



La loi, l'Etat, la société et la police locale au Kenya : étude de cas dans le comté de Kisii

Wycliffe Nyachoti Otiso

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UNIVERSITE DE PAU ET DES PAYS DE L'ADOUR
Ecole Doctorale des Sciences Sociales et Humanites (ED 481)
Les Afriques dans le Monde (LAM)

La Loi, l'Etat la societe et la police locale au Kenya: etude de case dans le Comte de Kisii

Law State Society and Local Policing in Kenya: A Case Study of Kisii County

THESE

présentée à Pau par

Monsieur OTISO, Wycliffe Nyachoti

Pour obtenir le grade de DOCTEUR EN SCIENCES POLITIQUE

Le 6 decembre 2017

Soutenue devant la jury compose de:

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DECLARATION

This thesis is my original work and has not been submitted for a degree in any other university.

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We confirm that the work reported in this thesis was carried out by the candidate under our supervision.

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DEDICATION

In loving memory of our loving dad Charles Otiso Getugi Otundo. To my loving mother Delilah Kerubo Otiso. To my dear wife Novah Kemunto, my children Owen and Nella. To my brothers and sisters. To my friends (too many to mention!)

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GLOSSARY OF AFRICAN TERMS

Abagaka b'egesaku	Clan Elders (Ekegusii)
Abagori	Non-autochthon Settlers (Ekegusii)
Abarogi	Witches (Ekegusii)
Abamenyi	Lodgers (Ekegusii)
Abayuti	State-sponsored youth enforcement group (Ekegusii)
Amasaga	Socio-economic Cooperatives (Ekegusii)
Amatombe	Deserted homes (Ekegusii)
Askari	Guard (Swahili)
Balunashi	Chief whip (Nyamwezi)
Baraza	Local deliberative public forum (Swahili)
Banamhala ba Ntemi	Elders of the Chief (Nyamwezi)
Boda Boda	Motorcycle taxi (Swahili)
Boma	Government station (Swahili; Tanzanian context)
Botende	Kuria-land (Ekegusii)
Chama	Organization/Group (Swahili)
Chinsoni	Moral Code (Ekegusii)
Ebisarate	Youth encampments (Ekegusii)
Enyomba	House/Home (Ekegusii)
Etureti	Cohort of Disputes' Tribunals(Ekegusii)
Emuma	Supernatural oath (Ekegusii)
Harambee	Fundraiser (Swahili)
Ichisaiga	Enforcement arm of Iritongo (Kuria)
Inchaama	Local Appellate Tribunal (Kuria)
Iritongo	Representative Assembly (Kuria)
Kanzu	Long Cotton shirt (Swahili)
Katibu	Secretary (Swahili)
Ntemi	Nyamwezi Elder and medicine man (Nyamwezi)
Nyumba Kumi	Ten households (Swahili)
Ogonsonorana	Cleansing ceremony (Ekegusii)
Omogaka bw'omochie	Head of household (Ekegusii)

Omochie	Homestead (Ekegusii)
Omokorerani	Cleansing Ritual specialist (Ekegusii)
Omokundekane	Marriage presiding officer (Ekegusii)
Omotembe	Ritualistic Tree (Ekegusii)
Ogoita kwa mosiabano	Manslaughter (Ekegusii)
Riiga	Lineage from grandfather (Ekegusii)
Rungu	Knobkerries (Swahili)
Usalama	Security (Swahili)

LIST OF ACRONYMS

AG	Attorney General
APS	Administration Police Service
CBD	Central Business District
CID	Criminal Investigation Department
CIPEV	Commission of Inquiry into Post Election Violence
CCM	Chama cha Mapinduzi
CPF	Community Policing Forum
CPG	Community Policing Group
DIG	Deputy Inspector General of Police
DO	District Officer
DC	District Commissioner
FORD-P	Forum for Restoration of Democracy-People
GJLOS	Governance Justice Law and Order Sector
GSU	General Service Unit
ICT	Information Communication Technology
IEA	Institute of Economic Affairs
IAU	Independent Accountability Unit
IMLU	Independent Medico-Legal Unit
IG	Inspector General of Police
IPOA	Independent Policing Oversight Authority
KADU	Kenya African Democratic Union
KANU	Kenya African National Union
KAR	Kenya African Rifles
KNBS	Kenya National Bureau of Statistics
MoPAIS	Ministry of Provincial Administration and Internal Security
MCA	Member of County Assembly
MLA	Mutual Legal Assistance
MP	Member of Parliament
NPS	National Police Service

NPSC	National Police Service Commission
ODM	Orange Democratic Movement
OCG	Organized Criminal Group
OCP	<i>Official</i> Community Policing
POCA	Prevention of Organized Crime Act
PC	Provincial Commissioner
PNU	Party of National Unity
UN	United Nations
UNCTOC	United Nations Convention against Transnational Organized Crime

LIST OF STATUTES

Constitution of Kenya 1963

The Constitution of Kenya 2010

Chiefs Act

County Government Act

Districts and Province Act

Elections Act, No. 24 of 2011

Kenya Independence Order in Council 1963

Local Government Act

Independent Policing Oversight Authority Act

National Government Coordination Act No. 1 of 2013

National Police Service Commission Act

National Police Service Act

Outlying District Ordinance Act

The Penal Code

Police Act 1988

Preservation of Public Security Act

Prevention of Organised Crime Act No. 6 of 2010

Special Districts Administration Act

Voluntarily Unemployed Persons (Provision of Employment) Ordinance

Vagrancy Act

Vagrancy (Amendment) Act 1949

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Randu Nzai Ruwa & 2 Others v Internal Security Minister & Another [2012] eKLR (*Mombasa High Court Petition No. 468 of 2010*)

Republic v Charles Ntabo Monda (Kisii High Court Case No. 148 of 2012)

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Republic v Nuseiba Mohammed Haji Osman alias Umm Fidaa, alias Ummu Fidaa, alias Ummulxarb [2016] eKLR

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PART I

LAW STATE-SOCIETY AND POLICING IN KENYA: THE CASE OF KISII COUNTY

Abstract

The thesis entails the study of the changing nature of local forms of governance in Kisii County situated in south-western Kenya. The study entails situating the histories of local policing groups operating in Kisii County between 1990-2016, focusing on the nature, modes of operation and interaction with legal and political processes. It examines actors at the societal level, their everyday activities and their relationship with the state in seeking to explain local policing (community policing and vigilante) trajectories as influenced by legal and non-legal dynamics. It examines the place of law in determining the nature of non-state enforcement of law and order and the extent to which it has played a role in reforming policing practices from vigilantism to community policing in Kisii County. It also examines social and political factors, how they affect policing practices and outcomes with an objective of advancing alternatives for better representations of the function of law and for purposes of improving governance. These factors are contextualized within the broad changes in the macro governance structure catalyzed by constitutional reforms. The study undertakes such examination through the use of qualitative methods of inquiry primarily the use of interviews and also review of relevant primary and secondary sources including books, scholarly journals, legislation and law reports. The study reveals that generally there are gains on wider participation and inclusivity in local governance mechanisms compared to pre-existing policing strategies as practiced by police and vigilante which had minimal community involvement. The increased instrumentalization of law by the state has made little contribution to the gains associated with the development of nuanced forms of community policing. Rather the changes in policing are attributable to dynamic everyday uses of law and societal action by community members in joint local governance mechanisms hence increasing the potential for better state-society relations. The study concludes that notwithstanding a number of changes towards non-violent crime fighting, the transition has not been seamless as gains on state-society relations and improved societal adherence to law are compromised by episodes of use of force, asymmetries in the co-operation between the local government administration and the community, inadequate support for community policing and existing cultural constructs on governance.

CHAPTER 1 GENERAL INTRODUCTION

1.1. Background to the Problem

Over the years, African states have had to countenance recurrent governance challenges in the shape of conflictual state-society relations and ineffective law enforcement. First, the history of states in Africa, like Kenya, reveals a history of conflictual relations between state and society stemming from colonial rule replete with the state dominance and repression of society population continuing to independent governments¹. Much of such conflictual relations between state and society are manifest in the realm of law enforcement in both colonial and post-colonial governments. Under colonial rule, enforcement of the law by agents of the state like chiefs, police was undertaken to protect the regime's interests. Regime policing was meant to protect political and economic interest of the minority white population while repressing all spheres of the lives of the African majority. The issue of how to manage relations between the state and society by ensuring accountability to its citizens became a problem for the independent Kenyan governments much like the colonial government before it.

Beyond the challenge of managing relations between state and society, African societies have also grappled with another governance challenge in the frame of enforcement of law and order. Law enforcement has posed challenges of governance for both state policing agencies and non-state forms of policing in post-independent Africa. The high incidence of violent crime in Africa is a contributory factor to the challenge that states face in effectively enforcing the law. There has also been a proliferation of non-state forms of policing aimed at crime-fighting due to both ineffective public law enforcement (state absence) and active State facilitation in other instances. Local forms of policing like vigilantism have been much theorized through the lens of state ineffectiveness and a crisis of socio-economic conditions. However, there is also increasing academic attention highlighting non-state policing groups that have been formed at the instance of administrative authorities and others that have

¹Spalding Nancy (1996) "State-Society Relations in Africa: An Exploration of the Tanzanian Experience" *Polity* Vol.29 No. 1 pp. 65 -75 at p. 66

enjoyed support from the police. That the monopoly of force has been privatized to expand the policing arena to a pluralized space consisting of both state and non-state forms of policing is no longer a novel concept. Contemporary studies have explained that the monopoly over the use of violence does not reside solely in the state but one that is pluralized between different security providers².

Application of the state's monopoly of coercive instruments has to an extent been unsuccessful in enforcement of the law and maintenance of order in Africa in a similar manner for those non state groups that have ventured to fill the gaps left by the police. The police as the main state agents of law enforcement have been unable to implement effective governance practices. Governments have failed in the war on crime and enforcement of public order. The police presence has not done much to curb runaway crime and at times, police themselves have contributed to lawlessness owing to rampant corruption in police service, extrajudicial killings and violation of human rights.

Where society has stepped in, the alternatives it has sought to provide have been far from effective. Society initiatives by society for self-policing have itself culminated in the production of lawlessness mirroring the government's shortcoming in law enforcement. The emergence of vigilantism as a self-help community protection mechanism, where individuals volunteered to fight crime and maintain law and order, often mutated to extortion rings and political militia and fora for settling personal vendetta. Where success has been achieved in tackling crime, non-state policing has been characterized by use of violence and breaches of due process compounding to the state insecurity and fear. This challenge for both state and society in enforcement of law and order has been referred to as *lawless* law enforcement³. The challenge to law and order in terms of proliferation of local policing groups to tackle crime and insecurity is a phenomena experienced through Eastern, West and Southern Africa.

In Nigeria, the challenge to law and order resulted in the formation of local policing groups due to a combination of factors including the general increase in crime from colonial times

² Baker B. (2008) *Multi-Choice policing in Africa* Uppsala, Norway: Nordiska Afrikainstitutet p.5

³ Ibid at p. 2

to date and the nature of crime has gradually become more radical and violent with increased use of sophisticated weapons⁴. Local vigilante groups proliferated in the face of increased crime and lack of sufficient police presence.

When crime became prevalent in Tanzania in the late 1980s, due to poor law enforcement by the police, members of the Nyamwezi and Sukuma ethnic groups resorted to *sungusungu* to protect their communities from cattle raiders⁵. *Sungusungu* has been defined as an informal institution of *social control* that provided the public good of law and order where state institutions were weak, corrupt, under-resourced, absent and unreliable in the protection of property and personal security⁶. It has also been referred to by Abrahams (1987) as a type of self-help initiative (distinct from state institutions) by locals in a given area formed with the common objective of addressing a certain problem, be it, political or social⁷. According to Abrahams, the *sungusungu* started in Nyamwezi, in East of Kahama. The specific location where the first group was established remains a matter of controversy amongst scholars of *sungusungu*. However, there is general consensus that *sungusungu* was first established in the larger Kahama district by Kishosha Mwang'ombe who was a medicine man and a seer. He was also known as *Ntemi*. Bukurura's study of the evolution of the *sungusungu* supports this observation that the *sungusungu* was established in Kahama district by elders with divine and ritual powers and not the youth⁸. *Sungusungu* spread from village to village in Sukuma and Nyamwezi, later spreading south to Rukwa region and North to Kuria who straddle the Tanzania-Kenya border. Subsequently the phenomenon spread further North to the Kuria in south of Kenya and ultimately to the Gusii community in south western Kenya.

The law enforcement challenge has been no different in Kenya. Ineffective law enforcement, increase in violent crime and community governance mechanisms has

⁴Fourchard, L. (2008) "A New Name for an Old Practice: Vigilantes in South Western Nigeria" *Africa* 78 (1) p.19

⁵ Abrahams, R. (1987) "Sungusungu: village vigilante groups in Tanzania" *African Affairs* 86 (343) 179-96

⁶ Paciotti B. and Boergoeff M. (2004) *Sungusungu: The role of pre-existing and evolving institutions among Tanzanian vigilante organizations*, *Human Organization*, 63, 112-124

⁷Supra note 5

⁸ Bukurura (1996) Combating Crime among the Sukuma and Nyamwezi of West Central Tanzania, *Crime Law and Social Change* 24: pp257-266

brought into sharp focus the relations between the state and society in the regulation of order and in implementation of law. At the height of proliferation of non-state policing groups in Kenya in 1990s, perpetuation of crime was common to the activities of militia and vigilante groups. At the time no other group elicited as much attention the *Mungiki* from state authorities and scholars alike including some of the researchers who noted the significance of the phenomenon like Maupeu⁹. Ever since the initial studies on *Mungiki* a number of theorists have contributed to understanding the group each privileging attention to different aspects of interest¹⁰. *Mungiki* started out as a political and cultural-religious group among the Kikuyu community in the early 1990s. Over time it spread to different parts of the country, but its origin is traced to Nyandarua. It appealed to customs pre-existing customary practices predating the advent of colonial rule in Kenya. Its objectives sought to address political issues affecting the community and especially those affecting the youth including political marginalization from leadership positions and denial of adequate economic opportunities as both spheres were monopolized by the elderly hence the clamour for a generational change. What had began as political and religious movement morphed over time into an extortion ring with members using threat and actual violence against citizenry. Its political activity had also heightened and political agenda initially driven by clamour for political participation culminated in an agenda for a revolution. The attention of the government was captured. As a result the group was banned and later special police units formed to crackdown on *Mungiki* members¹¹

Different from *Mungiki*, the activities of a vigilante group, *sungusungu*, had on occasion captured national attention because of its methods for sanctioning crime through summary justice and extrajudicial killings in Kisii County. At the time of emergence of *sungusungu* in Kisii in the late 1990s it had no political agenda of its own, neither did it have a political

⁹ Maupeu H. (2002) "Mungiki et les elections: les mutations politiques d'un prophetisme kikuyu" *Politique Africaine* 87 pp 117-137

¹⁰ Rasmussen J. (2010) *Mungiki as Youth Movement: Revolution, Gender and Generational Politics in Nairobi, Kenya*; Gecaga M. (2007); Kagwanja P. (2003) "Facing Mount Kenya or Facing Mecca: The Mungiki, Ethnic Violence and the Politics of the Moi Succession, 1987-2002" *African Affairs*, 102 (406) pp 25-49; Anderson (2002);

¹¹ Rasmussen J. (2010) *Mungiki as Youth Movement: Revolution, Gender and Generational Politics in Nairobi, Kenya* at p. 302,306

organization like the *Mungiki* who had formed the Kenya National Youth Alliance to articulate its political agenda.

The linkage of *sungusungu* to politics emerged in its involvement in the 2007 elections that it was singled out as one of the major perpetrator of violence in western Kenya in the period that followed the disputed elections. According to the Report of the Commission of Inquiry into Post-election Violence (CIPEV and popularly known as the “Waki Report”) *sungusungu* were involved in violence in 2007 elections where they were used by the incumbent and aspiring politicians to intimidate their opponents¹². The groups’ activities may have gained attention for its role in national electoral processes but its institutionalization as local governance organization involved in day to day policing had long preceded the 2007 elections.

Over the years, maintenance of order by non-state groups in Kisii County had been associated with violence and crime. For instance, where *sungusungu* had been deemed to succeed by reducing incidence of crime, they were also implicated in preying on the same society that they purported to serve. Summary justice was the *modus operandi* in enforcement of sanctions against suspects. Maiming and killing of suspects and torching of suspects’ houses were common. The effect of the phenomenon is that the community ended up being the loser and the net effect is increase in crime rates and compromise to law and order. The result was counter-productive to the *raison d’être* of non-state policing, as vigilante groups engaged in the very crime they made their core objective to fight when they were formed. As a measure towards curbing the soaring crime in the 1990s by both criminals and the non-state policing groups, community policing was introduced in Kenya as one of the key initiatives to improve law enforcement through improved relations and collaboration between state and the community. Despite the lofty objectives of community policing, it failed to take root as the ideal institution for fostering police-community

¹² Republic of Kenya (2008) Commission of Inquiry into Post Election Violence (CIPEV) (Nairobi: Government Printers) Although, the report uses the terms ‘chinkororo’ and ‘sungusungu’ interchangeably, it was *sungusungu* that was implicated in violence in various parts of Kisii during the election crisis period in late 2007 and early 2008

partnerships¹³. The whole transplantation and under-contextualization of liberal prescription of community policing contributed to its failure.

Due to the resurgence of armed non-state policing groups like *sungusungu* and their involvement in the post-election violence in 2008, the government attempted to intervene through the introduction of a new law to ban proscribed groups which would eradicate vigilante and militia groups. In 2010, the government enacted the Prevention of Organised Crime Act (POCA)¹⁴. Enforcement of the provisions of the Act has had minimal success in achieving its objective of tackling organised crime. Instrumentalization of the force of law as represented in statutory law has had minimal success if at all. In the six years POCA, has been in operation, proscribed groups have continued to operate. Despite its minimal success, there is scant connection of *sungusungu* to the pockets of electoral violence experienced in 2013, although recent reports indicate that armed groups banned under the Act, are regrouping in other parts of the country ahead of the August 2017 elections¹⁵. It is reported that governors have mobilized private militia, who are supported by police and county government officials in Kiambu, Malindi, Turkana, and Murang'a. During the sitting of Parliamentary Committee on Administration and National Security, Member of Parliament (MP) for Lari, Honourable (Hon.) Mburu Kahangara stated that in Kiambu, the rise of militia had resulted in re-emergence of Mungiki. Much as there is little evidence corroborating the remarks by Hon. Kahangara or any discovery of mass member recruitment or oathing of Mungiki group members such assertions cannot be ignored as periods preceding the previous elections witnessed similar activity of re-arming by groups¹⁶. While, no similar report has been made about *sungusungu* about their planned involvement in the August 2017 elections, the group continues to operate in different parts of Kisii County, and are involved in both policing and non-policing related activities, albeit covertly.

¹³ Ruteere M. & Pommerolle M. (2003) "Democratizing security or decentralizing repression: The ambiguities of community policing in Kenya" *African Affairs*, 102: 587-604

¹⁴ Act No. 6 of 2010 available online at

https://www.unodc.org/res/cld/document/ken/2010/prevention_of_organised_crimes_act_html/PreventionofOrganisedCrimesAct6of2010.pdf last accessed 5 May 2016

¹⁵ Ngirachu J., "MPS to question Kabogo on private militia allegation" *Daily Nation* 23 March 2016, p.4

¹⁶ KHCR (2011) "Recurrent Ethnic Violence and Claims of Communities Arming Ahead of the 2012 General Elections" (Nairobi: KHCR)

Around the same time of the enactment of POCA, there was establishment of new democratic governance philosophies and structures laying emphasis on decentralization of political units, economic resources and enhancement of citizen participatory mechanisms. Less than a month before the commencement of POCA in 2010, a new constitutional order was adopted laying a framework for new governance structures and consolidation of democracy¹⁷. Later that year, POCA was enacted banning activities of armed groups implicated in crime and violence. Attempts at institutionalization of new democratic governance structures and enhanced law enforcement have resulted in different trajectories on the mode of non-state policing. The study analyzes trends in policing by non-state groups in Kisii County and the interaction with changes brought about by law reform and local democratization processes.

The study therefore seeks to address the conundrum why measures taken to ostensibly increase state presence, improve law enforcement, and better societal relations (by bridging the gap between society and state) not achieved the much publicised desired results and instead turned out to be arenas for contestation and negotiation. Prior to the legal and policy reforms in 2010, it was much publicized that with increased regulatory measures in new law, self-help anti-crime groups rampant crime would be reined in, giving way to state-society partnership in form of community policing. The first part of the reform, therefore, was the enactment of law targeting anti-crime groups like vigilantes and their activities. In this regard, POCA was enacted as main legislation with promise of tougher measures and effective results over and above existing Penal Code. In its implementation tenure, POCA has failed to deliver its promise; *organized* crime groups targeted by the law continue to operate; no cases brought under POCA; no reports of crackdowns as promised; minimal arrests, where arraigned before court no successful convictions, constitutionality of POCA been challenged, contestation among implementers on right interpretation and applicability of the law.

Secondly, there followed reform of the police where there was enactment of laws to conform to the new Constitution to improve state policing through professionalization of

¹⁷ The Constitution of Kenya, 2010 Available at www.kenyalaw.org/lex/actview.xql?actid=Const2010 Last accessed 29 March 2017

police. The goal was to change philosophy and strategy of policing from regime policing inherited from colonial government. Such policing was characterized by heavy-handedness, repression towards Africans and sought to serve narrow elitist interests, at the expense of majoritarian societal interests. The second mechanism entailed passing of new comprehensive legislation as stipulated by the Constitution mainly geared towards reforming State policing. It entailed enactment of laws like the National Police Service Act, National Police Service Commission Act, and Independent Police Oversight Authority Act. Stipulations were aimed at ensuring that police service conformed to the new constitutional dispensation that restructured governance that would be guided by increased citizen participation, transparency, accountability, human dignity, equity, social justice, inclusiveness and human rights¹⁸. Related to the enactment of laws, state-led interventions were also introduced aimed at improving relations between the state and society by involving society in policing. Such interventions prescribed the re-introduction of community policing to engage society to assist in enforcement of the law and maintenance of security.

The study seeks to contribute to academic discourse by situating the appropriate place of law and political processes in the shaping of the nature and quality outcomes of local policing mechanisms hence urging a re-evaluation of prevailing legal and policy approaches. The study seeks to advance regulation of local policing as a way of thinking of state and society relations. Examines how looking into local policing practices invokes issues of legality and important political processes and how aspects of the two disciplines (law and politics) are bound together. The study also evaluates alternative conceptual premises in understanding society centered approaches to state-society relations complimented with sociological interpretations of law. It seeks a refocus of policy interventions on law enforcement premised on law and order.

1.2. Statement of the Research Problem

Local policing in Africa and in Kenya has been characterized by a number of groups that have sought to undertake the role of law enforcement with varied objectives and means. Traditionally, the state is vested with the monopoly of use of violence and police is

¹⁸ Article 10 of the Constitution of Kenya

the primary state agent tasked with law enforcement. The reality is that other than the police, law enforcement is now a function undertaken by diverse groups, through varied means and forms, and in different spheres. Policing is no longer synonymous with the police and the practice of law enforcement is also undertaken by community policing initiatives, neighbourhood watches and vigilante groups alongside the police¹⁹. Where they have been successful in tackling crime and performed better than the police, these non-state forms of policing have gained considerable acceptance in the societies in which they operate²⁰. The resort to alternative law enforcement mechanisms complementary to state policing is not the problem, *per se*. The issue is what form, nature and scope does such policing take, its effectiveness and responsiveness to the citizens it intends to serve, so that, it is in-efficient, non-responsive and *lawless* law enforcement²¹ that becomes a problem.

In Kisii County, community members resorted to the setting up of *sungusungu* as a self-policing initiative to curb crime in Bonchari constituency in the late 1990s²². The objective was that members of the community, structured in groups at the local level would volunteer to fight crime. With the help of the government, *sungusungu* units were established at the locational level with the mandate of assisting the provincial administration in the investigation, arrest and punishment of criminals.

In the initial years of operation of the *sungusungu*, incidence of crime levels in Kisii County had decreased, but, it was attributable more to the violent and summary nature of punishment rather than legal means of coercion and observance of due process in handling suspected offenders²³. Elements of procedural justice in the arrest and handing over of suspected criminals to the police were replaced with *summary* forms of justice. Persons suspected of committing serious crimes like murder would be killed and their bodies dumped in public places. For other misdemeanours, suspects would face corporal punishment or be forced to pay fines. Through the fear instilled in the community, suspects

¹⁹ Newburn T.(ed.) (2003) *Handbook on Policing* (Exeter, UK: Willan)

²⁰ Masese E. & Mwenzwa E. (2012) "The genesis and Evolution of Sungusungu Vigilante group among the Abagusii Ethnic group of Kenya" *Elixir Social Science* 42 pp.6485-6492

²¹ Baker B. (2003) *Lawless Law Enforcers in Africa* p.2 Baker uses this term to refer to policing activities undertaken by both police and non-state groups that are implicated in breaking the law

²² Supra note 20 at p. 6486

²³ Ibid at p. 6487

ran away and the deserted homes were torched down. Lack of accountable and transparent investigation procedures also led to lawlessness by *sungusungu*. In exchange for money from accusers, *sungusungu* members would be used to perpetuate personal vendetta. As a result, accountable and responsive policing in Kisii County became elusive from both the police and security provision by the *sungusungu* vigilante group. The rise in crime in the 1990s was attributable to state decline in law enforcement while the alternative by *sungusungu* in many ways contributed to insecurity rather than alleviated it bringing *sungusungu* into a collision course with the government that had supported its creation. The provincial administration publicly denounced the operation of *sungusungu* but no concrete action was taken to prosecute members of the group. *Sungusungu* continued its operations culminating in its role in post-election violence in 2008. Two years later, along with 32 other groups, *sungusungu* was proscribed as an organised crime group and banned after the enactment of POCA in 2010. POCA, fronted as a robust regulatory framework, provided for tougher penalties and enhanced sentences. While the state acknowledged the importance of relations between the state and the community, it did not want to repeat the pitfalls of groups like *sungusungu* which it had helped to set up. Subsequently, the state strategy in tackling the problem of crime and insecurity was to reconfigure police and community partnerships through revitalization of community policing. However, there was no legislative action to provide for framework and community collaboration which had long been acknowledged by the government as important to fighting crime. In 2011, in line with government objectives, one such partnership was initiated in Keumbu Division in Kisii County with the aim of establishing community policing forum represented by membership at each sub-location.

The government has applied the law towards eradication of vigilantes while simultaneously advancing measures encouraging citizens to actively engage in the revamped community policing forum. This strategy has not been successful in effective enforcement of the law or improvement of state-society relations participating in local governance mechanisms. There has been no success in eradication of *sungusungu* neither has there been a wide embracement of the new community policing initiatives by government. In the areas targeted by this study there is continuity of vigilantism, where *sungusungu* remains dominant actor in local policing while in other parts of Kisii County there appears to be

achanges towards community oriented policing especially where the sungusungu activities waned over time and failed to take root since initial establishment between 2004-2006.

There is a need for change in academic focus on *state* policing and *non-state* policing generally. Application of binaries in characterizing policing through the type of provider by measuring its links to state or *stateness* has increasingly held diminishing application in capturing realities of policing practiced in increasingly pluralized networks in Africa. This is manifested in realities of local policing involving both state and society as stakeholders in Kisii County, which is the site of investigation in this study. Rather than examining state policing or non state policing, the study chooses instead to focus on *local policing*, which accords attention to the dynamics of law enforcement at the local level especially those that are structured as *joint* governance mechanisms involving both the state and the community²⁴. In such an arrangement, it is important to understand holistically the relationship between the partners. Conventionally, binaries have been applied to separate state and non-state actors on basis of legality and authorization where in most situations non-state actors have carried the negative tags while state actors are seen to be automatically legitimate. Hence, to separate the partners as those that are linked to the state or not misses important aspects of implementation of the law and interdependence between state and society. Therefore, in line with its objectives, the study is firmly focused on arena that policing takes place at the local level rather than classification of actor as either state or non-state.

The study inquires into the following problems. Despite instrumentalization of law increased use of law, increased punitive measures there is continued presence of outlawed groups *policing society*. Despite the wide acceptance of community policing (its benefits) and its privileging as a means of reconfiguring state and society relations by govt officials, public agencies and officials; why is there low uptake? Despite transitioning to a new constitutional order, with new democratic governance structures; why is crime still rampant? Yet it has been widely predicted that with democratic transition, citizenry will results in more peaceful

²⁴As emerges from discussions in Part II of the thesis “joint” does not necessarily presuppose an equal or equitable partnership between state and community participants

means of dispute resolution due to better governance and more socio-economic opportunities.

The study seeks to explore several issues; firstly; the study explores changes to the nature of local policing in Kisii County after increased regulation marked by introduction of new laws. It also evaluates the effect of new laws in the broader context of adoption of the new Constitution. It is also necessary to examine the whether there is shift from one form of local policing to another form and assess the place of law in the process. Secondly; the study broadly examines the place of law in regulating local policing groups, especially such mechanisms structured as joint governance partnerships involving both the state and the community. It seeks to answer the question what is the effect of law on policing outcomes. While it is acknowledged here that the effect of new law in the regulation of policing is important, it seeks to understand the instrumental use of law and non-rational uses of law and how they affect policing. The study therefore seeks to examine whether the introduction of new laws affects local policing groups and the extent to which it has shaped relations between state and society.

1.3. Theoretical Framework

A number of theories have been advanced in conceptualizing the use of law in effective regulation of local policing groups involved in tackling crime. Common approaches like the law and order approach have advanced arguments in favour of increased state regulation represented by enactment of tougher laws and instrumental use of the force of law to tackle crime and violence applied by non-state policing groups like vigilante²⁵.

Other theories like rational-legal authority reassert the state's monopoly over violence hence state response to non-state actors through reciprocal force, crackdowns, bans and punishment. The rationale for increased regulation is two-fold; that vigilante groups (and associated violence) will be crushed, and, that non-violent local self-policing initiatives will thrive at the local level. Despite the tough stance, these approaches to application of law

²⁵ Weatherburn D. (2004) Law and Order in Australia: Rhetoric and Reality (Federation Press: Annandale) pg.29

have been ineffective in achieving stated objectives²⁶. Weakening of vigilante groups and transitions to new forms of local policing have emerged owing to nuanced understandings and uses of the law rather than the much publicized instrumental application of the law. Rational-legal authority approaches have been applied to justify instrumental uses of law in tackling crime to little success and have had *unintended consequences* of facilitating sungusungu strategy shifts in political participation rather than eradicating it altogether.

The study urges a refocus to view “law” as a form of social control that can be understood better by examining how society shapes legal institutions. Rather than focus of the instrumental aspects of the law by having our fixation on controlling behaviour and sanctions, we ought to look at its effects and facilitative aspects.. Applying this conceptual shift, it conceptualizes a meaning of law different from formal law (law in the books) that is discernible from important activities, expressions and uses situated within societies (law in action). This view is advanced by the advanced in legal sociology approaches which the study identifies as the most applicable to its objectives. Legal sociology is a term applied in the study that aggregates theories of law that seek to advance and situate an understanding of law in its social context, including Pound, Parson and Harris.

Broadly, sociological jurisprudence sought to distinguish between written law (law in books) and quotidian experiences of law, which Roscoe Pound referred to as *law in action*. Sociological jurisprudence scholars like Pound tried to use various other social sciences to understand the role of law as a tool for both *social control* and *improvement* of the society. Law is an instrument of social control as it is not only coercive (backed by the state) but also because it has ends which may be improved and expanded through a conscious effort to achieve its goal of social engineering. For the sociological jurist, the only legal precepts that matter are the ones that result in the most *effective laws* and subsequently, the philosophy of sociological jurisprudence tends to be *pragmatism*²⁷. While the sociological jurist’s

²⁶Ruteere M. Mutahi P., Mitchell B., & Lind J., (2013) Missing the Point: Violence Reduction and Policy Misadventures in Nairobi’s Poor Neighbourhoods Evidence No. 39 (IDIS: Surrey)

²⁷Gardner J. (1961) The Sociological Jurisprudence of Roscoe Pound (Part 1) Villanova Law Review Vol. 7 Issue 1 (available at <http://digitalcommons.law/villanova.edu/vlr/vol7/iss1/1>) 1-26 at p.2 (last accessed 2 March 2017)

interest is in the nature of law, this is mostly in relation to the way the legal precept can be used as an *effective tool in the service of the society*.

In the study of local policing groups in Kisii, there was a paucity of data necessary to test the content and scope of application of the concept of justice, hence the inclusion of theories of justice made secondary to those on law in the conceptual framework. Data was limiting in both substantive (outcome) and procedural (process) aspects of justice to warrant separate treatment from the issue of law enforcement. Limitation was encountered in both the *state* legal system and local *societal* governance mechanism. For example, in state legal systems studied including courts, police and directorate of prosecution, only two relevant cases had been determined both leading to acquittals. In the study justice is not treated separately from law, it is aggregated as part of it instances where study analyzes law enforcement. Indeed in many of the instances of local policing groups' interaction with the law, notions of justice are invoked. For instance discussions in Part II on similarities between the groups on importance of adherence of the connotations of justice strongly emerge. Subsuming justice in the law is not a relegation of the significance of the concept rather it is an acknowledgment of inherence of justice in law. Such treatment is in alignment with the sociological banner that the *social end of law is justice*.

This conceptualization of law resonates well with society centred approach to state-society relations. It advances the argument that where these two specific alternative conceptions of state-society relations and law converge they provide an appropriate understanding of new local governance forms that have emerged in local policing in Kisii County.

The study therefore is premised on a theoretical analysis that seeks to combine specific elements of theories of state-society relations and legal sociology. The study adopts society-centred approaches to state-society relations which are different from the predominant conceptions largely based on statist conceptions to state-society relations. Statist conceptions make the assumption that all important policy making resides with the state.

The study therefore applies society centered state society relations and legal sociology theories. Society centred state-society relations theory focuses its attention towards

analysis of *social bases of political processes*. Society based state society theory posits that political processes that affect relations between the state and society are better understood by examining society actors and activities at the society level. Legal sociology similarly is concerned in understanding law by giving attention to the influence that society has towards law. It places emphasis on a meaning of law that can be discerned from everyday practices and implementation of law by societal actors in societies. The study seeks to draw specific elements from each of the theories that converge in the explanation of emergent local governance mechanisms as practiced in Kisii County. The elements of the combined model and its relation to new forms of local governance mechanisms are explained further in chapter 2.

Frame for Structure and Analysis

Complementary to the model developed in chapter 2, an expedient frame for analyzing and data was formulated²⁸. Data collected on *sungusungu* and OCP was organized under the following categories for description of the characteristics of the group: Establishment of the group; organizational structure; mode of operations; financing; implementation of law/role in elections; and challenges. The categories set out above were mainly applied in structuring and managing data from the cases (excluding contextual information on the origins of the groups in the beginning of the chapters) in Chapters 5 and 6, which largely entailed the description and characteristics of the local policing groups (*sungusungu* and OCP). The data was further analyzed using the theoretical framework.

The theoretical framework constituting the combined model (legal sociology and society centered state-society relations) was weaved in the analysis of the effect of law and political dynamics, in cases where they emerged throughout the study, namely, in the analysis of the regulatory framework and case law in Chapter 4, description of groups in Chapters 5 and 6, comparative discussion of the cases and analysis of the findings in Chapter 7 and evaluation of the implications in Chapter 8.

1.4. Objectives of the Study

²⁸ Drawing from the approach applied by Wiper A (1977) *Rural Rebels Study of two Protest Movements in Kenya* Nairobi: OUP at p. 16

Broadly, the study aims to assess the effect of law and justice on the nature of local policing groups. It also examines relational aspects between state and society, attendant political processes and the extent to which these affect local policing outcomes. The study seeks to inquire into the broad objective further by addressing the following specific objectives;

- a) To examine the place of law in determining the nature of local policing mechanisms and to assess the extent to which the law has functioned in shaping the trajectories of emergent local policing groups in Kisii County
- b) To examine the political processes and social dynamics affecting the practice and relations of state and society participants involved in joint local policing mechanisms
- c) To evaluate the implications of law and state-society relations on the nature of policing and suggest alternatives for better representations of the role of law for purposes of improving governance.

1.5. Research Questions

The study has formulated the following questions to be addressed by the study;

- 1. What is the place of law in determining the nature of non-state policing and to what extent has the law functioned in the transition of non-state policing from vigilantism to community policing in Kisii County?
- 2. What extent have non-legal, social and political dynamics catalysed transition(s) from vigilantism to community policing and has this effectively resulted in less vigilantism and increased resort to democratized non-state policing?
- 3. What are implications to understanding the function of law and non-state policing and what measures can be suggested to improve the quality of law enforcement?

1.6. Hypothesis

If, in joint governance arrangements, there is increased government through increased instrumentalization of law and state dominance coupled with, the exclusion of society actors characterized by minimal participation of community members then; there is likely to be ineffective governance mechanisms and ineffective forms of local policing in Kisii County.

1.7. Site of Study

1.7.1. Kenya

Kenya is situated in East Africa between the latitudes 4° 28' S and N, and between 34 and 40 degrees East meridian. It is a founder member state of the East African Community, which is a regional economic cooperation bloc that includes Tanzania, Uganda, Rwanda and Burundi²⁹. Kenya is the second largest country in East Africa covering an area of 582,646 km². It gained its independence from British colonial rule in 1963. The independence Constitution was modelled under the Westminster settlement which provided for powers and functions of the organs of the state³⁰. After independence in 1963, Kenya was divided into 8 regional administrative units known as provinces, namely Rift Valley, Coast, Nyanza, Central, Nairobi, Western, Eastern and North Eastern. Several constitutional revisions were made since independence largely to serve political expediencies but none were more fundamental than adoption of a new Constitution in 2010.

By virtue of the new Constitution, Kenya has two levels of government, namely, national government and county governments. National government is headed by the President. The National Government Coordination Act provides for representation of national government functions at the local level through constitution of administrative units from Regions, counties, locations to sub-locations which form the most basic administrative unit.

Under the new governance structure, Kenya is also divided into 47 county governments, based on districts as provided under the Districts and Provinces Act³¹. The devolved

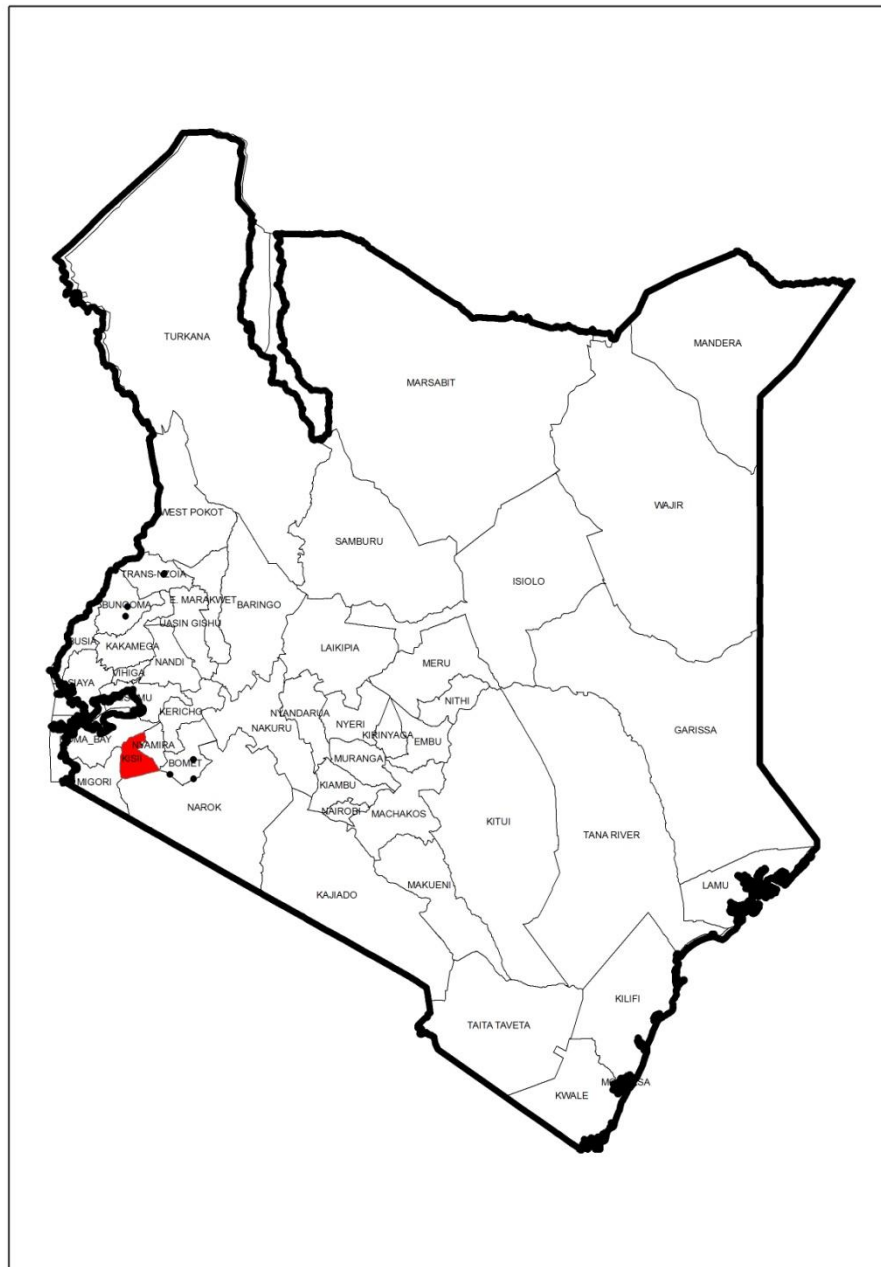
²⁹ Treaty for the Establishment of East African Community available on http://www.eac.int/sites/default/files/docs/treaty_eac_amended-2006_1999.pdf last accessed 5 May 2017

³⁰ Constitution of Kenya, 1963

³¹ Act No. 5 of 1992 available on kenyalaw.org/Acts%20and%20Regulations/Districts%20and%20Provinces%20Act last accessed 5 May 2017

governments are headed by Governors. Amongst the 47 counties is Kisii County which forms the overall area of study. The research was undertaken at the sub-location and locational levels. Both local policing groups in Kisii, namely, community policing and vigilantism are structured in accordance with existing national government administrative levels from county level to the most basic unit of administration, that is, the sub-location.

Figure 1.1: Map of Kenya



Source: Osire, R.

