is a bulky and cumbersome piece of legislation, devoid of any thought or effort on the part of the Kenyan legislature.

The socio-economic and socio-political dynamics surrounding the passing of this piece of legislation is beyond the scope of this dissertation but suffice it to say that it is a classic example of an IMF conditionality met too soon. This has resulted in ambiguity and most of the conflicts and contradictions already discussed. One of my key informants, Bishop Taama, captured this anomaly when he protested that the provisions of an Act as important as the Children Act, cannot be slapped wholesale on a people whose culture has not been taken into account, and whose views were not sought at its inception.

In addition to Bishop Taama's protest, was my personal observation that the apparent hostility to the law and any suggestions to change by the Maasai was more an outburst of repressed anger from an earlier experience with the law and its administration, than conservatism and backwardness as portrayed by contemporary literature from the west. This sentiment will be revisited later in this discussion because, although parliament cannot consult every single Kenyan before it passes law, equity and social justice are the cornerstone of governance of any people. The government therefore has a moral duty to ensure that as far as is practicable, measures are taken to ensure equitable treatment of its citizens, and where applicable, making reparations for past wrongs.

Some of the classic ambiguities in the law are contained in section 7 which places the responsibility for provision of education on the government and parents. The Act does not define governmental responsibility, nor does it give the scope to which this obligation extends, nor what the benchmark is for responsibility on the part of both the government and parents. Does responsibility cover factors other than economic which are equally important? On whose motion, rather who instigates enforcement of this obligation? It is instructive to note that at the time of writing this report, although the procedures and rules of practice to the Act have been gazetted, they are not explicit as to the offence of not taking a child to school, and no penalties are prescribed for this offence. As stated elsewhere in this study, the rules read like a set of precedents on adoption, custody and maintenance of the child.

Another challenge to the law is that as a dualist state, international instruments and conventions can only have the force of the law in Kenya upon their domestication by legislation at the municipal level. It is therefore not possible to enforce rights guaranteed by the international instruments until these are legislated upon. The subtle effects of these constitutional bottlenecks kept leaping out of my findings and leaving in their wake more questions than answers.

For instance, some of my key informers said that the 8-4-4 school curriculum is too long and has a social cost for the girl child. The curriculum is formulated in accordance with the provisions of the Education Act Chapter 211 of the laws of Kenya. Does the right to education encroach on the girl child's right to marry, form and build a family at her own preference, in terms of timeframe as provided for in Article 16 of the Universal Declaration of Human Rights (UNDHR)?

In the case of the refugees' situation one would rightly ask, what is the lesser evil, rescuing a girl and removing her from kith and kin, familiar surroundings and family in total contravention of the right to live and belong in a family (Article 10 of the ICESCR and Article 18 of the African Charter) or enabling her to exercise her right to education under the Kajiado school rescue programme and in accordance with section 7 of the Act? Article 9 of the African Charter guarantees the right to information. At the risk of being accused

of stretching the law a little too far, I wish to state here that for the Maasai parent in Kajiado who does not know and has not been informed that only a nominal fee for lunch and boarding facilities is charged at Kajiado school, has not only had her or his right to information violated, but as a result of this violation, is being denied a vital right, access to quality education in a school that has superior advantages for his girl child. Such a parent would of course have no recourse under the municipal law, and as an individual would have no locus standi in an international tribunal which is the province of state parties.

Where a parent has recourse to the law, for example in the case of Kirwara school where a multinational flower farm poaches cheap labour from school-going children, the cost of bringing it to court and seeing it to completion is more often than not out of reach for such a parent, not to mention having to deal with the high level of corruption in the corridors of justice. Should the government's obligation to provide free and compulsory primary education extend to providing the wherewithal to enforce the right to education?

### **Obligation of the government as the state party**

Obligation of the state party for provision of education is predicated upon the provisions of the law that impose such an obligation and upon the governmental policies put in place by the subject state to enable it to meet this obligation under the law.

As law has been discussed in detail above, the government policy in so far as it affects obligation of the Kenya government to provide free and compulsory education will also be looked at in some detail.