(2017)

1.7.2. Kisii County: Socio-economic and Political Landscape

Kisii County is situated in the south-western part of Kenya in the former Nyanza province. It lies south of the equator and its geographical coordinates are 0° 41' 0" South, 34° 46' 0" East³². It is bordered by Nyamira County to the North East, Migori County to the South West, Narok County to the South East, Bomet County to the East and Homabay County to the North. It is largely inhabited by the Gusii people. However, the administrative capital, Kisii town is cosmopolitan area consisting of ethnic communities from neighbouring counties including Kuria, Luo, Kipsigis, Maasai, as well as communities from other counties including Kikuyu, Luhya and Kamba. Kisii county covers 1317.4 km² and a population of 1,152, 282, comprising 550,464 males and 601,818 females³³. Kisii has a high population density of 874.7 people per km² which has affected use and access of land. Land related tensions and conflict has also been attributed to population pressure³⁴.

Situated in the highlands west of Rift Valley, with an average elevation of 1700 m, a significant area of the County is arable land with rich volcanic soil. Kisii County also receives reliable rainfall throughout the year recording an average annual rainfall of 1500mm. The main economic activity undertaken in Kisii County is agriculture. The fertility of land and reliable rainfall make it conducive for sustenance of farming. The main agricultural activities comprise cash crop farming, livestock production, small-scale grain and vegetable farming. The main cash crops include tea and coffee. The state corporations like Kenya Tea Development assist the local farmers to process and marketing their products for export.

Livestock production including rearing livestock for beef and dairy produce remains small-scale. Dairy farmers lack organized marketing systems to link the subsector with commercial

³² www.maplandia.com/kenya/nyanza/Kisii

³³ Kenya Population and Housing Census (2009) Population Distribution by Age, Sex and Administrative Units, Volume I C Retrieved from http://www.knbs.or.ke/index.php?option=com_phocadownload&view=category&id=109:population-and-housing-census-2009&Itemid=599

³⁴ Boone, C. 2014 *Property and Political Order in Africa: Land Rights and the Structure of Politics*. (New York: Cambridge University Press)

dairy companies. There are very few cooperative societies involved in the marketing of dairy farming despite its potential. Similarly, beef is sold to the local markets as there are no meat processing companies in the County. Despite its fertility of Kisii County, productivity has been affected by fragmentation of land due to high population density.

Figure 1.2: Map of Kisii County

hosting over 17 commercial banks and micro credit institutions. According to estimates by the County government, financial market in Kisii accounts for 60% of money transactions in Nyanza Region (which includes Kisumu), prompting the County government to petition the Central bank to establish a branch in Kisii Town, to help in cutting costs for handling and transferring money³⁵.

Despite the vibrancy of trade and financial sectors, poverty levels pose key challenges to the wellbeing of a significant majority of Kisii County residents. A recent survey by Institute of Economic Affairs (IEA) on the monthly consumption rates shows that Kisii lags behind most counties on the average monthly consumption rates per person. The average monthly spending power is Kshs. 7769 (approximately \$70) well below the national average which is Ksh.9237 (approximately \$90)³⁶.

In line with the new constitutional dispensation, the two levels of government are represented at each County. For representation of the local citizens at the national level, Kisii County is divided into nine (9) parliamentary constituencies namely Nyaribari Chache, Nyaribari Masaba, Bobasi, Bomachoge Chache, Bomachoge Borabu, Kitutu Chache North, Kitutu Chache South, South Mogirango and Bonchari. It is from these constituencies that citizens elect politicians to represent them in the National Assembly. The functions of government departments are exercised by county coordinators on behalf of the Executive. Under the devolved system, Kisii County is divided into 45 electoral wards dispersed among the 9 constituencies. From these wards, citizens elect persons, namely; members of county assembly (MCAs) to represent them in the County Assembly. Bobasi has eight (8), the largest number of wards while Bomachoge Chache has three (3 wards) which is the lowest number. Nyaribari Chache and South Mogirango both have 6 wards. Also, Nyaribari Masaba and Kitutu Chache South both have 5 wards. Bonchari and Kitutu Chache North and Bomachoge Borabu have 4 wards each³⁷.

³⁵ www.kisii.go.ke/index.php/county-profile

³⁶ Daily Nation (2016, June 7) p. 10

³⁷ www.kisii.go.ke/index.php/county-profile/county-administrative-units

Since the advent of the multiparty system in 1992, there has been no dominant political party in electoral politics in Kisii County save for the 2002 elections, where a majority of Members of Parliament (MPs) were elected to office on a Ford-People ticket. The Forum for Restoration of Democracy-People (Ford-People) party was led by Honourable Simeon Nyachae, a former powerful bureaucrat who was once the Head of Civil Service³⁸. In a period of 5 years, Ford People had lost its popularity, where Hon. Simeon Nyachae himself was ousted from office by a newcomer Dr. Robert Monda in the 2007 elections³⁹.

The youth⁴⁰ population in Kisii County in 2012 was 385, 143 representing 31.4 % of the total population⁴¹. The youth account for 61% of the total unemployed persons in Kisii County, are within this age group. It is projected that by 2017, the number of unemployed youth will have risen to 518, 774.

The county's labour force (persons aged 15-64) is 695,024 people with 318,510 males and 376,513 females. This age group represents 56.7% of total population. Most labour is unskilled with only a small percentage engaged in formal employment. Most engage in small scale subsistence farming. Only 46% of labour force is literate (implying 54 % cannot join formal economy)

Under the traditional system, the equivalent of employment was accounted for through organized groups called *Ebisarate*. *Ebisarate* provided an arena for the youth to undertake social, economic and political activities. *Ebisarate* were encampments situated in strategic geographical locations throughout Gusii land where "all able-bodied young men from the same lineage or clan were supposed to live together...to protect the community against any form of external aggression...it was in these encampments that livestock, specially cattle, belonging to different homesteads that belonged to the same kinship were kept for security reasons (to minimize theft and loss of livestock due to attacks from cattle rustlers and wild

³⁸ Throup D. & Hornsby C. (1998) Multi-party Politics in Kenya; Kenyatta and Moi states and the Triumph of the System (James Currey)

³⁹ Nyasato R. (2007, December 30) "Kisii Embraces Generational Change as Nyachae Packs" *The Standard*

⁴⁰ Youth is defined in the study as persons aged between 15-30 years different from the constitutional definition. Article 260 states that youth is "the collectivity of all individuals in the Republic that have attained the age of eighteen years but have not attained the age of 35 years"

⁴¹ www.kisii.go.ke/index.php/county-administrative-units/item/1575-demographic-features last accessed on 21 May 2017

animals)”⁴². The youth were supposed to keep constant vigil over the livestock, especially at night when the enemy and/or cattle rustlers were most likely to attack. They also took turns to make regular surveillance in areas adjacent to the various Gusii homestead and were responsible for fending off any possible external aggressor and/ or enemy attack”. The *Ebisarate* was the main source of socio-economic and political activity that kept the youth occupied in traditional society.

1.8. Methodology

This section provides an overview of the research techniques and methods used to collect data in the study. Following up on the background to the site of the study provided above in 1.6, this section provides the methods used in the study to collect data.

1.8.1. Qualitative Research Design

Broadly, the study largely comprised of qualitative fieldwork and a desk review of primary and secondary sources. The methods used in collection of information that were relevant to this study were guided by the nature and objectives of the study. The study intended to undertake in-depth analysis of the character of policing at the sub-national level and to capture how such policing is shaped or influenced by increased regulation by law. The study therefore undertakes qualitative research as best suited method for collection of perceptions and opinions on character of non-state policing in administrative units in Kisii County. A number of qualitative methods were used to collect data and each method was found to be appropriate for the issue being researched on, the research question it was intended to answer and the category of respondents.

1.8.2. Non Random Sampling Techniques

Most of the data was collected through non-random sampling techniques. Non probability sampling is used when a researcher is not interested in selecting a sample that is representative of the population. Most qualitative studies use non-probability samples

⁴² Akama J (2017) *The Gusii of Kenya: Social, Economic, Cultural, Political and Judicial Perspectives*(Nairobi: Nsemia) p. 168

because the focus is on in depth information and not making inferences or generalizations⁴³. Largely, information was collected through non-random sampling because of the nature of the study, which was focused on in-depth information from members and former members in establishing the proliferation and internal dynamics of *sungusungu*. The *sungusungu* is a vigilante group that undertakes overt law enforcement. Unlike other non-state groups like the local community policing initiative, identity of its members is not easily discernible.

1.8.3. Primary and Secondary Sources

The distinction between primary and secondary data sources according to Mugenda and Mugenda is that “primary data refers to information obtained from the field i.e. from the subjects in the sample...secondary data refers to the information a researcher obtains from research articles, books, casual interviews etc.”⁴⁴ Applying this categorization, the data for the study was sourced both from primary and secondary sources. The major primary data was sourced during the fieldwork which entailed the collection of information through interviews and observation⁴⁵.

In collecting primary data, the main research instrument employed was interview which involved use of both semi-structured and unstructured interviews. Mugenda and Mugenda observe that “interviews are advantageous as they provide in-depth data, are flexible and very sensitive and personal information can be extracted from respondent by honest and personal interaction between the respondent and the interviewer”⁴⁶. Interviews were preferred instrument as it enabled sensitive information on internal dynamics of vigilante groups, areas of operation, methods of sanctions and personal information about the leader and group members.

In collecting information from *sungusungu* members and former *Sungusungu* members on the nature of activities, internal dynamics, operation, and hierarchical structure of the group, purposive and convenient sampling methods were applied, in particular, sampling

⁴³ Mugenda O. and Mugenda A. (2003) Research Methods: Quantitative and Qualitative Approaches (Nairobi: ACTS)

⁴⁴ Ibid at p. 12

⁴⁵ Ibid

⁴⁶ Ibid at p.29

was conducted through snowballing technique as respondents were contacted through reference networks. The methods employed included: in-depth unstructured interviews; non-participant controlled observation when collecting information on *sungusungu* and the participation in politics and elections. Semi-structured interviews were administered to local police, chiefs and assistant chiefs. Unstructured interviews were also administered to a number of government officials including key informants attached to the police reforms secretariat who were willing to engage in longer conversations. Responses on the utility of community policing were sought from citizens who were sampled through random techniques. Semi-structured interviews were preferred to close ended interviews in order to collect their perspectives and opinions on level of security and impact of community policing. Data collected from interviews was documented in written form and some interviews were recorded. Recordings were transcribed, translated and edited to allow for analysis.

Secondary sources have also been consulted in developing the content of chapters. A major secondary data source is academic literature contained in text books and scholarly journals. Academic texts in diverse fields including law, political science, history, anthropology, criminology and sociology; that addressed issues on law democracy and policing that were relevant to the study were referred to. Secondary data was also sourced from government reports, civil society organization publications, conference papers, newspaper reports and unpublished thesis. The review of academic literature is important as it enables establishing available information on phenomena of interest under study and it also provides a framework for analysis and interpretation of research findings of the study⁴⁷. Further as Creswell observes, analysis of secondary data is important as it; relates to the study to a broader on-going debate in the literature, fills gaps and extends prior studies⁴⁸. It also provides a framework for establishing the importance of the study as well as provides a benchmark for comparing the results with other findings.

The Constitution of Kenya (1963) and the Constitution of Kenya (2010) were reviewed. Analyses of statutory law relevant to regulation of policing have also been reviewed in

⁴⁷ Ibid.

⁴⁸ Creswell J (2013) Qualitative Inquiry and Research Design, 3rd Edition (London: Sage) p.23

depth. The relevant laws include the Prohibition of Organized Crime Act and the Penal Code. Other statutes that have been reviewed include Elections Act, District and Provinces Act, Chief's Act and County Governments Act. Basic archival research was also conducted by examining parliamentary documents like the Hansard to establish the objective, rationale and policy behind the enactment of the Prevention of Organized crime Act and policy informing increased regulation of non-state policing groups.

1.8.4. Case Study

The case study method was also employed in collection of data on the operation of *sungusungu*, establishment of community policing and emergence of nuanced non-state policing. Using the methods detailed above, information was collected from cases namely; Kisii Central (Bosongo and Nyanchwa locations) and BirongoWards (Taracha location). The cases selected at the locational level and sub-locational levels constitute the most basic administrative units representative of national government.

The cases were selected purposively and conveniently. The study entails a comparison of varied cases in different areas of Kisii County. Non random sampling was employed. As the study involved interviewing respondents with confidential and privileged information including vigilante, ex-vigilante members, police and community policing members, considerations of selecting main cases was made based on feasibility of collection of data, availability of would-be respondents and reliability of referral networks. It was also important to examine cases where information about the operation of non-state policing groups (both vigilante and community policing) was readily available. Hence cases were selected where there was information about functioning and/or institutionalizing non-state policing initiatives, information about continued robust operation of vigilante were found suitable and chosen for study in line with the non-random technique.

Two different areas in Kisii County were selected, for comparative purposes in line with the objective of achieving variation. As Boonenotes, case variation is important comparisons and contrasts that emerge in the cases allow us to draw out the broader political implications for

understanding political conflict and political integration in African states and societies⁴⁹. The cases were selected where *local policing* groups including vigilante and new community policing were in operation between 2003 and 2016. *Nyumba Kumi* as a local policing mechanism was also excluded from in-depth analysis as it has not fully institutionalized in Kisii County since its introduction in 2013. There is not much development in institutionalization of *Nyumba Kumipolicing* initiative in terms of legal protection, provisions, implementation and practice.

Case 1: Kisii Central Ward

Kisii Central is an important study area as the *sungusungu* headquarters is situated here. Kisii Central Ward represents the most urbanized part of Kisii County with a concentration of all major trading, financial, educational activities. It is the administrative capital of the County. The Kisii County government and the County Assembly have their headquarters in Kisii Central. It also serves as the financial centre where financial institutions. Major public tertiary institutions with their headquarters in other counties have their campuses located in Kisii Central. Kisii central ward is one of the wards in Nyaribari Chache Constituency. Other wards are Bobaracho, Kiogoro, Keumbu, Ibeno and Birongo. (See Figure 3)

According to the 2009 census, Kisii Central has a population of 100,000 residents which accounts for about 10% of the county's population⁵⁰. Like the rest of the areas in Kisii County, population density is high with the average standing at of 874.7 people per km².

There are three locations in Kisii Central ward namely; Nyaura, Bosongo and Masongo. Each of the locations have two sub-locations each. Nyaura location has two sub-locations: Nyaura and Kiamabundu. Masongo location comprises; Masongo and Otamba sub-locations. Bosongo Location comprises; Township and Nyanchwa sub-locations.

⁴⁹ Boone C. (2014) *Property and Political Order in Africa* (New York: Cambridge University Press)

⁵⁰ KNBS (2010) "The 2009 Kenya Population and Housing Census: Counting our People for Implementation of Vision 2030" Volume 1 C (Nairobi: KNBS)

Figure 3: Nyaribari Chache Constituency County Assembly Wards



Source: IEBC 2013

Birongo Ward: Taracha Case

Birongo Ward is an important site of study because it is one of the areas where new community policing has been established in Kisii County. Taracha is one of the locations that make up the Birongo Ward within Nyaribari Chache constituency. Taracha location consists of three (3) sub-locations; namely; Taracha, Irondi and Nyabiosi. Each sub-location is headed by an Assistant Chief who reports to the Chief. Birongo is situated along Kisii-Nairobi highway. It represents the urban part of the location where most of the trading takes place. This is where the most wholesale and retail shops are located as well as the local produce market. The police post is also located here while the Taracha Chief's office is 1 kilometre away.

1.8.5. Data Analysis

Data was analysed using qualitative content analysis and interpretive text analysis. Qualitative content analysis was used in the extraction of the text data which was primarily collected from interviews. The text data consisted field notes and text transcribed from recorded interviews. Most of the interviews with *sungusungu* members and members of community policing group were in *Ekegusii* language which required translation. With the help of research assistants who were conversant with the *Ekegusii* language, the recorded interviews were transcribed verbatim and translated into English.

Drawing from a model developed by Glaser and Laudel, data was analyzed through qualitative content analysis. It applies a sequence of linking data to first identified and located in the text compiled from semi-structured and unstructured interviews. Since not all that was said by the respondent may be relevant to research questions and objectives, this first stage is important in sorting out the relevant information from the bulk of the information collected. The raw data was structured by placing the data in categories and themes. Patterns of recurring descriptions of conditions, outcomes, and events were then identified, explained and interpreted. Presentation of the data collected from the cases followed a narrative structure. The van Maanen "realist tale" approach was applied in

structuring the presentation⁵¹. Based on the responses from the interview, the narratives entailed description of details, quotes from the respondents and my interpretation of the events described and my first hand experience in stances where observations were made.

1.8.6. Validity and reliability

Validity and reliability were ensured through several procedures. Creswell describes validity as a checking for the *accuracy* of findings by employing certain procedures while reliability indicates the researcher's approach is consistent across different researchers and different projects⁵². Validity has also been described as the degree to which the results obtained from analysis of the data actually represents the phenomenon under study⁵³. On the other hand, reliability refers to the consistency of the researcher's approach across different research projects. Reliability is a measure of the degree to which a research instrument yields consistent results or data after repeated trials.

In order to establish validity Creswell advocates for the use of more than one procedure. The study applied triangulation to ensure validity of results. In the study data was triangulated through application of multiple sources of data including interviews, observations and documentary review. Creswell explains that "if themes are established based on *converging* several sources of data or perspectives from participants, then this process can be claimed as adding to the validity of the study"⁵⁴. In other words, where one data source point to an existence of a certain characteristic, and another data source or other data sources points to similar results, such convergence points to the accuracy of findings, and therefore adds to its validity. For example, in the study of non-state policing, where information from interviews and observation, point to fact that policing patrols are undertaken by local policing groups at night, the combination of the two sources add to validity of the fact or event that is sought to be established. Participants in the interviews were also involved in checking the accuracy of analysed data through multiple visits, follow-

⁵¹ Creswell (2013) *Qualitative Inquiry and Research Design: Choosing Among Five Approaches*, 3rd Edition, (London: Sage) p. 403

⁵² Ibid at p. 404

⁵³ Mugenda O. and Mugenda A. (2003) *Research Methods: Quantitative and Qualitative Approaches* (Nairobi: ACTS) p. 99

⁵⁴ Creswell (2013) *Qualitative Inquiry and Research Design: Choosing Among Five Approaches*, 3rd Edition, (London: Sage) p. 404

up and repeat interviews. Questions that guided the feedback included: Is our description of the events accurate? Are the patterns we have identified consistent with your experience? Are there some important incidents that we may have missed in our account?⁵⁵ This was an on-going process through-out the period of fieldwork and it added to the validity of the findings of the study.

To improve reliability, the raw data was checked to ensure that there were no mistakes during transcription. This ensured that there was consistency between the information collected and the phenomena under study.

1.9. Chapter Breakdown

The thesis is divided into two Parts each with four Chapters. Generally, Part 1 introduces the nature of the study, stating its objectives and approaches of the study. It provides a brief geographical and demographic background of study locale and units of analysis to give an insight into areas chosen for study. It also lays down the conceptual and contextual landscape (historical, political and legal) of policing.

Part 2 presents different information collected primarily from the field in relation to nature of non-state policing. It also collates the patterns in the text, findings and provides interpretation of data.

PART 1

Chapter 1: General Introduction

The first chapter provides an overall introduction to the study. It states in general terms; the research problem, objectives, and, frames the general and specific research questions and formulates the hypothesis for study. It sets out the methodologies applied in data collection and provides a general description of the study locale setting out the geographical, demographic and historical landscape of the site of the study.

⁵⁵ Questions were modelled upon descriptions in Creswell (2013) *Qualitative Inquiry and Research Design: Choosing Among Five Approaches*, Third Edition, (London: Sage) p. 403

Chapter 2: Theoretical Framework: State-Society Relations and Legal Sociology in Governance

This chapter explains the main concepts in the study by looking at prevailing theoretical propositions of the place of law in regulating non-state policing. It examines the content, scope and limitation of these propositions and explores alternatives with the potential of strengthening and bridging gaps in the theoretical underpinnings of existing legal and policy interventions.

Chapter 3: Social Historical and Political Context of Policing In Kenya

The chapter entails a historical account of the character of policing as shaped by evolving social, political and legal conditions. It reviews nature of policing in pre-colonial, colonial, independent Kenya through to 2010. It traces legal and policy developments on policing resulting into regime policing which was shaped by political interests of colonial government. The analysis also reveals that post-colonial policing by successive governments reveals continuities in the style of policing despite *Africanisation* of the police further creating distance between the police and the policed.

Chapter 4: Policing Reform and Regulation: Constitutional and Legal Framework 2010-2016

The chapter examines a number of political and legal reforms that were initiated by the government in 2010 as a means of policing reform. These reforms were geared towards facilitation of community oriented policing and regulation of non state policing like vigilantism which was classified as organized crime. The chapter examines the design, content and rationale of main provision of Prevention of Organised Crime Act. It also analyses relevant provisions contained in the Penal Code that relate to regulation of coercive and criminal forms of non-state policing.

PART 2

Chapter 5 Local Policing in Kisii County: History and Evolution of the Sungusungu

The chapter examines the organization of non-state policing groups in Kisii with a focus on *sungusungu* and new community policing groups. It describes the structure, membership

and internal dynamics of the groups. The chapter also examines the operations and activities of respective groups, including, methods of investigation, arrest and punishment of offenders employed by group members.

Chapter 6: “New” Community Policing in Kisii County

The chapter evaluates the effect of the character of policing attributable to the instrumentalization of new law in the regulation of non-state policing groups. It examines the place of law in the shaping of non-state policing in Kisii County and transitioning from vigilantism to the state led community policing initiative.

Chapter 7: Vigilantism to Community Policing in Kisii County: Dynamics Continuities and Transitions

The chapter evaluates information collected in the cases examining *sungusungu* and community policing in Kisii. It assesses society-based implementation of law alongside important political processes at the local level and the extent to which they have shaped synergies in local governance arrangements. It also analyzes the place of non-legal dynamics in catalyzing nuanced forms of community oriented policing.

Chapter 8 Conclusions, Implications and Prospects

The chapter sets out the conclusions on the findings from preceding chapters. It also reviews implications of theories of state-society relations and legal sociology on governance. It explores prospects of policy and legal reform on policing.

This chapter has examined the problem of enforcement of laws, regulation of local policing, and deficient relations between the state and society providing a broad context of the nature and extent of the problem in Africa. The challenges that regulation of non-state policing portend for African society, is no different in Kenya. It is observed that the dynamics of non-state policing continue to challenge prevailing orthodoxies on suitable regulative mechanisms in tackling them as manifested in the emergence of nuanced forms of policing. The chapter provides a general introduction into the context of the problem, research problem, research objectives, research questions and the approach to the study, which comprises theoretical framework and methodology design employed and strategies for

collection of data. Building on the general introduction, Chapter 2 reviews existing conceptual descriptions of non-state policing. By exposing their limitations, the study advances an integrated conceptual model unifying law and democracy theories as an appropriate approach to better regulation of non-state policing.

CHAPTER 2: THEORETICAL AND CONCEPTUAL FRAMEWORKS ON STATE-SOCIETY RELATIONS AND LEGAL SOCIOLOGY IN GOVERNANCE

Introduction

In chapter 1 of the study, it was noted that the study is premised on a theoretical analysis that combines specific elements (theories) of state-society relations and legal sociology. It was further noted that the specific elements (theories) of the combined model and its relation to new forms of local governance mechanisms will be discussed in detail in this chapter. This chapter, therefore, evaluates the theories on state-society relations and legal sociology as dimensions of governance with a view to understanding political and legal processes in community governance systems in Kisii County. Prevailing statist perspectives are examined and critiqued for their relevance in explaining and understanding contemporary practices of policing. Nuanced approaches are advanced providing alternative viewpoints to emergent practices of everyday policing in Kisii County.

2.1. State-Society Relations Theory

The role of the state or its centrality has over the years come under increased critique. As March and Olsen observe, “In contemporary theories of political science, traditional political institutions Legislature Executive Judiciary, the state, legislature and legal system; and economic institutions like the firm *have receded in importance* from the position they held in earlier theories of Burgess, economists like Commons and sociologists like Weber”⁵⁶. Yet it has not lost its importance as a critical institution in determining political processes. Like March and Olsen state “Modern dynamics of modern institutions has necessitated examination of institutional perspective and their effect on society”. Indeed, there have been lucid analyses supporting the importance of state institutions in explaining phenomena through historical approaches⁵⁷. Despite recession of significance of institutionalism, alluded to by March and Olsen, institutional perspectives have recently

⁵⁶ March J. and Olsen J. (1989) *Rediscovering Institutions: The Organizational Bases of Politics* (New York: Free Press)

⁵⁷ Pierson P. & Skopcol T (2002) *Historical Institutionalism* In Katznelson I (ed.) *Contemporary Political Science in American Political Science*, 693-722 New York, USA; Norton

reappeared in explaining the importance of understanding the organization of political life⁵⁸. In her work, Boone explains how land tenure institutions are critical in determination of political process in the rural economy.

The centrality of state has equally divided opinion amongst scholars of state society relations. Conceptualization of the “state” and its privileged place in government and society relations has been the subject of much scholarly attention replete with diverse approaches. The field of study encompasses divergent views relating to classical and contemporary approaches to understanding relations between government and society. A new body of literature has emerged seeking to provide new directions and perspectives that call for a rethinking of understanding of state-society relations in the context of governance. The study draws from Sellers’ perspective that provides contemporary perspectives on state-society relations (in the face of nuanced shifts from the study of government to governance) which have a useful bearing to the approach adopted in this study. Two main perspectives have been advanced⁵⁹.

The first approach is a state-centred conceptualization of state society relations. Under the statist approach, the study of state society relations is about the study of the “state” itself. Seller’s states this is still the case “despite the elusiveness of *stateness* and fluctuating fortunes of the concept”⁶⁰. The statist approach still dominates studies on state-society relations as even leading scholars in developing countries like Kohli, Migdal and Evans aiming to show the limits of the state’s authority and monopoly, still apply a Weberian conception of the state⁶¹. For instance, Migdal notes that in the contemporary world the state is perceived as the model of political order and thus it has been adopted as the means to the achievement of economic development and social modernization⁶².

⁵⁸ Boone, C. (2013) *Property and Political Order in Africa: Land Rights and the Structure of Politics* (New York: Cambridge University Press)

⁵⁹ Sellers J. (2011) *State-Society Relations* in M. Tevir (ed.) *Handbook on Governance* (Sage: London) p. 124-142

⁶⁰ *ibid* at p.124

⁶¹ *Ibid* atp. 125

⁶² Lambach, D. (2004) “State in Society: Joel Migdal and Limits of Political Authority” Paper for “Concepts Beyond the Nation State: Cosmopolitanism, Territoriality, Democracy”, Danish Political Theory Network Conference, University of Copenhagen, Department of Political Science Copenhagen, 27-30 October 2004. p. 4

The limitations of the statist approach are evident in the assumptions that it adopts. Firstly the assumption is made that, state and society are dichotomous and mutually exclusive. Invoking the Weberian definition of the state, statist approaches assume a unitary notion of state itself⁶³. Secondly, it is assumed that relations between the state and society can be aggregated throughout a nation State. In other words, it is problematic to conceptualize the state as a *complete separate entity from society*. It is also problematic to view the state as an aggregation of homogeneous state actions, institutions and policies without diversity. The state is much more than an entity comprised on homogenous state institutions and actors. It is *disaggregated in different ways with diverse organizational designs, distinct unique practices and diverse functions*.

Lund's analysis on institutions and the exercise of public authority also problematizes the privileging of the state in state society relations. He proposes a refocus away from the state to also include happenings in societal activities. He posits that in order to understand how political power is exercised, we need to look into *processual aspects of the formation of public authority, in particular, how it takes place in day to day social encounters*⁶⁴.

However, despite the criticisms on state centred approaches to state society relations, the basic concern for state-society as a field is the focus on the interactions and interdependence between state and society. There is a realization that in field of state-society relations, none of the two entities can dismiss the others importance as described by Sellers. He observes that, "Just as state-centered approaches have increasingly acknowledged the importance of society, society-centered approaches can rarely jettison state actors and institutions as an important element in explanation"⁶⁵. This viewpoint is supported in Migdal's analysis of state-society relations. Migdal theorization of state society relations notes that the relationship between the state and society is not characterized by domination of one over the other as both entities influence each other even where one is weak. The state and social organizations are *continually in competition for social control*. The

⁶³Sellers J. (2011) *State-Society Relations* in M. Tevir (ed.) *Handbook on Governance* (Sage: London) p. 124-142 p.125

⁶⁴Lund C. (2006) *Twilight Institutions: Public Authority and Local Politics in Africa* *Development and Change* Vol. No. 37 (4) pp. 685-705 at p.686

⁶⁵Supra note 59 p. 126

amount of social control an organization has is ultimately determined by the number of people who follow its rules as well as by the motivations of the people in doing so. The *dominant authority determines* who will make rules pertaining to certain segments of the population and this may lead to a shift in the available strategies of survival for the affected individuals thus leading to conflict⁶⁶.

The second approach which is the society-centred approach, conceptualizes the study of State society relations as a field focused on the *interactions and interdependence between state and society*. The society-centred scholars have sought to reach a broad conclusion that; society provides crucial supportive elements for a state to be effective. Society-centred studies have been able to demonstrate an increasing shift away from Weberian conceptions of a unitary state and statist conceptions of state-society relations (government) towards elements of *governance*. A focus on governance rather than government advances the interdependence between state and society as opposed to independence as an important aspect in understanding political processes⁶⁷.

Changes in focus in the study of state-society relations from *government to governance* is a product of the changes in society that have increasingly generated interdependence between state and society reshaping the privilege accorded to state as sole or main determinant of state-society relations⁶⁸. Increased importance of the place of society in state-society relations has been reflected in emergence of new aspects of governance that demonstrate greater interdependence rather than state autonomy. Examples of the new areas of governance are manifest in; policymakers engaged in non-state organizations like nonprofits and charities in the delivery of social and a variety of public private partnerships; decentralization of important policies that have created new local channels of state-society relations; privatization of public companies and services new regulations that seek to

⁶⁶Lambach, D. (2004) "State in Society: Joel Migdal and Limits of Political Authority" Paper for "Concepts Beyond the Nation State: Cosmopolitanism, Territoriality, Democracy", Danish Political Theory Network Conference, University of Copenhagen, Department of Political Science Copenhagen, 27-30 October 2004.p. 6

⁶⁷ Supra note 59

⁶⁸ ibid

compensate for deficiencies in unregulated markets; and, new mechanisms have provided for public and stakeholder participation in policy⁶⁹.

According to Sellers, alternative empirical approaches to state-society relations have been advanced seeking to remedy the limits of understanding interaction between government and society through state-society dichotomy⁷⁰. While they are still applied from the premises of “state” or “society” as main focal point, these approaches employ different empirical strategies with a focus on interactions between societal and state actors in joint processes of governance. Their attention is geared towards *different units of analysis* away from the regular concerns of typical state-centric or society centred analyses of state society relations as explained below.

Limitations of Nuanced State-society and Society centred Approaches

The state centred approach typically focuses on the “top-down” view of actors and institutions at the top of either state or societal hierarchies. The top-down view is typical to political science, public policy and public administration⁷¹. It reinforces statist approaches to state-society relations holding the traditional institutionalism presumption that state-society relations can best be understood from *the perspective of public officials* or other state actors majorly centering on the actions and institutions of the state.

Contemporary studies on state-society relations no longer exclusively focuses on the state and its institutions at the top but on policy making in instances of multi-level *governance at the local* or regional level, aiming to determine how *public officials can act as policy entrepreneurs to bring elements of the state and society together*⁷². As Sellers observes, “Accounts of multilevel or layered governance have gone a step further. Work in this vein demonstrates lower as well as higher levels in state hierarchies have played important roles in policy and governance, and analyzes the interplay between levels.”⁷³

⁶⁹ Supra note 59

⁷⁰ Ibid at p. 130

⁷¹ Ibid

⁷² Ibid

⁷³ Ibid at p. 131

Even so, these nuanced approaches are not without a number of limitations. Firstly, the state centred approach with its tradition of generalization of characteristics of the State has been criticised for failing to capture important elements of the state. Such limitation is as a result of the conceptualization of the State as an aggregation of institutions and actors within it. Secondly, the approach privileges the role and place of state actors and institutions above other actors which has the effect of over-privileging state actors with more power to shape political processes than they actually have. Therefore, adoption of the top-down perspective as *the starting point of analysis* obscures the realization of equally important political processes and outcomes that occur beyond the realm of the State. In other words nuanced approach only in terms of exploring different units of analysis does not rid it off its inherent weaknesses which are attributable to its prioritization of proceeding with analysis of activities at the “top”.

On the other hand, although some society-centered approaches incorporate both “top-down” and “bottom-up”, they primarily focus on the “bottom-up” centered perspective of processes. This entails evaluation of dynamics at the local levels of state and societal organization. The society-centered approach is a popular in sociology and economics studies where more attention is accorded to happenings in society than in the state⁷⁴. Objectives of such disciplines, beyond the state, are focused on assessing the wider impact of the state and its policies in society. According to Sellers, society centred bottom-up approach takes a different tangent from the state centric view as it steers away from examination of interest intermediation and structuralist accounts of classes, regions or aggregated economic interests. Instead it evaluates *agency* in society as the main analytical focus. Its interest is in understanding consequences of governance by examining *relationship between groups, individuals and their influence on processes and outcomes*. It employs different strategies to demonstrate this by: *separating individuals and communities from the State; stressing the role of the local or regional State; and, allowing the State to remain as a disaggregated institution capable of influences external to the State*.

⁷⁴ Ibid at p. 131

The main focus in society-centred accounts is given to activities occurring outside the state broadly classified into two; *collective action* (especially at the local level) and *individual action governance*. *Collective action* at the local level like that undertaken by community based groups is attractive to society-centred scholars as such groups possess the potential of exercising important political processes like *effective local policy making, representation, civic participation* and *effective governance*⁷⁵. *Individual action governance* is also important as it offers opportunity for scholars to study the *action of individuals, families or firms in interaction with the state*. Scholars of legal mobilization examine how individuals innovatively mobilize law and legal institutions to engage with the state and hold it to account by contesting its decisions.⁷⁶

The advantage of bottom-up approaches to state-society relations is that those studies are cognizant of the *complexity of diverse state activities* and the *disaggregation of various relationships within the state*. As a result, bottom-up approaches have a comprehensive appreciation of policy making processes and outcomes and *the social influences on State activity*. Sellers sums up the advantage of society centred accounts employing bottom-up approaches as follows, "Society-centered approaches to the analysis of state-society relations have proceeded from the disaggregated perspective of individuals and communities. This societal perspective from the bottom up offers a vantage point from which to *assess the wider impact of the state and its policies in society*. Simultaneously, this starting point enables an inquiry into what difference citizens, workers, neighbourhoods, or other small-scale groups and individuals have made for policy and implementation...within this general approach, distinct lines of research have adopted a range of alternative views of what it means to center analysis of the state and public policy around the vantage point of society"⁷⁷.

Disadvantages of Bottom-up approaches

Bottom-up approaches to state society relations are not without their disadvantages. Important *indirect state influences* can be missed where Society is privileged a starting point

⁷⁵ Ibid atp. 132

⁷⁶ Ibid

⁷⁷ Ibid

for analysis of state-society relations⁷⁸. Also, bottom up approaches focused on everyday relationships between the citizen and the state have had limited analytical value in explaining “how the *shadow of the law shapes the perceptions and incentives of citizens*, and have *neglected* to capture the ways that *power relationships* can shape and reshape state policy”⁷⁹ To this end, bottom-up strategies should not operate as closed systems focused on societal actions only, they must *consider state traditions* and to what *extent they affect the organization societal groups*. The issue then is to examine ways of reconciling the different viewpoints adopted by top-up approaches and bottom-up approaches so that we do not miss important political processes flowing from state tradition or from the society. The question arises as to how can competing approaches be reconciled to enable comprehensive understanding of state-society relations?

2.1.2. Synthesis of Top-down and Bottom-up Approaches: Reconciling the Tensions

A problem of reconciliation of the respective approaches stems from fundamental traditional view-points and strategies. There are two major problems. Each approach has different ways of aggregation of different actions of different actors and institutions, that is, individuals, firms, voters and how this is generalized to wider patterns. Top-up approaches are premised on broad generalizations of local level governance units and individual actions therein⁸⁰. They ignore critical aspects of individual agency and influence on local processes and outcomes. Assumptions are made about the uniformity of behaviour among individuals ignoring diversity and differentiation amongst such individuals. Such oversight of important diversity of institutions and actors is also replicated when it comes to the study of the state.

Similarly, bottom-up approaches by concentrating on the societal action may fail to capture important elements of *individual action governance at top level of state institutions*. Interesting aspects of contestation, deliberation and *interest intermediation* at the top end of both state and non-state organizational hierarchies may also not be discernible from a

⁷⁸ Skocpol (2004) in Sellers (2011, p. 132). Changes in state structures like decentralization leading to decline in importance of collective action groups may be overlooked when starting point is society centered. These indirect State influences in state-society relations can only be discerned through comparative analysis over a long duration.

⁷⁹ Supra note 59 p. 133

⁸⁰ Following the traditions of macro social science: strategy of broad generalization fails to capture differences and diversities existent in phenomena

bottom-up perspective. Strategies focused on cases at the local level are also likely to miss developments of critical aspects of governance in *other parts of the nation* that would have been captured through cross-national comparative studies. Bottom up approaches fixed on employing qualitative cases have *limitations in making broad generalizations about the extent to which activities they study at local level impact macro-level governance*.

The second problem for both top-bottom and bottom up approaches is the reality of multi-layered governance in both state and society. This reality is reflected in Seller's observation that "governance arrangements take place in a variety of nested settings"⁸¹. Further, because of the diversities in state (sectoral, territorial and vertical) and the variety of individuals and groups in society, it is difficult to sum up either state or society as having single common characteristics. This makes it difficult for either approach to be a perfect fit model for explaining state-society relations thus necessitating development of multi-level analyses. *Multi-level analyses* focused on examining multiple levels policymaking in state hierarchies. Others examine how local level policymaking feeds into national level governance. *Multi-level analyses* have developed as an attempt at *reconciling the tensions* between the four approaches to state-society relations. Scholars have sought to do this by bridging the differences through multi level analysis and incorporation of more hybrid approaches to reconcile the "top-down" and "bottom up" approaches and the "society centred" and "statist conceptions" of state-society relations.

Much as multi-level analyses have shown good promise as an integrated approach, it is yet to solve the differences in strategy advanced by each approach. Sellers states, "Multilevel analyses, and more generally hybrid approaches, hold considerable promise for advances beyond the shortcomings of each approach. Yet no single integrated approach is likely to resolve the inherent analytical tensions between macro and micro analysis as well as between the perspectives of state and society. As strategies of governance shift more toward reliance on societal actors, society-centered approaches will gain in validity. As decentralization, flexibility and local responsiveness predominate, bottom-up approaches must supplement top-down ones...The optimal mix of approaches differs with both the

⁸¹ Ibid at p. 133

policysectors and the aspect of state-society relations under study. The choices also have normative implications. A society-centered, bottom-up approach, for instance, will be more likely to clarify the possibilities for movements of citizens to organize to attain power. A top down approach is more likely to be instructive about the possibilities for those who obtain power to enact effective policies⁸². Therefore, the way forward is to understand the efficiency of each approach as being context specific and will much depend on the objective of the study and phenomena, the aspect of state-society relations being studied and type of institution and diversity of actors within it.

In the face of growing contemporary literature increasingly advocating for the meaning state society relations away from state, this study does not yet represent another cynic or minimalist view of the centrality of state. Rather, it seeks to represent contextualization of state-society relations in face of nuances in local political processes, with view of examining in context and specific to certain areas. Indeed following Seller's exposition of state-society relations, even when applying a society-centered view as a starting point in evaluating collective action and individual action governance at the community level, it is acknowledged that the place of the state and its influences remains important if we want to derive a holistic understanding of state-society relations under study. The problem here is not in the sense of the *presence* of the state in understanding state-society relations but in the traditional conceptualization of "state" as unitary state. The problem is that in the Weberian sense, the state is paramount in relation to the state, has monopoly over exercise of public authority. That governance comes from a single source, that is, the "state". That in state-society interaction, there is one way of understanding as a vertical dominance of state over its interaction with society. That governance is one-dimensional as it flows from the state towards controlling society and cannot be vice versa.

Despite inclination to society-centred perspectives, the study does encompass an examination of the nature of the state more so its place in state-society relations. The study seeks to examine state-society relations as a dimension of changing non state policing practices in local units in Kisii County. In explaining this, the study seeks to advance a

⁸²Ibid atp. 131

moving away from understanding or viewing of state-society relations from state-centric viewpoint and the view that state-society relations are solely shaped by the state.

2.1.3. Synergy Strategies in State-Society Relations

Because new forms of local policing in Kisii County engage state and societal actors, the objectives of investigation are focused on how the state and society based actors relate when they interact as co-participants in local governance arrangements with objective of maintenance of law and order. Beyond this it is also important to evaluate the synergies created by co-existence of government and society in such governance arrangements. It is not assumed that the combined action between state and societal institutions is automatically complementary; rather, it encompasses examination of both instances of collaboration and competition.

Scholars have explored the question of state-society synergies through different dimensions looking at the importance of and effective strategies for such synergies. According to Brenya and Warden, scholars like Evans have advocated for a synergy between state and society as an essential approach to addressing the issue of developmental challenges owing to a perceived failure of the state in driving developmental agenda⁸³.

Evans views achievement of state-society synergy as involving three strategies, namely; endowments', constructability, and, the social capital perspectives⁸⁴. Under the endowments' view the success of state-society synergy is contingent upon pre-existing features of the society and the polity. The constructability perspective is concerned with building synergy for the short term rather than for posterity. The social capital perspective is the one that creates an effective synergetic partnership⁸⁵.

For Evans, *social capital* perceives state-society synergy beyond the theory of development to incorporate the "importance of informal norms as valuable economic assets that

⁸³ Brenya E. and Warden E. (2014) Bridging the Great Divide: A Case Study of Ghana Community Policing as a State-Society Synergetic Developmental Approach *Journal of Emerging Trends in Educational Research and Policy Studies (JETERAPS)* pp.282-287 at p. 283

⁸⁴ Ibid at p. 284

⁸⁵ Ibid at p. 283

makes people collectively productive”⁸⁶. According to Brenya and Warden, analysis by Evans refers to a specific kind of synergy for a link to be created between *informal ties* and development⁸⁷. Such synergy is defined by *civic engagement* which strengthens state institutions and the state institutions *reciprocate* by creating conducive environments for civic engagement. For Evans, a governance arrangement that involves the informal (society in particular involving civic actors) and invokes an interaction based on reciprocity is likely to *strengthen* the state itself and result in an effective synergy.

Evans also differentiates between complementarity and embeddedness in situating effective strategy for state-society relations where *complementarity* refers to mutually supporting relations between public and private actors. Complementarity is suggestive of a dichotomy between state and societal institutions. The actors conceptualized as “public” and “private” are taken to be separate distinct entities that are still expected to deliver better developmental outcomes.

Further, Evans uses the term *embeddedness* to refer to the creation of synergy based on everyday public-private interactions and the norms and ties that build up as a result of such interactions⁸⁸. This resonates well with social capital strategy which puts the place of everyday interactive civic-government ties at the centre of effective synergies.

The discussion above may be viewed as discussion of state-society relations through state-conception of state-society and society-centred conceptions of politics (state-society relations), where the study seeks to adopt the latter with a qualification as to the importance of state. In relation to the place of law, the study similarly urges a refocus away from the conceptualization of law of “what law is” as formal law, which conception, it is submitted here, amounts to what the study refers to as a *state-centered conception of law*. That law must be understood exclusively as *positive law*, of pure value, only capable of being sourced in formal text, and authorised or developed by the State. It must be of

⁸⁶ Brenya E. and Warden E. (2014) Bridging the Great Divide: A Case Study of Ghana Community Policing as a State-Society Synergetic Developmental Approach *Journal of Emerging Trends in Educational Research and Policy Studies* at p. 284

⁸⁷ Ibid at p. 284

⁸⁸ Ibid at p. 284

pure content and value without any other influence whatsoever be it morality or other foundation outside the law itself. Law is also understood as *rule of law*. While the place of formal law has its application, it is equally important to examine the *law in action* where it has been enacted to apply to society. It is vital to observe everyday applications of law in the context of daily social, cultural, legal and political practices as it occurs in society. Hence alternative perspectives of law are applicable and in that regards the legal sociology perspective possesses comparative competence over other theories in providing a comprehensive understanding to society-centred understanding of law.

Understanding of law as formal law or law as “the law” is not without foundation, so is the understanding of alternative understandings of law, legal systems and orders as institutions shaped by society. The question of “what law” is or “what law ought to be” is an issue that has occupied the minds of scholars of legal theory over the years. The conception of law in modern legal theory originates from the differences, if occasionally convergences, from two classical schools of legal theory; natural law, and, positivism. However, understandings of law has evolved over the years and now encompasses “other” approaches to law including inter alia, sociology of law, utilitarianism, legal anthropology, historical, economic analysis of law, realism, interpretationism, critical legal studies and post modernist theories. In most instances, however, the work of theorists in the different schools is not mutually exclusive and therefore all contribute to understanding of the law in different ways. As Harris observes, the law and the legal system can only be analysed by considering them in relation to the other processes and institutions within the society in which they operate⁸⁹.

The proposition that the meaning of law should be understood in the context that it is applied is further illustrated in the classic case of *Speluncean explorers*⁹⁰ which showed that an occurrence in society can be interpreted differently in law and that it carries diverse meanings. In other words it shows that members of a society presented with a dispute over certain set of facts, a certain event or problem will have different opinions on the correct decision to make in reaching a resolution and most certainly they will reach different conclusions.

⁸⁹ Harris P. (2007) Introduction to Law, 7th Edition (Cambridge, CUP) at p. 3

⁹⁰ Suber P. (1998) The Case of Speluncean Explorers: Nine New Opinions (Routledge: London)

Fundamental to the objectives of the study is to examine everyday societal processes at the local level and how they affect the law. The study develops the thesis by situating the place of law, by examining its effects in determining quality and trajectory of governance systems manifest in local policing institutions at the local level. Broadly, it formulates its approach closely modelled on the tradition of examining the law in action which constitutes an important component of legal sociology⁹¹.

There are arguments supporting and disputing the importance of *formalist approaches of law* in transforming societal stability in relation to tackling crime and disorder. The study categorizes these theories into two broad categories; *rational-legal authority* and *legal sociology*. The analysis begins by examining classical approaches of law, outlining their relevance and limitations. It then proceeds to evaluate legal sociology perspectives and their relevance to understanding realities of non state policing. It is submitted that owing to the limits of instrumental legal rationality, the application of important elements of legal sociology is more appropriate in capturing the dynamics of local governance under examination. The features of law advocated for under legal sociology are fortified and resonate well with society-centred approaches of state-society relations.

2.2. Rational-Legal Authority

This section reviews the formalist and rational meanings given to law. Arguments under this category include, instrumentalist approaches (rule of law approaches) and rational approaches (legitimacy of the law and order approach).

2.2.1. Rule of Law Approaches

There have been diverse meanings developed by theorists of the nature and scope of the principle of rule of law. A good starting point is to look at Dicey's exposition of the rule of law. Dicey, a constitutional law theorist is widely credited with comprehensive account of the scope of the rule of law. The work of Dicey has been expanded by other scholars including Hayek and Raz. Dicey was concerned by restraint of government through law. That

⁹¹ To an extent where analysis of data invokes clearer understanding of concepts through ethnographic accounts, aspects of legal anthropology are applied

governments' actions to be tested by independent courts of law and are constrained by the law. It recognizes that *all* power is derived and exercised in accordance with the law. Law should have absolute supremacy so that there is no arbitrary power and no punishment unless there had been a clear breach of the law. Equality before the law is necessary element for rule of law to operate.

Hayek advocated for law to be fixed and announced before hand and that rules must enable certainty. This would provide a system on how government will use its coercive power and it would enable an individual plan one's affairs on basis of such knowledge. According to Raz everyone (including the government) should be ruled by the rule of law and obey it. Echoing Hayek's requirement for fixing law before hand, Raz held the view that law should be knowable and performable.

There have also been different interpretations on the use and application of the rule of law beyond classical approaches to the rule of law which have been classed as functional and instrumental interpretations of rule of law. Theorists like Fuller were concerned about the functionality of rules. That rule of law should also have other virtues apart from certainty, for example, generality, publicity and prospective value. It must embody values like clarity, non-contradictoriness, conformability, stability and congruence. Rule of law must be seen as a way to make rules work and get the best out of the rules, that way it will constitute an effective system of inducing desired behaviour.

Instrumental interpretation of the rule of law is premised on control of society, legal certainty and universality. It is based on the assumption that rules work best when they are consistently applied. That all law be applied to all of its members by approved institutions. While the instrumentalist concern about rule of law is to make law consistent and bring about certainty and universality, its claims are incomplete in a number of ways. It does not look at the quality of the law, how it is made, whether free from discrimination, bias and severity. Its basic concern also is how to control the society using rules but without regard to the effects of its implementation including breaching other rights conferred by the same law.

2.2.2. Rational Domination

Theorists that support rational legitimacy based on the Weberian model believe that law is a rational response to social problems. Weber explained that law was a problem solver as it carried rational thought especially in Western legal systems. He observed that the West had monopoly on sophisticated rational and juridical thought. That rational authority only exists in modern western societies, where authority of regime is legitimised through rules and procedures. Hence people obey legal authority as it is founded in those rules and procedures.

The Weberian model also posits that the only institution authorised to use of force is the state. That the instruments of force and coercion and their use backed by law are exclusively vested in state institutions like the police. Over the years, the law has been applied in effecting state's use of force in tackling crime, applying the Weberian model.

Limits of Rational Legal Authority Model

The orthodoxy of the Weberian model has since been limited and the thrust of state monopoly over force argument by developments in law enforcement. As Baylely and Shearing observe, there has been a reconstruction of law enforcement "with not only a separation between those who authorise it from those who provide the service but a dispersal of both functions away from government"⁹². Bakershares this observation especially in regard to policing in Africa. According to Baker, other than provision of enforcement by government there is now "...a proliferation of non-state agencies involved in street patrolling, order, maintenance, arrest, search, detection, surveillance, inspection, personal escort and protection. They bear firearms, handcuffs, pepper spray and other means of coercion to enforce the law. Law enforcement is a broader activity than simply what the Police do"⁹³

2.2.3. Rational Legal Authority and Law and Order

In the control of crime and law enforcement, instrumental legal rationality models have found expression in the law and order approach. The law and order approach refers to the

⁹² Supra note 42

⁹³ Baker B. (2002) *Taking the Law into their Own Hands: Lawless Law Enforcers in Africa* (Surrey: Ashgate)

introduction of stronger laws and punitive sanctions as a way of tackling crime. It forms an important agenda in politics of reform for governments that are keen to show its capacity to fight crime. Law and order approaches are characterized by enactment of tougher laws, enhanced penalties, increased budgets on crime fighting, increased police staff. It is also defined by building of new prisons and upgrade of courts. It has been shown in different jurisdictions that the weaknesses of advancing the law and order approach are much rooted in its implementation, rationale and assumptions.

In Australia, over time, the introduction of the law and order approach, represented by tougher laws and tougher penalties had no effect on the rate of crime. Weatherburn examined the Instrumentalization of law to curb motor vehicle theft⁹⁴. He identified the reasons for failure to lack of sound evidence for application of robust laws, breach of basic legal rights including the rights to fair trial and presumption of innocence. Further, the primary objective appeared to be the concern in allaying public perceptions about crimes through promises to get tougher on crime, rather than address the crime itself. Weatherburn refers to this as *penal populism*, which only contributed to *politicization of criminal justice reform* and *publicization of law and order* rather than contribute to its effectiveness⁹⁵. It refers to the situation where governments make policies as a response out of a political need in order to manage public outcry on crime rather than address the core issue of crime prevention itself. Penal populism expressed through increased policing had no effect in curbing motor vehicle theft, instead, alternative less publicized forms of law enforcement (legal and non-legal) were more successful than the much politicized law and order interventions.

In Kenya, the shortcoming of the law and order approach in tackling crime has also been highlighted. Ruteere et al. observe that “The argument that increased policing will reduce violence and crime in poor neighbourhoods assumes that the police can act effectively...More robust policing measures are unlikely to succeed without fundamental reforms to existing policing institutions, an end to impunity for crimes and abuses

⁹⁴Weatherburn D. (2004) *Law and Order in Australia: Rhetoric and Reality* (Federation Press: Annandale)

⁹⁵ Ibid at p. 29

committed by sections of the police, and reforms to make the formal justice system more accessible and responsive to the needs of the poor.”⁹⁶

2.3. Theories on Relationship between Law and Society

There are conflicting views on the interaction or the relationship between law and society, more so about whether the law affects societal relations or vice versa, that is, degrees to which societal relations influence the development or implementation of law and legal institutions. This issue still divides opinion among legal scholars and other social scientists. Such studies with an interest of the place of law in society have gone under different banners including socio-legal studies, law and society, legal sociology, and, sociology of law. At many instances the terms have been applied interchangeably. For objectives and scope of this study, legal sociology is a term used to encompass the theories that are applied in analysis of the content that relates to the nature, understanding and effect of the law in society. *Sociological jurisprudence* as advanced by Pound assumes prominence in the analysis in this study, complemented by contemporary variants and critiques including Quinney, Harris, Simmonds and Freeman. Other theories have been advanced seeking to characterize the manner in which law functions in society. Such theorists have attempted to classify the theories into categories like consensus, conflict, functional or social cohesion theories.

2.3.1. Law and Society as Function and Consensus

One of the major proponents of this view was Talcott Parson⁹⁷. He viewed society as a system comprising actions and institutions, each functioning to maintain *social stability*, equilibrium and order⁹⁸. Such a society is one characterized by a shared consensual value system. In part, it is a plausible proposition as there are basic minimum accepted social norms and values, that if breached attract sanction/condemnation by majority of members of community, for example murder or rape and that law functions to maintain such social stability by sanctioning such breaches.

⁹⁶ Supra note 26

⁹⁷ Harris P. (2007) introduction to Law, 7th Edition (Cambridge: CUP)

⁹⁸ *ibid*

The Parsonian position has been criticised for its focus of elements of maintenance of order and equilibrium with no attention to *social conflict* and *instability* which were equally vital in understanding social order. The assumption of a universally shared value system was difficult to defend in a society where the existence of disputes is common. If anything, it has been argued that such disputes are indicative of presence of conflict between individuals and groups within society rather than a consensual view.

2.3.2. Law and Society as Conflict

Critics of the consensus model posit that there is no such single, universally agreed set of social values⁹⁹. Rather there is a whole variety of different social values, some which are protected by law in partisan manner in order to protect certain dominant groups in society. That the nature of society is one replete with conflict and comprises a pluralist value system rather than a set of common values.

The pluralist view in its pure form posits that social stability is maintained not through a unitary value system but that through the constant interaction and negotiation of existing conflicting groups and interests. The assumption is that such groups have equal bargaining power and that the state is a neutral arbiter in the conflict¹⁰⁰. Further, for the pluralists, the state should take no sides in the conflict and resolution of such conflict should be settled through the law or through political debate and policy making by government. The conflict theory has been criticized for making unproblematic assumptions. Firstly, varieties of interest groups in society do not possess equal power in political, legal or economic terms. Some groups are dominant in influencing law-making, implementation of those laws than the others who are less powerful¹⁰¹.

2.3.3. Sociological Jurisprudence

Major proponents of the thesis that law cannot be separated from interests that shape social and economic life belong to the school of sociological jurisprudence. The term

⁹⁹Harris P. (2007) Introduction to Law, 7th Edition (Cambridge, CUP) p. 9

¹⁰⁰ Ibid at p. 10

¹⁰¹Harris P. (2007) Introduction to Law, 7th Edition (Cambridge, CUP) at p.10 Harrisurges a refocus on attention to more important questions like: how do less powerful come to accept views and policies of ruling groups?; How do we identify those ruling groups?; What are the various relationships between these various groups and between law state and society?

sociology was coined by Auguste Comte in 1839 in reference to “the science of society”¹⁰². Comte advanced positivist sociology. Legal scholars, among them Pound developed their ideas from those of Comtian sociological positivism, applying them in law with a view to coming up with an understanding of law that would comprehend the law from a practical perspective, that is, how it functions¹⁰³.

Pound was influenced by the notion that the science of law is insufficient as a field of study as law naturally interacts with other areas of study¹⁰⁴. That law had to be linked with other disciplines such as sociology, history and psychology. This is what informed Roscoe Pound’s position that law is not an abstract tool, but a social reality. Law as a tool is used as a means of social control. Consequently, even in the issue of judicial law making, the judge has to be cognizant of the fact that the law he makes will not exist in an abstract form, but it will be a source for the control of the population. This has been interpreted to mean that it is permissible for judges to make law, hence judge-made law is valid law¹⁰⁵. Pound’s position on judge-made law is oppositional to legal positivism and has come under scathing attack from theorists like Hart.

The study of law in action involves three considerations: the administration of justice, the legal order, and the law itself. It is also important to note that administration of justice had to go *beyond mechanical application of law*, which could only work in the areas of commercial law and property law where, where mechanical application is necessary for certainty and predictability. Mechanical application of the law is not possible in cases where an individual conduct is involved because at least seven agencies are involved¹⁰⁶. The seven (subjective) considerations include; equitable discretion, legal standards, general verdicts of juries, “finding the law” where adjudication is involved, penal sentences are individualized, informal justice in petty courts and administrative tribunals.

¹⁰² Rathore L. (1986) Political Sociology, Its Meaning, Evolution and Scope *Indian Journal of Political Science* vol 47 No. 1 pp119-140 at p. 120

¹⁰³ Dean Roscoe Pound gained his province in his field for his instance on studying the law in action (rather than law as an abstract entity) in 1909. He would become the leader of the sociological school only two years later.

¹⁰⁴ Gardner J. (1961) The Sociological Jurisprudence of Roscoe Pound (Part 1) *Villanova Law Review* Vol. 7 Issue 1 Retrieved from <http://digitalcommons.law/villanova.edu/vlr/vol7/iss1/1> 1-26 at p.2 (last accessed 2 March 2017)

¹⁰⁵ Ibid at p.2 (last accessed 2 March 2017)

¹⁰⁶ Ibid

In this case, the legal order is a process through which the legal and administrative processes are ordered, and the means by which the tribunals adopt to finish legal guidance which people must follow to avoid legal conflicts. The law is more than a body of rules but also the knowledge and the experience in which the judicial experience occurs. With the basis above, Pound formulated the *objectives* of sociological jurisprudence as follows: study of the *social effects* of the law, its institutions, and its doctrines, that is, the law in action as different from the law in “books”; sociological study as *a preliminary step* in the legislative process (legislation to be preceded by sociological research); study as to how the law can be made effective in society; studying the growth of jurisprudence by studying judicial methods, and thoughts of great thinkers (lawyers and judges); examination of sociological legal history of the common law to understand past relations and legal institutions; individualization of the application of legal rules to fit particular circumstances; and, to establish a ministry of justice by governments to deal with the aforementioned issues.

According to Pound, *law is a tool for social engineering* that had undergone five major stages: (which are the paths to liberty) moving from primitive law; to strict law; to equity and natural law, maturity and ultimately to socialization of the law. The concern of primitive law is to keep peace between people with different interests, that is, to ensure that there is a harmony of interests. Strict law aimed at ensuring certainty and uniformity in the society. Equity and natural law brings in the qualities of morality and ethics to the law. Maturity of the law experiences an emphasis of security and equality with the ends of the law being individual assertion. The last stage of socialization of the law is the stage in which the law incorporates the ethical considerations and the *society becomes more important than the individual*. At this stage, the most important thing in law is the advancement of the civilization.

However, Pound also considers that in the present era, we are in the process of a new conception of law other than the five described¹⁰⁷. In this new stage, the law is in a state of fluidity. He terms this the “humanitarian path.” Consequently, with the passage of the

¹⁰⁷The five earlier stages are described by Pound as the paths of liberty

various stages, the definitions and the ends of law change to fit the stage of development of the law from the primitive societies to the present era as law is an instrument of civilization. While law must be stable, it cannot stand still and not adjust to change. He accepted that rules and interests cannot be static.

Moreover, with law being a social mechanism, there are further changes in the definition and idealization with the present circumstances. For Pound, Law has three *dimensions*. It is: a highly specialized form of *social control* in a *developed politically organized society* obtained by the *application of force of that society*; a body of authoritative guides to decision; and a, judicial and administrative process, in which the guides to decision are developed and applied by authoritative techniques.

Similar to other legal sociologists, Pound sought to develop a sociological jurisprudence theory that broadly sought to explain the relationship between law and society. For Pound the sociological jurists have a difference to other schools of thought in that unlike other schools of legal thought in that they: consider the working of the law rather than its abstract content; regard law as a social institution which may *be improved by human effort* and endeavour to discover and effect such improvement; lay stress upon the *social ends of law* rather than *sanctions*; urge that legal precepts be used as guides to socially desirable results rather than as inflexible moulds; and, their philosophical views are diverse, usually positivist (in Comte terms, based on social data) or some branch of the social-philosophical school.

Of relevance to this study is a number of propositions that Pound formulated that separated legal sociology from other scholars of jurisprudence which can be summarised as follows;

- a) Law as a form of social control that is better understood when examining it in action in society examining the function of the law in society;
- b) Law as a social institution which may be improved by human effort (Law ought to be a tool for social reform, what in law can be improved to make it effective in society and how such improvement can be effected);
- c) Regulation focused on *social ends of law (justice) rather than sanctions*. Law should function to ensure that there is a *harmony of interests in society*; and

- d) Use of law for socially desirable results rather as inflexible moulds (law as progressive and responsive to *societal demands* rather than as a fixed, static and rigid form of regulation)

Law as Justice

Deliberation on what constitutes justice is not new and has been a long drawn program for scholars, arguably as old as the debate on the meaning of law pitting different schools of thought like natural law theorists and positivists. As Gardner observes, “the fact that law has different definitions and dimensions has also made it difficult to define its ultimate end, *justice*”¹⁰⁸. For legal sociologists like Pound, justice was the maximization of the “good” which is achieved by achieving the best balance of societal demands.

In illustrating what justice means Pound equated justice with “quietening those who are banging at the gates”. He gave an illustration of a situation where society is faced by people banging at the gates making diverse demands about the law. In such a scenario we are required to note down all the demands people have made or are making on the law, and achieve the best balance we can. The best balance would be achieved where there was little waste. As he stated, “we do better to speak of providing as much as we may of the total of men’s reasonable expectations in life in civilised society with the minimum friction and waste”¹⁰⁹.

Therefore Pound interpreted *law as justice* to mean the adjustment of relations among human beings so that the goods of existence can go as far as possible (and be distributed to reach as many people as possible). As such, for Pound, in the process of judicial law making, *judges must ensure that they know* that they are involved in the process of social engineering. To attain the ends of law (*justice*), a legal system will need to follow four criteria below:

- a) recognize certain interests which can be individual, public and social;
(recognition of plurality/inclusion)

¹⁰⁸ Gardner J. (1961) The Sociological Jurisprudence of Roscoe Pound (Part 1) *Villanova Law Review* Vol. 7 Issue 1 Retrieved from <http://digitalcommons.law/villanova.edu/vlr/vol7/iss1/1> 1-26 at p.2 (last accessed 2 March 2017)

¹⁰⁹ Supra note 99 at p.253

- b) defining the limits through which the recognition and the efficacy of the interests through the judicial process; (regulated by legal process)
- c) balance the needs of individualized justice and the general social claims; and, (pragmatic balance)
- d) induce a consciousness of the role of ideal pictures of the social and legal order in both judicial decision and legislation (induce consciousness of the legal order)

From this, it is apparent that Pound sought to have a scientific definition of law and justice which would later take the term “theory of interests”¹¹⁰. To this end, he would adopt pragmatist ethics whose conception of *highest good, as the satisfaction of the maximum number of claims with the least friction or waste*. This would lead to Pound’s theory of justice that seeks to *keep the law in harmony with the pragmatics* of the interests of the individual and the society. According to the *Theory of Interests*, as long as the law is *pragmatic* enough to maintain a *harmony of interests*, then the law is *justified (and just)*.

Pound acknowledged however, that law is not perfect as a social tool, and therefore it can also have its limits while maintaining its pragmatism¹¹¹. The limits to law as a tool for balancing competing interests in society include; difficulties in the ascertainment of facts; enforcement of moral duties; incapability of law securing certain interests; difficulty of law been applied mechanically and the burden of appealing to the political class to make and implement the law (limited effectiveness in its enforcement).

2.4. State-Society Relations and Legal Sociology in Governance

The relationship between government and community is a central issue that transcends interests and focus of both state-society and legal sociology. Notwithstanding diverse interpretations about how to understand and study state-society relations, scholars’ basic interest is interaction between state and society. Similarly, legal sociology with its variants is

¹¹⁰Gardner J. (1961) The Sociological Jurisprudence of Roscoe Pound (Part 1) *Villanova Law Review* Vol. 7 Issue 1 Retrieved from <http://digitalcommons.law/villanova.edu/vlr/vol7/iss1/1> 1-26 at p.2 (last accessed 2 March 2017) at p. 21

¹¹¹ Ibid at p.22

concerned about relationship between societal relations and law and also the extent to which law is reflective of society.

Broadly, examination of state-society relations theory above has revealed that two major schools of thought statist thesis and society centred accounts which employ empirical strategies modelled on top-down approach or the bottom-up approach. The study seeks to draw specific elements from each of the theories that converge in the explanation of emergent local governance practices. Rather than a focus on the application of state society relations theory, or legal sociology, exclusively, it is submitted here that, the leverage of the convergences in state-society relations and legal sociology provide a vantage point in the understanding of contemporary forms of non state policing as practiced in Kisii County.

The converging point for state-society and legal sociology theories is identified here as the broad concern for understanding *social bases of governance*. While state-society scholars privilege the study of political processes in state and society and legal sociologists focus on relationship between legal institutions and societal relations, both fields are concerned about interrelationships law state and society culminating in a focus on governance (where governance is conceptualized as the blur between state and society due to their interdependence) On the part of state-society relations, attention towards analysis of social bases of political processes is more a focus of the society centred approach to state-society relations and less a starting point for statist conceptions of state-society relations. Similarly, for legal sociology, the interest is on influence of societal activities in law in action (as a function in regulation and facilitation of governance).

A second instance of convergence is identifiable in the empirical strategies applied by both theorists. The starting point of inquiry for both society-centred approaches and legal sociology is investigating everyday activities local governance mechanisms for political outcomes and law in action respectively. Society-centred accounts largely apply “bottom-up approaches”, focused on individual and collective action at especially at the lowest administrative units or sub-national levels for important political outcomes and important policy making mechanisms. In the same vein, legal sociologists train their eyes on examining everyday experiences, individual behaviours as important ways to understand the function

of law and legal institutions. It is these broad convergences that the study seeks to apply in advancing its analysis of contemporary policing practices. While fronting the joint approach adopted for society centred account of state-society and legal processes, it is equally important to qualify that the place of state is not discounted. The approach adopted does place society centred accounts as starting points for analysis but not to the exclusion of analysis of the state. Studying of state-society relations and interplay between society and legal institutions would be nugatory without investigating state processes. Tilting the focus in the direction of society rather than state does not mean the latter has no part to play. The study will also seek to examine pertinent state influences on shifts in societal agenda and dynamics of community groups including the state's use of the law to that effect.

Adopting Rathore's analysis, it is acknowledged that limitations exist in the formulation of perfect fits in mixed-theories, in a way that an integrated model is developed to provide for each theory to have equal relevance and application. Rathore observes that building of interdisciplinary bridges and interconnectedness between theories is quite problematic. Limits exist in obtaining the ideal balance between dictates of both disciplines.¹¹² The challenge remains with the scholar but here it should not be viewed as a venture in discovering likeness or locating where the theories mirror each other but the enterprise would be exploring points of accord. Rather than endeavour to achieve a perfect mixture of the theories, what may be more fruitful is exploring the extent to which state-society relations enhance the function of law in society and how state-society relations in turn can be optimized by functioning law or not. It is therefore useful to look at points of convergence that exist between the two disciplines.

Policing by the community or non state policing traditionally have been conceptualized in terms of authorization as non-institutional types of policing. The connotation is that these policing types are not authorized by the state or state involvement in their operations. Yet there are growing cases of state participation and even establishment of the so called self-governance mechanisms¹¹³. A narrow conceptualization based on rigid binaries of formality

¹¹² Rathore L. (1986) Political Sociology, Its Meaning, Evolution and Scope *Indian Journal of Political Science* Vol. 47 No. 1 pp119-140 at p.121

¹¹³ Heald S. (2005) Heald S. (2005) 'State Law and Vigilante in Northern Tanzania' *African Affairs* 105/419

and informality, legality or illegality, or stateness and non-stateness fails to capture diversities of policing trajectories, policing types at different stages of evolution and which have had varied interactions with state. Alternative theories on the conceptualization of relations between government and society have since emerged which move beyond the discourse on private (society) and public (state) which Kooiman refers to as a “sterile debate”¹¹⁴. In this sense, community policing is seen as an expression of the state being dependent on societal implementation to achieve success in social control. Vigilante groups like *sungusungu* may have been formed by society but took the effort and support of provincial administration for it to be institutionalized in Kisii¹¹⁵. To refer to either as private or public form of policing therefore misses crucial characteristics and dynamics of its organization. Without an invocation of public-private divide, these groups can be viewed as governance mechanisms. Kooiman urges a conceptualization of governance as distributed governance which allows for discussion of a combination of formal and informal entities involved in decision making¹¹⁶. Kooiman’s distributed governance is society centred and less statist in its approach to state-society relations. It urges a shift away from the *sterile debate* on what is public (formal, state, legally sanctioned) and what is private (informal, non-state, illegal) to a focus on convergences, trade-offs and balance of power between the entities¹¹⁷.

The chapter therefore has developed a framework for analysis combining society-centred approaches to state-society relations and legal sociology in seeking to understand dynamics of interactions between government and society through the examination of the emergence of specific forms of local policing as a dimension of governance in Kisii County.

Conclusion

In moving away from statist conceptions of state-society relations and state rationalization of law, the study applies *society centered state-society relations* and *legal sociology* as a framework for understanding local governance mechanisms, particularly local policing in Kisii County. These two approaches are united in focusing on *social bases of governance*

¹¹⁴ Kooiman (1993) *Effective Water Governance: New Government Society Interactions*, Sage Publications, Global Water Partnership p. 7

¹¹⁵ Masese E. & Mwenzwa E. (2012) p. 6485

¹¹⁶ Supra note 114

¹¹⁷ Ibid

situated in activities at local levels of society. Prevailing approaches to implementation of law and policy have privileged the centrality of state in shaping governance mechanisms. Statist conceptions on relations between society and state advance the idea that important development on political processes emanate from the state without influence of societal factors. With regard to legal processes and institutions, legal rationality theorists posit that legitimacy exclusively resides with the State and instrumentalization of law is the only means of adjudicating societal problems. The study urges a refocus. The refocus is centred on moving away from state centred approaches to legal and political processes will be attainable by applying society based state-society relations and legal sociology theories.

Society centred state-society relations theory focuses its attention towards analysis of social bases of political processes. Such society based posit that political processes that affect relations between the state and society are better understood by examining society actors and activities at the society level. Legal sociology similarly is concerned in understanding law by giving attention to the influence that society has towards law and legal institutions discernible from everyday practices and implementation in societies. The study seeks to draw specific elements from each of the theories that converge in the explanation of emergent local governance practices in Kisii County.

CHAPTER 3: SOCIAL HISTORICAL AND POLITICAL CONTEXT OF POLICING IN KENYA

Introduction

The chapter evaluates policing practice in Kenya through its social, cultural and political context tracing enforcement institutions and actors from pre-colonial period to independent

Kenya through to 2010 with a view to understanding influences on state and non-state policing in Kenya. The chapter commences by examining pre-existing enforcement and adjudication systems practiced by the Abagusii prior to the colonial experience. It also provides an account of strategies employed by the State in reforming policing systems through legislation and policy of respective governments from independence.

It is observed in the chapter, that the post-colonial experience of the policing of public order reveals continuities of regime policing inherited from the colonial government rather than substantial change between successive governments from the independent Kenyan government in 1963 to current Jubilee government that came into power in 2013. The system of policing practiced by successive governments has been inimical to security, accountability and rule of law. Owing to the new dispensation introduced by the constitution in 2010¹¹⁸, there ought to have been a recession of regime policing to give way to responsive and accountable policing. Ideally state policing characterized by the state's monopoly over law enforcement and its assertion over authority ought to give way to democratic policing. Nevertheless in practice, the shift from regime to democratic policing is inchoate, lethargic and manifests state reluctance to cede to accountable forms of enforcement of the law.

3.1. Law enforcement and Administration of Justice in Pre-colonial Gusii

3.1.1 Political Organization

An account of pre-existing enforcement and adjudication systems practiced by the Abagusii prior to the colonial experience must be understood from a perspective on how the Abagusii were politically and socially organized.

The Abagusii were politically divided into "self-sustaining and autonomous clans"¹¹⁹. Akama states that "Political organisation was based on a lineage system, *ebisaku*, starting from smallest socio-political unit, the homestead (*enyomba* or *omochie*) to the clan level. It was the conglomeration of these various self-governing and autonomous clans that formed the

¹¹⁸ The Constitution of Kenya (2010) The Constitution of Kenya, 2010 Available at www.kenyalaw.org/lex/actview.xql?actid=Const2010 Last accessed 29 March 2017

¹¹⁹ Akama (2006) Social Organization and Administration of Justice in J. Akama and R. Maxon *Ethnography of the Gusii of Western Kenya: A vanishing Cultural Heritage*, 2006, Edwin Mellen Press pp.81-103

broader Gusii community". The Gusii lineage system was patri-lineal as it entailed tracing one's descent from the paternal side. A woman once married would belong to the lineage of husband.

The basic social unit was the homestead (*omochie*) which was headed by a family patriarch, *omogaka bwo omochie* (head of the homestead). An ideal homestead consisted of the family patriarch, his wives, married sons and unmarried children. *Omochie* formed the basis of Gusii lineage ties that extended to the sub-clan and clan levels, and eventually the clusters of the clans constituted the whole Gusii community, namely, the Abagetutu, Abanyaribari, Abanchari, Abagirango, Abamachoge and Ababasi. The Gusii Community was made up of the Abagusii people traced their belonging to the community right from: the homestead to the sub-clan; the sub-clan to the clan; and then, from the clan to the community.

Omogaka bw'omochie wielded a lot of authority and influence over his wives and children. They had the role of maintenance of family harmony and smooth running of all homestead's social and economic activities. *Omogaka* also ensured family obedience and observance of various Gusii customs, norms, traditions and religious rituals. By virtue of his role and functions commanded immense respect and authority commensurate to his social status and control of family resources.

Descendants of the same grandfather formed a social unit that was referred to as *riiga*¹²⁰. *Riiga* had no role in socio-political and economic functions of the community. However, *riiga* groups formed the second most significant socio-economic and political grouping of the Gusii people, the clan. The clan was an autonomous socio-political and economic entity. The clan occupied a specific geographic location that was exclusively owned by the clan members and managed by the clan elders on their behalf. Land was vested in the clan and its use would have to be sanctioned by the elders of the Clan. Clan members were supposed to be united as a group. Conflict amongst clan members was considered a taboo and most offences were sanctioned through payment of fines in form of cattle.

¹²⁰ Ibid. at p. 284

Any person who committed murder would be ostracized. Conflicts were settled quickly to re-establish normal relations through a cleansing ceremony, *ogosonsorana*. Where conflict persisted, the affected kinship unit would decide to move away from the clan land altogether and settle in the adjacent frontier territory, and sever all links with the clan. Where need arose clans would form cooperative groups known as *amasaga* to undertake social and economic tasks together, including clearing of land for farming and building new houses for members of the clan.

Each clan member had a specific function to perform. The elders were charged with providing leadership and guidance to members of the homestead. The young men were responsible for looking after families and tending to the cattle which belonged to the clan. The youth were also responsible for providing military defence against forms of external aggression to the clan and the community. The youth played a limited role in matters of governance. Clans operated independently as self-contained independent units. There was no central form of political and administrative structure that bound the various clans together. Beyond the clan, the Abagusii were bound by: the same language (*Ekegusii*); similar cultural and social practices; a shared history, and, a common patri-lineal founder called *Mogusii*.

3.1.2. Administration of Justice

Resolution of disputes began at the homestead level. *Omogaka* was responsible for adjudicating any disputes relating to any offence committed at the homestead level would be sanctioned by *Omogaka*¹²¹. Orders from *Omogaka* were considered as commands. Disobedience led to various socio-economic sanctions and religious sanctions. It is believed that *Omogaka* had powers to curse any offender in the family.

Cases of disobedience of *Omogaka*'s orders were rare. *Omogaka* issued threats and warnings where dispute involved petty issues offences like the use of abusive language and disrespect to family members. Serious offences (physical violence, incidents of incest) and led to invocation of curses. Petty committed repeatedly were also considered to be serious

¹²¹ Ibid at p. 285

offences. In most cases, homestead heads applied powers sparingly to promote peace and harmony in the family. *Omogaka* also had to be impartial and non-partisan so as not to enhance or perpetuate such conflicts by being seen as favouring one party.

Where the subject of the dispute related to the commitment of an offence involving members of more than one homestead, then the case would be handled by lineage elders known as *abagaka begesaku*¹²². (heads of homesteads) For instance, if there was a land dispute between two homesteads, *abagaka begesaku* would sit to hear the dispute. *Abagaka b'egesaku* was *ad-hoc* unit that was not a fully institutionalized into the Abagusii administrative system. It was an informal meeting of homestead heads that met as dictated but the nature of the offence. Its *ad-hoc* nature is reflected both in its (lack of) permanency and its limited jurisdiction. *Abagaka* did not have jurisdiction over offences considered to be serious like murder or witchcraft. Where cases involved murder, for example, the composition of the adjudication unit would be expanded to include elders from the whole clan. Unlike clan elders, where lineage elders sat as a tribunal, *Abagaka begesaku* had no specific instruments of coercion to enforce their ruling. The main form of sanction that the *Abagaka* had at their disposal was the power to curse any offender. Due to their age and wisdom, communal authority vested in *Abagaka* such powers. In addition to curses, *Abagaka* would enforce their decisions by threats to or actual invocation of a supernatural oath referred to as *emuma*. In performing *emuma*, *Abagaka* would slaughter a goat and sprinkle the blood from the animal at the site of the crime while issuing a curse "let the person who committed this offence die". Alternatively, Elders would ask the litigants to take an oath stating "if i committed this offence, let ancestors, take away my life". It would then be left to the Ancestral spirits to enforce the curse, where it was believed the offender would die subsequent to the performance of the *emuma* ritual. A third enforcement mechanism available to *Abagaka begesaku* would be to sanction offenders by allowing self-help action from the aggrieved party.

Adjudication Systems

¹²² "Abagaka" is the plural of "Omogaka". "Egesaku" refers to a cluster of homesteads belonging to the same lineage. "Abagaka begesaku" therefore loosely translates to head of homesteads.

The Abagusii social political organization did not provide for a formal centralized institutional set-up to deal with various legal issues. As such, there were no clearly structured and formalized rules concerning law enforcement. The judicial system was informally constituted and was modelled along social hierarchical organization, starting from the family homestead to the clan level which exercised authority on behalf of the whole community. The judicial system constituted of the sum of informal legal institutions including *omogaka*, *etureti* and *Abakumi*.

Disputes at the Homestead level involving homestead members¹²³ would be dealt with by *omogaka*. Issues that would be dealt with by *omogaka* included usage of land, payment of dowry. In making a decision, *omogaka* was guided by principles of equity and objective of building consensus amongst the parties to a case. *Omogaka* would consult widely with other members of the family especially elder sons. A ruling made by *Omogaka* was final and aggrieved party had no right of appeal. A large number of the Gusii homesteads comprised polygamous families hence *Omogaka* had to adhere to principles of equity and fairness as he could not be seen to favour any side of the parties to the dispute¹²⁴. Heads of homestead with large polygamous families, who dealt with disputes amicably, were perceived as “men of great wisdom”. They were usually called upon to assist in settling complex issues involving two or more homesteads hence they were considered natural candidates for the *abagaka begesaku* forum.

Etureti

The *Etureti* “consisted of a cohort of informal courts” that usually comprised highly respected elders in a sub clan¹²⁵. Elders were appointed to be members of these informal courts on the basis of criteria by the community. For an elder to be eligible as a member of the *Etureti*, one had to qualify as a role model who would serve as an example to aspiring community leaders. Secondly, one’s success rate in the resolution of several disputes that

¹²³ This included *Abamenyi*, that is, visitors/people who stayed at the homestead over a relatively long period of time that they were considered part of that homestead.

¹²⁴ Ibid at p. 89

¹²⁵ Ibid at p.90

had an effect on the whole sub-clan was taken into account. Further, one had to have an exemplary record of their past decisions in particular those that they had exhibited wisdom and impartiality. The jurisdiction of *Etureti* was wider than that of *omogaka* as it involved decision making on important social and political issues that have an effect on the whole sub-clan.

Etureti was headed by the senior most elder in the sub-clan. A complainant was required to submit their complaint directly to the presiding elder. Before receiving evidence from either party, the Presiding Elder briefed his colleagues about the facts of the case and nature of the dispute. Having been well seized of the matter at hand, *Etureti* would then conduct a hearing to listen to the presentation of the dispute by both the claimant and the accused. *Etureti* also provided for listening to witness accounts. After receiving all the information and evidence concerning the case, elders usually conducted detailed consultations among themselves and sometimes allowed members of the public who had important information on the history of the case to join them in the consultation process before making a decision¹²⁶.

Typical cases brought before *Etureti* involved issues concerning *witchcraft*, boundary disputes and assault. In case involving two homesteads, elders fixed the right boundaries and ordered immediate destruction of any structure that had been put up on the disputed land. The sanctions of *Etureti* included imposition of specific fines commensurate to the nature of the offence; public reprimanding an offender. The sanctions were meant to ensure deterrence both to the offender and to the general community on seriousness of the offence. However, similar to *abagaka begesaku*, the *Etureti* had no formal powers of coercion to enforce their ruling. Elders who also doubled up as members of *abagaka begesaku* would use their magical-religious powers to same effect when they sat in *Etureti*. These powers are believed to have been bestowed on them by ancestors due to the nature and importance of the work they were dealing with on behalf of their community. Elders used their traditional authority to cast curses or perform *emuma* to ensure that the offender pay the required fine.

¹²⁶ Ibid at p. 91

Kenani conducting a study on legal systems amongst Abagusii, focused on gauging Abagusii legal institutions and procedures with modern ordering of legal institutions including nature of cases, classification of cases, conduct of proceedings, probing of evidence, elements of due process and the objectives of sanctioning¹²⁷. As he notes, there was no distinction criminal and civil proceedings similar to what we now have in modern legal systems.

All concerned parties were required to attend the *Etureti* hearings. The hearing was held in public usually in the shade of specific types of trees that had “ritualistic value” to the Gusii people such as *omotembe*. Court proceedings were also held in specific sites that were considered sacred and/or places that were associated with the presence of ancestral spirits¹²⁸

There were no technicalities as to the type and manner in which evidence would be given at *Etureti* hearings. Any form of evidence was usually admissible and witnesses were allowed to participate in the hearing. Administration of justice and decision-making were based on reconciliation and not on retribution unless the offence was considered to be serious like in the case of murder, witchcraft, rape or incest. Attendance of the hearings was compulsory and proceedings could not begin unless both the claimant and the respondent are required to be present¹²⁹. Elder’s orders to attend a hearing were compulsory and were generally adhered to by the parties. This was due to the high regard and respect elderly members of the *Etureti* commanded¹³⁰. However, any failure to heed *Etureti* orders would be used against the defaulting party in the case.

Before the parties began presenting their cases, both parties were required to take a customary oath. Oath was taken by holding particular traditional regalia or a specific tree that had ritualistic values and uttering the words “If I, as a complainant or defendant tell a lie in this court proceeding let me suffer a lightning strike”. These traditional oaths were

¹²⁷Kenani B. (1986) *Politics and Law* in G. Were & Nyamwaya D. “Kisii District Socio-cultural Profile” Nairobi: Government Printers.

¹²⁸Ibidat p.90

¹²⁹ There is no equivalent to modern *dayex-parte* proceedings where orders can be handed down in the absence of either party.

¹³⁰Ibid at p. 90

usually taken seriously. Most of the Gusii people believed if one lied after taking an oath, he/she will be struck by lightning or a serious misfortune will befall the person or members of his/her immediate family.