According to my personal observation, and as confirmed by the Minister for Education himself, the Kenya government has put in place two policies dubbed UPE 2005 (universal primary education) and EFA 2015 (education for all) that seek to provide universal, free and compulsory primary education by 2005 and education for all Kenyans by 2015. In this respect therefore, the government has the requisite political will.

However, according to my findings, the Kenya government's role as the key mover and shaper of events in provision, management and maintenance of education has been faulted on four fronts namely: inability to cope with the work; unnecessarily cumbersome red tape in all its dealings; inadequate budgetary allocation; and lack of transparency and accountability on the part of its officers and inadequate law enforcement mechanisms.

According to my findings, the inability to cope with the work is as a result of lack of planning. The enactment of the Act followed by implementation of section 7 thereof providing for free and compulsory primary school education were implemented too soon. As alluded to in passing, this was done to satisfy an IMF conditionality prior to funding, at a time when Kenya needed every penny it could beg from the west. Be that as it may, there is no substitute for proper planning and the government's obligation under the Act must of necessity be extrapolated to cover proper planning for implementation of government policies.

Foot dragging on the part of key education managers should therefore not be tolerated. A case in point is the lacklustre 8-4-4 school curriculum which has been the subject of numerous and expensive commissions as captured in my findings. The government's obligation to providing free and compulsory education should extend to diligent formulation of a user friendly, value added and easy to sustain school curriculum. Where possible, this should take cognisance of special needs of minority communities without compromising the quality of education offered, or any of the communities' neighbouring basic human rights.

Much as I am a great critic of the colonial governments of yesteryear, I remember with nostalgia that when I did my O levels, those countries that were still allowed to teach their local languages were catered for by the then examining body, Cambridge University Examinations Board. To date, I still feel cheated that on a rainy November Friday morning, I sat a gruelling oral English exam, a *viva* of sorts, when my contemporaries in faraway Southern Rhodesia (present day Zimbabwe and my current land of adoption) and neighbouring Uganda were writing essays in their Shona and Luganda languages respectively!

Following close at the heels of lack of proper planning is the sheer weight of bureaucratic baggage under which government departments labour. According to my findings, a task as simple as providing clean drinking water for a school in Kajiado, has to be conveyor belted through no less than four government departments, each of which is a complete outfit, a mini-government of sorts, at great expense in terms of time and taxpayers' money. The net effect is that service and provision of goods are compromised. This trickles down to the person at the bottom of the ladder, a woman, the girl child; who as is always the case, suffers most.

According to the experts interviewed, a government must exercise some measure of bureaucracy, ostensibly as part of its control, checks and balances mechanism. However, this exercise of bureaucracy must of necessity be trimmed down in order to enable the government to cope with the demands of a fast developing global village, in translating its activities to tangible benefits for the girl child.

According to my findings, despite making an over 100 per cent increase in budgetary allocation for education, the Kenya government can still not meet its financial obligation to maintain and sustain free and compulsory primary school education. Budgetary allocation and fiscal policies of a government is an area for financial experts but suffice it to say here that it is critical that the government finds ways and means of sustaining funding for the education sector; that it services its current strategic development partners; and that innovative methods of mobilizing resources, both funding and human capital locally be explored. Education for the African girl child is first and foremost an African *indaba* and help must come from within Africa's boundaries.

Closely related to budgetary allocation is the area of regional development. The issue of social justice and possible reparations was mentioned in passing above. All through my findings, the inequities in socio-economic, political and cultural advantages between the geopolitically well endowed Central Province and Kajiado district came out very clearly. During my many field visits to the semi arid Kajiado area, I observed first hand the effect of colonial maladministration and the indifference of the independent governments as evidenced by lack of access roads, infrastructure, telecommunications, clean drinking water, and health facilities for the Maasai people. One of the elders that I interviewed summed it all up when he claimed that the Maasai

have been ‘forgotten’ by previous governments. The government’s obligation to provide free and compulsory primary school education should extend to some reparations for wrongs of the past.