After presentation of witness testimony, members of Etureti were not allowed to cross examine the witness. After hearing the parties and the witnesses wide consultations would be held among members. A decision would then be reached based on the facts of the case and the elders' understanding of the case. In cases where the offender insisted on their innocence after the decision, a second oath would be administered. In that case a second oath similar to the initial one is administered. However, in most instances, the fear of consequence of telling falsehood after an oath usually made guilty person to confess

If a member of the community is found to have committed *murder*, the person was required to compensate the bereaved family in form of livestock. The offender would be handed a fine if the murdered person was an adult. Also, a special form of sacrifice was supposed to be offered to appease ancestral spirits and to chase away the evil spirits so that the crime should not occur again. The sacrifice was supposed to bring about social harmony and tranquillity to all the involved parties and the community in general. It was also legitimate for the deceased's family members to take matters into their own hands and kill the person who murdered a member of their family. There would be no case against members of victims' family¹³¹

If a person killed another by accident which was referred to as *ogoita kwa mosiabano*, (manslaughter), no specific form of punishment for the offender. An offender found guilty of manslaughter was usually required to provide an animal that was used by elders to perform a reconciliation ceremony, *ogosonsorana*. This was supposed to appease ancestral spirits and bring peace and harmony between members of the affected families. In that sense, the offender would compensate the community rather than the family of the victim¹³². Cases of assault were also common. Where the assault caused grievous bodily

¹³¹Ibid at p. 92

¹³²Ibid at p. 93

harm, the offender would be required to compensate the injured person. A typical fine would be 1 or 2 goats.

The guiding principle for elders when considering appropriate sanctions was the objective of *reconciliation* and making peace among affected parties¹³³. However, the offence of rape was treated differently and the community sanctioned summary punishment. In the case of a rapist caught in the act by a relative of the victim, such a relative had the right to kill the rapist on the spot. This settled the matter and no further steps were supposed to be taken since raping a woman was a very serious offence among Gusii people alongside cattle theft¹³⁴.

A cattle thief from another ethnic community caught red handed was supposed to be killed instantly. It was thus permissible to avenge cattle theft *summarily*, which in essence was considered a more serious offence than murder. The punishment for murder was a fine. However, the punishment was less stringent for livestock from other clans within the Gusii community. Livestock found to have been stolen from other clans was somewhat more acceptable than apprehension of a cattle thief from another ethnic community. Stolen animals were allowed to stay in the clan, even where it was common knowledge that animals had been stolen from another clan¹³⁵. However, if a neighbouring clan eventually traced stolen animals, the animals had to be given back voluntarily, if not, war would be declared by the clan against the errant clan. Livestock theft among clan members rarely happened as it was considered a taboo. Even where the livestock was voluntarily returned to the claimant, the offender would not be spared the elders' curse.

The most common civil cases involved disputes over land and non-payment of debts. Where found guilty, offenders were ordered to return the property and pay the required fine. This was also the case for offences against property like arson or destruction of property. Such offenders would be ordered to pay back the equivalent of property destroyed. Apart from condemnation and invocation of the Elder's curse, if the offender failed to return property,

¹³³Ibid at p. 96

¹³⁴Ibid at p.94

¹³⁵Ibid

could ask for cooperative assistance from members of clan to forcibly recover stolen property and return it to the owner.

Cases of assault were also common. Where the assault caused grievous bodily harm, the offender would be required to compensate the injured person. A typical fine would be 1 or 2 goats.

Egesaku

This was the equivalent of an informal appellate tribunal, based at the clan level that listened to inter-clan appeals. The criteria applied for selection of *egesaku* members is the same like for elders who served on *Etureti*. Most persons recruited to the *egesaku* were the senior most elders of various *etureti* within the clan. Most cases were in the nature of appeal. They were brought by litigants not satisfied with *Etureti* judgements. *Egesaku* had powers to reverse decision of *Etureti*. *Egesaku* dealt with case involving different clans. However, *Egesaku* did not deal with any type of case like the *Etureti*. Cases dealt with *Egesaku* involved border disputes between two clans, homicide and incest cases. Enforcement powers of the elders of *Egesaku* were expressed through traditional powers to cast curses but with a wider reach above the *Etureti*. As Akama states, they “supposedly had utmost magical-religious power put them in a position to invoke a curse or oath that may affect whole sub clan or clan depending on the level of magnitude of the committed crime or offence”¹³⁶

Abakumi

Abakumi is considered the highest court with a jurisdiction that bound the whole Gusii community. An elder with status of *Omokumi* automatically qualified to become a member of *Abakumi*. An *Omokumi* was considered a rare, special Elder. The Elder commanded respect beyond the home clan and extended to other Gusii Clans thereby becoming a community legend. Characteristics of *Omokumi* included wisdom, high quality military and

¹³⁶ Akama J. (2017) *The Gusii of Kenya: Social, Economic, Cultural, Political and Judicial Perspectives* (Nairobi: Nsemia Publishers) p. 137

leadership skills, immense wealth measured in terms of children and livestock¹³⁷. The power to declare war against other communities was solely vested in *Abakumi*. *Omokumi* was regarded highly and received highest honour where one successfully led the community against aggression from other communities¹³⁸. *Abakumi* were believed to have supreme traditional powers above all other elders. Induction of *Omokumi* into *Abakumi* included the receiving of traditional items like *enyimbo ya obogambi*, special stools, head cap, *egobia yobogamabi* that symbolized level of magical powers and prestige that the individual commanded in the whole Kisii community. No other person in the community was allowed to sit on this stool or possess any of the traditional items that belonged to *Abakumi*.

3.1.3. Law Enforcement in Colonial Gusii Land: Competing Institutions and Contestation

The Gusii socio-political system did not run smoothly at all times. Dysfunction in the traditional systems emerged in different spheres of community life. Such dysfunction was clearly exhibited in the struggle encountered by the traditional Gusii political and judicial system in trying to control and govern its community members during the colonial period. Such challenges to the existing traditional system were waged by external actors (colonialization) and from actors within the community.

Colonial Invasion

According to Wipper, “Up to 1905, the British had little contact with the Gusii”¹³⁹. The initial contact was marked with conflict and confrontation. The beginning of conflict is attributed to a cattle raid by the Kitutu clan of Gusii on the neighbouring Luo community in Karachuonyo location. The chief of the Luo clan was in good terms in colonial administration enabling the colonialists to establish a post in Karungu. Wipper states that, “Reportedly a major motive behind the 1905 expedition was to gain restitution for stolen Luo cattle and to punish the raiders, the Kitutu, thus demonstrating that tribes under British protection were indeed protected”¹⁴⁰. The Gusii openly revolted against the British actions, necessitating colonial police sanctioned by the colonial government to be dispatched to tackle the Kisii revolt. Spearmen mainly from the Kitutu clan led by local leaders battled the settlers.

¹³⁷ *ibid* p. 97

¹³⁸ *Ibid*

¹³⁹ Wipper (1977) *Rural Rebels Study of two Protest Movements in Kenya* (Nairobi: OUP) p. 24

¹⁴⁰ *Ibid* at p. 25

Though “determined and brave”, the Kisii spearmen were overrun using the power of modern weapons that Kings African Rifles possessed (KAR) leaving several hundred spearmen dead and wounded. The Gusii were defeated and the chiefs surrendered unconditionally and paid fines in form of sheep and cattle¹⁴¹.

In 1907 under the watch of Northcote, the colonial administration established a district headquarters in Kisii in early 1907. However, attempts by Northcote to bring the Gusii under colonial administration control under the indirect rule system by choosing of headmen and chiefs were resisted. Forceful taking of agricultural produce and livestock soured relations between Northcote and the Gusii. Gusii were also required to pay hut tax which forced them to sell their livestock in order to pay the tax in rupees. On the other hand, the Kitutu continued cattle raiding on neighbouring Luo clans. Northcote visited Kitutu clan asking for return of stolen cattle. The Kitutu clan refused to return cattle they had stolen from Luo and also refused to pay fines to Northcote. Northcote dispatched police to recover the stolen cattle, and killed four Kitutu men in retaliatory attacks that ensued. Later in 1908, one Kitutu man had been involved in stealing a Swahili cattle trader’s money. The offence had been reported to Northcote. Northcote visited the Otenyo homestead who was the suspect and left with two of his cows when he did not appear. Otenyo later ambushed Northcote and speared him as he was riding on his horse Otenyo’s spearing of Northcote sparked the 1908 uprising¹⁴². The Gusii revolt was defeated by the colonial administration with heavy casualties estimated at 160 killed and the capture of 5636 cattle and 3281 sheep and goats.

One of the major factors that led to the erosion of the traditional system is the advent of colonial administration in Gusii and the competing institutions that that were introduced. The advent of colonial rule introduced a number of local level institutions which had the effect of dispersing reporting stipulations by community members to the clan elders hence eroding its powers. These institutions included regional administration, Local Native Council (LNC) and Local Advisory Council (LNC). Key among these institutions was the chieftaincy which constituted wide ranging powers.

¹⁴¹ Ibid

¹⁴² Ibid at p. 27, 28

Chief's Authority

A major component of indirect rule system was the institution of the Chief. Chiefs were agents of the Colonial government and they had to implement policies including collection of hut and poll taxes. They were mandated with maintenance of law and order at the local level, regulate agricultural, economic and social activities and dispute resolution. The Authority of the chief had permeated all spheres of the locals' lives. Chiefs were resented because Africans felt their concern was in favour of colonialists rather than their interests¹⁴³

There was incremental strengthening of the position of the chief over the years. For instance, in 1940 the position of headman was abolished by the colonial authorities. The objective was to have fewer administrators at the local level, namely sub-chiefs and chiefs. The objective was to have a leaner administration to enable colonial authorities pay the sub-chiefs well. It was also expected that for such positions that attracted better pay, candidates would be better qualified, have higher qualifications¹⁴⁴. Headmen lost their membership in the Local Native Council (LNC).

Petite Bourgeoisie

According to Maxon, innovations in the indirect rule system resulted in the emergence of a *petite bourgeoisie*. Maxon describes the *petite bourgeoisie* as Africans who had acquired western education combined with their involvement in economic entrepreneurship as cash crop traders, farmers or transport operators. Maxon observes that innovations in the indirect rule system led to "expanding opportunities for service and influence" for educated young men who were not sons of chiefs who had political power¹⁴⁵. Incorporation of educated men into local governance structures like the LAC and LNC led to the emergence of *non chiefly petite bourgeoisie*. The local institutions now had better revenue streams therefore inclusion of such educated men enabled them access to such revenue and led to the emergence of *petite bourgeoisie* among African population. Examples of innovations in local governance include restructuring of LACs and LNCs.

¹⁴³ Parson T. (2011) "Local Responses to the Ethnic Geography of Colonialism in the Gusii Highlands of the British-ruled Kenya" *Ethnohistory* 58 Vol. 3 pp. 491 -523 at 508

¹⁴⁴ Maxon R. (1989) *Conflict and Accommodation in Western Kenya: The Gusii and the British: 1907-1963* (London: Associated Press) p. 123

¹⁴⁵ Ibid at p. 125

Local Native Councils

Changes were introduced in early 1940s to restructure the composition of the LNC to include the election of officials rather than membership through appointment only. By 1944, half were elected members (19) and half were nominated chiefs (19). LNCs were also given increased financial responsibilities and tax rates were increased to fund their operation. Allowing for elected members marked the increased involvement of *non-chiefly elite/petite bourgeoisie* in local politics.

LNC was also granted more autonomy with less administrative control over it by the district commissioner, who was the chairman). In 1945 and 1946, the Vice Chairperson, Chief Musa Nyandusi was allowed to conduct and chair meetings. The selection of Paul Mboya as secretary to the LNC in 1945, who unlike Musa Nyandusi was not a chief or the son of a chief, also marked an increased involvement of *non-chiefly elite/petite bourgeoisie* in local politics¹⁴⁶

Local Advisory Councils

By end of 1947, Local Advisory Councils (LAC) had been established in all locations of south Nyanza. Every clan in the sub-location was invited to select 2 members, after which those selected from the sub-location would choose a small number amongst themselves to members of the LAC. Chiefs were ex-officio members of the Council. LACs functioned as an advisory organ to the chiefs. It was also designed to give the young and educated men a place in local affairs and administration¹⁴⁷.

Youth

The colonial system of indirect rule provided alternative forms for social, economic and political participation for the youth. According to Maxon *innovations* in local governance structures like the LAC created spaces for involvement of youth in governance matters. Western education was now a means to employment taking the youth away from their

¹⁴⁶Ibid at p.124

¹⁴⁷Ibid

traditional roles¹⁴⁸. Also the missions which were among the early providers of education introduced a new beliefs system that challenged traditional beliefs. As Wiper notes, “Besides introducing Christian teaching which challenged tribal beliefs, the missionaries opened schools and hospitals. Their educational efforts produced a group of young men increasingly divorced from indigenous social control. Year after year, the annual reports noted the growing rift between the students and tribal authority. The 1924 Report complained that the mission adherents ‘are too much inclined to consider themselves as a class apart and consequently entitled to different treatment from other natives and to a certain extent to be outside the authority of ordinary native law and custom...the elders complain of the lack of respect shown by the mission boys to their elders and betters. This is repudiated by the boys themselves who in their turn complain of the drunkenness, laziness and un-progressiveness of the older generation. Many new converts believed that in becoming Christian they had rid themselves of communal obligations and tribal control’¹⁴⁹. Rather than being holed up in the encampments system, youth had the alternative of pursuing education, gaining employment within the local governance structures.

Dysfunctionality of Gusii Judicial System

The functionality of the Gusii judicial system was also one of the institutions greatly affected. Its part as a mechanism of social control was put into test in guiding norms on the institution of marriage which was an important part of Gusii people. Marriage was important as it marked an important step in transition from youth to adulthood. Marriage status made one eligible to make binding decision as *omogaka*. As Shaddle observed, marriage was respected in Gusiiland as it was only through a valid marriage that young people would be transformed into adults and with time graduate to being respected elders.¹⁵⁰ Questions raised on the validity of customary marriage and rate of bride price that were considered by the apex of Gusii judicial system, *Abakumi*, therefore had a wide reaching effect on the community.

¹⁴⁸ Ibid

¹⁴⁹ Supra note 139 at p. 23

¹⁵⁰ ShaddleB (2003) “Bridewealth and Female Consent: Marriage Disputes in African Courts, Gusiiland Kenya” *Journal of African History Vol.44 No.2* pp241-262 at p. 254

The valid rate for bride-price became a crucial issue of concern for community members in Gusii land in the colonial period. At the time the rates were deemed too high for unmarried youth. As Akama, states, "The rates had become too high and there was urgent need to reduce them to acceptable levels...towards the end of the nineteenth century, the rate of bride wealth had tremendously increased. It stood at over eighteen cows, one standard bull and several goats"¹⁵¹. The contestation that the elders had to grapple with is demonstrated in the conflicting decisions given by the Abakumi in *the Bogonko, Ogeto and Inchwari rulings*

Bogonko Ruling

Bogonko, the leading Omokumi from Abagetutu clan held a meeting in the late 1880s to address the issue of high rate of bride price. Bogonko pronounced that the number of cattle to be paid as bride-wealth should be reduced to ten (10) animals. Invoking a curse, he also declared that anyone that contravened this order their cattle would die. "Most Gusii elders attribute to Bogonko's curse, the cause the cattle plague of the late 1890s where most of the cattle in Gusii land were wiped out"¹⁵²

Ogeto Ruling

In 1906, another Omokumi from the Abagetutu clan called for a meeting of abakumi to build consensus on the reduction of the bride price. Ogeto pronounced that in the face of the difficult economic conditions in Gusii land, bride wealth should be reduced to three cows, 1 standard bull and not more than four goats. The decision was unanimous as it was backed by the other abakumi present. Any person that breached the ruling would be cursed. Ogeto and his wife a (omokundekane) experienced wedding priestess declared "let us now agree to 3 cows and may any man die who disobeys this order"

Inchwari's Ruling

Before Inchwari's ruling in the 1920s, bride price had increased to eight cattle over and above Ogeto's order of three cattle. Concerned about the escalating rates of bride price, Inchwari an Omokumi from the Abagetutu clan convened a meeting of Abakumi from all clans in Gusii land. Inchwari declared 'that bride wealth should once again be brought down

¹⁵¹ Supra note 136 at p. 141

¹⁵² Ibid

to three cows and one standard bull". The elders present agreed to the proclamation which in effect was an affirmation of the decision in Ogeto's ruling. However, in enforcing Inchwari ruling, no curse was invoked. Instead Inchwari accompanied by Obwoye a famous rainmaker, proclaimed "let the people become wealthy, and heal from Bogonko's curse, let the number of cattle to be paid as bride wealth be reduced to three"¹⁵³.

Kirera's Ruling

In the 1940s and 1950s transformations in the Gusii political economy led again to an increase in bride-wealth. Commercialization of agricultural activities in Gusii highlands meant that the value placed on women increased due to labour provided by women played in tending land¹⁵⁴. This situation made young men to postpone marriage and young women remain home past the normal years of marriage. To remedy this situation, Chief Zachariah Kirera made a proclamation that set a limit of bride-wealth to six cows and one bull. This made it less prohibitive for the youth to contract marriages.

Two years after chief Kirera's proclamation, the wealthy raised the rate of bride price ignoring the proclamation to the limit of six cows¹⁵⁵. Many young men got kicked out of the marriage market and opted for elopement. Unmarried women also opted to elope as they found it to be more viable than forced marriages as their fathers married them off to wealthy older polygamists. Elopement therefore became prevalent as a result of the raised bride-prices and forced marriages by fathers who were not interested in their daughter's choice of groom. Rather they were motivated by the higher bride-wealth they would receive from wealthier old men.

3.2. Context of Policing in Regimes in Kenya: 1963-2016

The section seeks to trace the mode of policing in different historical periods from independence to date as implemented by different political regimes. The examination of

¹⁵³Supra note 136 at p. 142

¹⁵⁴Shaddle B (2003) "Bridewealth and Female Consent: Marriage Disputes in African Courts, Gusiiland Kenya" *Journal of African History Vol.44 No.2* pp. 241-262 at p.246 In the 1940s there was an economic boom. This necessitated an increase in bride-wealth as the rich made unfair bargains forcing other men to demand higher amounts for their daughters the increase in bride-wealth and cattle costs made young men to postpone marriage.

¹⁵⁵Ibid at p. 248

policing and reform agenda is set against their historical and politico-legal contexts to demonstrate the shift in nature and method of policing. Contextualization of regimes is important as it inquires into the underlying factors that may have led to the nature of policing and suggested reforms at the time. For instance, we observe that policing during the Kenyatta era was influenced by policies, laws and political conditions during colonial rule. The analysis employs historical approaches to law and politics, in particular that, to understand the politics of reform, it is imperative to examine the evolution of reform to enable us to understand its current nature, form and content¹⁵⁶.

The problems that bedevilled the police cannot be overstated. Unlawful, repressive and irregular acts of police with official sanction constituted significant part of undemocratic nature of the Kenyatta and Moi governments. Even the advent of multiparty democracy and the subsequent Kibaki regime up to 2010, did little to deter the police from perpetuating the policy of political repression at the behest of the executive. Yet, it is vital to set the contextual background for the need for police reforms by outlining the activities that have resulted in dismal perception by the public thus necessitating the overhaul of the police.

The police has greatly featured in corruption surveys and largely dominated the rankings as the most corrupt institution. In a study carried in 2002, results showed that on average each Kenyan citizen interviewed had bribed the police at least four times a month and the cost of the bribe was an average of US\$16 per month. The respondents' interactions with the police ended up with them parting with a bribe, 95% of the time¹⁵⁷. As late as 2012 the police still ranked as the most corrupt state institution. The likelihood of bribery for the police stood at 60% according to the East African Bribery Index survey¹⁵⁸.

The police have a long history in the disproportionate use of force against its citizens and politicians which has led to many deaths. Indeed, the police have been implicated in several

¹⁵⁶ Pierson P. & Skopcol T (2002) *Historical Institutionalism* In Katznelson I (ed.) *Contemporary Political Science in American Political Science*, 693-722 New York, USA; Norton; Bix B. (2006) *Jurisprudence: Theory and Context* London, UK: Sweet and Maxwell p. 255

¹⁵⁷ Baker B. (2008) *Multi-choice Policing in Africa* Uppsala, Norway: Nordiska AfrikaInstitutet p.29

¹⁵⁸ Kivoi D. and Mbae C. (2013) The Achilles' Hell of Police Reforms in Kenya *Social Sciences* (2)(6) 189-194 at p. 191

political and criminal assassinations and cover-ups. During the Kenyatta regime, a vocal critic of his government, J.M. Kariuki was picked by the police and days later found dead and his body dumped in a thicket in Kajiado. Where use of force has not led to death, police have been involved in torturing and maiming civilians. Under the Moi administration, the police maintained a special secret place for torture of political prisoners at the Nyayo House in Nairobi. In 2003, the Independent Medico Legal Unit (IMLU) reported 358 cases of torture. The police under the Kibaki administration were found complicit in failing to prevent and manage the post-election violence that broke out after the 2007 elections and they were found culpable in use of excessive force against civilians. For instance, television footage showed police officer shooting an unarmed civilian. The police officer was charged with murder but was later set free for lack of evidence. In 2009, the Special Rapporteur to the United Nations, Philip Alston revealed that police had been responsible for extra-judicial killings¹⁵⁹. Though at the time, the Alston report was vehemently criticised by the government, in 2012, the government report submitted to the United Nations Human Rights Committee admitted that the problem of extra-judicial killing remained a great security challenge in Kenya¹⁶⁰.

3.3. History of State Policing and Reform

3.3.1. Colonial Policing: 1887-1963

The genesis of the Kenya Police is in 1887 when the East Africa Trading Company¹⁶¹ operated in the region as a vehicle to expand British interest. The company recruited Indian police and watchmen in 1887, to provide security for its stores and premises. Prior to 1920, the police operated as “an armed wing of the administration made up of recruits commonly drawn from a military background, often deployed in punitive expeditions or other sorties against local recalcitrant peoples”¹⁶². In 1920 the police attempted to shed their militaristic image in favour of an institution that would gain public acceptance of both Africans and European settlers. The Kenya Police was established as a professional civilian outfit. African

¹⁵⁹ United Nations (2009) “Statement by Professor Philip Alston, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, “ Delivered at United Nations Human Rights Council <http://www.un.org/website/unhrc/11th.statements.Alston-STMT.pdf>

¹⁶⁰ Supra note 158at p.190

¹⁶¹ It was established in 1887 to develop trade in the far interior and in the kingdom of Uganda and which later came to be known as the Imperial British East Africa Company

¹⁶² Anderson D. (1992) *Policing the Settler State*. In Engels D. & Marks S. (1992) *Contesting Hegemony State and Society in Africa and India* London, UK: I.B. Tauris at p.249

officers were recruited for the first time although, Africans were only eligible for the lowest ranks subordinate to European and Asian officers¹⁶³. Police stations were established throughout the country. Stations were set up in Nakuru, Eldoret and Kisumu which were strategic areas near White Highlands and the railway¹⁶⁴.

Attempts made by police between 1920 and 1940 to implement civilian policing were diminished by colonial administration's prioritization of the protection of European persons and their property to the exclusion of the majority African population. Deployment of police was concentrated in the White Highlands and urban centres where they owned property and the race of the victim formed the base of culpability for crime¹⁶⁵. In the 1940s professionalization of the police remained as rhetoric only embraced by the senior police officers. In reality the police force poorly performed in crime control and was increasingly involved in political policing in response to proliferation of political activity at the time¹⁶⁶. The robust political mobilization of citizens by *Mau Mau* necessitated colonial authorities to extend police presence in the Reserves which had been hitherto policed by the Chiefs and Tribal Police under the Indirect Rule system. In 1940, the Police Act was amended to increase the number of police in the Reserves and to introduce the deployment of European officers to the reserves. According to Throup, police became agents for enforcing unpopular policies and laws of the colonial administration¹⁶⁷. The police pursued a European political agenda by enforcing laws restricting movement of poor Africans who had been migrated into the urban areas in search of work after they had been dispossessed of their land.¹⁶⁸ As analyzed in the Kituo cha Sheria Report, "the Kenya Police Force clearly structured itself around the policing needs of small and politically powerful elite"¹⁶⁹. Laws like the Vagrancy (Amendment) Act of 1949 empowered the police to deport anyone who failed to secure

¹⁶³ Commonwealth Human Rights Initiative (2006) *Police, the People, The Politics: Police Accountability in Kenya* Nairobi, Kenya: CHRI/ KHRC p.2

¹⁶⁴ Ibid p. 250 The first police station was established in Mombasa in 1900, the Headquarters was then moved to Nairobi in 1902

¹⁶⁵ Ibid at p.255

¹⁶⁶ Ibid at p.251

¹⁶⁷ Throup D. (1992) *Crime Politics and the Police in Kenya* In Anderson D. and Killingray D. (1992) *Policing and Decolonisation, Politics, Nationalism and the Police 1971-65*, (pp127-157) Manchester, UK: Manchester University p. 131

¹⁶⁸ Ibid

¹⁶⁹ Kituo Cha Sheria (2006) "A Summary of Truth and Justice and Reconciliation Commission" (Kituo cha Sheria) p. 25

permanent employment after three months residence in Nairobi. The Voluntarily Unemployed Persons (Provision of Employment) Ordinance empowered the police to arrest and deport to the Reserves anyone suspected of being unemployed or a vagrant. These laws were enforced in order to restrict the presence of Africans in urban areas by curtailing their movement¹⁷⁰. Between 1950 and 1952 police underwent major reforms initiated by Commission O'Rorke. The reforms focused on improving training, strengthening the Criminal Investigations Department (CID) and revision of curriculum to provide for intellectual and experiential training at the Police Training school in Nyeri¹⁷¹.

The commencement of the State of Emergency on 20th October 1952 completely changed the dynamics of policing in colonial Kenya. The O'Rorke reforms were intended to improve colonial policing standards and the capacity to deal with crime. However, the colonial administration redirected the police towards policing prevailing political activities of the *Mau Mau*. As Throup observes, "By the end of 1952, the political situation in the Colony had propelled the police back into the paramilitary role that had characterised an earlier phase of colonial policing"¹⁷². The nature of policing relapsed from professional policing to regime policing. Law and order approaches to law enforcement trace their roots to the colonial period.

Areas affected by *Mau Mau* were heavily policed. For example, where there had existed four police stations, twenty-seven police stations were set up within two months. By December 1953 the police force had grown more than two-fold from 7,000 to 15,000 police officers. The transition to civilian policing started in 1950-1952 reform period did not take place as expected even with the cessation of *Emergency* military operations in November 1956. The gradual relinquishing of representative democracy through the 1957 Legislative Council elections served to expand political participation of majority African population. The police force nevertheless, was not subjected to comprehensive reforms to accord to prevailing political developments and new political order. The police force at independence

¹⁷⁰Ghai Y. and Mc Auslan J. (2001) *Public Law and Political Change in Kenya: A study of Legal Framework of Government from Colonial Times to the Present* Nairobi, Kenya: Oxford University Press p. 136

¹⁷¹ Ibid

¹⁷²Throup D. (1992) *Crime Politics and the Police in Kenya* In Anderson D. and Killingray D. (1992) *Policing and Decolonisation, Politics, Nationalism and the Police 1971-65*, (pp127-157) Manchester, UK: Manchester University p. 134

lacked sufficient bureaucratic structures and properly trained personnel. For long African officers worked in junior positions and with the impending independence they were expected to take leadership positions and command the force. The rushed process of transfer of power from colonial authorities to the independence government affected the police structure as there was insufficient time for training. Hence the reform process of professionalization was incomplete due to disruption of the Emergency period. The police force at independence was competent in policing politics and suppression of perceived threats to incumbent establishment. Such competence was useful to Kenyatta government as it served his government's political expediencies.

3.3.2. Kenyatta and Independence Policing: 1963-1978

Adopting the assumption that reforms relate to positive changes, it is fair to say that there were minimal structured reforms during the Kenyatta and Moi eras. Any changes to the police force were not aimed at enhancing accountability, transparency or subjecting their powers to the rule of law or the constitution. Changes were aimed at consolidating political power and empowering police with wide and robust mandates. Reforms to the political system which had a direct effect on institutional structure of the police were made through constitutional and legislative amendments. The formalistic interpretation of statutory police powers by judiciary supported the Executive's objectives¹⁷³. State policing under the Kenyatta administration was characterized by weakening of regional governments and centralization of state policing that led to: state centralization of policing;

State centralization of Policing

At independence, Kenya adopted a federal system of government with the country divided into seven regions, each with its own legislative and executive powers as set out in chapter five of the self-government Constitution¹⁷⁴. In the subsequent independence Constitution, powers of the state were divided between the central government and regional governments. It was based on the parliamentary system and protection of minorities

¹⁷³Ghai Y. and Mc Auslan J. (2001) *Public Law and Political Change in Kenya: A study of Legal Framework of Government from Colonial Times to the Present* Nairobi, Kenya: Oxford University Press

¹⁷⁴Ibid at p. 179 Statutory Instrument 791/1963 which granted Kenya self-government in 1st June 1963.

through representation by regional governments¹⁷⁵. It was closely modelled on the Westminster style of government¹⁷⁶. The central government was bound to seek approval of regional governments on important matters of governance including decisions concerning the police. A year after independence President Kenyatta used constitutional amendments to remove police autonomy and centralize power of police in the Presidency¹⁷⁷. The first amendment to the Constitution targeted the weakening of the federal system of government. Because regional governments exercised powers over the police, these powers were stripped as a result of the amendment and effectively police was restored to the central government. The effect of weakening of majimbo system and ultimate abolition was the centralization of policing at the expense of service to citizen at the grass-root level. As a result of constitutional amendments, the President was granted, unlimited authority to control the police. There was no role for parliament in the Constitution or other legislative framework in the appointment or dismissal of the Commissioner of Police¹⁷⁸. Under the 1963 Constitution, the President was mandated by virtue of Section 108 to appoint and dismiss Police Commissioner.

The Kenyatta government retained several oppressive laws¹⁷⁹ that were used by colonial administration to protect interests of the settlers by restricting the free movement of Africans especially in urban areas. For instance, the scope of Vagrancy Act¹⁸⁰ gave the government wide powers in limiting the right of liberty and freedom of movement of any person. The police were charged with enforcing this law and any challenges to the validity of the law were defeated by the courts' narrow interpretation in favour of the State and to the detriment of individual rights¹⁸¹. The Vagrancy Act emanated from Vagrancy Regulations No.2 of 1898 which sanctioned the arrest and detention of any person found loitering

¹⁷⁵Supra note 173 at p.180

¹⁷⁶Hills, Alice (2009) "Policing in Kenya: A Selective Service" in eds. M.S. Hinton and T. Newton. *Policing Developing Democracies*, Abingdon: Routledge, pp.237-59

¹⁷⁷ Ibid. at 239

¹⁷⁸ Ibid.

¹⁷⁹ Vagrancy Act (Cap 58); Outlying Districts Ordinance (Cap 104); Special District Administration Act (Cap 105)

¹⁸⁰ Act No. 61 of 1969

¹⁸¹ For instance in the case of *Kioko v. Attorney General*, the court upheld the Vagrancy Act at the expense of the freedom of movement.

without employment or any means of subsistence. The Vagrancy Regulations were later amended in 1900¹⁸² and adopted by Kenyatta government as the Vagrancy Act¹⁸³.

Under the Outlying District Ordinance Act¹⁸⁴ the Commissioner could declare districts closed with the power on district commissioner to restrict movement of non-residents from entering into the closed district. The Act also gave wide powers to the Commissioner in issuance and revocation of licences. Section 7 (2) provide that a “licencee who failed to comply with the terms of his licence was liable to have his building or crops seized or disposed of as considered fit by the District Commissioner”¹⁸⁵ As late as 1967, four years into the Kenyatta administration, Parliament was informed that there were nineteen districts that had remained wholly or partly closed since the declaration of Emergency in 1952¹⁸⁶.

3.4. Moi Government: 1978-2002

Similar to the Kenyatta government, political reforms undertaken during the Moi era had a bearing on the regulation of public order and were aimed at the concentration of power at the centre rather than the democratization of governance. Policing was characterized by human rights violations where the police enforced repressive practices like detention without trial political activists¹⁸⁷. As noted in the Truth and Justice Reconciliation Commission hearings, the police were perpetrators of extrajudicial killings, torture and political detentions¹⁸⁸. Further, the Moi government adopted a similar approach to Kenyatta’s by retaining significant aspects of colonial laws aimed at curtailing individual rights and fundamental freedoms. Continuities were manifested by the retention of repressive provisions of law contained in the Vagrancy Act, Preservation of Public Security Act and the Outlying Districts Act. Changes in the government system in the *post-coup era* were geared to place a firm grip on power, security and public order regulation. The repeal

¹⁸² No. 3 of 1900

¹⁸³ Chapter 58 of the Laws of Kenya

¹⁸⁴ Chapter 104 of the Laws of Kenya The law was first enacted in 1899 as Regulations No.31 of 1899, and replaced by regulations no. 25 of 1902

¹⁸⁵ Supra note 173 at p.408

¹⁸⁶ ibid p.418

¹⁸⁷ ibid p.407

¹⁸⁸ Republic of Kenya (2013) Report of Truth Justice and Reconciliation Commission (Government Printers: Nairobi)

of section 2A of the old constitution in 1982 is only one example of fundamental change to the governance structure. The Police Act enacted in 1961 was revised in 1988. The aim of revision was an amendment of Police Act to include Police Regulations¹⁸⁹. None of the revisions were aimed at transforming the police into a democratic institution to serve the people.

Nevertheless, the last decade of Moi administration witnessed minimal reversals on constitutional and legislative provisions which had been used to justify repression, gagging of the media, limiting the freedom of expression, curtailing the independence of the judiciary and the office of the Attorney General (A.G.). In 1998, the Preservation of Public security Act, the Vagrancy Act and the Outlying Districts Act were repealed. The power to detain persons without trial for political reasons was removed from the Preservation of the Public Security Act. The offence of sedition which had been used to target opposition politicians and media was repealed from the Penal Code. The Constitution was also amended to restore the independence of the A.G. and nominal independence of the judiciary during this period.

3.5. Kibaki Government 2003-2013

3.5.1. Pre-constitutional Period 2003-2010

A number of reform initiatives were launched by Kibaki government prior to the promulgation of the Constitution. Even though laudable, the reform initiatives in the early years of Kibaki's tenure had no constitutional or legal backing and were therefore not enforceable. The initiatives were ad hoc and emanated from within the police itself, like the 2003 Strategic Plan and from semi-autonomous ministerial programmes like the Governance Justice Law and Order Sector programme.

The Governance Justice Law and Order Sector (GJLOS) programme was a sector wide approach to security sector governance and reform. It brought together 33 state institutions in the sector with the aim of coordinating activities aimed at improving service delivery and

¹⁸⁹ Ibid.

peer review under one body¹⁹⁰. The GJLOS programme was housed under the then Ministry of Justice and Constitutional Affairs. The activities of GJLOS thematic group on security were aimed at improving accountability anti-corruption sensitization, promotion of proactive policing, better training for police officers and provision of better training and technical assistance to improve efficiency in intelligence and investigation of crime¹⁹¹.

In accordance with the GJLOS programme each of the state institutions was required to implement their reforms through a strategic plan. With regard to security reforms, the police developed the Kenya Police Strategic Plan 2003-2007. The objectives included establishing a Police Service Commission, formulation of national policy on policing and modernization of the police as key priority areas. The Commission was to be mandated with an oversight role to monitor police performance and investigate misconduct. The police was to be modernized through acquisition of vehicles, modern communication equipment and weapons and use of Information and Communications Technology (ICT). Little was achieved in terms of implementation. No commission was established within relevant period while there was no formulation of a national policing policy. The reform proposals in the Strategic plan were positive and progressive. Indeed most of the proposals are replicated in the current reform agenda contained in the provisions of National Police Service Act, National Police Service Commission Act and the Independent Policing Oversight Authority. However, inadequate budgetary support meant that modernization plans failed in acquisition of necessary material to improve its operational efficiency.

3.6. A History of Continuities from Colonial Policing

As Kenya transited from a colony to an independent government, part of the fundamental issues preceding the full transfer of power was the debate on leadership and the structure of police intelligence. The debate was settled, or so it appeared, when a Cabinet resolution in October 1963 stipulated that the Director of Intelligence would be replaced by an African

¹⁹⁰ Government of Kenya *Governance Justice Law and Order Sector Programme Strategic Plan: 2003-2008* Nairobi, Kenya; Government Printers p.2

¹⁹¹ Commonwealth Human Rights Initiative (2006) *Police, the People, The Politics: Police Accountability in Kenya* Nairobi, Kenya: CHRI/ KHRC p.60

before independence¹⁹². However, it was Prime Minister Kenyatta's decision not to implement the Africanisation of the command of police intelligence despite the Cabinet decision. Kenyatta had come to trust the existing police structure owing to the critical role played by the Special Branch during the *shifita* incursions in Northern Kenya¹⁹³. Continuities from colonial government into the Kenyatta government were not only reflected in the leadership but they transcended the institution of the police as a whole. Africanisation of the leadership of the police would not take place until 1965 when Commissioner Catling retired but even then no comprehensive reform of the policing system was undertaken to meet the aspirations of the majority of African population¹⁹⁴. The independence government inherited a police force from the former colonial government comprising the same structure and composition and to a large extent the same objectives and modus operandi, namely to protect the interest of the administration. The interests of the colonialists were perpetuated through the independent government as power was transferred from the colonial elite to the new African elite¹⁹⁵. Grave as it may appear, objectives of state policing were not without judicial and parliamentary support, statutory and even constitutional basis. Any review or reform of law and policy was geared towards strengthening monopoly of police powers and centralizing and consolidating authority under the Executive rather than seeking to serve the citizen's interest. There was emphasis on the precedence of preserve of public order and security over the fundamental freedoms and individual rights of the citizen. Police forces under successive governments were anything but legitimate instead they were used to maintain political incumbency and expediency.

There were continuities in policing objectives in the formative years of Moi government. After the 1982 coup attempt, political repression became prevalent where the police were agents for quelling any perceived threats to the stability of the administration. In the period

¹⁹² Throup D. (1992) *Crime Politics and the Police in Kenya* In Anderson D. and Killingray D. (1992) *Policing and Decolonisation, Politics, Nationalism and the Police 1971-65*, (pp127-157) Manchester, UK: Manchester University Press

¹⁹³ Ibid. at p.154

¹⁹⁴ See Mawby I. (2003) *Models of Policing* In Newburn T (ed.) *Handbook on Policing* (pp 15-37) Exeter, UK: Willan. Indeed as Mawby notes, the change in personnel (or leadership) does not guarantee that the system itself has been transformed

¹⁹⁵ Branch D. (2009) *Defeating Mau Mau, Creating Kenya: Counter-insurgency, Civil War and Decolonization*. New York, USA: Cambridge University Press p.149

up to 1991 when the constitution was repealed to pave way for multi-party democracy. Legal and policy developments relating to public order regulation were aimed at rationalizing suppression of political opposition. The first tenure of the Moi government in the multi-party democracy era did not usher in comprehensive constitutional reform which would have had cascaded to the reform of the police. Constitutional and statutory reform was minimalist with piecemeal revisions mainly relating to the electoral process owing to concessions to opposition and civil society pressure. The Kibaki administration may be credited with setting the roadmap for substantive police reform though such credit is largely attributed to the reforms tied to the promulgation of the new Constitution in 2010. Even though initiatives were potentially progressive than the Moi government, looking back to the period before August 2010, the reform agenda lacked the necessary legal foundation and reform initiatives were driven by the police institution itself rather than its principal. The post-constitutional reform agenda for the police is replete with prospects for democratized police service that would cater for citizen's interests.

Conclusion

The chapter has set out the landscape tracing pre-existing practices on governance of law and order from pre-colonial period especially amongst the Abagusii. It then proceeded to outline governance of law and order during the colonial period, the professionalization of police and policing reforms from independence up to the promulgation of the Constitution in 2010. The next chapter develops the context further by evaluating the changes brought about by new legal framework aimed at regulating law and order and effect on local security governance. Relevant laws examined are the Constitution of Kenya and the Prevention of Organized Crime Act 2010.

CHAPTER 4: POLICING REFORM AND REGULATION: CONSTITUTIONAL AND LEGAL FRAMEWORK 2010-2016

A number of reforms were initiated guided by the promulgation of the 2010 constitution. Core to these reforms was the objective of adjusting the relationship between government and communities in governance, which deterioration and ultimate breakdown was

attributable to the histories of both colonial and independent governments. The government's articulation of the need for democratic policing marked an acknowledgement of the poor state-society relations rooted in historical models of colonial and regime policing. The chapter examines a number of political and legal reforms that were initiated by the government in 2010 geared towards facilitation of community oriented policing and regulation of non state policing like vigilantism which was classified as organized crime. The reform initiatives of the Jubilee government (2013-present), in particular constitutional and legal framework for institutionalizing a new police service and the *Nyumba Kumi* initiative are reviewed. Reforms undertaken by the successive government have been inspired by political expediency aimed at strengthening the regime rather than serving interest of its citizen.

The chapter begins by looking at the broad reforms brought about by the enactment of the Constitution in 2010 in relation to governance and policing. Section 2 of the Chapter then analyzes the Prevention Organized Crime Act which constitutes the main legislative intervention that sets out to regulate local policing mechanisms by eradicating groups like *sungusungu*.

4.1 Post- Constitutional Reform (2010-2013)

The single most significant contributor to policing reform since independence has been the new Constitution promulgated in August 2010. The Constitution lays the roadmap for improving the face and the perception of police and it lays the roadmap for transforming the regulation of public order from regime policing to democratic policing. The Constitution stipulates a number of enabling Acts that need to be enacted to implement specific Articles¹⁹⁶. The enabling Acts provide in detail the procedures, process and practice of day to day workings of the new Kenya Police Service. In sum, the constitutional and legislative requirements for police reform not only provide direction that reform will take and democratize policing, they provide much needed legal protection of the reform agenda that was lacking in previous governments. As the main reform areas are attributed to the passing

¹⁹⁶Odhiambo V. (2011) Constitutional Implementation in Kenya In PLO Lumumba, M. Mbondenyi M. & S. Odero *Constitution of Kenya: Contemporary Readings* (pp. 287-306) Nairobi: LawAfrica p.298; Fifth Schedule to Constitution of Kenya, 2010

of the Constitution, it is important to examine the extent to which transition to democratic policing has been realised by evaluating the extent to which the reforms have been implemented.

Article 239 (1) establishes the National Police Service as a national security organ alongside Kenya Defence Forces and the National Intelligence Service. In tandem with democratic policing, Article 239 (2) prohibits the police from partisanship, advancing political interests and prejudice of legitimate causes recognized under the Constitution. Enforcement of national security is to be exercised in line with guiding principles stated in Article 238 (2). National security is subject to the authority of the Constitution and Parliament, the rule of law, democracy, human rights and fundamental freedoms. Performance of national security functions must respect diverse culture of communities and recruitment of officers must reflect the diversity of the Kenyan people. Article 239 (5) of the Constitution also provides that national security organs are subordinate to civilian authority. Pursuant to Article 239(6), requires the enactment of substantive enabling legislation providing for establishment and regulation of the National Police Service¹⁹⁷, National Police Service Commission¹⁹⁸ and the Independent Policing Oversight Authority.

Broadly, the National Police Service Act 2011 regulates the administration, functions and powers of the IG and the DIGs, the Kenya Police Service, the Administration Police Service and the Directorate of Criminal Investigations. It gives the police a robust mandate, strengthens internal accountability, and attempts to curtail interference in police operations. The Act also provides for independent funding of the police service, with the intention of enhancing the management and quality of its investigations. It describes the powers of police and requires all serving police officers to be vetted for integrity and competence to determine their suitability to continue in the service. It also places limits on the use of force and firearms, arrest and detention by providing clear instructions for its use, and outlines management responsibilities when using these police powers. The Act diversifies means of accountability by establishing clear command structures and responsibilities among the Police, Administration Police and Director of Criminal

¹⁹⁷ National Police Service Act 2011

¹⁹⁸ National Police Service Commission Act 2011

Investigation. An Internal Affairs Unit also provides an internal accountability mechanism as it receives and investigates complaints about police misconduct. It reports directly to the IG and provides for civilian oversight at county level through the County Policing Authorities.

The National Police Service Commission Act establishes an independent commission responsible for overseeing appointments, promotions and transfers of police officers, to address corruption in recruitment and career management, and also disciplinary matters. Its main powers include: independent recruitment and appointment, promotions and transfers of members of the National Police Service; oversight over the disciplinary process and removal of members of the National Police Service; oversight of police training to enhance the capacity of police officers to deliver high quality services with respect for human rights; and, vetting of all current members of the National Police Service.

The Independent Policing Oversight Act establishes and stipulates the objectives, functions, and powers of the Independent Policing Oversight Authority (IPOA). This marks a significant step towards promoting accountability and democratization of the police and enhancing access to justice by creating an independent civilian oversight body over the National Police Service. Its investigative mandate includes inquiry into; policing operations; allegations of police misconduct; human rights violations; and any death or serious injury suspected to have been caused by a member of the police; and, to prevent excessive use of force and extrajudicial executions for which the police have been commonly implicated. IPOA is also charged with the responsibility of inspecting police premises; promoting police accountability to the public, and providing an independent oversight of complaints handled by the police.

4.1.1 Strengthened Constitutional and Legislative Framework

The promulgation of the Constitution in 2010 itself marked an important chapter in the history of police reforms. Entrenchment of the police service in the Constitution ensured that the intended overhaul of policing system would be infused with legitimacy, transparency and accountability to the law. It also ensured that the reform process would be safeguarded through the doctrine of supremacy of the Constitution. The police institution would no longer be subject to whims of the executive but it would be

accountable to the constitution, the law and its citizens. The National Police Service Act, The National Police Service Commission Act and the Independent Oversight Authority Act were enacted in accordance with the above stated constitutional requirements. Though the Fifth Schedule to the Constitution allowed two years for the enactment of new laws governing the National Police Service, the government prioritized these laws and had them in place by 27 August 2011, within one year of the promulgation of the Constitution.

4.1.2 Institutionalization of Joint Command and Independence of Inspector General

The National Police Service Act 2011 places the Kenya Police Service (KPS) and Administration Police Service (APS) jointly under command of the Inspector General of Police (IG)¹⁹⁹. The previous structure where the two institutions were under different commands had occasioned unnecessary turf wars which resulted in security lapses. The APS and KPS are each headed by a Deputy Inspector General (DIG) who report to the IG.²⁰⁰ The Constitution gives the IG security of tenure for four years, and clearly stipulates the grounds of his/her removal from office. In a significant departure from past practice, the Constitution gives the IG operational independence, outlawing political interference of police investigations and enforcement against particular person(s). The Cabinet Secretary for Internal Security can only give directions to the police on policy issues and such directives must be in writing²⁰¹. The National Police Service Commission (NPSC) is established as an independent commission by the Constitution. The rationale for the establishment of the NPSC is to inhibit political interference with police personnel management practices. It is responsible for recruitment, promotions, transfers and disciplinary sanctions of police.²⁰² Significantly, the interviews for the IG and DIGs were all held in public which was an important milestone since such positions were previously political appointees of the president.

4.1.3 Accountability

¹⁹⁹ Article 243 (1) of the Constitution provides for a National Police Service that consists of the Kenya Police Service and the Administration Police Service which shall function throughout Kenya.

²⁰⁰ Article 245 of the Constitution, 2010

²⁰¹ Article 245 of the Constitution, 2010

²⁰² Article 246 of the Constitution, 2010

Advances made in relation to police accountability are evident in the post-constitutional period. Key amongst the accountability mechanisms infused in police service is the provision on the requirement for vetting of police officers. The criteria and vetting tools were formulated in accordance with section 7(2) of the National Police Service Act 2011. Although initially met with resistance from senior officers within the service, first phase of the vetting exercise commenced in December 2013. The rationale behind vetting enables public scrutiny of senior police officers charged with the responsibility of providing leadership to the service of citizens. The procedure for vetting under the Act facilitates public participation. Citizens are allowed to file petitions on complaints about individual senior officers, who in turn respond to the allegations before the interviewing panel of the National Police Service Commission in a public forum. For the first time in Kenya's history, the public was invited to give feedback on the integrity and capabilities of candidates and their input was widely debated in the media²⁰³. The complaints raised by the public ranged from corruption, abuse of office and inefficiency. The Commission itself raised issues relating to wealth declaration, technical expertise and knowledge of reform agenda before making an assessment on the fitness of an officer to continue serving.

Further, a number of steps have been undertaken in the realization of internal accountability as stipulated under the constitutional reform agenda. The process of establishment of the Internal Accountability Unit (IAU) in line with the Act²⁰⁴ is at an advanced stage. Proposals to mainstream the IAU as one of the five (5) main directorates has been accepted by the NPSC and is awaiting budgetary support from National Treasury to facilitate its operation²⁰⁵. The financial support will enable competitive recruitment and staffing of the IAU.

4.1.4 Operational Efficiency

A number of milestones in the reform process relating to the operational efficiency of the National Police Service have been achieved. The formulation of a stakeholders' consultative draft of the National Police Service Strategic Plan 2013-2017 is complete. The police has

²⁰³ Recruitment of IPOA Board members and NPSC commissioners was also done in public

²⁰⁴ Section 87 of the National Police Service Act, 2011

²⁰⁵ Interview with PRC 1, Police Officer, Reforms Committee, 13 January 2014, Nairobi

taken initiatives to establish internal mechanisms for reform which are charged with implementation and monitoring reforms. Towards this end a reform committee was established on 1st July 2013 to track implementation under seven thematic areas, namely: traffic reforms; establishment of County Policing Authority; curriculum review and training; operations audit; police housing; welfare audit and general reforms

A number of measures have been put in place to modernize the operation of the police service. The police have received substantial budgetary support from the government to the tune of Kshs. 4 Billion to facilitate the modernization of police. In order to enhance police response efficiency the fleet of police vehicles have been increased in the past two years. In 2013, 335 vehicles were purchased for the NPS. The APS also acquired seventy four vehicles, while communication equipment was provided through partnership with the United Kingdom. There has also been established a control operation centre which comprises closed circuit television surveillance system completely furnished with trained officers to manage the centre. Emergency call lines have been reactivated and are fully operational.

As part of the performance of the police in creating conducive environment for democratic participation, overall the police successfully managed the 2013 elections as compared to 2007/8 Elections which degenerated to post-election violence and crisis. There has also been a drop in crime rate in the first year of the tenure of the IG which commenced on 24th December 2012. According to statistics, there has been a reduction in the crime rate by an average of 8%. Studies carried out on the basis of reporting of crime, levels decreased by 5903 cases where 66188 cases were reported compared to the same period last year when 72091 cases were reported.²⁰⁶

Certain changes relating to police welfare and measures to motivate police officers have been implemented. Substantial progress has been made in completion of housing projects for both administration and national police. By the end of 2013, five housing projects were completed in Ngong, Keroka, Kainuk, Kehancha, Ruai Police Station and the General Service

²⁰⁶ Interview with PRC 1, Police Officer, Reforms Committee, 13 January 2014, Nairobi

Unit (GSU)²⁰⁷. Further in relation to career advancement and upward mobility, over 2000 officers have been promoted in the first year of the IG's tenure.

4.1.5 Decentralization of Police Services

The decentralization of police services is an important aspect of democratizing policing as it ensures that the police service is accountable and connected to the community it serves rather than the political regime. The County Policing Authority has not been fully established and the guidelines are yet to be published. What is in place to guide the process is a consultative draft. However, certain activities have been undertaken towards decentralization of police services to the county. County commanders who will be in charge of counties have been appointed and deployed to the 47 counties²⁰⁸. Community policing has also been strengthened to bring services closer to the people and to ensure that there is partnership between the government and society in policing. Community policing programmes in their pilot phases have been established in following police stations in 5 different counties, namely, Manga Police Station (Nyamira County), Kajiado Police Station (Kajiado County), Sotik Police Station (Bomet), Kimilili Police Station (Bungoma), Kikuyu Police Station (Kiambu) and Lari Police Station (Kiambu)²⁰⁹

4.1.6 Challenges

Adoption of certain progressive reforms can be said to represent the success of the police, but the bulk of the challenges have emerged in implementation of reforms due to lack of goodwill, from within the police service and, externally, mainly from the executive. The lack of political will remains a major challenge to police reform cutting across political regimes since independence to the current administration. Kenya like many other African countries is struggling with entrenched impunity in some of its governance institutions. There has been lack of political will to put in place necessary structures to address the lethargy, inefficiency and mistrust created as a result of long standing impunity in the police service because the police service in Kenya has since independence been used as a political tool and not as a public service institution. This challenge persists, despite the constitution redistributing

²⁰⁷ Interview with PRC 1, Police Officer, Reforms Committee, 13 January 2014, Nairobi

²⁰⁸ Remarks by Inspector General at the Launch of County Police Reform Forum, Hilton Hotel, Nairobi 13 May 2013

²⁰⁹ Interview with PRC 2, Police Officer, Reforms Committee, 31 January 2014, Nairobi

wide ranging powers on from the Presidency to institutional mechanisms (IPOA, NPSC and the IG) with the aim of granting the police more autonomy and insulating it from political interference.

Numerous delays in establishing these institutions, point to the limited political commitment to police reform which may hamper their effectiveness in the long-run. Though Parliament passed the three Acts within the one year deadline, soon after, the Executive failed to ensure commencement implementation in accordance with the stated dates in the respective legislation. The National Police Service Act was due to come into effect on 30 August 2011. However, it was not published until July 2012 to enable its commencement. No explanation was provided for the lengthy delay, although there were indications of internal resistance to changes within the police service²¹⁰. The IG was not recruited until after the NPSC was established, though the National Police Service Act would have allowed the IG's recruitment beforehand under a transitional arrangement. All three institutions are now operational, but they lack proper secretariats and are under-resourced, significantly limiting their capacity to carry out their respective mandates²¹¹.

Reform in the Kenyan police service has been faced by several setbacks which have led to the slow pace in implementing change. Ad-hoc implementation of the new legislations which are vital to police reform remains a major concern. In part, this stems from a lack of knowledge within the police, as not all officers have been made aware of the implication of the new laws. As a result of lack of sensitization programmes, many aspects of the new legal framework, including new restrictions which limit the use of force and firearms, regulate arrest and detention, and enhance internal accountability and reporting obligations by the Police Service to IPOA, are yet to be embraced in practice. IPOA itself is not free from criticism. Though it takes time to build an institution, frustration is beginning to mount over

²¹⁰Kofi Annan, monitoring compliance with the Peace Accord, made a public statement that police were resisting reforms". The Daily Nation, "Police resisting reforms, says Annan", 20 March 2012 Retrieved from <http://www.nation.co.ke/News/Police+resisting+reforms+says+Annan+/-/1056/1370390/-/item/1/-o6171y/-/index.html>

²¹¹Amnesty International (2013) *Police Reform in Kenya: A Drop in the Ocean* London, UK: Amnesty International Publications p.19. It is noteworthy that all stakeholders shared this view, including civil society, IPOA, the NPSC, as well as the police.

the slow pace of IPOA's implementation of its mandate²¹². IPOA has received many complaints and has started some investigations, but their findings have not been made public and to date, no officer has been held to account under the IPOA mandate²¹³.

Undue delays by the executive and legislature in enacting constitutionally-required legislation have posed a barrier to efforts to create new structures to address the legacy and mistrust created by longstanding impunity. Despite ongoing reforms, the police still lag behind in public perception surveys as the most corrupt institution in Kenya²¹⁴. Consequently, there is great need for reforms to focus on restoration of integrity within the police force. Corruption in the police is perceived as an enterprise so entrenched and well protected that the current government has appeared unable to address it effectively. This perception is compounded by the belief that the political elite control the police and this control contributes to their failure to address corruption.²¹⁵

The chapter has traced the legal and political context of policing from 2010 to date. The legal and political landscape provides a contextual insight into the rationale of existing policing models. It also enables the understanding of the interaction between state policing and society in the context of law enforcement. Both state and non-state actors have sought to enforce the law with the objective of crime fighting and improving security. Accountability in law enforcement has been a major challenge to both set of actors. New mechanisms such as new policies on police-community partnerships have been put in place to enforce accountability. Institutional reforms on the police service catalysed by the new constitutional dispensation have been set in motion. New laws like POCA with harsher penalties particularly targeting local law enforcement groups like *sungusungu* have also been enacted as a means of tackling crime. The involvement of non-state groups have come under increased pressure. However, there has been no corresponding regulatory framework

²¹² Interview with HR 1, Human Rights activist, 8 January 2014, Nairobi

²¹³ Interview with HR 2, Human Rights activist, 8 January 2014, Nairobi

²¹⁴ Transparency International (TI) (2012) *East Africa Bribery Index* Nairobi, Kenya: Transparency International p.3.

²¹⁵ Amnesty International (2013) *Police Reform in Kenya: A Drop in the Ocean* London, UK: Amnesty International Publications p. 17

or clear policies for the facilitation of members of the society to partner with police in security governance.

4.2. Prevention of Organized Crime Act

The section examines the Prevention of Organized Crime Act (POCA) as the main legislation enacted to regulate criminal activities perpetrated by groups involved in local law enforcement like sungusungu. The Prevention of Organized Crimes Act was enacted in August 2010. The Act is divided into five parts. Briefly, Part I provides preliminary content including short title, interpretations of the key terms used in the legislation. Part 2 provides description of organised criminal activities and relevant sanctions for commission of the crime. Part III specifies other offences related to obstruction of justice that organized crime groups (OCG) may be involved in. Part IV provides remedial procedures aimed at recovering property and funds appropriated by criminal groups. Part V contains general provisions relating to the amendment of the Act, gazettment of OCGs and makes provision for regulations.

4.2.1. Objective and Rationale of the Act

The objective of the Act is to provide for the prevention and punishment of organised crime; to provide for the recovery of proceeds of organised criminal group activities and for connected purposes. In Parliament during the second reading of the Prevention of Organized Crime Bill, the Minister for Provincial Administration and Internal Security stated that to the objective of the proposed law was to “detect, prevent, investigate, criminalise and punish organised crime in Kenya”. The regulatory framework at the time was weak and there were gaps in existing laws. Although Members of Parliament (MPs) contributing to the motion consistently referred to inadequate existing law(s), no law was specified or singled out for its ineffectiveness during the parliamentary debate. The only other existing law that which contains the comprehensive substantive law on fighting crime is the Penal Code. The argument advanced on inadequacy of existing law, was that despite the *efficiency of the police in law enforcement*, offenders were being acquitted by the courts due to *technicality of the law*²¹⁶. Further, it was argued that *existing laws were weak* because they did not carry

²¹⁶Parliamentary Hansard 17 June 2010, p.21 available on www.parliament.go.ke

tough sanctions that would *deter* persons from engaging in organised crime. The enactment of the Act was also necessary, as part of Kenya's commitment to *fulfilling its international obligations* under the United Nations Convention of Transnational Organized Crime 2000, to which Kenya is a signatory²¹⁷.

The Minister also alluded to the socio-political context that necessitated the passing of the law at the time. He stated, "The government has come lately under very close scrutiny over the spate of criminal activities being perpetrated by the organised criminal groups impacting negatively on the safety, the economy, the health and the general livelihood of Kenyans"²¹⁸. Though unspecific as to the source of pressure for parliament to provide legislative response to rising crime, it is clear the government was concerned on negative impact of insecurity on safety and economy of the nation. It is important to note that the passing of POCA occurred two years after the 2007-8 post election crisis in which militia and vigilante groups like sungusungu, Mungiki had been implicated as perpetrators of violence. These same groups were targeted for proscription under the provisions of POCA.

4.2.2. Definition of Organized Crime

It is important from the outset to understand what organized crime is. Organized crime is not expressly defined in the Act. This is not only a deficiency of the Kenyan legal framework. Lebeya observes that there is an absence of a definition of organised crime in the UN Convention on Transnational Organized Crime arising out of difficulties faced by the United Nations Working group in building consensus among members on what *organized crime* constitutes.²¹⁹ There is no scholarly consensus on what organized crime is. Scholars have advanced different meanings and characteristics to the term. Albanese describes organized crime as a "continuing organization that operates rationally for profit, use of force or threats, and the need for corruption to maintain immunity from law enforcement"²²⁰.

²¹⁷ Article 1 of the Constitution provides that international law that Kenya is signatory to forms part of Kenyan law

²¹⁸ Parliamentary Hansard 17 June 2010, p.22 available on www.parliament.go.ke

²¹⁹ Lebeya G. S. (2012) *Defining Organized Crime: a Comparative Analysis* (University of South Africa) (unpublished thesis) p.51

²²⁰ Albanese J. (2003). "Prediction and Control of Organized Crime: A Risk Assessment Instrument for Targeting Law Enforcement Efforts" National Crime Justice Reference System (NCJRS): US Department of Justice p. 16

Rather than expressly define what organized crime is, Albanese provides four primary elements that a criminal group must possess to qualify as an organized criminal group. He further states the types of organized crime undertaken by organized crime groups. The types of illegal activities include; provision of illicit goods (for example, drugs), provision of illicit services (gambling, smuggling of goods and human trafficking) and infiltration or abuse of legitimate business (extortion and racketeering). Lebeya suggests that the definitions of organised crime can be divided into two models, structural model and a crime model. Under the *structural model* organized crime is defined by description of the group itself, while under the *crime model*, organized crime can be understood through the reference to the acts of crime committed by an individual or members of the group²²¹. The Kenyan Prevention of Organized Crime Act appears to favour a middle ground approach which employs a combination of the structural and crime approaches to organized crime.

The meaning of organized crime under POCA can be gleaned from the key terms that have been used to describe it; namely, organised criminal group, organized criminal activity, and serious crime provided in sections 2 and 3 of the Act. *Organized criminal group* is defined as: a *structured group* of 3 or more persons existing for a period of time and acting in concert with the aim of committing 1 or more *serious crimes*; or committing 1 or more serious crimes in order to obtain directly or indirectly, financial or other material benefit, other advantage for the organized crime group or any members of the group; and it includes a *group* declared as an organized crime group under section 22 of the Act through a ministerial declaration. Therefore the meaning applied of organized crime in the Act refers to the structural aspects of the group and the criminal nature of the group's activities. In reference to organized crime, what connotes "organized" is further described under the term *structured group*.

The term *structured group* means a "group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure". Serious crime²²² refers to

²²¹Lebeya G. (2012) *Defining Organized Crime: a Comparative Analysis* (University of South Africa) (unpublished thesis) at p. 49

²²² Section 2 POCA

conduct constituting an offence against a provision any law in Kenya punishable by a term of imprisonment of at least 6 months or an offence in a foreign state which would constitute and offence against a provision of any law in Kenya. Here, serious crime is defined in reference to the punishment that is accorded to the criminal activity. Under the Penal Code such crimes are referred to as felonies. These include; murder, manslaughter, robbery, robbery with violence, theft and assault. Section 4 further provides for the sanction for committing a serious crime as provided under section 3. Upon conviction, a person committing a serious crime as defined in section 3 is liable to a fine not exceeding Ksh. 5 Million or to imprisonment for a term not exceeding 15 years²²³. If the OCG member commits murder, such a member will be liable to life imprisonment²²⁴.

Section 3 specifies what constitutes organised criminal activities. It lists 16 different activities that fall under the ambit of the Act. These offences can broadly be divided into the following categories; membership, threats of violence, possession offences, receipt and retention of material benefit, obstruction of justice offences and ministerial declaration.

4.2.3. Membership to Organized Criminal Group

Membership to an organised criminal group is an offence under the Act. Under section 3(1) and section 7 (1) (a) of POCA, membership is apparent when a person admits to being a member of an OCG. Other than admission, membership is also determined through the criteria provided under section 7. These include: “reasonable grounds”, frequent association, arrest with OCG members, ascribing to ideologies and practices of OC members, and, receipt of material benefit from OCG.

By virtue of a person being a member of an OCG, an offence is committed under the Act where such OC members instruct other persons to commit a serious crime. This is further defined in section 3 (n) to include “being a member of an organized criminal group endangers the life of any person or causes serious damage to the property of any person”.

²²³ Section 3 (a) POCA

²²⁴ Section 3(b) POCA

This was one of the issues addressed in the *Aboud Rogo Mohamed and Abubakar Sharif Ahmed Abubakar v. the Republic*²²⁵.

In the case the applicants Aboud Rogo Mohamed and Abubakar Sharif Ahmed Abubakar were charged with the offence of engaging in an organized criminal activity, contrary to section 3(3) as read with section 4(1) of the Prevention of Organized Crimes Act, 2010. The particulars of the charges were that the applicants were found engaging in an organized criminal activity by being members of *Al-Shabaab*, an outlawed organized criminal group as per Kenya Gazette Notice vol.cx-11 No.113 of 3rd November 2010. Both applicants were arrested on 21st December 2010. Thereafter they were charged with the offence on 22nd December, 2010. Although the applicants had been charged in separate cases, both cases were heard before Mrs. Ngenye Macharia, Principal Magistrate Nairobi. The learned magistrate presided over the taking of pleas where both the applicants pleaded not guilty. Thereafter each of the applicants made an application for bail pending trial. After giving due consideration to the applications, the trial court rejected the applications for bail prompting the applicants to move to the High Court at Nairobi for bail pending the trial of their case.

The application for bail pending trial was allowed by the High court. The court found that the respondent had not demonstrated any compelling reasons to warrant the denial of bail to the applicants. The court's reasoning was that the prosecution needed to prove that the accused persons were *connected* to the suicide bomber (in a terrorist attack that the applicants were being charged for) or to the *Al-Shabaab* organization so that it becomes undesirable to grant them bail pending trial. The court stated that it could only be possible for the prosecution to lead evidence to prove at the trial that the accused persons were members of *Al Shabaab* and not at the preliminary stage of deciding whether to grant bail pending trial or not. Although the assertions of the state that the applicants had some *connections* with the suicide bomber were not baseless, the court was obliged by Article 50(2) of the Constitution of Kenya, to uphold the legal presumption that the accused persons were innocent until the contrary was proved. On the basis of the legal presumption of innocence, it was not open to the court to conclude without the benefit of evidence, that

²²⁵ Nairobi High Court Criminal Case No. 793 of 2010

the applicants had already been connected to Al-Shabaab. To do so, the court said, would be inconsistent with the presumption of innocence. That if the legal presumption was to have a tangible meaning at that stage, the Constitution had to be interpreted in such a manner as to enhance the rights and freedoms granted, rather than in a manner that curtails the said right.

Recruitment and Oathing

The recruitment, training and oathing of persons by OC members amount to an offence under section 3 and 5 of POCA. Direct recruitment of a member to an OCG or the advice or encouragement of a person to join an OCG is an offence under section 3 of POCA. Attendance of meetings and mobilization of support for furtherance of activities of OCGs is also prohibited.

Oathing is prohibited under section 5 of the Act. It is targeted at both the persons consenting to the oath and the persons administering the oath. Where force has been used to administer the oath or where a person has been coerced to take the oath, such a person may be excluded from liability under the provisions of section 5 if within 5 days, he or she reports the incident to any law enforcement agency. This provision is similar to section 63 of the Penal Code which provides that a person can raise a defence to a charge of oathing, if within 5 days of engagement one reports to the police that he or she was compelled to take an oath. (See: Table 4)

4.2.4. Receipt and Retention of Material Benefit

Commission of an offence in concert with other persons for purpose of obtaining material or financial benefit or for any other purpose constitutes organized crime. Material benefit or financial benefit is not expressly defined, however *benefit* is defined in section 2 to include money, valuable consideration, office or employment.

4.2.5. Use of Threats of Violence

Use of threats and violence by criminal groups is also sanctioned under the Act. The Act specifies that threats to commit or facilitate the commission of any act of violence with the assistance of an OCG group amount to a serious crime²²⁶. Section 3 (f) of the Act also provides that threats to any persons with retaliation in any manner in response to any act or alleged act of violence in connection with OC amount to serious offences under the Act.

4.2.6. Possession offences

The law also specifies offences related to possession of articles, documents or records that are likely to be useful to the commitment or are connected to the commitment of a serious crime²²⁷. This applies to persons who have already committed a serious crime involving an OCG or those who are preparing to commit a serious crime. POCA also prohibits the possession of an article for a “purpose connected with the commission, preparation or instigation of serious crime involving an organised criminal group”.

4.2.7. Obstruction of Justice

Other offences which are not primarily organised crime offences but are specified in the Act for the protection of witnesses and police officers in the investigation and enforcement of the Act are set out in Part III of the Act. In the Penal Code these offences are classed under offences relating to the administration of justice²²⁸. Sections 8 -13 specify acts that amount to obstruction of justice, including obstruction of public officers, witness intimidation, retaliation against witnesses, interference with investigation, falsification of information, while section 14 provides the penalty for offences under Part III of the Act. The punishment for a person convicted under section 14 is a fine not exceeding Kshs. 500,000/- or imprisonment not exceeding 10 years or both. It is clear that sentencing under POCA, serious crime is equated to felony as provided under the Penal Code. The Penal Code defines a felony as “an offence which is declared by law to be a felony or, if not declared, punishable, without proof of previous conviction, with death, or with imprisonment for 3 years”²²⁹.

²²⁶Section 3 (e) of Prevention against Organized Crime Act

²²⁷ Section3 (j) of the Prevention against Organized Crime Act

²²⁸ Chapter 11 of the Penal Code; sections 108-121 of the Penal Code

²²⁹ Section 4 of the Penal Code

4.2.8 Remedies

For purposes of investigation, the Attorney General (AG) may institute civil proceedings and apply to the High Court to trace property that is reasonably suspected to belong to an organized criminal group. Upon application by the AG, the court will compel the person (s) to deliver up any document or record relevant to identifying, locating or quantifying any property in the organised criminal group, or the person's control, possession or ownership belonging to the person or to the or in his possession or control. The court is also mandated to require a bank or any other financial institution, trustee, cash dealer or custodian to produce all information and deliver up all documents and records regarding any business transaction involving the person or group.

4.2.9. Declaration of Entities as Organized Criminal Groups

In Part V of the Act, section 22 contains important provisions as it vests in the Minister the powers to declare an entity to be an organized criminal group. By virtue of section 22 as read with section 3 (b) of the Act, Professor George Saitoti (then Minister for Provincial Administration and Internal Security) proscribed 33 groups as OCGs. Such groups included; *Sungusungu*, Mungiki, Al-Shabaab, Mombasa Republican council, Angola Msumbiji among others. These powers however, have been contested in court by groups that have been subject of the ban like the Mombasa Republican Council (MRC) as shown in the case of *Attorney General v. Randu Nzai Ruwa and 2 others*²³⁰.

The case constituted an appeal from judgment of the High Court at Mombasa. The case was lodged as an appeal from a considered judgment delivered on 25th July, 2012 in the High Court of Kenya at Mombasa in Miscellaneous Application No.468 of 2010. In the judgment, the court declared that the declaration published in Gazette Notice No.12585 by the Minister of State for Provincial Administration and Internal Security that Mombasa Republican Council (MRC) is an organized criminal group is unconstitutional and was therefore lifted. The Attorney General being dissatisfied with that decision preferred an appeal to the Court of Appeal. On appeal it was argued by the AG that the decision by the minister in proscribing was lawful as it was founded on reasonable justification. The AG

²³⁰ Nairobi Civil Appeal No. 275 of 2012

argued that the MRC having engaged in criminal and unconstitutional activities was disentitled to freedom of assembly and association as well as constitutional reliefs; that MRC'S call for secession was unconstitutional and a threat to the territorial integrity of the republic; and that POCA having come into operation before the promulgation of the Constitution of Kenya, 2010, Article 24 of the constitution did not apply retrospectively to the ban of MRC. The issues for determination by the appellate court surrounded the following issues; whether the minister was justified in proscribing MRC against the respondents' constitutional rights and freedoms that were alleged to have been violated; whether the state of security was an important consideration for the trial court; and, whether the MRC'S secession agenda was contrary to the provisions of Articles 4 and 5 of the constitution, in relation to the territory and declaration of a republic of Kenya.

The court held that in the new constitutional dispensation under Constitution of Kenya 2010, it had jurisdiction to question or interfere with any decision of the executive, as long as such even if such decision touches on national security. It also found that the right procedure in determining whether the minister's decision was justified is spelt out by Article 24 of the Constitution which provides conditions for limitation of human rights. Since POCA was assented to on 13th August 2010 and its date of commencement was 23rd September 2010 and the new constitution came into operation on 27th August 2010 hence POCA must be interpreted in light of the provisions of Article 24 and any other relevant article of the constitution. The court therefore concluded that the government's argument that the respondents' agenda of secession is unconstitutional and has no basis in law.

4.3. Cases on Sungusungu in Kisii

Prosecution of sungusungu members involved in commission of extrajudicial killings of suspects of crime has been very rare in the Kisii High Court. Where such prosecution is undertaken, the police and DPP opt to use provisions under the Penal Code rather than the Prevention of Organized Crime Act. From archival research of court records, there were only 2 cases that had been brought before the courts involving sungusungu members; namely, *Republic v Vincent Michira Obebo*²³¹ and *Republic v Charles Ntabo Monda*²³²

²³¹ Kisii High Court Criminal Case No. 100 of 2010

The facts of the case of *Republic v Vincent Michira Obebo*, are that; on 30th day of October 2010 at around 7.00 pm in the evening, the deceased victim, Leonida Nyariki was at her house together with her two children namely Edwin Karani Nyariki aged 14 years and Aliet Kwamboka aged 7 years taking supper when a group of people entered their house and forced the two children into one of the bedrooms and locked them therein. In the process, they injured Aliet on her head. The children managed to positively identify two of the assailants. They then took away the deceased as she was protesting. Early the following morning at around 7.00am, the children woke only to find out that the door was still closed and they raised alarm where one of the neighbours known as Mellen Machoka responded and on arrival at the house, she found the body of the deceased in one of the rooms with deep cuts on the back of the neck and shoulder of the deceased. She raised an alarm and neighbours came to the scene.

The police searched the house of one Charles Mukoma and found gumboots with blood stains, a jacket with blood and recovered a phone belonging to the deceased. In another house belonging to Vincent Michira, where he was found sleeping, worn out military boots with bloodstains and clothing were also recovered with blood stains. A mattress was also recovered from the house. A post-mortem was conducted on 1st November 2010 at Christa Marianne hospital with the pathologist concluded that the cause of death was suffocation due to strangulation and haemorrhage shock following deep cut wounds on the neck region of the victim. The accused was arrested and charged with the murder of the deceased.

The honourable judge acquitted the accused for lack of sufficient evidence linking the accused to the murder of the victim. The prosecution office is of the opinion that members of the outlawed *sungusungu* vigilante group murdered the woman because of being suspected of being a witch. Other of the group's members who were involved in the case and who were not arrested for the offence may have compromised the witnesses who were scheduled to testify against them, making them miss court proceedings for fear of reprisals from the group. The police themselves seem afraid of investigating the group and initiating

²³² Kisii High Court Criminal Case No. 148 of 2012

action against them in accordance with the provisions of the Prevention of Organized Crimes Act, 2010²³³. The office of the Director of Public Prosecution (DPP) also cites poor cooperation and coordination between them and the police to help in taking action against the vigilante group²³⁴

The facts to the case of *Republic v Charles Ntabo Monda*²³⁵ are as follows: on the night of 3rd December 2012 at around 11p.m. some screams were heard from Iyienga village after Ester Kerubo Nyagwaka raised an alarm that she had seen some people in her compound trying to steal her cattle. After hearing the screams, neighbours responded to the distress call and went to the Ester Kerubo's homestead to find out what was happening. Among the people who responded to the distress call was the deceased victim, Joseph Oganda Mogaka and other people including the defence witnesses who rushed to the scene where the screams were coming from.

On reaching the scene, they found the accused Charles Ntabo together with other suspects among them Nyamatari Makori and one Albert who were amongst the mob who had attacked the deceased. The postmortem was done on 5th December 2012 and the doctor formed the opinion that the cause of the death was cardio respiratory arrest secondary due to shock suffered after being assaulted by the mob. The accused was arrested and arraigned in court on 17th December 2012 and charged with murder contrary to section 203 and 204 of the Penal Code. The matter was concluded on 12th February, 2016 and the accused was acquitted because the court found that he had no case to answer.

As the officer at the DPP stated "Though this is a case of murder against the Charles Ntabo, the crime is widely believed to have been perpetrated by members of the outlawed sungusungu vigilante group who had turned on the villagers by robbing and stealing from them. The group turned and attacked the deceased for responding to the distress call and raising alarm over their activities. That because of their ruthlessness even the police might

²³³ Notes accessed in the prosecution file at the Direction of Public Prosecution, Kisii office

²³⁴ Interview with SO 1, State Officer, June 26, 2017

²³⁵ Kisii High Court Criminal Case No. 148 of 2012

have feared to name the group as the perpetrators of the crime. Coupled with poor investigations, the case had to be terminated for lack of sufficient evidence”²³⁶.

4.4 Evaluation of POCA

The stated rationale for the introduction of POCA was to: *eradication of organized criminal groupsthrough enforcement of stiff penalties to act as deterrence from organized crime; conviction rates by avoiding technicalities; and; to ensure compliance to international law obligations*²³⁷.

Eradication of Organized Criminal Groups

Evaluation of POCA reveals a shortcoming in enforcementowing to the continued existence of organized criminal groups. Seven years after introduction of the law, sungusungu has not been eradicated save for minimal interruptions. As discussed further in Kisii Central Ward case in Chapter 5, POCA has to an extent distorted the activities of sungusungu that have necessitated restructuring, change of ideology, operations but the groups is very much in existence.

Conviction rates and Technicalities

Conviction rates have not been helped with the enactment of POCA, in fact, no conviction of sungusungu members have been reported so far. The local police still prosecuting crimes linked to sungusungu using the Penal Code. POCA is therefore not considered as the appropriate law to prosecute those crimes. In any case there is little distinction in the facts leading to the offence; apart from the technical distinction introduced by POCA. In other words *unlawful killing of victims* is not any different under the pre-existing Penal Code and after introduction of the offence of *causing of death by an organized criminal group member* under POCA as both acts amount to murder. The Penal Code deals with murder under section 203. POCA considers murder as an *organized crime* by virtue of commitment of the crime by sungusungu member. It appears that it is POCA that has been applied with technicalities rather than the Penal Code. At least, as demonstrated in the cases of *R v.*

²³⁶ Interview with SO 2, State officer, Director of Public Prosecution, Kisii, 26 June, 2017

²³⁷ Parliamentary HansardParliamentary Hansard 10 June 2010

Vincent Obebo and *R v. Charles Monda* above, the local directorate of prosecution and the police prefer to use the pre-existing Penal Code for prosecution of suspected members of *sungusungu* which should otherwise be dealt with as an *organized crime* under POCA. There is also a lack of direction from courts as to the interpretation of the appropriate legislation as the few cases involving *sungusungu* members have been interpreted and decided under the Penal Code.

Further, the courts have declared certain administrative action provided for under POCA as unconstitutional. The court in the case of *Attorney General v. Randu Nzai Ruwa and 2 others*²³⁸ agreed with members of the MRC, a secessionist group classified as an organized criminal group under POCA that the actions of the state had infringed on the political rights and freedom under the Constitution. The court's decision provides room for its provision of POCA to be challenged in the future by other OCGs hence creating a crisis of the constitutionality for the law.

Harsher Penalties

Contrary to pronounced assertions, the sanctions under POCA did not in a number of instances constitute harsher penalties compared to penalties under the Penal Code (see Table 4). The more serious crime of murder and grievous bodily harm attract a lesser punishment under POCA than a similar offence under the Penal Code. Under section 4(2) of POCA where organized criminal group member "endangers life of another" and death occurs as a result, the offender is liable to life imprisonment while murder defined under the Penal Code as "causing unlawful killing" under the Penal Code is punishable by death.

²³⁸ Nairobi Civil Appeal No. 275 of 2012

TABLE 1: Comparison of Sanctions between POCA and the Penal Code

OFFENCE	DESCRIPTION UNDER POCA	DESCRIPTION UNDER PENAL CODE	PENALTY UNDER POCA	PENALTY -PENAL CODE
Murder	Endangering life of a person and causing death [Section 4(2)]	Causing death of another by an unlawful act or omission (section 203)	Imprisonment for life	Death penalty
Grievous harm	Endangers the life of any person (section 3(n))	Unlawfully cause of grievous harm to another (section 234)	Fine: 5 million shillings Prison: up to 15 years or both	Imprisonment for life
Intimidation	Causes the person to reasonably fear for his safety or anyone known to him (section 12)	Causes alarm to another person; causes person to do any act one is not legally bound to do (section 238(2))	Fine: up to 5 million shillings Prison: up to 15 years or both	Prison: up to 3 years
Oathing	-consent to oathing; administering oath; compels one to take oath; engages in nature of oathing (section 5)	-consent to oathing; administering oath; Compels one to take oath; or engages in nature of oathing	Imprisonment for life	Prison: up to 10 years
Interference with witnesses	-Threatens person with retaliation in response to any act of violence in connection with organized criminal activity (section 3 (f))	Any person obstructing the due course of justice , hinders or prevents any person lawfully bound to give evidence	Fine: up to 5 million shillings Prison: up to 15 years or both	Prison: up to 5 years

Compliance with Obligations under International Law

The second objective for the enactment of POCA is to ensure Kenya's Compliance with State Parties' Obligations under UN Convention against Transnational Organized Crime (UNTOC). This obligation is provided under Article 5 of the UNTOC. Towards this, the government in enacting POCA complied with state Parties' obligation under Article 5. Article 5 of UNTOC obligates states party to adopt "legislative and other measures" as maybe necessary to establish participation and membership in an organized criminal group as criminal offences. This includes activities like agreeing with one or more persons to commit a *serious crime* in order to directly or indirectly obtain a financial or a material benefit, organizing, aiding, or abating, the commission over a serious crime involving an organized criminal group. This obligation under Article 5 of the Convention is complied with through provisions in sections

3, 6 and 7 of POCA. Section 3 of POCA criminalizes *membership and participation* in organized criminal activities like advising and recruiting another person to become a member of organized criminal group. Section 6 of POCA criminalizes, aiding, abating, counselling, procurement or to conspire or with another to commit a serious crime. Under UNTOC, the term *organized criminal group* is defined to mean a structured group of three or more persons, existing for a period of time acting in concert with the aim of committing one or more serious crimes or offences established in accordance with the Convention, in order to obtain directly a financial or other material benefit. Also under section 3 of POCA the term *organized criminal group* is defined in a similar manner as provision in UNTOC. Section 7 of POCA provides the criterion to be used in considering whether a person belongs to an organized criminal group or not. This includes; admission by such a member and where a person, ascribes the ideologies, values, practices and mannerisms of an organized criminal group and knowingly receives any financial or material benefit from organized criminal groups.

A reading of POCA reveals compliance in terms of a significant reliance and borrowing of terms from UNTOC. However, enactment of the law alone has not proved to be adequate in establishing an effective legal framework in achieving the purpose of dealing with organized criminal groups.

The chapter has explored the interplay between law and policing through perspectives contained in different sources including available scholarly literature, governmental policy and legislative responses to non state security groups as contained in Hansard. The text of Prevention of Organized Crime Act which represents the main legislation enacted to tackle crime and mitigate violence in the wake of post-election period has also been reviewed. The next chapter furthers this analysis as it evaluates the case of *Sungusungu*, a non state group originally established to tackle crime in Kisii County (principal area of operation). It seeks to provide an understanding of the group by examining the history, internal organization, membership and mode of operation. By evaluating the effect of POCA and other non-legal mechanisms, the chapter analyzes the legal and political factors that have shaped non state policing as practiced by *Sungusungu*.

CHAPTER 5: LOCAL POLICING IN KISII COUNTY: HISTORY AND EVOLUTION OF THE SUNGUSUNGU: 2002-2016

The chapter evaluates the introduction of the practice of non state policing in Kisii as manifested in the vigilante group, *sungusungu*. It traces its genesis and how it came to take root in Kisii from early 1990s to date. The chapter begins by examining its origin of the colonial history from the *ruga ruga* phenomenon in the context of colonial Tanganyika history in the 1880-1920. It then looks at the emergence of *sungusungu* in 1980s in the Sukuma Nyamwezi and how the phenomenon spread to Kuria and then to Kisii. It then delves into internal workings of the group, its membership and structural organization and its policing practices as undertaken in cases of Kisii Central and Bobaracho. It also outlines challenges facing operation of the *sungusungu* group.