Corruption which is euphemised as lack of transparency and accountability, was cited as the greatest handicap in provision of goods and services by the government and its development partners. The culture of kickbacks, as captured in my findings, jeopardises provision of quality education. As a beginning point, the Kenyan parliament has passed the Public Officers Ethics Act 2003 which outlaws corrupt practices by public officers. It is too soon to comment on the efficacy of this piece of legislation but I need to mention here that the definition of ‘public officer’ is too narrow and exclusive to have any meaningful impact on eradication of corruption which has so eaten the moral fabric of the Kenyan society, that nothing short of a national purge would rid Kenya of the rot. Eradicating corruption from our borders is and should be part of the government’s obligations to providing free and compulsory primary education.

Under the doctrine of separation of powers<sup>36</sup> which Kenya subscribes to, the legislative role of parliament ends at the enactment of an Act. The function of putting into effect the intentions of parliament is to a large extent in the hands of the judiciary. When things go wrong, the executive steps in to enforce the law. The executive, the legislature and the judiciary are the three arms of government and in spite of the concept of separation of powers, their roles are somewhat intertwined. Needless to say, when one part suffers, the whole body suffers.<sup>37</sup>

Some of the factors that underlie the lacklustre performance of the governmental law enforcement mechanism such as the conflict between various provisions of the law, and the conflict between the provisions of the law and cultural orientation of individual players have been discussed above. Cultural orientation of law enforcement and judicial officers was observed as one of the major handicaps. The government’s obligations in providing free and compulsory education, must of necessity extend to the responsibility of ensuring that those in whose dockets lie enforcement, arbitration and interpretation of the law are well equipped. Mainstreaming gender in these departments is critical. The importance of the role of the government in sensitising these players to the changing trends cannot be over-emphasized. Continuing education for police and judicial officers should be made obligatory. They should be taught how to handle witnesses who under the Act will for the greater part be minors or not much older. Courts of law should be user friendly and where possible, *camera* hearings, complete with closed circuits and television monitors where a minor witness can be protected if need be, should be put in place. Only then can the interests of a girl child be adequately protected under the law, should the need to litigate arise.

### **Need for further research**

During my literature review and field research work, I became acutely aware that there was not much data to go by in the area of education and law in Kenya. As the Act is two years old, it is still too soon to verify some of my findings.

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<sup>36</sup> Munro, C R., (1897) *Studies in constitutional law*, Butterworth, London, UK

<sup>37</sup> Kang’ethe, N. (2002) *Women and devolution of property: Why law reform without more is inadequate*, LL. B, Dissertation, University of Nairobi, Kenya

HIV/AIDS has acquired a global dimension. I steered clear of the epidemiology of the disease and instead, focused on the socio-economic and socio-cultural aspects

AIDS as it affects the girl child's access to education. Because of lack of basic empirical data, and the confidentiality that surrounds any discourse on HIV/AIDS I did not have much to go by as evidenced by my scanty discussion of the effect of AIDS on the girl child's education.

There is need therefore to carry out more research in this area and perhaps develop jurisprudence on education law.

## CHAPTER SIX

### The way forward

On the face of it, having looked critically at my findings, discussed and analyzed them, one sees that the study raised more questions, particularly in the area of conflicts in the law, than it had answers to. However, it has also become apparent that there are critical implications for change. In conclusion, this study looks at some of these implications.

As the obligation to provide free and compulsory primary education attaches to the government as the state party, this final chapter takes the liberty to map a way forward, a wish list if you may, of the areas that the government needs to address itself to.

To avoid repetition the way forward will be by way of a bulleted recap:

#### Law reform

- It became apparent that the Act was enacted in haste. There is need therefore to revisit it, with a view to reviewing it in order to bring it in line with reality on the ground. Particular attention needs to be paid to the local situation, especially as pertains to culture, particularly the provisions that give rise to the claw backs and consequent conflicts, contradictions and ambiguities.
- The current constitution does not provide for automatic incorporation of international instruments into domestic law. There is nothing inherently wrong with Kenya being a dualist state but there is need to put in place some self-regulating machinery that will at the very least ensure that where need be, parliament is diligent in legislating on issues of human rights. This will to some extent alleviate the legal lacuna that ensues where international instruments are nothing but toothless bulls due to a constitutional bottleneck.
- It was evident that even where recourse to the law in enforcement of the right to education is available, the cost of instigating and sustaining a case to its logical conclusion is out of reach for most people. Legal aid for human rights enforcement should be legislated upon and a fund, to be drawn from the consolidated fund, should be established.
- As an enabling resource, the right to access to and appropriation of education is a *suis generis* human right. There is need to develop education law in the region.