5.1 History of *Sungusungu* in Tanzania: From *Ruga-Ruga* to *Sungusungu*

5.1.1. Ruga-Ruga: 1880-1918

Pesek offers a lucid insight into the evolution and operation of the *ruga-ruga*.²³⁹ The origin of *ruga-ruga* is traced to chief Mirambo of the Nyamwezi. Mirambo, a chief of the Uyambo in Nyamwezi, interested in the caravan business of trading in ivory and slaves, gathered a number of young men, mainly made up of teenagers to defend his interests against the Arab traders. The German traveller Hermann Wissmann reached Lake Tanganyika eastern shores in 1881, 40 years after traders had arrived at the East African Coast. When Wissmann reached Unyamwezi, he was impressed by the power that Mirambo had as he was controlling most of the northern Unyamwezi. He was captivated by the military design of Mirambo's empire, the high standards of the military discipline and the skills among the *ruga-ruga*.²⁴⁰

Ruga-Ruga were young African men who served as armed guards in coastal caravans or for chiefs who participated in trade in Tanganyika. Their participation in the caravan trade was necessitated by events such as the *Ngoni* invasion and the inter-regional caravan trade

²³⁹ See Pesek M. (2014) *Ruga-Ruga: The history of an African Profession 1820-1918* available on https://www.academia.edu/1521133/Ruga-ruga._The_history_of_an_East_African_profession_1820-1919

²⁴⁰ Ibid at p.3

which went hand in hand with civil war and enslavement of many East Africans²⁴¹. *Ruga-ruga* opened up opportunities for young Africans to play a role in policing and the possibility of a career arose within the framework of the colonial rule and beyond the colonial state²⁴², especially being a time when most Africans were exposed to violence and exploitation by people who were invading the country from different directions.

According to Pesek, the *ruga-ruga* was an African response to the social and political upheavals that came with the caravan trade²⁴³. The *ruga-ruga* evolved to serve different masters ranging from the warlord Chief Mirambo and the German colonizers. The various roles they undertook included being temporary hired mercenaries in German military expeditions²⁴⁴; serving as important agents in pre-colonial state building as they helped in the adaptation of local political structures to the new conditions that accompanied colonial rule; and also serving as personal guards of the colonial chiefs like Kahigi of Kianja. The *ruga-ruga* also enforced chief's orders such as Mirambo, acted as tax collectors, and acted as a medium of negotiation between the Germans and Africans over how Africans were to be integrated into the colonial state²⁴⁵.

They were also a product of the trans-local cultural transfers as they adopted various cultural practices from a wide range of origins and influences. For instance, their clothing was majorly shaped by local and coastal patterns but they normally wore a *kanzu* and long red capes and turbans or colourful feathers²⁴⁶. They often subscribed to Islam due to influence from the coastal traders or new warlords²⁴⁷.

A majority of the *ruga-ruga* were formal slaves or prisoners of war or people who had served either in the caravans of Coastal traders or had served the Unyamwezi chieftaincy

²⁴¹Ibid at p.1

²⁴² Ibid at p. 17

²⁴³ Ibid atp. 4

²⁴⁴The *ruga-ruga* were experts in warfare especially with their military behaviour, tactics in scorched earth and their drilling techniques which were admirable. Lettow-Vorbeck was supplied *ruga-ruga* by local chiefs and the *ruga-ruga* became his main fighting force. The *ruga-ruga* were among attackers when German forces attacked the British garrison at Jassini. See Pesek M. (2014) *Ruga-Ruga: The history of an African Profession 1820-1918* at pps.4, 6, 13

²⁴⁵ Ibid atp.17

²⁴⁶ Ibid at p. 4

²⁴⁷ Ibid at p. 7

headed by Chief Mirambo. The *ruga-ruga* also included teenagers who had lost their families during the civil wars²⁴⁸.

5.1.2 The return of the *Ruga-Ruga* 1914-1918

With the outbreak of the World War I in 1914, East Africa became a bitterly contested region as the Germans needed new recruits from Africa. The new recruits were majorly the African auxiliary troops composed of the *ruga-ruga*, who ultimately helped increase the number of the German troops. According to estimates of the British War Office more than 12,000 *ruga ruga* fought on the German side²⁴⁹. In 1915 when the German officer Max Wintgen's attacked Anglo-Belgian positions at Lake Kivu, the *ruga-ruga* were more in number than the German officers together with the *askaris*²⁵⁰.

Throughout World War I, the *ruga-ruga* played a significant role by fighting many battles in various areas/locations such as Tanga, Jassini, Lake Victoria, Lake Nyassa and Rwanda²⁵¹. The success of most of the Europeans (were mainly based on the use of the *ruga-ruga*²⁵². It is worth noting that the *ruga-ruga* often had conflicts among themselves but from different *ruga-ruga* factions.²⁵³ From 1916 to the end of the WWI, many more *ruga-ruga* were hired by the Germans as they had shortages in their troops due to desertions of *ruga-ruga* and *askari* and combat deaths of their own soldiers. Certainly the WWI and its aftermath led to the last significant appearance of the *ruga-ruga* in the history of Eastern Africa as British sources rarely refer to them after the war.

5.1.3. Political and Socio-Economic Context in Tanzania: 1980-1987

²⁴⁸ Ibid. at p. 4

²⁴⁹ Ibid. at p. 12

²⁵⁰ Ibid. at p. 12

²⁵¹ Ibid. at p. 12, 13

²⁵² See Pesek M. at p. 14 Wintgen's success in defending the borders against superior Anglo-Belgian forces mainly attributable to the inclusion of *ruga-ruga* in his army

²⁵³ The Usaramo offered *ruga-ruga* services to the British troops while the Nyaturu warriors acted as *ruga-ruga* on behalf of the Germans.

The section describes the socio-economic and political context in which sungusungu emerged in central Tanzania between 1980 and 1987. The 1970s and 1980s signify limited success by the Tanzanian government in terms of leveraging its state capacity in governing its population. The 1970s were fraught with a number of challenges to the Tanzania government.

Government had for long decried the lack of appreciation of the peasantry of benefits of socialist policies arising from Arusha declaration. The Tanzania government embarked on the villagization policy which according to Hyden was aimed controlling the “un-captured peasantry”²⁵⁴. On November 6, 1973, Nyerere announced that all Tanzanians would have to live in villages by the end of 1976. For the government, the villagization strategy was crucial to the success of its socialist development agenda.

The government undertook villagization through the resettlement of rural populations which at times was coercive where persons refused to move from their homes. Compulsory villagization was meant to reverse increasing peasant autonomy (to make access to the peasants easier than when in scattered households). The government expended a lot of attention and resources to ensure the success of the villagization programme which in turn would contribute to overall success of Ujamaa policies. The policy strategy was two-fold. First, the objective was to cut out middle-men, so that the farmers could trade directly with the government which could then control the peasants. Secondly, the government aimed at developing more effective and robust party and government structures to *reach* peasantry

The early 1980s also marked the beginning of long years of recovery for Tanzania from the war with Uganda. The war has resulted in the depletion of state resources. Part of the negative effects of the lack of resources was reflected in its inability to fight crime. There was a loss of public confidence in the police’s efficiency and transparency and as a result of police failure the vacuum created provided an opportunity for *sungusungu* to step in and deal with crime²⁵⁵. Further, Tanzania was faced with an armed civilian population due to the

²⁵⁴ Hyden G., (1980) *Beyond Ujamaa in Tanzania: Underdevelopment and an Uncaptured Peasantry* (Berkeley, Univ. of California Press) at p.130

²⁵⁵ Abraham (1987) “Sungusungu: village vigilante groups in Tanzania” *African Affairs* 86 (343) 179-96

war. After the war, there was a proliferation of small arms in the hands of civilians. For Marwa, the proliferation of small arms caused by the war led to more violent forms of crime²⁵⁶. For instance, with small arms readily available, cattle raiding involved more sophisticated weapons replacing traditional weapons like spears, bows and arrows. This in turn led to emergence of Sungusungu as a response to increased crime.

The late 1970s and the 1980s is a period that signals a Tanzanian state struggling with tackling crime and enforcing the law. Masanja links socio-economic differentiation amongst Tanzanians to the increase in crime, which ultimately necessitated a response from the community in the form of *sungusungu*²⁵⁷. Socio-economic differentiation brought about state policies encouraged commoditization of hitherto subsistence economic activities. The government at the time advocated for a shift to commercialized agriculture away from traditional economic activities like subsistence farming and pastoralism that were aimed at meeting needs of the local communities. The shift to commercialization at the expense of subsistence which aided in meeting local needs of communities led to pressure on affordability of food and basic items. Resulting socio-economic pressures affected the citizens differently, widening the gap between rich and poor, hence created necessary conditions for crime. Masanja also posits that the replacement of traditional structures with new governance structures led to disconnect between community and the state. Masanja refers to the poor design of state policies and the imposition of appointed officials who replaced popular traditional authority as cause of increased gap between the government and its citizens. The arbitrary replacement of local leaders with that of appointed officials was a perpetuation of colonial policies. The state was generally unresponsive in recognizing the traditional authority's popularity, respect and legitimacy amongst their citizens.

5.1.4. Emergence of *Sungusungu* in Tanzania

²⁵⁶ Marwa, P. (2002) "Sungusungu in Kuria Indigenous approach towards control and management of small arms" *Small arms in the Horn of Africa*, Brief 23, May 2002, Bonn International Centre for Conversion. Available at www.bicc.de/publications/brief.brief.content.html at p. 23 last accessed 19 May 2014

²⁵⁷ Masanja P., (1992) Some notes on the Sungusungu movement in P. Foster and S. Maghimbi (eds) *The Tanzanian Peasantry: Economy in Crisis* (Avebury: Aldershot)

There have been diverse explanations advanced on the origin, nature and operation of *sungusungu*. According to Abrahams the phenomenon developed after villagers in Nyamwezi land decided to organize themselves into groups to tackle cattle rustling, after the crime had spiralled out of control²⁵⁸. The *sungusungu* was predominantly populated with young men armed themselves with bows and arrows and whistles. A special fund was established where all group members were to contribute. By 1987, the *sungusungu* phenomenon had spread throughout Sukuma Nyamwezi (central Tanzania) region occupied by the Sukuma and Nyamwezi. From its birthplace in Sukuma Nyamwezi land, it spread to different directions. *Sungusungu* spread west to Tabora, Mwanza and Shinyanga regions. It later spread southwards to Rukwa region²⁵⁹. In 1998, *sungusungu* spread northwards into southern Kenya amongst the Kuria who straddle the Kenya/ Tanzania border and later to Gusii land in South-western Kenya²⁶⁰

Accounts of *sungusungu* have been made through varied descriptions amongst scholars, governmental and non-governmental organizations, ranging from a conceptualization of the group as a self-help initiative to description of *sungusungu* as an organized criminal group. Most scholars have characterized the phenomenon as vigilante activity. Abrahams describes vigilantism as a type of self help initiative by local in a given area formed with the common objective of addressing a certain problem, be it, political or social²⁶¹. Masese and Mwenzwa describe the *sungusungu* as a grass-roots law and order organization²⁶². Under the Prevention of Organized Crime Act, *sungusungu* is proscribed as an organized criminal group which is defined as a structured group of 3 or more persons existing for a period of time and acting in concert with the aim of committing 1 or more serious crimes like murder or robbery with violence, in order to obtain financial, material benefit, other advantage for the group or any members of the group. Paciotti and Mulder describe *sungusungu* as an

²⁵⁸ Abrahams was amongst the first scholars to highlight the phenomenon, though as acknowledged by Abraham himself, earlier research had been undertaken in 1986 by Masanja.

²⁵⁹ Paciotti and Mulder (2004) "Sungusungu: The role of pre-existing and evolving institutions among Tanzanian vigilante organizations" *Human Organization*, 63, 112-124

²⁶⁰ See Heald S. (2007) Making Law in Rural East Africa: Sungusungu in Kenya Crisis States Programme Working Paper 12, Series 1 (<http://www/crisisstates.com/Publications/wp12.htm>; Mkutu K. (2010) Mitigation of Armed Criminality through an Indigenous Approach: The Case of Sungusungu *Law and Social Change* Vol. 53 No.2, pp.183-204

²⁶¹ Abrahams, R. (1987) "Sungusungu village vigilante groups in Tanzania" *African Affairs*, 86: 179-96

²⁶² Masese E. & Mwenzwa E. (2012) "The genesis and Evolution of Sungusungu Vigilante group among the Abagusii Ethnic group of Kenya" *Elixir Social Science* 42 pp.6485-6492 at p. 6486

informal institution of social control that provided the public good of law and order where state institutions were weak, corrupt, under-resourced, absent and unreliable in the protection of property and personal security²⁶³. For Mwaikusa, sungusungu was a people's organization with origins from traditional defence and self-help groups of the Sukuma people in the Lake region. He states that sungusungu groups were initially ad-hoc community groups established for the "mutual benefit of their members" in order to "alleviate hardship" in cases where there was a disaster that befell a member of the community²⁶⁴. Later sungusungu evolved into a "defence group" that had to defend the communities interest and repulse attacks from cattle raiding that had been intensified due to the increased demand for beef brought about by regional and international markets.

The origin of the word *sungusungu* is also in contention in terms of what it means and from which community. According to Abrahams, *sungusungu* is a Swahili word for a species of large black biting ants. Marwa further qualifies the analogy, by stating that the term means ants and refers to the agility of ants engulfing their enemies and destroying them. A different account by Masanja is that *sungusungu* was derived from Nyamwezi word "busungu" which means poison and is connected to the use of poison on arrows used by the vigilante groups especially in Northern Nyamwezi²⁶⁵. In Sukuma land word *sungusungu* referred to the black clothes/drapes worn by the pastoralist community. It appears that the term "*sungusungu*" is a combination of *Swahili*, Sukuma and Nyamwezi nomenclature; biting ants, black drapes and poison. However, Campbell in the study of the organization of policing amongst the Sukuma adds another term "ruga ruga" in reference to *sungusungu*. He discounts the notion that the *sungusungu* originated from Kahama, advancing the argument that *sungusungu* started in the Sukuma area²⁶⁶.

²⁶³ Supra note 257 at p.112

²⁶⁴ Mwaikusa (1995) Maintaining Law and Order in Tanzania: Role of Sungusungu Defence groups" in Ssemboja J. & Therkildsen O. *Service Provision in East Africa: the State, NGOs and People's Organizations in Kenya, Tanzania and Uganda* (Copenhagen: Centre for Development Research) pp 166-178 at p. 167

²⁶⁵ See Bukurura S. (1996) Combating Crime among the Sukuma and Nyamwezi of West Central Tanzania, *Crime Law and Social Change* 24: pp257-266 at p.260 Sungusungu were also referred to as Busalama (agents of peace). Busalama is the Nyamwezi form of the Swahili word Usalama which means safety and security

²⁶⁶ Campbell, H. (1989) "Popular Resistance in Tanzania: Lessons from the Sungusungu" *African Development* Vol. 14, no.4, pp 5-43

Abrahams was amongst the first scholars to highlight the origin and nature of operations of the *sungusungu* in 1987. According to Abrahams, the *sungusungu* started in Nyamwezi, in East of Kahama district in a place called Kahama ya Nhalanga, in particular in Buhama area of Jana which is near the border of Kahama and Shinyanga districts²⁶⁷. There are conflicting reports about which specific location in Kahama in which the first *sungusungu* group was established. However, there is general consensus that *sungusungu* was first established in the larger Kahama district. Kahama District is an area that is vast covering 19, 946 square kilometres with 34% of the area covered by forests²⁶⁸. There are 11 gold mines in the area. The Nyamwezi are a semi-sedentary agro-pastoralists largely involved in cattle and goat rearing and cereal farming.

The group started by Kishosha Mwang'ombe who was a medicine man and a seer. He was also known as *Ntemi*²⁶⁹. Bukurura's explanation of *sungusungu* supports this observation that the *sungusungu* was established in Kahama district by elders with divine and ritual powers and not the youth. Subsequently, *sungusungu* spread from village to village in an *ad hoc* manner. Each village had its own *sungusungu* group organized under the leadership of *Ntemi*. The *Ntemi* was referred to as "the keeper of the poison". Under the *Ntemi* was *Ntwali*, the second officer in command who was also a medicine expert. Reporting to the *Ntwali* were operating units comprising the *katibu* (secretary of the group), six male commanders (*banamhala*) and chief whip (*Balunashi*). Below these units were the male youth guards known as *askari*. In Busangi area, each member of the group was required to contribute 30 shillings in support of group activities. The fund was maintained by treasurers to the group who were called *Banamhala ba Ntemi* (Elders of the Chief). When *sungusungu* was in its formative stages, there were tensions between *Ntemi* and the government. The State was not comfortable with the group's use of rituals. The group was also referred to as *chama* which in Swahili means political association or political party. The use of *chama* brought it into collision course with the government which as the term was exclusive to the one party state under the ruling party Chama cha Mapinduzi (CCM)²⁷⁰.

²⁶⁷ Supra note 261

²⁶⁸ Supra note 265

²⁶⁹ Ibid

²⁷⁰ Ibid at p. 185

5.1.5. Reasons for Emergence of *Sungusungu* in Tanzania

A number of reasons that led to the emergence of the *sungusungu* have been advanced. Fleisher explains that on the basis that the State has been ineffective in protecting the existing socio-political order, vigilante groups seek to play a role in protection of such order by restoring or restructuring existing societal arrangements²⁷¹. Fleisher also highlights the emergence of *sungusungu* as a response to the pressures of capitalist penetration into rural economy. Capitalism put pressure on traditional livelihood pushing citizens to resort to cattle raiding as an occupation. Cattle raiding became rampant as a result of inadequate economic opportunities and recurrent inter-clan rivalry. State inefficiency in law enforcement compounded prevalence of cattle raiding and banditry necessitating a reaction from the citizens in the form of *sungusungu*. As a law enforcement agency, *sungusungu* were more effective in curbing crime and enjoyed the support of the locals.

Abraham offers a different perspective focused more on state failure rather than on influence of capitalism. For Abraham, *sungusungu* stepped into State vacuum due to police failure to deal with crime and loss of confidence in their efficiency and transparency. The State's relationship with vigilante is usually ambivalent even when dealing with common enemies like criminals. However, at times the State may form vigilante groups but may find it difficult to control them.²⁷² The State usually resents alternative organizations not only because of its unwillingness to share power but because of broader political and economic concerns. The Tanzanian government was concerned that it would lose its grip on control of citizens economically and politically, because *sungusungu* had succeeded in capturing citizens economically by successfully mobilizing funds for security provision.

Other scholars provide different reasons for the emergence of *sungusungu* specifically among the Sukuma and Nyamwezi. Bukurura holds the view that *sungusungu* was mobilized as a result of the frustration with established mechanisms of crime control²⁷³. Bukurura observes that the state was quick to obstruct the private initiative of local communities in

²⁷¹ Fleisher Michael (2000) "Sungusungu: State-sponsored village vigilante groups among Kuria of Tanzania," Africa 70, 2

²⁷² Supra note 261 at p.181 Resonant to *sungusungu* in Kisii which was a state creature in 1990s and to date the government is experiencing difficulties in controlling it through law (POCA)

²⁷³ Supra note 265 at p. 258

security provision despite its own failure in curbing crime. He is critical of the initial state obstruction of *sungusungu* as it was an expression of cultural identity that represented collective action against perceived common enemies²⁷⁴.

Paciotti and Mulder explain that the emergence of *sungusungu* was due to weak, absent, unreliable state and its failure to provide the public good of law and order. Crime was rampant in the 1970s²⁷⁵. The end of Tanzania-Ugandan war, low disarmament of population resulted in increased armed civilians which contributed to unprecedented crime levels. The 1979 *operation majambazi* failed to curtail crime which continued. In the mid 1980s, the Nyamwezi reacted through *sungusungu*. In their attempt to explain the genesis of *sungusungu*, each scholar privileges one of the factors as being the proximate cause. The literature analyzed suggests that *Sungusungu* emerged due to; State weakness, unprecedented crime rates, largely armed population (small arms race) or pre-existing cultural institutions. A better understanding would be found in explaining the emergence of the *sungusungu* as a combination of the factors stated above.

5.1.6. *Sungusungu* in Kuria Land: Early 1990s

Kuria land straddles the Kenya-Tanzania border where the Kuria community occupies land lying between the North western part of Tanzania and the South western part of Kenya. The majority of Kuria people live in Tanzania occupying 581 km².²⁷⁶ In 1980s and 90s there was an intensification of cattle rustling among Kuria and Maasai along the Kenya Tanzania border. Violence was aggravated by the involvement of small arms. There was a loss of faith by the community in the state's ability to deal with cattle rustling as evidenced by rustlers raiding police stations. Law enforcement was difficult due to the fear of criminals by the community. The Tanzania border which was nearby was porous enabling the cattle rustlers to "disappear" making it difficult to arrest them. The local arms race between Kuria, Maasai and Kalenjin exacerbated cattle rustling and proved to be the main challenge to law enforcement.

²⁷⁴ Ibid at p. 261

²⁷⁵ Supra note 261

²⁷⁶ Supra note 256

Sungusungu was established as a solution to the problem of runaway crime and weak law enforcement in Northern Tanzania. The Kuria on the Kenyan sidesought to emulate the use of *sungusungu* to curb crime which was being used by their counterparts in Northern Tanzania. The first *sungusungu* group in Kenya was established in Kuria district in 1998²⁷⁷. The *sungusungu* aligned itself with the *Iritongo*, which was the traditional Kuria politico-legal administration mechanism to structure its operations. Under the governance mechanism, the *Iritongo* was established as a representative assembly vested with important decision making powers on behalf of the community, including defence of the community²⁷⁸. Heald also points to this fact as she describes the *Iritongo* as a democratic assembly²⁷⁹. Prior to the establishment of *sungusungu*, the *Ichisaiga* was mandated with policing the decisions and orders of the *Iritongo*. With approval from the *Iritongo*, the *sungusungu* replaced the *Ichisaiga* as its enforcement arm. While the primary concern for its establishment was to protect the community from cattle rustlers by neighbouring communities and conduct revenge raids. However, it was also vested with robust powers in prosecution, investigation and sanction crimes perpetrated within the community. *Sungusungu* was involved in investigation, prosecution and sanction of crimes. Another important institution in the justice system was the *Inchaama*. The *Inchaama* dealt with appeals from decisions of the *sungusungu* in undertaking its enforcement function.

Where crimes involved the use of arms and the recovery of guns was involved, the *sungusungu* liaised with the police in the investigation and arrest of suspects. The *sungusungu* therefore cooperated with the police in the tackling of crime. Marwa observes that by partnering with *sungusungu*, the government acknowledged its failure in law enforcement and accepted that revamped community security mechanisms were effective in fighting crime²⁸⁰. Actually, government had no choice but to support *sungusungu* which

²⁷⁷ Heald S. (2005) Making Law in Rural East Africa: Sungusungu in Kenya Crisis States Programme Working Paper 12, Series 1 (<http://www.crisisstates.com/Publications/wp12.htm>)

²⁷⁸ Marwa, P. (2002) "Sungusungu in Kuria Indigenous approach towards control and management of small arms" *Small arms in the Horn of Africa*, Brief 23, May 2002, Bonn International Centre for Conversion. Available at www.bicc.de/publications/brief.brief.content.html at p. 23 last accessed 19 May 2014 p.27

²⁷⁹ Immigration and Refugee Board Canada (2014) Report on Sungusungu available on <http://www.irb-cisr.gc.ca/Eng/ResRec/RirRdi/Pages/index.aspx?doc=454894;pls=1> last accessed 1/8/2014

²⁸⁰ *ibid*

had proved to be more effective than it in security provision²⁸¹. To do otherwise would have led to further loss of legitimacy and confidence from the community.

Different explanations have been advanced about the reasons for emergence of Kuria *sungusungu* and their degree of success. The Kuria *sungusungu* were effective in their operations and successful in the control of armed cattle rustling²⁸². Heald refers to their success in terms of their ability to spread their operations from village to village and partly attributes the success of the Kuria *sungusungu* in curbing crime to working relationship with the State²⁸³.

5.1.7. Spread of *Sungusungu* from Kuria to Kisii: 1990s

According to Masese and Mwenzwa, *sungusungu* started in Tanzania among the Sukuma and Nyamwezi living amongst rural areas. They mobilized communities to protect property and provided dispute resolution mechanisms to the local communities²⁸⁴. Faced with similar threats of cattle rustlers along the porous Kenya-Tanzania border, the Kuria community in south-western Kenya then adopted the *sungusungu* model from the counterparts²⁸⁵ in Northern Tanzania. The system subsequently spread to the Kisii²⁸⁶ from the Kuria community in South Western Kenya who like the Abagusii are Bantus and have a similar language.

According to Masese and Mwenzwa, the political context between 1978 and 1997 created a “fertile ground” for the adoption of the *Sungusungu* model for community policing in Kisii, varying from lack of adequate political participation and economic marginalization of the youth²⁸⁷. Youth were marginalized from accessing economic opportunities which resulted in high rates of youth unemployment. This contributed to the high incidences of crime in both rural and urban areas. Other factors that contributed to high crime rates included; low

²⁸¹ Ibid p.31

²⁸² Ibid p. 28

²⁸³ Supra note 277

²⁸⁴ Supra note 20 p. 6485

²⁸⁵ The Kuria community straddles the Kenya-Tanzania border

²⁸⁶ Heald S. (2007) Making Law in Rural East Africa: Sungusungu in Kenya Crisis States Programme Working Paper 12, Series 1 (<http://www.crisisstates.com/Publications/wp12.htm>)

²⁸⁷ Supra note 20

police population, poor public-police partnership and inadequate sources for crime detection. The government embraced community policing as an intervention. The adoption of community policing represented an acknowledgement that the State cannot be the only actors in security provisions²⁸⁸.

By 2002, alongside *sungusungu*, a number of non-state policing groups had emerged for purpose of security provision in Kisii. (See *Table 5below*) The *amachuma* had been formed in period running up to the 1992 elections. The *amachuma* described as a militia group had been formed as an armed wing of political big man, Mr. Nyachae. Although, the group claimed otherwise, its main objective was to instil fear against political competitors that were perceived to pose any competition against their patron. The *amachuma* claimed to protect the security of the community but it was clear that their activities were to protect the personal interest of the political big man in Kisii and to counter any political competition through threats of actual use of violence²⁸⁹.

Another group, *chinkororo*, emerged along territorial borders shared with Maasai and Kipsigis to protect the community from cattle raiding attacks by the Maasai and the Kipsigis. It was *ad hoc* in nature as it only emerged when territorial disputes emerged. It was organized as a self-help grass-root defence group to protect the community due to the slow reaction of state security mechanisms. In many instances, members of the Kisii community complained that police were not only slow to react but they had taken sides with the Maasai aggressors thereby necessitating the community to protect itself through the formation of *chinkororo*²⁹⁰. Aggression and retaliation by Kisii and Maasai communities sharing borders along Kisii-Transmara region culminated in the 1992 land clashes in south-western Kenya. At the Commission of Inquiry formed by the government to investigate the genesis of the violence, evidence was adduced on the complicity of police in fuelling the violence²⁹¹.

²⁸⁸ Ibid.

²⁸⁹ Ibid. at p. 6485

²⁹⁰ Republic of Kenya (1999) Report of the Judicial Commission Appointed to Inquire Into Tribal Clashes in Kenya (Government Printers: Nairobi) popularly known as the "Akiwumi Report"

²⁹¹ Republic of Kenya (1999) Report of the Judicial Commission Appointed to Inquire Into Tribal Clashes in Kenya (Government Printers: Nairobi) p.185; Comments by Government on the Report of the Judicial Commission Appointed to Inquire Into Tribal Clashes in Kenya (Government Printers: Nairobi) p.16

Table 2: Local Policing Groups in Kisii by 2002

Name	Category	Activities	Co-operation with State	Funding
Sungusungu	Vigilante	-Night patrol -Investigation -Adjudication	Yes	Community
Amachuma	Political Militia	Intimidation of political opponents	No	Political Big man
Chinkororo	Territorial Guards	Recovery of stolen cattle	No	Community

Source: Otiso (2014) field interviews and literature

Of all these groups, *sungusungu* emerges as the dominant actor in non state policing for the past 15 years. Despite the *amachuma* and *chinkororo* groups involved in provision of some form of security, neither of the groups was involved in protection of communal order through prevention or investigation of breaches²⁹². According to Baker, policing is “any organized activity whether by the State or non-state groups that seeks to ensure the maintenance of communal order, security through the elements of prevention, deterrence, investigation of breaches and punishment”²⁹³.

The initial activities of *sungusungu* and their objectives were similar to traditional strategies under the *etureti* system; sanctions were made through odium and warnings. Criminals countered vigilante by killing *sungusungu*, retaliatory attacks led to scaling up of violence that led to its partial legitimization and institutionalization²⁹⁴.

5.2. Contemporary *Sungusungu* in Kisii

A large number of accounts contained in literature and from interviews conducted in the study area point to villages in Bomorenda, Suneka (Kisii South) as the genesis of the first *sungusungu* group in Kisii County. The increase in crimes in Bonchari area necessitated the

²⁹² Otiso W. (2015) “Community Policing and Vigilantism in Kisii: Towards Nonviolent and Inclusive Non-State Policing” *Cahiers D’Afrique de L’Est* no.50, 2015 pp 99-111 at p. 101

²⁹³ Supra note 2

²⁹⁴ Supra note at p. 6491

formation of *sungusungu* to counter criminals and return order, peace and security in the community²⁹⁵. The crimes that had caused concern were cattle rustling, murder and theft. Currently, the administration of group activities is coordinated through administrative units with a chairman at each level from the district to the most basic unit. The chairman at Bokeiri sub-location reports to the chairman at Iyabe location in Riana Ward who in turn reports to the chairman Kisii South district. At each level other officials include, vice chairman, treasurer and secretary. The Bonchari constituency branch has a total of 50 members. Members work for the group on a part time basis, as they undertake other roles in society. For example, the Chairman Bokeiri sub-location, is a farmer and a herbalist. For one to be a member, one must get approval from the public during a *baraza*. A prospective member must be below 60 years, be married and have *goodrelations* with family members and the community²⁹⁶.

Spread of *Sungusungu* from Kisii South to Kisii Central

The *sungusungu* phenomenon then spread to other parts of Kisii, notably Nyaribari Chache Constituency in which state administrative headquarters are situated and also where current *sungusungu* headquarters is located. Bobaracho location was among the first places within Nyaribari Chache to embrace the *sungusungu*. This came at about when the criminal levels were at its peak, especially, in the neighbouring Nyamage sub-location. Violence and crime in the area emanated from land disputes that arose out of autochthonous claims against settlers. As one elder resident in Bobaracho area explains, the adoption of informal policing model was due to high incidences in crime in the area arising out of tensions between *abagori*²⁹⁷ (new settlers) and indigenous members of the community in the neighbouring Nyamage sub-location, located in Bobaracho Ward. He said that “over time, the local Nyamage youth became bitter with *abagori*, who had been sold land by their fathers. Most of the parcels of land sold was their entitlement under customary laws on inheritance. They perceived *abagori* as foreign opportunistic elements that capitalized on the poor indigenous members who had sold them land. As a result the indigenous members of the community who had ‘lost’ their land began to detest the *abagori* and plotted to have

²⁹⁵ Ibid

²⁹⁶ Qualities are similar to that of the Taracha sub-location

²⁹⁷ The term literally means “buyers of land”. It refers to settlers conventionally non indigenous persons that have recently bought land in the area.

‘their’ land back. Through the use of local youth several settlers were threatened and fled the area, leaving behind *amatombe*²⁹⁸. A number of youth took advantage of the uncertainty in Nyamage to engage in criminal activities in Nyamage and other parts of Kisii County. They would engage in armed criminal activities and retreat back to the *amatombe* which they would use as hiding places.

The members of the Nyamage indigenous communities themselves were concerned about rising crime. While their initial concern was what they considered to be ‘dispossession’ of land, some deviant youth had taken advantage of the situation to commit violent crime against their own community members. The elder states that “it came at a time in early 2000 when even the locals themselves raised eyebrows on some of the acts which were being committed by the men. Some even possessed guns. Through the assistance of the local provincial administration, the locals ganged up to form a security group to deal with these men. In fact, it was intended to “extinguish the fire which the community itself had lit”. The newly formed group went to *Botende* (Kuria-land) to receive training and later came back to deal with the criminals”. *Sungusungu* was formed to counter the crime and violence in Nyamage and is celebrated as one the success cases of the group in its formative years. Within a few months of its operations the criminal elements in the sub-location had been dealt with²⁹⁹.

5.3. Organizational Structure of *Sungusungu*

5.3.1 Overall Leadership

The Chairman is from Bobaracho Ward in Kisii Central District even though the origin of *sungusungu* in Kisii was from Suneka in Kisii South District. Prior to the institutionalization of *sungusungu* into a central organization there existed various small *sungusungu* groupings attached to village elder system (*etureti*) with loose linkage to provincial administration. Mr. Ongubo was elected the chairman of the group in his home area of Bobaracho. As one of the former *sungusungu* member states “There is no evidence as to whether there was another chair person before, but in the Bobaracho area he was the first chairman. Later, through the interaction with the other *sungusungu* group at Suneka they formed a

²⁹⁸ The terms refers to deserted and unoccupied homesteads

²⁹⁹ Interview with OCP 1 Community Policing Leader, Taracha Ward, August 2016

formidable group within Kisii town, where again Ongubo was elected the overall chairman of the group". It is believed that he was chosen during a meeting organized by the then head of Criminal Investigation Department (CID) attached to the Kisii police station. The meeting was held at the District Commissioner's office³⁰⁰.

To corroborate this, several accounts from respondents drawn from *sungusungu* members and former *sungusungu* members reveal that in the whole Kisii region, *sungusungu* has one overall chairman. As one respondent stated, "The chairman was elected in the year 2002 when we started as a small group of about 200 people. We were tired of criminals being let free by the judiciary on grounds that evidence was insufficient".³⁰¹ In response to question about the criteria for electing a chairman, he continued "When choosing our chairman we consider certain qualities. One has to have: respect among group and society members; trustworthy; good conduct; and, bravery. We first conduct our assessment on a person before we settle on him to be our chairman. We first let him know of our intention to have him as our chairman, then he must swear (under oath) that he will perform as the group desires. The leadership skills and age of our chairman were taken into consideration. He is aged between 45-50 yrs. He was proposed and after our assessment, we settled on him". One elder describes him, "The chairman is a very good listener and slow in answering. I suppose that these two character traits plus others earned him respect within the *sungusungu*."³⁰² It is believed that his refusal to act quickly enabled him to conduct proper investigation and apply wisdom in decision making.

Prior to assuming leadership of the *sungusungu*, *Chairman* was a farmer and businessman. He majored in the carrot business which he used to plant and sell them in markets in Kisii and Kisumu counties. In 2013, *Chairman* ventured into elective politics where run for the Kisii Central Ward seat which would have enabled him sit in the County Assembly. It is interesting to note that when *Chairman* run for political office, he opted to vie in Kisii Central Ward rather than Bobaracho Ward, his *home* ward where it would be presumed he

³⁰⁰ Interview with OCP 1, Community Policing leader, Taracha Ward, June 2014; he further states that as a result of the involvement of the provincial administration "the election was valid"

³⁰¹ Interview with SGK 6, *sungusungu* member, Kisii Central, August 2016 His sincere prayer is that even if this information comes out to the general public; his identity should never be revealed. In his words, he says "...if anything goes wrong, I will be in big trouble."

³⁰² Interview with REK 1, Resident, Elder, Kisii Central, July 6 2013

would command support. He chose Kisii central where he felt he exercised more influence, where *sungusungu* is headquartered over his home support³⁰³.

When interviewing one respondent who professed to be a *sungusungu* member on the organization of the group he said “*We are just like the police force*”! Below the overall chairman in the whole Kisii region, we have commanders in each administrative unit up to the location level...the lowest rank is that of the clan elder “*who has no otherwise*”³⁰⁴ but to co-operate with us in terms of information”. The member interviewed was proud to point out that *sungusungu* had broken up the monopoly of police in terms of patrol.

Membership

Persons wishing to join *sungusungu* have to be vetted before they are allowed to join the group. This is done to ensure that the member does not have a past criminal record. As one official stated “Before a member is recruited we have to investigate one’s past”. Any member who wishes to join is then summoned and informed of the decision. Although a former member of the group asserted that they had a constitution that contained rules and provided a framework for their operation, inconclusive evidence to prove their existence as he himself admitted he did not have a copy and fell short of saying that he had not seen them. “We have rules. They are in a book. I do not have a copy but am conversant with the rules. The custodian of the book is the secretary of the group. Only two chiefs have attended our meetings since inception. One of them was killed and the other has a copy of the rules.”³⁰⁵

5.4. Mode of Operation

One of the respondents summed up their mode of operation citing notification of public officers as the necessary step required for the *sungusungu* to proceed with arrest of suspects. He stated, “when going for an operation the Officer in Charge of Police Division

³⁰³ Otiso W. (2014) “Evaluation of Political Mobilization Strategies Employed by Vigilante Groups in Kisii County during the 2013 Kenyan Elections” in C. Thibon, M. Ndeda, M.A. Fouere and S. Mwangi (eds.) *Kenya’s Past as Prologue: Voters, Violence and the 2013 General Elections* (Twaweza/ Heinrich Boll) p. 184

³⁰⁴ Interview with member of SGK 4, *Sungusungu* member, Kisii Central (Town); there was a different tone during the interview, with emphasis on the power of the group and that all other institutions are subservient to their wishes.

³⁰⁵ Interview with SGK 3, *sungusungu* member, Kisii Central, April 5 2013

(OCPD) and DC have to be informed. This is done by the Chairman. Whether he declines or accepts, we carry out the operation for we have done adequate investigation". Our investigations are carried out by our members and also the local mothers (who act as informers) who sell chang'aa for they are on the ground and know who is who in the village. For *sungusungu* the sellers of illicit brew are not criminals but collaborators and intelligence officers of the group.

Punishment

The type of punishment depends on the type of the case; whether it is civil or criminal. Generally, civil cases are considered to be minor compared to criminal cases especially where there is loss of life or injury. Punishment will also depend on the nature of crime committed, whether it is considered a petty or serious offence. Cases like cattle rustling, murder and robbery with violence are considered to be serious offences. These cases invoke the exclusive jurisdiction of the police. In such cases police are invited to conduct investigation with a view to taking the matter to court for prosecution. When meting out punishment several considerations are taken into account. The previous record of the suspect is taken into consideration. The suspect will face a stiff punishment if he/she is a repeat offender. Petty offences include; when one fails to respect the summons; and when the suspect is a first time offender, or the property stolen is considered to be trivial. In petty cases like sugarcane theft – the chairman plus the elders and clan will constitute a hearing. When the committee fails to agree, the clan elder sends the case to the Assistant Chief.

"We also conduct cross-investigation across villages (inter-village investigation with the cooperation of counterparts, hence it is not restricted to one village to ensure that there is no escape to another village as a safe haven. For instance if a suspect moves from his village in Bomorenda and commits a crime at Lyabe, the Bomorenda community policing members to go to Lyabe to investigate the past record of suspect including previous involvement in crime. This is intended in finding the truth, tracking down the suspect and prescribing the suitable punishment for him"³⁰⁶

³⁰⁶ Interview with SGS 3 Sungusungu member, Suneka, 5 March 2015

Typical sentences include warnings and fines for what are considered minor offences. For example, for stealing, if found to be petty, the offender is fined, told to return the property and warned against repeating the offence. If the offence involves stealing what is considered to be valuable property, the suspect may be faced with further punishment in addition to the fine. This decision entirely vests in the claimant. The claimant may direct that suspect be punished through whipping and that the suspect be handed to the police. When one is required to pay a fine, *arrest expenses* is paid to the *sungusungu* in addition to the fine which is compensation for the victim of the crime. There are certain offences where only the arrest expenses are paid to like in the case of failing to respect summons to appear before the *sungusungu*.

On being asked how they relate with other policing groups, he replied “with the *introduction of community policing* in which we have been incorporated, we work in full co-operation with the police and even conduct patrols which was a preserve of the police force³⁰⁷. It is evident that there is dual membership in *sungusungu* and the new *Official Community policing* initiative. A number of *sungusungu* members are involved in the new community policing mechanism while maintaining their membership in the vigilante group.

Dispute Resolution

The *sungusungu* have a forum for dispute resolution which they refer to as a *small court*. When responding to a question on the existence of an adjudication body, he responded “We do have *small courts*; a small fee is paid for our sitting” In a follow up interview, another member confirmed that the court rarely sits during the day. As part of delineating their jurisdiction, they are some matters that they decline to adjudicate upon which they state are the exclusive jurisdiction of clan elders or the state. “We do not entertain boundary disputes, husband-wife disputes...we leave this to clan elders”³⁰⁸

5.5 Financing

³⁰⁷ Note that respondent differentiates himself from the official community policing groups.

³⁰⁸ Shifting away from shaping and policing a moral community; previously *sungusungu* were involved in domestic cases, adultery and domestic violence. Partly attributable to rhetoric of new order for regulation of land

When asked how the group raise its finances, the respondent was quick to answer “We are not a profit making organization...ours is to rid the community of evil³⁰⁹. The group also relies on support from politicians. On a follow-up question, on how then the group sustains itself without an economic enterprise; he stated that they depend on well-wishers and voluntary contributions. “At one time when one of us was shot by an arrow on the neck, Mzee Nyachae took care of the bill”³¹⁰. He also stated that the group owns *kiosks* at the heart of Kisii town next to the stage where tenants pay rent. The group obtains its revenue from these *kiosks*. The stalls are strategically situated next to the Kisii County bus park, which is a beehive of activity and therefore a good revenue source³¹¹. This account on ownership of *kiosks* by *sungusungu* has since been contradicted in an interview held with *Chairman*. The chairman stated that the stalls are not corporate properties owned by the group. However, it has been confirmed that some of the members of the group own the stalls by the bus park.

5.6. *Sungusungu* role in Elections

This section examines different aspects that motivated the *sungusungu* to participate directly in elective politics rather than continue to influence local politics indirectly through reliance on its former patronage networks.

Disconnection from Patronage Networks

In informal interviews administered to *sungusungu* location leader and members of the group, we sought to find out whether the decision by the group leader to seek an elective post as a County ward representative received members’ support. In relation to the rationale for the group leader seeking an elective post as a County ward representative, the respondent stated that the *sungusungu* decided that it was the opportune time to participate in local political decision making. He stated that this had to be done directly rather than through patron-client networks which had been employed in the past with no tangible benefits to the group members. The group wanted to delink itself from such

³⁰⁹ Note: Some members of the community have complained of distortion or harassment wherever this group is solving a dispute. They have reported that *sungusungu* ask for money and that sometimes they ask for money to buy batteries for their torches during patrols

³¹⁰ In reference to the political big man in Kisii

³¹¹ Observation in Kisii Central Bus Park: these premises are strategically placed in the centre of the city, high revenue area, attract high rents

networks owing to unreliability of their former patrons³¹². In the past *sungusungu* had relied on political patrons comprising councillors within the former Municipal council to have the group recruited to maintain law and order in the town centre. However, after some time disputes emerged between *sungusungu* and political patrons over broken promises on payment for services delivered³¹³. As a result, the relationship between *sungusungu* and its patrons broke down. The decision to seek political posts directly by *sungusungu* raises scenarios that require deeper interrogation on the relationship between the disintegration of patronage networks and the effects on the former clients. Scott Matter in studying interplay between neo-patrimonialism, violence and land tenure systems in Enoosupukia in the 90s found that in neopatrimonial networks, the security of clients' security, personal access to power and economic resources depended much on the whims of the patron³¹⁴. The clients were involved in a loose and asymmetrical relationship with the risk of being disconnected anytime to their disadvantage. The result of disintegrated patronage network meant that they were in a vulnerable position and open to further marginalization and domination through state institutions and law controlled by their former patrons. However, in the case of *sungusungu*, voluntary disconnection from its former patronage network appears to have galvanized the group not to renegotiate a return to their former patronage networks but instead to seek access to political power and economic resources directly. *sungusungu* direct involvement in elective politics was a decision which received the support of group members with no objections within the group³¹⁵. Members united behind the group leader because they were convinced that the 2013 elections presented an opportune moment for direct political participation and to influence decision-making given their proven record in restoration of security in Kisii County.

Role of County and Devolution of Resources

³¹² Interview with SGK 3, Location *sungusungu* Leader, April 5, 2013, Kisii Interview with SGK-5, *sungusungu* member, 15 February 2013, Kisii

³¹³ Interview with SGK 5, *sungusungu* member, 15 February 2013, Kisii

³¹⁴ Matter S. (2010) 'Clashing Claims: Neopatrimonial Governance Land Tenure Transformation and Violence at Enoosupukia Kenya' *Political and Legal Anthropology Review*, 67-88 at 72

³¹⁵ Interview with SGK3, *sungusungu* location Leader, April 5 2013, Kisii Central; However, it was unclear at the time from the interview whether it was the personal decision of the leader to seek direct political participation that was endorsed by the group or the whether the decision originated from the group.

The desire by *sungusungu* to have a better influence in county affairs was in recognition of the vast powers vested in the County Assembly to steer the management of institutions and processes involved in the exploitation of county resources. Prior to enactment of the new Constitution in 2010, the functions of the local government were regulated by an Act of Parliament and a lot of discretion in decision making was left to the Mayor and departmental committees³¹⁶. Under the previous system of representation, the ward would be represented by a Councilor. The position of Councilor was not highly regarded due to responsibilities, powers, attendant remuneration and modest budgetary allocation. However, the member of County Assembly is seen as a more powerful political position. The County Assembly is now entrenched in the Constitution with specified legislative, oversight and approval functions³¹⁷.

Sungusungu members also realized that it would be difficult to influence Governor (the highest political office) through proxies because accountability structures under the new Constitution were more rigid compared to those under the old dispensation³¹⁸. *Sungusungu* members were thus motivated to seek County Assembly elective posts directly having realized that the new Constitution envisaged that Members of the County Assembly (MCAs) would play a vital role in the county governance through direct contact with the Governor. They also appreciated the changes that were introduced by the new Constitution especially devolution which influenced their decision to have direct representation in county assembly. Therefore, promises in the new constitutional dispensation to devolve decision making to the local level were also contributory factors in motivating *sungusungu* to seek elective office in local elections.

Economic Reasons

Direct participation was also catalyzed by certain economic considerations introduced by Chapter 11 of the new Constitution. As the locational leader stated “We wanted to increase our influence in the management of county resources.”³¹⁹ The rationale of establishing

³¹⁶ Local Government Act, Cap 265 of the Laws of Kenya

³¹⁷ Articles 185(1), 185 (2), 185 (3) and 185 (4) of the Constitution of Kenya 2010 and Chapter III of the County Governments Act

³¹⁸ Interview with SGK 2, *sungusungu* location leader, May 2, 2013, Kisii Central

³¹⁹ Interview with SGK 3, Location CPG Leader, April 5 2013, Kisii

county governments is to ensure increased political, economic and social participation by all citizens through decentralization of governance structure. The constitutional language resonates well with *sungusungu*'s rationale for contesting in ward elections. In particular, Article 174(c) specifies one of the objects of devolution as giving "powers of self governance to the people and enhance participation of the people in exercise of powers of the State in making decisions affecting them". Article 174 (d) also recognizes "the right of communities to manage their own affairs and to further their development".

Further, Article 203 (2) of the Constitution stipulates that the Revenue raised nationally that is allocated to county governments shall not be less than fifteen (15%) of all revenue collected by the national government. The intention of *sungusungu* to increase their "influence in management of county affairs" was not only by their clamour for political participation but extends to economic considerations in light of exponential increase of revenue allocated to Kisii County compared to low allocations to former municipal council from the government. Prior to elections, the Commission on Revenue Allocation criteria published for revenue sharing amongst counties meant that Kisii which would receive the 5th highest revenue allocation nationally. Although the figures were revised in recently released Revenue allocation for financial year 2013/14 Kisii County emerged with a favourable allocation of Kshs. 5.29 Billion³²⁰ which still marks a colossal increase in revenue.

Kisii Town as the Political Base: Popularity in the Urban Areas

It was observed that the *sungusungu* chairman opted to vie for the Kisii Central Ward and not Bobaracho Ward where his home is situated yet it is only 5 kilometres away from the town centre. It is difficult to discern whether most of *sungusungu* group members were registered in town centre and whether this was a factor in the decision to vie in Kisii Central ward. However, a significant majority of its membership have their economic activities concentrated in the town centre. It was observed that *sungusungu* enjoyed popularity among informal economic sector groups undertaking small businesses like hawkers, touts and motorcycle taxi operators. Hence, because *sungusungu* enjoyed wide support in the town centre, members felt that their leader to exert more influence in Kisii Central Ward

³²⁰ CRA Revenue Recommendations for Financial Year 2013/14 Retrieved From www.crakenya.org/publications

than in his home ward of Bobaracho. Activities of *sungusungu* including provision of security, patrols and pro-social services like garbage collection are all conducted in the town centre. Further, contesting the home ward seat would have pitted him against his own clansman. 'Clanism' is an important consideration in elective politics in the Gusii region and this contributed to the decision to change wards. In Kisii politics, contests for elective seats become inter-clan competition so that where it emerges during campaigns that among the leading contestants two or more candidates belong to the same clan, the clan elders encourage negotiations amongst the candidates so that one of the contestants drops their ambition in support of the other³²¹. Such a negotiated communitarian settlement avoids splitting votes between members of the clan and increase chances of a clan member to clinch the elective post. In this case, the ultimate outcome of the election appears to have vindicated the considerations based on avoidance of inter-clan competition as the Mr. Nyangeso eventually emerged the winner by a slim margin over the *Bomobea* candidate represented by Mr. Ongaki. Mr. Nyangeso belongs to the same clan as the *sungusungu* chairman and had the chairman vied for the elections in Bobaracho Ward, supporters from his clan would have split their votes between Mr. Nyangeso and the *sungusungu* leader, which would have worked in favour of Mr Ongaki.

Kisii Central Ward is more strategic. It covers Kisii town centre where the Kisii County headquarters is situated. The County headquarters is also where the County Assembly, the Governor's and County Executive offices are housed. The *sungusungu* political base has its headquarters in proximity to the County headquarters. The base is strategically placed and it symbolizes proximity to power. *Sungusungu* administrative headquarters are situated less than 1 kilometre away from the County headquarters. This also informs *sungusungu* decision not to contest elective seats in Bonchari constituency which is where *sungusungu* was born over a decade ago. Though *sungusungu* traces its roots to Bonchari constituency, its political base has since shifted to Kisii town centre. It is for these reasons that *sungusungu* campaigns were concentrated in the town centre. *Sungusungu* members held the perception that Kisii Central Ward developmental needs would be given priority over other wards hence they would gain access to large budgetary allocations to initiate a

³²¹ Interview with REK 2, Elder, Kisii Central, 11 December 2012

number of developmental projects within Kisii Central Ward. Successful developmental programmes would then boost their profile, popularity and legitimacy amongst the citizens.

5.7 Challenges: Operation and Institutionalization

Challenges to operation of *sungusungu* include the waning material and non-material support of the community. According to one group member, previously the group used to get “enormous” support from the community. Such support included contribution of necessary patrol instruments like batteries and torches. There is also lack of adequate support from the provincial administration which convenes the *barazas*. At a baraza held by the Assistant County Commissioner at Kerina, Kisii South District headquarters, the group appealed to the administration for material support. Despite assurances from the Commissioner has not been forthcoming. The *sungusungu* members have also pressed the chairman to seek some form of partnership from local politicians. While the former Member of Parliament (MP) had provided some support, there has been little action from the current MP but members indicated that the group are still keen on seeking audience with him. He stated further, “At the moment we are trying to get the help of *mhesimiwa* so that we can get some support for the work that we do”³²².

One of the *sungusungu* members summed up the challenges the group faces in operation and financial matters. “The success of this group has not been without some challenges here and there. It must be remembered that the role played by this group is voluntary in nature. Due to lack of incentives the group has slowed down its activities and as a result the crime rate has shot up. Of late, there have been frequent reports of incidents relating to house breaking and theft of farm produce, especially bananas”. One respondent lamented that despite the area being the *birthplace of sungusungu* the future success and sustainability of the group is under threat.

Conclusion

The chapter has provided an account of the operation of local policing as practiced by the *sungusungu*. It has sought to provide an understanding on its origin, institutionalization,

³²² Interview with SGS 3, *sungusungu* member, Suneka Ward, 5 August 2016

structure and its approach to day to day policing. The next chapter examines the institutionalization new community policing initiatives in order to provide a holistic view of all actors in local policing in Kisii.

CHAPTER 6: NUANCES IN LOCAL POLICING: NEW COMMUNITY POLICING IN KISII COUNTY2011-2016

Introduction

The chapter evaluates the practice of community policing in Kisii. In particular it provides an account of its establishment, membership, security practices and relationship with state security providers.

6.1. Community Policing in Kenya

Community policing is much contested in terms of its definition, description, meaning, its uses and applicability and contextualization. Community policing is viewed differently amongst scholars, most looking at its rationale as professionalizing democratizing the police service, others examining the improvement of the quality of relationship between the government and the governed. Marenin identifies this difficulty and contestation of meaning of CP. He observes that “scholarly disagreements on how to conceptualize and measure whether a *policing system* practices COP should cause reformers, advocates, scholars, critics and the police to step back to rethink what COP looks like when implemented”³²³.

Further, the problem of transplantation of the success of community policing models in Western democracies to the African continent without much regard to the varied political and socio-economic have been well documented³²⁴. Associated with the critique to the wholesale exportation of the community policing product is the selling point that its introduction serves to bolster security reform, elevating it to being the panacea to crime and insecurity challenges.

Community policing was first piloted in Kenya in 1999 through a partnership of local and international non-governmental organizations, administrative agency and Nairobi Central Business District Association (NCBDA) and government agencies like Kenya School of Government (then Kenya Institute of Administration) and the police³²⁵. The non-

³²³ Marenin O. “Foreword” in Wisler D. and Onwudiwe I. (2008) *Community Policing: International Patterns and Comparative Perspectives* at p.8

³²⁴ Ruteere M. & Pommerolle M. (2003) “Democratizing security or decentralizing repression: The ambiguities of community policing in Kenya” *African Affairs*, 102: 587-604

³²⁵ Ibid at p. 599

governmental organizations included Safer World Initiative³²⁶, New York Institute of Security (Vera) and the Ford Foundation. The national launch for community policing was followed by a government directive to all Provincial Administrators to formulate community policing committees in their own areas of jurisdiction. In 2005, the National Community Policing strategy was launched in Ruai, Nairobi.

There is a diverse understanding of the meaning of community policing as contained in government documents and amongst practitioners and citizens. The government adopted a general definition that focused on the nature of the relationship between state and community and its objective of addressing insecurity. In defining community policing, no reference is made of community policing as a tool for reforming or professionalizing the police. However, democracy is included as a guiding principle in practice of community policing. According to the Mwananchi Community Policing Handbook ("the Handbook, community policing is "a policing strategy that allows the police and community to work together to solve problems of crime and insecurity"³²⁷. The handbook further delimits the scope of the term by describing what does not constitute community policing. It states that community is not *vigilantism*; settling scores; commercial; political forum; coercion; parallel security; form of employment; power sharing.

The institutionalization of community policing in Kenya, itself has been problematic. Compared to the South African community policing model there is no linkage between policy and practice in Kenya. Further, the Kenyan community policing model is not enshrined in a legal framework providing for its regulation and facilitation. The practice of community policing in Kenya has been the subject of many studies. Attention has focused towards assessing the constraints in implementation of community policing.

6.2. Community Policing in Kisii

³²⁶In addition to supporting the community policing initiative, the Safer World initiative encompassed wider interventions to addressing violence and crime, by initiating programmes providing opportunities to youth through. These programmes were later undermined by City Council representatives. See Ruteere M. Mutahi P., Mitchell B., & Lind J., (2013) Missing the Point: Violence Reduction and Policy Misadventures in Nairobi's Poor Neighbourhoods Evidence No. 39 (IDIS: Surrey)

³²⁷Ministry of State for Provincial Administration and Internal Security (Mo-PAIS) (2009) *Mwananchi Handbook for Community policing*(Nairobi: Government Printers)

Similar to the advent of *sungusungu* in Kisii, there is little certainty at which point *sungusungu* operations were effectively disrupted by security agents to pave way for a new non-state policing structure in the name of community policing. The lack of certainty is attributable to the amorphous nature if dynamism of the group³²⁸. What is clear is the establishment of community policing in certain locations of Nyaribari Chache especially in Taracha. Compared to Taracha, there is little information about the operation of community policing in Bobaracho and Kisii Central Wards. *Sungusungu* remains the dominant actor in non state policing. The mention of the words “community policing” in Kisii Central Ward is traced back to *sungusungu* members who refer to themselves as “community policing members”. Hence the dynamics and evolution of local policing in Kisii links community policing and *sungusungu* in a number of ways. Even though Taracha case is one of the few areas to have embraced community policing from 2011, the first experience of community involvement in policing is traceable to the *sungusungu* activities in the location a number of years earlier.

6.2. *Sungusungu* in Taracha Location

Specific dates on the spread of the *Sungusungu* phenomenon to Taracha are not available but it is estimated to be around 2004³²⁹. Different accounts point to varied causes that catalyzed the adoption of *sungusungu*. From the accounts of participants interviewed, it is clear that the advent of the *sungusungu* in Taracha Location can be narrowed to three factors: increased cases of crime and insecurity; increased incidents of witchcraft and lack of faith in existing state mechanisms.

According to a certain set of respondents, central to the formation of the group was tackling of crimes including murder, burglary, theft of livestock and farm produce; vagrancy and drunkenness (especially at night). Secondly, there was a lack of cooperation between the chief and the elders. The elders employed a weak policing model with no robust enforcement mechanisms as their orders were often disobeyed. On the other hand, the

³²⁸ KHCR (2011) *Sungusungu: Merchants of Terror and Death in Kisii* (Nairobi: KHCR) p.3. It has long been stated by various stakeholders including state institutions that *sungusungu* has not been neutralized rather the group has morphed with some of its members joining the new community policing initiative.

³²⁹ Interview with OCP 1, Community Policing Leader, Taracha Ward, 9 August 2016 Other accounts point to the year 2006 as the starting point of *Sungusungu* in Taracha.

policing system by the Chief³³⁰ proved to be unpopular due its highhandedness and predation on innocent residents, the very members of the community it was established to serve. The chiefs had hitherto relied on *abayuti* (youth wingers) who were notorious for use of excessive force and confiscating Taracha residents to enforce attendance of barazas and forceful contribution *toharambees* (fundraising). Lapses in security due to incoherent policing mechanisms between the chief and the elders and unpopularity of youth winger system had eroded legitimacy of the chief. At the same Taracha residents were concerned about the rampant crime and were growing impatient with the repressive youth wingers which reflected negatively on Chief's tenure and "something had to be done". In looking for a solution he sought to implement *sungusungu* which had already worked elsewhere in the region. News had spread all over the Gusii region of the ostensible success of the *sungusungu* in partnership with chiefs in tackling crime in Bomorenda Ward in Suneka. Taracha residents were aware about impact of *sungusungu* and their sentiments were made known to the chief. The founder members of *sungusungu* in Taracha location were impressed with the success of *sungusungu* in Suneka, Bonchari constituency and sought to replicate the benefits of self help policing in the location. Subsequently, applying the Suneka model of *sungusungu*, the Taracha chief recruited youth to assist him to police the location through investigation, arrest and disciplining of offenders. The recruitment of members to serve in the group was subject to approval of members of the community in *barazas*.³³¹

In the formative months of policing by the youth volunteers in Taracha, several *sungusungu* members from Suneka were brought in to train the youth in Taracha. The relationship between the youth in Taracha and *sungusungu* was formalized and established as a branch of the divisional organization at Keumbu which then reported to the district organisation under the leadership of the chairman who based in Kisii town.

³³⁰ A Chief is the administrative head at the location level serving under the Provincial administration and a representative of the President at the local level. The Chief is deputized by a sub-chief, who heads a sub-location

³³¹ A public forum organized by the Chief. At this time the provincial administration was headed by the Chief for Nyaribari-Keumbu Location and an Assistant Chief for Taracha sub-location. These administration units were later sub-divided in the year 2010, when Taracha was elevated from a sub-location to a location. The new Taracha location now has 3 sub-locations namely; Taracha, Irondi and Nyabiosi

Witchcraft had also been targeted for sanctioning by the community. The formative years of existence of *sungusungu* in Taracha largely involved the curbing crime and stamping out of witchcraft. Incidences of witchcraft led to the coming together of the people to do away with the ill it was causing. According to narration by one of the respondents, an elderly man from Amabiria area in Taracha location “agatarigwa na abarogi”³³² and he became deaf for almost three days. Aggrieved by this act, members of the community organized themselves to look into the incident and take the appropriate course of action. Youth volunteers organized themselves into a group that would execute orders and resolutions of the meetings on behalf of the community. The family of the victim had also commissioned a number of *sungusungu* members from Suneka to assist the community to search for the witchcraft suspects and punish them.

In broad day-light, hundreds of people comprising the community members, youth and the Suneka *sungusungu* members were guided by the victim in identifying the areas he had been taken to by the witches. The youths were armed with crude weapons like machetes, sticks and *pangas*. The victim led them to a homestead in Keoke area. The owner of the homestead was identified by the victim as one of the witches. She was taken from her homestead and burnt alive. The victim then led the armed youth to another homestead in Irondi. A man who was identified by the victim was also killed. As the youth were being led to identify a third witchcraft suspect, the relatives of the Irondi suspect waged retaliatory attacks against these youths. In the process two youth lost their lives as they were caught in the chaos. A respondent who witnessed the incident said “It is indeed a sad story to narrate since one of these youths was my best friend...my desk-mate in primary school”³³³.

Even after the retaliatory attacks and the loss of lives, the youth group did not relent. The youth who had by now reorganized themselves into a larger group proceeded to bring raze down the homes of the suspects. The people who had been mentioned by the victim started fleeing from their homes.

³³² Literally means “to be taken for a walk by witches”

³³³ Interview with RET 1, Resident, Taracha Ward, 20 June 2016

The vibrancy of the group evidenced in the early years of its operation in Taracha waned over time. Most of the group members opted to operate from the divisional headquarters located at the neighbouring town centre of Keumbu. The sungusungu group still maintains its office there and its activities in the area are coordinated from the Keumbu

6.3. Community Policing in Birongo Ward- Taracha

Taracha is one of the locations that make up Birongo Ward within Nyaribari Chache constituency. The location is governed by a Chief who is the state representative of the national government. Taracha location is further sub-divided into sub-locations which form the most basic administrative unit in Kenyan governance system. Taracha location consists of three (3) sub-locations; namely; Taracha, Irondi and Nyabiosi. Each sub-location is headed by an Assistant Chief who reports to the Chief. Community policing in Taracha is structured along this system where each group is coordinated from the assistant-chief's office reporting to the Chief.

Taracha is approximately 16 kilometres from the Kisii central business district, which is the Kisii County headquarter. The closest major town centre is Birongo. Birongo is situated along Kisii-Nairobi highway. It represents the urban part of the location where most of the trading takes place. This is where the most wholesale and retail shops are located as well as the local produce market. The police post is also located here while the Taracha Chief's office is 1 kilometre away. Keumbu town centre is a larger town centre than Birongo. It is also situated along the Kisii-Nairobi highway but is 5 kilometres away from Birongo.

In Taracha, the typical economic activities include; small scale farming, small retail business and provision of unskilled labour in the farms. Farming in the area comprises animal husbandry and crop farming. Residents keep chicken, cattle and goats. Crops grown in the area include sugarcane, bananas and avocados. The produce is later sold to middle-men at the nearby Birongo market or the Keumbu town market, along the Kisii-Nairobi road. The middle-men then transport the produce to sell it in Nairobi.

The major educational institutions in this area are schools—Taracha primary, Taracha secondary, Kianate primary, Keoke primary, Keoke secondary, Boruma primary, Boruma

secondary and Riondong'a primary. The majority of the people confess Christian faith-the main denomination being Seventh Day Adventist.

6.3.1. Establishment of Community Policing in Taracha

In 2011, under the auspices of government, community policing was publicly launched in Taracha which was followed by the election of officials from the community. The 2011 launch was a result of the countrywide programme that was spearheaded by the Ministry of Provincial Administration and Internal Security (MoPAIS)³³⁴. The respondents say that the re-launch of community policing by the state, was effected through the police and the local administration (chiefs and sub-chiefs). "The government of Kenya made an announcement through the Officer in Charge of Station (OCS), chiefs and sub-chiefs for the establishment of the community policing programme."³³⁵ The chiefs were pivotal in calling for public barazas, where the officials from MoPAIS sensitized the public about security issues and importance of community policing. The public was then required to elect persons who would be members of the community policing initiative. It was also emphasized that the two-thirds rule should be respected in election of member. The programme aimed at empowering locals in taking charge of their own security. "The government deemed it wise to include locals in security matters since people at the local level stood a better chance than the police in identifying criminals"³³⁶.

After the 2011 launch, there have been other seminars that have been held with the aim of strengthening the group³³⁷. Taracha provides an ideal case where its establishment and institutionalization was expressly documented in minutes. Interestingly at the forum of the launch of the group, the former *sungusungu* chairman is referred to as the Chairman of CP Kisii, and expressly denounced the *sungusungu* group, as a criminal group that had no place in CP.

6.3.2. Organizational Structure

³³⁴ The 2011 launch was effectively a second attempt at institutionalization of Community policing. The initial launch in 2005 by the government failed to take root outside Nairobi.

³³⁵ Interview with OCP 2, CP Official, Taracha Ward, June 10 2014

³³⁶ Interview with OCP 1, CP Leader, Taracha Ward, June 3, 2014

³³⁷ Interview with OCP 1, CP Leader, Taracha Ward, June 3, 2014

Community policing in Kisii is coordinated from the location level which is headed by a Chief. Typically, at the locational level, the group consists of 60 members, with 20 members recruited from each sub-location. The chief is the overall leader of this group but the day-to-day activities of the group are carried out by members of the community headed by the chairpersons of community policing from the sub-location in collaboration with the assistant chief. The Chairperson is assisted by the other elected officials namely, the secretary and the treasurer. The Official Community Policing (OCP) in Taracha location largely comprises youth (18-35) but there is a number of members above 35 years. However, apart from chiefs and sub-chiefs, who retire at the age of 65 years, the mandatory retirement age set by the State, there are a few above the age of 50³³⁸.

Leadership

The leadership of new community policing executive committee in Taracha is vested in the chairman of the locational committee. Executive duties are conducted with the help of vice chairperson, treasurer and secretary. Executive posts of each community policing committee are elective positions. First, it is members of the public that elect persons whom they entrust to be members of the Community Policing group. Once CP members are constituted, members will then elect officials who will sit on the committee in the respective positions. The practice in Taracha sub location is that for the vote of chairperson, the member who garners the highest votes becomes chairperson and the second highest becomes vice chairperson.

Over the course of the study, we were able to build a good rapport with the current locational chairman, OCP 1 (pseudonym) which enabled close interaction and collection of information on several aspects relating to leadership, social and economic profile. In 2011, at the inception of community policing in Taracha, OCP 1 was first elected as a vice chairperson of the Taracha OCP committee. This is the position he held at the time of the very first conversation in 2013. OCP 1 described himself as one of the few active members in the location to the point that other locations like Irondi and Nyabiosi would request the participation of Taracha committee when faced with tough criminal cases or operations that

³³⁸ Interview with OCP 5, CP Member, Taracha Ward, June 10, 2014

involved arrest of dangerous criminals. OCP 1 narrated the sense of fear instilled among residents when they policed public gatherings or when they conducted routine day patrols. He was excited when revealing that he ensured that the sense of fear was associated with the bar of iron he always carried akin to weapons carried by policemen in their patrols. Much as it was clear that the OCP members were feared in the public sphere, it became evident that there was not as much respect or support for OCP 1 and his colleagues.

In 2014, OCP 1 had invited the research team for a fundraiser towards the raising school fees for his eldest daughter to which we obliged. In the numerous meetings we had prior to the invitation, he had lamented that his financial situation had made him incapable of paying school fees for his daughter who was in college. Like many of his neighbours and community members in Taracha, he was involved in small-scale crop and livestock farming. Unlike his more endowed neighbours he did not grow tea which afforded other households more revenue. He was also disadvantaged as only one of his cows was producing milk at the time. He had also lamented that the work he does as Taracha OCP committee member was voluntary and therefore did not get paid anything from it. He had struggled through the years to pay fees for his daughter. She was now in her final year and required Kshs. 30,000/- (equivalent to 300 Euros) to enable her complete her college education.

When we arrived at OCP 1's residence at around 11 a.m. only the family members (wife and children) were present. The tents set aside for guests were empty save for a family friend who operated the Public Address system. By the time we left at 3p.m. a handful of guests had stopped by and left to attend to other assignments. Overall, the fundraiser was poorly attended with few close relatives and friends attending³³⁹. The monies collected were not enough to meet the target but OCP 1 was hopeful that by the end of the day, invited guests would show up and bridge the deficit. The following day OCP 1 called to thank us for our attendance but mentioned that he still had not been able to raise the full fee as anticipated. OCP 1 decried this situation and was clueless as to the reason for poor attendance despite the *kind of work they were doing for the people*. It therefore appears that the Taracha OCP

³³⁹ Observation at homestead of OCP 1, Community Policing Leader, Taracha, October 20, 2015

leadership is more feared rather than respected as members of the community stay away from social functions organized by CP leaders.

The lack of support for OCP leaders in Taracha notwithstanding, appraisals on their utility and function with senior OCP leaders and state officer's remains positive. Recent changes in August 2014, demonstrated that there was faith in the performance of Taracha OCP (and for OCP 1 in particular). OCP 1 was promoted to chair Taracha OCP as a reward for his continued performance. Despite the steady rise to chairmanship in the Taracha OCP committee, OCP 1 notes that challenges have compromised the efficiency of their work.

Leadership Changes in Taracha

Owing to radical changes in the structure and leadership, a number of officers were sacked and others promoted. The Taracha OCP leadership went through significant changes between months of May and August 2014. The chairman and secretary of Taracha sub-location OCP were sacked and the then vice Chairperson was promoted to Chairman and the secretary was replaced by a non executive member who had been active in the group's activities. The newly appointed office bearers were officially made known to the public during a chief's baraza that was held at Riamokwobe in Irondi sub-location on 14th August 2014.

Events preceding the chief baraza triggered the leadership changes. According to OCP member who witnessed the incident, "the former Chairperson was sacked for his involvement in a family dispute at residential premises in Keumbu market where he was a tenant. The chairman had received a phone call from her neighbour who said she had been assaulted by her husband. The chairman took no time to investigate the incident or attempt to solve the dispute in an amicable way. He took sides with the woman beat up the man not knowing that he had been stabbed by his wife. The man who was then rushed for medical attention succumbed to the stabbing "before arrival to the nearby Keumbu hospital"³⁴⁰. As a result of this incident antagonized the standing of OCP in Boruma sub location which is the ancestral home of the victim. The Chief and Assistant chief who were the only OCP officials

³⁴⁰ Interview with RET 1, Resident Taracha Ward, December 21, 2014

who attended, got a hostile reception during the burial of the victim. Angry mourners cut short the Chief's speech demanded the immediate disbandment of OCP in Boruma sub-location because of the actions of the OCP chairman. The Chief yielded to the demands which led to the sacking of the chairman. He was not only relieved of his official duties but was also deregistered and could therefore not participate as a member of the group.

On the other hand, the secretary was dismissed for breaching rules of the organization and unprofessionalism. The respondent narrated that "the secretary was relieved of his position on two main grounds. He was a drunkard and he revealed the top secrets of the group long before operations could be executed".

Notwithstanding the chairman's involvement in the death of victim of the family dispute in Keumbu market, no charges of murder or manslaughter or any other crime have been preferred against him. The former Chairman was arrested on the day of the incident but was subsequently released in unclear circumstances. Current chairman stated that the OCP used certain links in the police to thwart any efforts pursued by victim's family in following up the case. The former chairman has since relocated and works as a boda-boda operator in another location 15 kilometres away in Kisii Central ward.

Membership

For a person to become a member of this group, the person must have a "good moral character". Some of the qualities used in judging the criteria for eligibility include honesty, respect, obedience and patience. It must be noted that these virtues are always stressed by the community leaders during public forums like public barazas. Another member elaborated on other factors that were taken into consideration before one gets admitted into the group. He stated that a person must have; *a clean track record*, one must be a resident; must have completed secondary school; one must be above 30 years but below 60 years of age³⁴¹.

³⁴¹Interview with OCP 4, Community Policing Official, Taracha Ward, June 10, 2014

Information given by the respondent of what happens in practice in recruitment of members differs with the official minutes of meeting for the launch of Community policing. Minute 03 states that for one to be a CP member, one must be: a Kenyan citizen, 18 years and above; a person of high integrity or honesty; an influential *role model*, a permanent resident of that locality or a resident of that area for more than one year. Further one must have; no criminal record and have a *warm character*.

After being chosen by members of the public, members are required to go for training (coordinated by the local police officers and the chief) on how to implement the main policing activities which include how to; carrying out investigations, arrest suspects, patrol, search and seize property of suspects. They are also trained on how to protect themselves and fellow group members when undertaking an operation. The training is meant to infuse a measure of professionalism in how OCP members conduct everyday policing tasks. “Sometimes the arrested suspects target our members by claiming that their property and money was stolen during operations in order to spoil their reputation, therefore they need proper training on how to avoid such situations when doing their work”³⁴².

CP as practiced in Taracha is a collective action and is not only preserve of male youth. It encompasses elderly, women and professionals and envisages a place for each societal member. There is a conscious effort to ensure that at least 1 out of 3 members at the village level is a woman³⁴³. The OCP member stated that this ratio was in line with constitutional stipulation on gender parity³⁴⁴. “We have gender!” the member responded to our question as to relative increased involvement of women unlike other non state policing groups. Out of the 60 members, there are 15 women, with one village having two representatives out of the three members. Boruma Getare provides interesting scenario as it comprises 2 women and 1 man. However, despite the exceptional case of Boruma Getare and despite concerted efforts, it must be noted that female members are fewer than men in the group. The highest participation of women in Taracha location is in Taracha sub-location where out of the

³⁴² Interview with OCP 4, CP Official, Taracha Ward, 10 June, 2014

³⁴³ See Appendix : Minutes of Taracha sub-location Seminars, 31 March 2011

³⁴⁴ Article 27 (8) of the Constitution states that the State shall take legislative and non-legislative measures to ensure that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender

current 10 members, 5 of them are women. In Irondi sub-location, 2 out the 5 members are women, while in Nyabiosi sub-location, only one member out of the 5 members is a woman.

As the community policing official notes that female members are (by design) few since they cannot participate in the many activities of the group which most times require the use of force, for instance, arresting of suspects. Further women are not involved in patrols because these are largely conducted in the night which is quite dangerous. The social and cultural norms of the community are prohibitive to women. As the respondent stated, "...it is against cultural convention for women to protect the community while the husbands are in the house sleeping"³⁴⁵. One respondent also stated that restricting women to daytime operations would also avoid any allegations of adultery or affairs with fellow community policing members.

In Nyamage location situated in the Kisii Central Ward, another reason was advanced for the low participation of women in community policing apart from the cultural constraints mentioned above. Low participation was attributed to reluctance or lack of desire on the part of women to challenge for leadership position or generally join as members of the group. When asked whether there were women in the local OCP the chief answered, "Yes, there are women in the group...but they continued to shy off from taking leadership positions in the committees. To stop this, we have reserved some of the seats for women in the group in line with government efforts for affirmative action"³⁴⁶

Although their role is restricted to daytime policing, these female members act as intelligence officers which the respondent notes is a vital role in investigative function of the group. Alongside other, male members, the female intelligence officers provide crucial information to preventing incidences of crime and insecurity. Women play a critical role when it comes to arresting female suspects. Previously there have been cases where women suspects accuse the male OCP members of attempted rape and indecent assault in order to taint image of OCP and to avoid further investigations. Thus, the women members come in handy to insulate the group from any false allegations.

³⁴⁵ Interview with OCP 3, CP Official, Taracha Ward, July 4, 2014

³⁴⁶ Interview with SOK 5, State Official, Nyamage location, July 17, 2014

Some members of the group have a professional backgrounds including teaching, legal practice and civil service. These members are instrumental in the daily operations of the group. They play an advisory role in different aspects of policing and *current issues*. For instance in Taracha, one of the members is a retired police officer. “He has proved to the group to be an instrumental figure when it comes to guidance on arresting techniques”. Another member of the group had worked as a court clerk until his retirement. “He is a reliable advisor on matters of law and court procedures”. Overall, the professionals play an advisory role on: arresting skills, matters on rule of law, conduct of OCP members in public spaces.

Village elders play an important role in the community policing system. The village elder is the first point of call for a resident, where a crime has been committed in the elder’s area of jurisdiction. Elders will then transmit such reports to the assistant chief who will then involve OCP. Besides the handling of reports on crime from victims, Elders on their own volition, collect intelligence reports on daily incidences in the area. Elders report to Assistant Chief on the existence and location of illicit brew homesteads.

Elders who are not actively involved in the day to day operations in community policing play an advisory role to officials of OCP. They provide advice on cultural norms and practices that may apply to different situations that an OCP member may face in carrying out their duties. For example, one respondent stated that when carrying out arrest of illicit breweries, it is the elders who advised us to direct suspects to pour their own brew as doing it ourselves would carry a curse!”

6.3.3. Mode of Operation

Everyday policing in Taracha constitutes the combined effort of the Assistant Chief and the OCP, with the assistance of the police attached to the Birongo police post. The main roles of OCP include; arresting suspects, investigation of criminal acts within the sub-location, destruction of illicit brew dens, maintenance of order and peace during public gatherings like fundraising, funerals, political campaigns. They also liaise with the police in effecting arrests of *dangerous criminals* like murderers. Where called upon to act on disturbances

they may respond to calls to private functions like funerals. OCP are also deployed by the Assistant Chief to mobilize residents to attend *barazas*, a forum in which administration discusses issues of concern regarding law and order. This function was formerly carried out by *youth wingers* who were instructed by the chiefs made administrative authorities unpopular among residents. The youth wingers were highhanded in their mobilization of residents to attend chief barazas and often involved coercive means like threats of violence for those found to be “uncooperative”. Residents were also forced to contribute money for the chief and those in default would have their property confiscated.

The day to day community policing is undertaken by OCP officers on their own volition as part of routine investigations and at times through the instance of elders and other citizens resident in the area. Operations are carried out very early in the morning usually between 5.30 and 6.30 a.m. This time is found suitable as the best time to ambush a suspect before he/she wakes up and leaves the homestead. At times they will send OCP member who is not familiar to the suspect to go ahead of the arresting party as a decoy to confirm that the suspect is in the homestead and to ensure that the suspect does not escape upon sighting familiar officers. If the suspect resides in remote areas of the location, a reconnaissance group will visit the area day/days before the appointed day of arrest to survey the area and collect intelligence about the movement of the suspect. This helps them determine their approach on the material day of the arrest.

When undertaking a crackdown against unlicensed brewing of alcohol, the area assistant chief and an elder must be presented. The owner of the house must also be present. When asked why presence of owner of the brewery, he replied “So that there are no allegations that OCP members have been involved in the theft of money collected during a raid on such unlicensed premises...my colleagues in the past have been falsely accused”³⁴⁷.

We asked the locational leader about his experience on the first operation he was involved in. He stated, “My first day was full of fear. I asked myself: how am I going to arrest a criminal suspect without a gun? I also felt numb. How was the general public going to view

³⁴⁷ Interview with OCP 1, OCP Leader, Taracha Ward, May 29, 2014

me? Most people regard this job as a job for idlers. I also wondered what kind of job is this where I protect people who are sleeping but then I still buy all the material like shoes and torches required for patrolling” However, he said that he realized over time that once public knew about the group, even with a walking stick was enough to instil fear on the suspect before effecting an arrest.

The officers arm themselves with some weapons (crude) like *rungus*. They also carry ropes and mosquito nets proven to be effective) to be used to tie the suspect after arrest. He noted that once they arrested the suspects, they would escort them to the police station and hand them over to the officers who would then take necessary action. Apart from routine crackdowns on suspects arising from their own investigations, OCP officials also act upon tip-offs from elders about criminal activity in their area.

OCP also undertake night patrols in its area of jurisdiction. As one member informed us, “We start anytime from 8.30 p.m. when there is no one on the road. Anyone found on the road at 10 pm must explain where they are coming from and where they are going. Even persons on motorbikes are detained if found at that time because they have been found to take part in crime or sometimes used by criminals to commit crimes...the patrol goes up till 2 a.m.”³⁴⁸

Reporting

OCP is answerable to the Office of the Chief (chief and the assistant chief) in any given area. In practice, because the group’s activities are based at the sub-location, the group is primarily answerable to the assistant chief who then reports to the Chief of the location. The group draws its members from all the corners of the sub-location. The officials include; the chairperson, vice chairperson, secretary and treasurer, who are charged with the responsibility of executing the orders made by the chief. The group highly regard discipline and justice among themselves³⁴⁹.

³⁴⁸ Interview with OCP 4, CP Official, Taracha Ward, 10 June, 2014

³⁴⁹ Interview with OCP 1, Community Policing Leader, Taracha Ward, May 29, 2014

The assistant chief organizes public *barazas*. Where there are serious issues of concern to be addressed, a baraza will be convened by the assistant chief on behalf of the Chief who will address the meeting. Through these *barazas*, the public is briefed about different crimes and the actions of CP in tackling crime. The residents are then warned against committing of criminal offences. Through these *barazas* that the assistant chief sensitizes the public on the positive role played by CP in ensuring effective governance and promoting security in the respective jurisdiction.

The assistant chief is charged with leading patrols in conjunction with OCP members. However, with the exception of crackdown on illicit breweries, OCP members informed us that when it comes to patrols and especially night patrols this rarely happens as OCP are left to carry out the patrols on their own. Most of the times that assistant chief is involved in patrols is in cases when police are involved or where the cases involved are serious. The involvement of assistant chief in patrols also depends on the relationship between OCP and assistant chief.

On a subsequent visit to Taracha, we learnt that crackdowns on illicit brew is a special case because breweries collect a lot of income, hence assistant chief will want to be involved because “bribes are demanded during such crackdowns”³⁵⁰. It therefore represents a lucrative venture that the assistant chief may not want to miss.

Meetings

Apart from the public *barazas*, OCP members hold regular and emergency meetings whenever called upon. Regular meetings are held periodically to discuss issues of concern regarding security in the area. In the regular meetings, updates on the status of ongoing investigations, patrols and surveillance are given by members. Emergency meetings are conducted when security issues arise that need urgent attention. Where issues of security cut across several locations within the division, Taracha may hold joint meetings with other locational groups. This enables the maintenance of strong partnership network with other *compatriot groups* in the Division in ensuring safety.

³⁵⁰ Interview with OCP 8, CP member Taracha Ward (Irondi) May, 29, 2014

6.3.4. Financing

Questions about the mode of financing were met with a defensive stance and was used an opportunity for the respondents to express the challenges they were facing. As one member stated, “We know that the guiding principle is that Community policing is a voluntary exercise and requires personal sacrifice but we do not receives any financial support from the government”, a community policing member laments when asked what the major challenges to community policing³⁵¹. The main financial support that the group receives is drawn from contributions made by the members of the community. For instance, members of the community make contributions during public *barazas* to enable the group purchase torch batteries for use in their night patrols. They do not draw a salary or wages from the government nor do they gain any from the police or the chief.

Due to lack of financial support, the group has developed their own financial streams for self-sustenance and upkeep akin to the fundraising mechanisms of vigilante groups. They earn an income through the fines imposed by the chief on the offenders. OCP members stated that victims of theft, creditors, give a token as a form appreciation for the good job done by the group in investigation and arresting of the suspect. For example, a person whose money has been recovered through the help of OCP usually offers a token to the community policing members involved in the debt recovery or recovery of stolen goods. However, one member was hasty to qualify that these tokens are not what sustains members but their desire to tackle crime. He stated that the group draws its motivation from the moral support and good will from community member as the community appreciates the work they do. They also rely on the support of good Samaritans in the society mostly well to do civilians who give them rewards on their own volition. Different from *sungusungu*, the OCP is an apolitical organization. It does not actively participate in any political activities or elections as a group; hence they do not get any favours or funding from politicians.

6.3.9 Implementation of Law

³⁵¹ Interview with OCP 9, CP member, Taracha Ward (Irondi) May, 29, 2014

The current Taracha chairman stated that he appreciates provisions of the Constitution which have given the group some guidance in the performance of their work. He says that the Constitution has guaranteed every person a number of rights which they observe in the everyday operations. For example, they must inform a suspect the reason for arrest before they do so. They also carry out searches in a decent manner. For example, they use female suspect members to carry out searches on female suspects. Before arresting a suspect, they must have a warrant of arrest which is provided with the help of the chief. Also when effecting an arrest they escort the suspects to the police station. One member pointed out that “It is not our concern as to whether the arrested person is arraigned in court within 24 hours as we have done our part and handed over the suspect to the police”³⁵².

The composition of the group is gender sensitive. It applies to the officials of the group and the non-executive members too. For instance, if the chairperson is a man then automatically either the secretary or the treasurer must be a woman.

OCP take pride in the fact that they have support and authority from the government. OCP members are keen to emphasize their legality and government support especially pointing to the fact that the government sponsor their training. At the same time they dissociate and denounce OCP from *sungusungu*. They refer to *sungusungu* as the “banned group” and the government cannot be dealing with such a group. They are not involved in any criminal activity which includes not associating themselves with persons who have a criminal record and those that take illicit liquor. Their role in reconciling people and ensuring that there is peaceful coexistence. They also involve people in decision-making through barazas.