#### The government's obligation – Mapping the gap

The government's obligation to provide free and compulsory primary education is all inclusive and must of necessity address administrative, developmental, fiscal, and monetary policy issues. Some of these are:

- The government must make deliberate efforts in its development and distribution of resources policies to bring the Maasai and other marginalized communities at par with the rest of the Kenyans. Now that the Truth and Reconciliation Committee has been put in

place, the question of reparations for the atrocities visited upon the Maasai by the colonial government, particularly theft of their prime rangeland should be looked into and effected.

- The government should spare neither money nor effort in formulating and implementing a user-friendly, value added, holistic and sustainable school curriculum. Teaching of human rights should be core to the school syllabi and at all practicable levels.
- The government must look for ways and means of mobilizing funding and human capital locally, and sustaining its resources base to supplement and finally do away with expensive, ‘strings attached’ donor funding.
- The government must do all in its power to eradicate corruption and inculcate in its ranks the culture of transparency and accountability.
- Law enforcement and judicial officers should be sensitized as to the specialist care needed in their dealings with children and women as complainants and witnesses in courts of law.
- The Return to School Policy of the Ministry of Education must be revisited to cater for child brides and to provide for basic baby necessities such as baby formula, crèche facilities, pampers, and so on. It should be upgraded from mere guidelines to a government policy document and one that has the force of the law.

## BIBLIOGRAPHY

- Weiss-Bentzon, A *et. al.*, *Pursuing grounded theory in law: South-North experiences in developing women's law*, Mond Books and Tano, Harare and Oslo, 1998.
- Bloch, M., *et. al* (1998) *Women and education in sub-Saharan Africa: Power, opportunities and constraints*, Lynne Rienner Publishers, Boulder, London, UK, 1998.
- Calderwood, A., *Kikuyu News*, an educational journal, Oxford University Press, Oxford, 1961.
- Kang'ethe, N., *Women and devolution of property: Why law reform without more is inadequate*, LL. B, Dissertation, University of Nairobi, Kenya, 2002.
- Kinoti, H. W., *A handbook of social research methods*, National Christian Council of Churches in Kenya, Nairobi, 1998.
- Leys, N., *Kenya London School of Economics*, London, UK, 1925.
- Meinertzhagen, R, (1957) *Kenya diary* (1902 – 1906), Oliver Boyd, Edinburgh, 1957.
- Mol, F., *A dictionary of Maasai language and folklore*, Marketing and Publishing Ltd, Nairobi, Kenya, 1978.
- Munro, C R., *Studies in constitutional law*, Butterworths, London, UK, 1987.
- Mutunga P. *et. al.*, *What's (not) happening in our schools? An exploratory study from Kenya*, Weaver Press and Women's Law Centre, Harare, 2003.
- Nherere P., *et. al.*, *The institutionalisation of human rights in southern Africa*, Nordic Human Rights Publications, Oslo, 1993.
- Okwach, A., *Household-based factors as determinants of school participation in Kenya: The case of Nairobi and Siaya districts*, Abridged research report No. 20 African Academy of Sciences, 1994.
- Thairu, K., *The African and AIDS holocaust: An historical and medical perspective*, Phoenix Publishers, Nairobi, 2003.
- Thairu, W., *Millennium poems: Come, Let us reason together: African poetic reflections*, Square one Publications, UK, 1999.
- Tsanga, A. S., *Taking law to the people: Gender, law reform and community legal education in Zimbabwe*, Weaver press and Women's Law Centre, Harare, 2003.
- Soyinka, W., *The burden of memory: The muse of forgiveness*, Oxford University Press, New York, 1999.
- UNICEF (2002) *State of the World's Children 2002*, UNICEF Working Paper Series, Education Section Program Division, New York, 2002.

United Nations, Article 39 of the *Beijing Declaration and Platform For Action*, New York August 2001.

UNESCO, *Opportunity 21 for Kenya* , Nairobi, 2001.

Government of Kenya, *The Kenya Government five year development plan 1970-1975*, Sessional Paper No. 10 , Government Printers, Nairobi, 1970.

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