6.4 Challenges in Everyday Policing in Taracha

The group faces several challenges. Firstly, they lack appropriate clothing useful in the execution of tough roles associated with their activities such as boots and warm clothing as they undertake night patrols. The lack of basic equipment that is necessary for carrying out

³⁵² Interview with OCP 11, CP member, Taracha Ward (Nyabiosi) May, 29, 2014

their job limits their operations. Most of them lack experience of the older members who have learnt policing skills on the job. Hence they do not have continuous/regular and adequate training, save for inaugural seminar which provided tips on how to arrest and handle suspect. This may reduce their capacity in dealing with tactical issues like –reduction of crime by preventive means without resorting to punishment.

The chapter has provided a description of everyday policing as practiced by new community governance mechanisms aimed at addressing law enforcement challenges through joint state-society efforts. It is important to evaluate the operational dynamics and processes of these institutions in the context of relations between government and society and also the influences these processes have in shaping the law. The findings on different societal actions and events as dimensions of state-society relations and legal sociology are considered in the discussion that follows in Chapter 7.

CHAPTER 7: VIGILANTISM TO COMMUNITY POLICING IN KISII COUNTY: DYNAMICS CONTINUITIES AND TRANSITIONS

Introduction

The chapter evaluates similarities and differences between the cases and examines the extent to which there have been transitions from one form of policing to another, in particular, shift from vigilantism to community policing. Section 7.1 below highlights different changes in the nature of policing of local policing groups in Kisii County and the extent to which such changes amount to the desired transitions where policing is professional, involves community participation and adheres to law. The second section of the chapter analyzes the relationship that local policing groups have with the state, law and society.

7.1. Sungusungu and Community Policing: Similarities and Differences

7.1.1. Establishment and Organizational Structure

Sungusungu was established in 1990s at the behest of the provincial administration (under the direction of district commissioner Leloon) with the assistance of local chief, citizens (elders and youth) of Bomorenda to tackle crime. OCP was established in 2011 under the auspices of the Kisii police division, with the cooperation of elected citizens. It was established in pursuit of revamping community policing that had been reintroduced in 2009.

Organization

Sungusungu is structured differently from OCP. Has an overall leader supported by different commanders. Originally linked to etureti and reported to the chiefs, who in turn reported to the DC under the provincial administration. Currently an overall leader, referred to as the Chairman in charge of operations in the county. Under the chairman are commanders in charge of different administrative units structured along existing public administrative units (divisions, locations and sub-locations) Members to the group are selected Recruitment to the group is mixed through selection and voluntary applicants and at times head-hunting.

OCP are closely linked to the provincial administration and reporting locally to the chief. The police assist in holding suspects in the cells before they are transferred to Kisii town for arraignment before court, where investigations reveal that they are culpable for offence they have been suspected of. The membership to OCP is drawn from citizens resident in its area of operation. Non-executive members of OCP are elected from fellow citizens present

in the assembly specifically called for elections of community policing members. Executive members are then selected from amongst the persons elected to serve as members of the OCP.

Differences between sungusungu and OCP in recruitment are evident. Under the sungusungu structure members are selected from the public, while in OCP, citizens elect members to represent them in the organization and in the executive committee. Openness and transparency in election of member and officials is lacking in the recruitment of sungusungu members compared to OCP. Qualifications for one to be a member of sungusungu and OCP are similar. For both groups, emphasis is laid on personal attributes and character for one to be able to join as a member.

7.1.2. Mode and Sphere of Operation

Sungusungu changed its name to Kisii “Community Policing Group”. It was a strategy adopted by the group to operate within the law, in light of the introduction of POCA which banned its activities. Beyond a desperate survival strategy in the sense of clutching to next opportunity available it is a means of using the same law that prohibits it to create an opportunity out of it, by clothing itself with the legal status of a policing body initiated by the state³⁵³. OCP on the other hand have had no reason to restructure their identity or change their name in response to the law.

There has been a change of ideology as the current practice by sungusungu shows that the group has to an extent deviated from the initial or original objectives. Initially, sungusungu was a voluntary organization focused on tackling crime and providing security through alignment to existing traditional institutions at the local level. There has been a diversification in the scope of their operations that sungusungu are involved in. The activities range from: surveillance and night patrols targeting burglary; moral policing; targeting prostitution, vagrancy and adultery; to, pro-social behaviour which includes policing order in the transport sector and collection of garbage.

³⁵³ Supra note 303

Over time they have also evolved from a voluntary self help institution concerned with curbing rampant crime to actors in privatised and commercial security. Where in the formative years, sungusungu would request for tokens of appreciation, the group has changed as they now charge regular protection fees for business premises especially in the Kisii Central Business District (CBD). In Nyanchwa area, the sungusungu levy protection fees to provide security for residential premises. Therefore, further to enforcement of public order and moral rules, they expanded their operations to provide protection to the business community for a fee. It is a case of pragmatic vigilantism similar to observations made by Shah on the study of vigilante groups³⁵⁴.

A shift in the mode of operation has also changed the character of the group. Operations have changed from partly overt (policing public order in transport sector and maintaining a report office during the day) to partly covert (surveillance, patrol and arrests at night). They also undertake covert operations during the day where they use informal sector hawkers as their intelligence gathering agents. Their activities have also diversified from tackling insecurity to becoming moral police, for instance, the prohibition of under-age gambling and tackling school truancy.

Sphere of Operation

The presence and prevalence of *sungusungu* is mostly around specific geographical spheres. The sungusungu are most prominent in Kisii Central (where the administrative headquarters of the County is situated) and smaller urban centres (sub-urban areas of Kisii County) like Keumbu and Suneka town centres. Community policing like that practiced in Taracha is more active in the rural areas like the OCP in Taracha location. Community policing appears to be prominent in areas where *sungusungu* is not active. As discussed in Chapter 5, sungusungu had penetrated Taracha in the early 2000s but operated for a relatively short period of time after which they receded to the divisional headquarters in Keumbu town. The sungusungu remains the dominant policing group in Keumbu.

7.1.3. Financing

³⁵⁴ Pratten and Sen Pratten D. & Sen A. (2007) *Global Vigilantes* (Hurst: London) p. 15

There is a significant difference on the revenue streams for sungusungu and OCP. Sungusungu members control a considerable amount of resources and are engaged in variety of economic activities which earn them revenue. The chairman is a successful farmer and businessman. A large section of sungusungu members own motorcycles which are involved in transport business. There are also owners of *kiosks* around the busy bus station in Kisii CBD which they benefitted through the relations with officials of the former municipal council. The National Crime Research Centre report confirms this as it states that “the group has deeply penetrated the formal economy since it had many interests and business in public transport, retail and real estate. The group members also own motorcycles which they use for public service transport”³⁵⁵ Sungusungu members also collect revenue in terms of protection fees from businesses in the CBD and residences in the adjacent Nyanchwa estate within Kisii Central ward. It is unclear whether there is a pool resources dedicated to the group or contributions from individual members to a group kitty. Initial responses to questions to group members on their upkeep were not helpful as we were given the standard answer that their work was voluntary.

The endowment of sungusungu shows a stark contrast to the financial status of OCP. Members of Taracha OCP do not have similar sources of revenue like that of sungusungu. Members are largely involved in subsistence farming, minimal commercial farming and retail trade. They do not levy protection fee and depend on tokens of appreciation from community members and appreciative victims in the event that they recover stolen property on their behalf.

7.1.4. Political Patronage

Between the two groups, *Sungusungu's* involvement in politics has been more pronounced with much publicized role in 2008 electoral violence and the sponsorship of *Chairman* to run

³⁵⁵ National Crime Research Centre (2012) “A Study on Organized Criminal Gangs in Kenya” (Nairobi: NCRC) at p. 80

for political office in 2013³⁵⁶. In Taraacha, the OCP was formed in 2011, years after the 2008 elections. They were not implicated in electoral violence in 2013 and unlike *sungusungu*, they did not make corporate decision to support any of their leaders to vie for elective office. They were involved in policing political rallies but there have been no reports of political leaning towards specific candidates to the exclusion of others or favouritism to certain politicians. Their role in such rallies was to maintain law and order unlike *sungusungu* who were involved in intimidating opponents to their political opponents in 2008.

However, political patronage or connection to politicians is seen by members of both groups as essential to their economic sustenance and overall influence and legitimacy in their areas of operation. The community policing group members have often complained of the lack of direct financial support from elected leaders like Members of County Assembly, Members of Parliament (MP) and Governor of Kisii County Government. Such support they feel is vital towards the motivation of members and sustainability of the group. In Bonchari constituency example, a *sungusungu* member stated that there was general dissatisfaction amongst group members about the level of support from the former MP, the current MP and the Governor. There had been concerted efforts by the executive members led by the Chairman to remedy the situation and to improve the relationship between the group members and the political class but little progress had been made.

7.1.5 Use of Violence

Both *sungusungu* and community policing groups use violence and the threat of violence in everyday policing albeit through different modes and scales. Generally, both policing forms experience challenges to implementing non-violent ways of maintain law and order in the communities that they operate in.

There appears to be minimal change in enforcement of policing objectives with the wide expectation that the introduction of the new state-led community policing mechanism will

³⁵⁶Otiso, W. N.(2014) Evaluation of Political Mobilization Strategies Employed by Vigilante Groups in Kisii County during the 2013 Kenyan Electionsin M. Ndeda, C. Thibon, M.A. Fouere and S. Mwangi S. *Kenya's 2013 Elections* (Twaweza/Heinrich Boll)

strictly adhere to non-violent law enforcement. Wide expectation that OCP will invoke non-violent has fallen short of the lofty aspirations espoused in the constitutive documents during the launch. In theory the new institution was to mark a departure from the violence associated with *sungusungu*, but, in practice, the use of violence or the threats of use of violence still remains an important currency for law enforcement in community policing. It is not clear whether the inclusion of *sungusungu* (existing) and former *sungusungu* members has contributed to the violence experienced in OCP.

Officials of both groups were keen to show their appreciation of legal dictates and their endeavours to apply the law in their policing practices. Phrases like “*the law does not allow*” were common in responses relating to the use of violence in investigating cases, arrest and punishment. For example, in initial conversations with officials of OCP were keen to show clear procedures apply in the local criminal justice system from investigation to arrest and that cases were forwarded to the local chief and the police. However, in subsequent interviews, officials admitted to the utility of use of threat of violence and at times actual violence in “hard cases”³⁵⁷. One member explained, “This enables us to *stamp our authority* and instils a *sense of fear* to criminals”³⁵⁸.

7.1.6.Socio-Cultural dynamics: The Centrality of Culture

In the formative stages of the *sungusungu*, *sungusungu* aligned itself to the Gusii cultural administrative system, the *etureti*. There was cooperation between the *sungusungu*, *etureti* and provincial system. However, the relationship between *sungusungu* and elders (who reported to the chief) was affected due to incidents that occurred in early years of formation of the *sungusungu* in Bonchari. There developed mistrust of local chiefs by *sungusungu* about their role in tackling crime and arresting of criminals. In one incident in Bomorenda, Kisii South, the local chiefs were implicated in alerting suspects of an impending raid by *sungusungu*³⁵⁹. *Sungusungu* abandoned their partnership with elders and *etureti* and decided to pursue objective of tackling security separately from their former partners. This

³⁵⁷ Interview with OCP 1, Community Policing Leader, Taracha 3 June 2014; Interview with OCP 5, Community Policing Member, Taracha 10 June 2014

³⁵⁸ Interview with OCP 5, Community Policing Member, Taracha, 10 June 2014

³⁵⁹ Onsarigo D. “Case Files on *Sungusungu*: The Kisii Administrators” 21, July 2014, Kenya Television Network Documentary

led to the rift between sungusungu and their promoters, provincial administration. Operations tackling criminals were undertaken without notification of the administration and pursued at night, with a resort to summary justice where suspects were killed and houses torched. The death toll of suspects increased in a short period of time and activities of sungusungu gained notoriety in national headlines. With mounting pressure and public outcry, the provincial administration and police had to act which culminated in the condemnation of the sungusungu and warnings of crackdown on sungusungu. The much publicised crackdown on sungusungu did not take place.

Under the classic Etureti system, summary punishment was seldom used to punish offenders. As described by Akama, save for specific offences, the objectives of justice system under Etureti was largely reconciliatory and compensatory³⁶⁰. Avenging an offence through killings was only permissible for crimes like murder, rape and specific forms of cattle rustling. Even so, such specific sanctions were undertaken after hearing facts from the concerned parties to the dispute. Yet the sungusungu breached traditional sanctions by bypassing requirements for establishing facts and regularly meting out punishment that had been applied in specific circumstances. Also the torching of suspects' houses was not practiced as a punishment under the Etureti system.

It is this shift evident in sungusungu operations from maintenance of cultural norms to policing of moral values that Das and Poole caution about³⁶¹. Different from maintenance of cultural norms, when the *sungusungu* undertake policing of morals, the conceptions of justice are rigid, "ambiguous and powerful", subjectively defined moral boundaries and subjectively enforced hence usually result in the use of violence³⁶².

Comparatively, undertaking of OCP operations appear to be less in breach of cultural norms even though OCP have not claimed or professed to be aligning its operations to the etureti system like the *sungusungu*. However, in the daily activities of investigation and enforcement, OCP does apply cultural beliefs and taboos in their daily operations and

³⁶⁰ Supra note 136

³⁶¹ Pratten D. & Sen A. (2007) *Global Vigilantes* (Hurst: London) (2007) *Global Vigilantes* p. 7

³⁶² *ibid*

activities of investigation and enforcement. For instance in conducting operations raids on illegal breweries, OCP members rather than pour the traditional liquor, they will order the suspects to do it themselves. As one member explained it is taboo to pour someone's traditional brew as curses may befall on them.

Table 3: Dynamics of Non State Policing Groups within Kisii 2010 to Date

Area	Policing Type	Sphere of Operation	Involvement in Politics	Activities	Frequency of Use of Force	Operation for Gain
Bomorenda Suneka	<i>Sungusungu</i> (Vigilante)	Rural/Peri-urban	Indirect	-Patrol -Investigation -Adjudication	Often	None (community contributions)
Kisii Central	<i>Sungusungu</i> (Vigilante)	Urban	Direct (2013)	-Patrol -Arrest -Protection of Business Premises -Adjudication	Often	Protection Fees Levied
Taracha	New Community Policing (CP)	Rural	Non-involvement	Patrol Investigation Arrest	Rarely ("where necessary")	None (community contributions)

Similar to the observations by Fourchard³⁶³, in Kisii, the assumptions that vigilantism and community policing are complete opposite non state policing mechanisms may not hold as nuanced by everyday policing practices in the cases researched above. Overall, the non state policing groups compare evenly when studying their nature and policing approaches in terms of their origin, organization, sphere of operation objectives, application of the law and use of violence.

7.2. Interplay between Law and Local Policing

Effect of the Law on Sungusungu

³⁶³Fourchard L., (2012) "Politics of Mobilization for Security in South African Townships" *African Affairs* 1-21

Legal developments in 2010 affected the nature of operations of sungusungu and there were changes in the way the group engaged with the state, political processes and the law³⁶⁴. Sungusungu reacted to the enactment of POCA in 2010 was enacted in 2010 aimed at defining organized crime and banning specific organized crime group. Sungusungu was one of the groups identified as organized criminal groups and the ban took effect upon gazettelement by the Minister for Internal Security. The group reacted by changing its form, adjusting its operations and the nature of engagement in elections.

7.2.1. Change of Identity and Form

The respondent was keen to dissociate the group from vigilante and emphasized that they were neither a sub-group nor an extension of sungusungu nor was there any affiliation between the two non-state policing groups. They also confirmed that they were not subservient to sungusungu. As one member stated “No, no, we are a community policing group, we are not vigilante...we are not a branch of sungusungu”³⁶⁵. In pointing out the difference between the group and sungusungu, there was emphasis from members that there only objective was to tackle crime in the location. However, in subsequent conversations, the locational chairman stated that at times when dealing with hardcore criminals, they would engage the services of vigilante, especially in instances where it became clear Chief or Police were ineffective or had been compromised³⁶⁶.

In the interview it also became clear that after 2010 (the year of banning of the group through POCA) the *sungusungu* started operating from the divisional headquarters and do not maintain an office at any of the locations. In 2011, the Chairman of *sungusungu* during the inaugural meeting of Community policing also publicly denounced the group and pledged support for the new community policing initiative. Aggrieved citizens from Taraacha who seek sungusungu intervention now report crimes to their office at the divisional headquarter in Keumbu. To date this remains to be the position that sungusungu operates from the peri-urban centre of Keumbu. There is no active sungusungu cell in Taracha

³⁶⁴ Supra note 292 at p. 102

³⁶⁵ Interview with OCP 10, Community Policing Member, Taracha Ward, 30 May 2014

³⁶⁶ Interview with OCP 1, Community Policing Leader, Taracha Ward, 9 August 2016

location whereas OCP has gained its presence in all the sub-locations, namely Taraacha, Irondi and Nyabiosi.

7.2.3. Disintegration of Sungusungu

Since 2010, there has been a proliferation of smaller groups appropriating the sungusungu model of policing in Kisii County. Groups like *Kumi Kumi* and *Bamba 40* that appropriated the sungusungu style of investigation and punishment were formed in neighbouring district of Gucha. Their names synonymous with the kind of punishment they mete out to offenders. A sungusungu member denied that these groups had neither split from sungusungu nor was it signalling the weakening of authority of sungusungu in the aftermath of enactment of POCA. He said, “We are one big group divided into small units depending on districts and locations for easy operation. There are small groups that have been started by sub-chiefs in certain sub-locations...we accommodate them to prevent them from forming alternative and parallel units opposed to us. They lead us to thieves and witches. *Kumi Kumi* was started in the district of Gucha district but they are under us. *Bamba 40*, is not a group, it is the 40 strokes of the cane that we give a suspect”³⁶⁷

7.3. Law and Community Policing

7.3.1. Adherence to the Law

The chairman of Taracha OCP stated that he appreciates the provisions of the Constitution which have given the group some guidance in the performance of their work. He stated further that the Constitution has guaranteed every person a number of rights which they observe in the everyday operations. For example, they must inform a suspect the reason for arrest before they do so. They also carry out searches in a decent manner. For example, they use OCP female members to carry out searches on female suspects. Before arresting a suspect, they must have a warrant of arrest. Also when effecting an arrest they escort the suspects to the police station. “It is not our concern as to whether the arrested person is arraigned in court within 24 hours as we have done our part and handed over the suspect to the police”.

³⁶⁷ Interview with SGK 6, Sungusungu member, 9 August, 2016 Kisii Central (Mwembe)

The composition of the group is gender sensitive. It applies to the officials of the group and the non-executive members too. For instance if the chairperson is a man then automatically either the secretary or the treasurer must be a lady. OCP also take pride in the fact that they have support and authority from the government. OCP Chairman was keen to emphasize their legality and government support that they enjoy especially pointing to the fact that the government sponsor their training. At the same time he was keen to dissociate OCP from sungusungu and denounce its activities. They refer to sungusungu as the “banned group” and the government cannot be dealing with such a group. Further, in response to questions about application of the law, the Chairman pointed out that the group had utmost respect for the law. He stated “We are not involved in any criminal activity which includes not associating themselves with persons who have a criminal record and those that take illicit liquor. Our role is in reconciling people and ensuring that there is peaceful coexistence.”³⁶⁸

7.4 Sungusungu-State Relations

7.4.1 Privatisation of Security

The sungusungu have had a mixed working relationship with the state. The relationship between sungusungu and the State can be traced all the way back to the establishment of the group. It is with the active involvement and support of the District Commissioner that sungusungu was set-up in Bonchari constituency and aligned with the provincial administration structure. As one respondent stated, “when we started, District Commissioner, Leloon was present”³⁶⁹. The provincial administration contributed to the formal recognition of sungusungu among the locals. In the formative stages, sungusungu and the provincial administration shared a common objective of maintenance of law and order. The relationship deteriorated over the years, the relationship deteriorated due to implication of sungusungu in the rampant killings of suspects. However, such relations have not been entirely antagonized.

Contrary to popular opinion, many times sungusungu and the police work together³⁷⁰. Police not only acquiesce to vigilantes’ activity but they actively cooperate with the police. The

³⁶⁸ Interview with OCP 1, Community Policing Leader, Taracha Ward, 12, May 2013

³⁶⁹ Interview with SGS 5, Sungusungu member, Suneka, 2 April, 2013

³⁷⁰ Interview with SOK 4, State official, Kisii Central, 21 July 2013

police outsource security in order to be more effective in tackling crime in certain “difficult” areas and they achieve it by employing the threat of sungusungu which is more feared³⁷¹. The sungusungu are more feared and more effective in policing certain areas and populations. For example, they work in conjunction with police in arresting murder suspects or those involved in armed robbery. At times they also undertake traditional police roles in law enforcement activities considered “less dangerous” like night patrols. One way of cooperation with the police is to arrest ‘vagrants’ during their patrols and take them to police stations. However, this symbiotic relationship between sungusungu and the police is not unproblematic as it is not without gain for the sungusungu. After making the arrest, police detain the suspects or free them on paying a bribe, which is then shared between police and the sungusungu³⁷². It points to an erosion of the voluntariness aspect often fronted as the standard answer by sungusungu members when asked about their source of funding. As Harris observes, vigilantes conventionally seek to profit materially from their actions³⁷³. Some charge for their services and others force victims to pay up not just to the complainant (if at all) but to the vigilantes as well. Harris’ observation is reflective of sungusungu’s current mode of operations and is at odds with their original philosophy which was based on service to the community and premised on altruism. This has changed over the years where sungusungu would *request for tokens of appreciation*. However, because of violence they were associated with, refusals to pay up by citizens were minimal. The money would be used to purchase batteries and torches for protection of neighbourhood. However, in areas like Nyanchwa, there is voluntary compliance by citizens in payment of protection fees for which the sungusungu issue receipts³⁷⁴.

Another point of interaction between the sungusungu and police is in the state-led community policing incorporation of SGS into the ‘official’ community policing which consists of police, Chiefs and citizens as stakeholders³⁷⁵. In certain instances, the police have

³⁷¹ Interview with SGK 3, Member Sungusungu, Kisii Central, 5 April 2013

³⁷² Interview with REK-4, Resident, Kisii Central, 2 February, 2013. It is unclear whether the percentages on the sharing of the money are predetermined.

³⁷³ Harris B. (2001) “As for Crime that’s Our Daily Bread: Vigilante Violence during South Africa’s period of Transition” *Violence & Transition Series Vol. 1* pp. 1-24

³⁷⁴ It is also unclear whether this is a function of accountability; to avoid excesses of deviant members who may double-charge; or is it internal control system for CPG so that they can monitor their revenue

³⁷⁵ The distinction/emphasis is made between ‘official’ and non-official community policing because sungusungu have in the recent past changed their name to the “community policing group”

fronted “former” *sungusungu* members as good candidates to lead community policing groups. Some *sungusungu* members are seen “as natural choices” to lead the new official community policing initiative given their past experiences in policing crime³⁷⁶. However, some accounts from interviews with other *sungusungu* members, seek to show a different situation, where *sungusungu* privilege themselves above the provincial administration. When asked about their relationship with the government, the respondent provided a different account implying that government officials are actually subservient to *sungusungu* when it comes to security matters in Kisii County. He stated. “All the others have toed the line. Nobody dares us. Any new administrator to this place is briefed of our operations and has no option but to follow what we have. In fact they assert that they set the agenda on security in Kisii County to which the provincial administration adheres to and cooperates with them on the activities that need to be done³⁷⁷”.

7.4.2. Direct Participation

The political strategies of former *Sungusungu* have changed from indirect to direct participation. This shift manifested itself in the leaders’ direct participation in elections in 2013³⁷⁸. The CPG chairman contested the Kisii Central county ward representative elections rather than supporting incumbent political patrons. The shift in participation changed from traditional forms of accessing decision making through patron-client network which had provided an indirect and often unreliable access to power. The decision to participate was influenced by a number of factors including disconnection from unreliable patronage, economic opportunities and perceived new political system. This, it is argued is a nuanced form of engagement in political processes by vigilante in Kisii. It marks a change in role of vigilante groups influencing local political processes through non-violent forms by using peaceful electoral processes, rather than resorting to the use of violence to influence outcomes of elections by intimidating opponent of their former political patrons. It marks an ostensible shift, if puzzling, that former users of violence in 2008, have turned to preaching peace and security as a platform to participate in political life and access decision-making.

³⁷⁶ Interview with REK 7, Resident, Kisii Central , 12 March, 2013

³⁷⁷ Interview with SGK-10, *Sungusungu* member, Kisii Central (Nyanchwa) August 2014 The respondent was stressing the fact to show their importance and that they are in charge. However, the accounts above are contradictory to events that have occurred in the area since 2010.

³⁷⁸ Supra note 303 at p. 102

Put differently, former users of violence advocated for non-violent participation in the 2013 elections.

7.5. Community Policing and the State

7.5.1. Official Community Policing- State Relations

OCP is answerable to the assistant chief. The group draws its members from all the corners of the sub-location. Officials of the group are delegated with the responsibility of executing the orders made by the chief. They hold regular and emergency meetings whenever called upon in dispensing their duties. Much as they are accountable to the provincial administration, it appears that they are not subservient to the state structure as they enjoy a strong working relationship with the assistant chief. Many times, they act autonomously, where circumstances dictate³⁷⁹. However, unlike vigilante, they are cognizant that they do not have the mandate to punish suspects. The understanding of role of the local administration and police, the OCP have little opportunity to resort to violent means of sanctioning crime. In response to questions about the guiding principles, a group official responded that they highly regard discipline, justice and the law amongst themselves and in their operations³⁸⁰. As one OCP official stated “the law does not allow...” them to mete out any punishment against the suspect. There is recognition that the local Birongo police post has the jurisdiction to handle all the criminal matters arising within Taracha location and the role of community policing entails providing intelligence, investigation and arrest³⁸¹.

The relations between the community, assistant chief and the police is suggestive of a budding working relationship between state officials and the community policing officials, unlike previous community policing initiatives and early cooperation between former provincial administration and vigilante, which was fraught with conflict and competition. While these relations appear to be cordial, asymmetries still exist. The state remains as the dominant organ that primarily directs and controls process of crime control. However, the existing asymmetries do not appear to have affected the common objective of collaborative crime control. Besides, the chief and the police are cognizant that they owe reciprocal

³⁷⁹ Interview with OCP 10 ,Community Policing official, June 3, 2014, Kisii; Interview with OCP 12, Community Policing member (Taracha, Nyabiosi) 4 July 2014,

³⁸⁰ Interview with OCP 8, Community Policing Official, June 3, 2014

³⁸¹ Interview with PT 2, Officer, Police Post, Birongo Ward, June 4, 2014

accountability to members of the community and even as they direct the crime control process, unpopular decisions not in consonance with aspirations of members of the community will erode the budding partnership and goodwill.

There is constant sharing of information between the police at Birongo and the OCP in Taracha through phone calls and regular courtesy visits. The relationship between the two is well coordinated; where the police assist the group in detaining extreme criminals, while the group assists them by providing intelligence, investigation, arresting suspects and handing them over to the police³⁸². There is also inter-locational cooperation as the group maintains a very strong partnership network with other OCP groups in the larger Keumbu Division in ensuring safety.

7.6. Official Community Policing: Continuities from Sungusungu?

The similarities that OCP shares with sungusungu pose challenges to the idea of a full transition and transformation of local policing in Kisii County from vigilantism to the idealised model of community policing. Instead the reality is that in certain instances the new community policing manifest in OCP exhibits continuities from practices of sungusungu in regard to loss of trust in the relationship with citizens and under representation of youth and women.

7.6.1. Relationship between Citizens and Official Community Policing

There are mixed sentiments on the state of the relationship between community policing officials, members and citizens (non-members). Both positive and negative responses were elicited from interviews conducted with several non-members as to the relationship with community policing members. In sum there appears to be a fluctuation of the relationship between community policing members and citizens over time and contingent upon particular circumstances.

In Taracha, the overall sentiment is that at inception official community policing (OCP) started well, enjoyed support amongst residents and were effective in tackling crime. The

³⁸² Interview SO 3, State officer, Taracha Location, Birongo Ward, 4 July 2014

relationship with resident citizens was good and policing practices were conducted within the law. The Taracha OCP enjoyed public confidence different from the previous system conducted by the chief which was unpopular amongst residents. In a self assessment on the success, one OCP official stated, “Since we started the group, we have been successful in that “people sleep in peace, there is no more theft and we have chased all the witches and bad people in society.”

However, the support for the authority of the OCP has waned over time. The deteriorating relationship is summed up below by the response from respondent who works as a senior teacher in the local primary school. “At the beginning, the Community Policing recruitment exercise was people driven and democratic in nature. However, on a sad footing...of late the public’s confidence on this group has deteriorated...some members of this group seem to be engaging in corrupt and dishonest acts thus tainting the reputation the public had towards this group. There is a growing perception by the public that they are idlers with no job to do. The rate at which the insecurity incidents like shop-breaking have shot up is alarming...this has not augured well with the members of the public. Also, members of this group have been accused as being insensitive, too rough and at times *inconsiderate*”. Another respondent stated that “the performance of Taracha Community Policing in terms of carrying out their mandate can be *graded* at 50%. Thus it cannot be said with certainty that they are doing too well or too bad. Because of accusations of biasness and that of bribery, they have been unable to curb all the incidents of insecurity in their area of jurisdiction³⁸³

Another resident, a former elected representative, corroborated the issues of harassment and lack of sensitivity. He stated that “At times the members of this group are too *inconsiderate* especially when it comes to night patrols. They do not bother to confirm the nature of work that may make one get home late. For instance, a person whose job involves travelling may come back late. They apply the *8p.m.rule* with a lot of rigidity and harshness. Notwithstanding one’s good record he is subjected to unwarranted searches and flogging at times. This has made the public to lose confidence with this group³⁸⁴”.

³⁸³ Interview with RET 10 , Resident, Taracha, 8 June 2016

³⁸⁴ Interview with RET 12, Resident, Taracha, 30 Sep 2016

There also appears to be a tense working relationship between *sungusungu* and residents. The *sungusungu* themselves are convinced that they enjoy a good working relationship with the residents in their respective areas of operation. They are also as they state that they have never encountered any resistance.³⁸⁵ Interviews with several respondents have yielded positive and negative reactions on the role and nature of *sungusungu*. This explains why aspect of mixed relations with the citizenry is not pointed out by the *sungusungu* as part of the challenges that they face.

7.6. 2. Realities on Inclusive Governance: (Under) Participation of Women

Inclusive governance of community policing marked by insistence on implementation of the *two-thirds rule* in community policing is not without its challenges. Whereas, the requirement is expressly stated and is documented as a requirement in the minutes of the inauguration of OCP, it remains as a formal requirement that has not been operationalized in everyday practice. With the exception of the Boruma Getare sub-location, participation by women in Taraacha community policing is still very low (yet still relatively one of the highest compared to other parts of the County)³⁸⁶. From recent visits in August 2016, there has been no marked improvement in the involvement of women. Cultural constructs still inhibit the participation of women in non state policing as the occupation is still perceived to be dangerous and inimical to cultural norms. Policing is deemed a dangerous occupation which women should not participate more so at night where culture requires that women are in the house preparing meals for their husbands and tending to the children while men are allowed to be out patrolling and ensuring the community is safe. Women therefore have a minimal role in policing limited to daytime patrols and provision of intelligence.

7.6.3. (Under) Representation of Youth in Leadership

Youth under the new Constitution are described as “an adult who has attained 18 years but is below 35 years of age”³⁸⁷. It would be assumed that the youth largely make up the numbers of Community Policing members. In reality, there is a little proportion of women below 35 years of age participating in OCP. The same under-participation is noted in male

³⁸⁵ Interview with SGK 6 , Sungusungu member, Kisii Central Ward (Mwembe), August 9, 2016

³⁸⁶ See Otiso W. (2015) “Community Policing and Vigilantism in Kisii: Towards Nonviolent and Inclusive Non-State Policing” *Cahiers D’Afrique de L’Est no.50, 2015*

³⁸⁷ Article 260 of the Constitution of Kenya, 2010

youth both in terms of overall number of members and in relation to those youth members who have taken up leadership positions. Cultural norms continue to constrain male participation of youth despite emergent clamour for inclusivity as promoted in new political and legal discourse. Article 100 of the Constitution identifies youth as marginalized groups. Attitudes embedded in cultural norms towards the incapacity and unsuitability of youth for leadership persists. Aside from patriarchal nature of Gusii community, gerontocracy is practiced as male youth still not automatically ascend to power. Cultural precepts are against disadvantageous to young people keen on taking up leadership positions. One customary proverb captures this aspect, “*monto monene ndiogo, mwana make mosori o’ ng’ende*”. This literally translates to: *an elderly person’s (view) is like medicine/tonic, a young person’s (view) is (merely) like bean soup*³⁸⁸. The “youth must wait for leadership” is a common notion applied to deny them participation in the decision making process at community level and it is not a new phenomenon.

For long, the cultural arrangements in the community have not supported youth leadership. Leadership has always been vested in the elders. It is a practice dating back to the pre-colonial period, where only the elders participated in making decisions that were binding to the community³⁸⁹. The youth were only called upon when such decisions were to be enforced hence they only participated in policing the orders of the elders rather than in the decision making process itself. There are little prospects that underrepresentation of women and youth in leadership positions in the local governance mechanisms like OCP or in wider political representation. Since independence, no woman has been elected as a Member of Parliament in Kisii County while no male youth was voted as MP in the nine constituencies in the last elections.

7.6.4.Lack of Opportunities for Youth

There is a lack of economic opportunities for youth in Kisii County. In Taracha, youth engaged in small scale farming do not reap full benefits of their labour. To earn a living, such youth sell their produce in nearby Birongo and Keumbu markets. Middle-men buy the

³⁸⁸ Akama J. & Maxon R. (2006) *Ethnography of the Gusii of Western Kenya: A vanishing Cultural Heritage*, 2006, Edwin Mellen Press p.82

³⁸⁹ Ibid

produce at relatively low prices and make large profits by selling them off at higher prices in large markets in cities like the Nairobi Farmers Market. The youth have no direct access to such markets nor do their youth groups have the financial clout to sell produce directly to retailers in Nairobi. Further, a minority of youth do not own adequate land to be able to produce commercially viable quantities of produce. A significant majority are limited to small scale subsistence farming or working as labourers for the elderly landowners.

From the information gathered, one may make a broad conclusion that there are differences and similarities among the non state policing groups-*sungusungu* and OCP studied in Kisii County. (Table 7)

7.7. Relationship between OCP and Sungusungu

Having explored the similarities and differences between *sungusungu* to community policing, it is important to evaluate any aspects in which the two policing groups relate and interact.

The interesting interaction between OCP and *sungusungu* can be traced back to events at the launch of community policing in Taracha. In 2011, the launch of community policing in Kisii County was conducted in Nyaribari Chache organized by the Kisii Central police in conjunction with area chiefs³⁹⁰. At the event, the Chairman of *sungusungu* disowned his group, terming it as an “illegal” group and acknowledged that community policing represented the appropriate means for local law enforcement. The realities of local policing in Kisii County illustrate a different situation to the popular expectation that the pronouncement by *Chairman* would signal the end to *sungusungu* activities. *Sungusungu* remained an active organization even after the pronouncement in 2011, largely operational in urban and peri-urban areas of Kisii Central and Suneka. (See Table 7) Indeed its operations and strategies have evolved over time, but such reorganization has not amounted to its transition to community policing as structured by the state even though its

³⁹⁰ Recognizing that a partnership between the police and society was still important in security governance, state-led community policing initiatives were re-introduced country-wide in 2009. This followed the publication of the *Mwananchi Handbook on Community Policing* by MoPAIS. This was the second re-launch of community policing following the first one piloted in 2005 in Ruai, Nairobi. In Kisii, Nyaribari Constituency, the launch was done in 2011 in Taracha.

members participate in the state-led community policing. However, in disowning his group it can be interpreted as providing support for state-led community policing. Indeed as earlier discussed a number of members of sungusungu joined community policing groups in Kisii County, many as regional heads, as they were seen as natural leader owing to their past experience with Sungusungu. What is also interesting in the relationship between OCP and sungusungu is the ostensible existence of a referral system to sungusungu for *hard cases* by OCP. Where there are “hard criminals” who are “known” to have committed serious offences like murder or robbery with violence and have been set free by the police even after community has informed the police of their criminal activities, in certain instances the OCP may refer the case to *sungusungu*³⁹¹.

7.4. Transitioning or Continuum: From Sungusungu to Community Policing and Relapse

There is little certainty to be gleaned from data pointing to an overall transition from sungusungu as the dominant actor in local policing to state-led community policing in Kisii County. We can talk with more certainty about similarities and differences than make conclusions about transitions from sungusungu to community policing. To different degrees, there are areas in Kisii County where state-led community policing are in the process of institutionalization (Taracha case) and areas where *sungusungu* remains the dominant actor in non state policing (Kisii Central case). In certain locations there were mixed models of *sungusungu* and community policing (Nyamage in the Kisii Central Case) members of the community professed they practiced community policing while it was clear that the membership largely made up of former sungusungu members and operational structures were borrowed from the sungusungu mode of policing. Also as stated above in the case of Kisii Central, sungusungu remains the dominant non state policing group. Sungusungu appropriated the name *community policing group* (CPG) but its membership, leadership and operation are rooted in vigilante traditions.

The next chapter examines the findings from the study and the broader implications of dynamics of local policing in Kisii on understanding of effect of state-society relations and law on policing practices and outcomes.

³⁹¹ Interview with OCP 1 Community Policing Leader, Taracha Ward, 9 August 2016

CHAPTER 8: CONCLUSIONS IMPLICATIONS AND PROSPECTS

The previous chapter analysed and discussed the results from the data collected. The discussion in this chapter proceeds in two parts; first, it begins by providing an overview of the main findings of the study. It then evaluates prospects, implications and contribution of the findings in the study to; accumulation of knowledge in politics and law, and, the prospects for legal and policy reform.

8.1. CONCLUSIONS

The broad findings and conclusions are framed as responses to the research questions and objectives as set out in Chapter 1. To explore the implications of recurrent issues in the study, the chapter then reviews the conclusions through a number of recurrent themes and sub-themes; namely; law, state-society relations, vigilantism, community policing, youth and culture.

8.1.1. *The place of law in determining the nature of local policing mechanisms and assessment of the extent to which the law has functioned in shaping the trajectories of emergent local policing groups in Kisii County*

Examination of the dynamics of local policing in Kisii affirms that the law does have a significant effect in the fashioning of policing types and outcomes albeit not in the way intended by the implementers of the law. The effects that the government envisioned in passing new law was that *sungusungu* and other organized crime groups would be stamped out and levels of crime controlled. That thereafter a fresh platform for engagement between state and the community would be created. This in turn would result in a new type of local policing in the mould of community policing. However, the use of the law has resulted into policing outcomes and types different from those envisaged by the state.

The government's approach in tackling organized crime groups like *sungusungu* has been through application of the force of law as expressed in POCA which provides for banning of the group and seeks to introduce *tougher* measures. The effect of the law on the group has been to drive *sungusungu* operations underground but it has not been effective in eradicating its existence completely. Therefore, is there a negative effect on the group by law? Ostensibly, yes, as the law has prevented *sungusungu* to operate with a free-hand and overtly as it did before POCA. However, that should not be construed to mean that the law has succeeded in eradicating the group in totality. There actually appears to be a strategic use of other opportunities within the law to continue its operation and existence. Hence, its effect on *sungusungu* is not to the credit of the state's implementation of the law as an instrument of rational domination. As observed in chapter 5 *sungusungu*, vigilantism

continues to exist in dynamic ways in Kisii County. There is a change in the name, form, character, area and mode of operation. Sungusungu now undertake covert operations and concentrated in urban and peri-urban areas. However, in their restructuring they have exploited opportunities within the law to remain in existence. For instance, in circumventing the ban of its activities under POCA, sungusungu exploited opportunities under the Constitution and the Election Act to pursue direct participation in politics. The chairman of Sungusungu run for political office in 2013 elections which were regulated by provisions of the Election Act with a view of influencing decision making at the local level in light of increased decentralized resources brought about by the new Constitution.

The limitations to the effectiveness of POCA in eradication of sungusungu go beyond the enactment of the Act itself extending to factors relating to challenges in its enforcement. While crimes linked to sungusungu activities are prevalent, there is minimal application of the provisions of POCA to bring perpetrators to book in the courts of law resulting in an *underutilization* of laws prohibiting organised crime. As discussed in chapter 4, the few cases that have been brought to court against suspected sungusungu members have been prosecuted under the Penal Code such that it calls into question the necessity and utility of enactment of POCA in the first place. Even so, none of the cases that have presented before the courts have successfully resulted in the conviction of the suspects charged. These challenges to the implementation of POCA stem from the reluctance of the police to carry out thorough investigation of cases linked to sungusungu members. In the few cases handled by the judiciary in Kisii concerning sungusungu members, the court reached the same finding, that there was no sufficient evidence to convict the accused persons. There has also been a lack of cooperation between the local directorate of public prosecution and the police especially in cases concerning sungusungu members. The local directorate cites challenges in the cooperation with the police in which the police often ignored their legal advice on gaps in investigation and evidence required to sustain charges against suspects in courts.

Realities at the local level indicate measures in POCA as a means of eradicating sungusungu have had minimal success while the crime rates remain high. On the other hand, citizens equally concerned about rampant crime have mobilized into groups to tackle insecurity.

Established in the aftermath of POCA, community members have joined up with state officials to form an *official* community policing initiative, appropriating the name official to differentiate them from banned sungusungu group. In the different processes of organizing themselves, application of the law is central to determining the scope of their daily operations of OCP.

Sungusungu and OCP share similarities and differences in many fronts, and the understanding and application of law is one of them as gleaned from the analysis in chapter 7. There is what we can call a *consciousness of legal minimums* shared by both sungusungu and OCP, which is an appreciation that in enforcement of law, certain laws have to be adhered to. This is reflected in the similarity of certain narratives that invoke an appreciation of the importance of working within the limits of the law and at the same time conscious of what actions are unlawful. Narratives like '*the law does not allow us to use force*' represent a consciousness exhibited by members of the policing groups on that adherence to the law is an important aspect in policing and certain rules have to be followed.

Therefore the positive aspects of the centrality of the law have emanated from application of the law in society itself rather than from increased regulation through tougher laws by the state. Revelation of the relevant attributes of law impacting on local governance mechanisms has been enabled by training attention and pursuit of the operation of law in the society that it is intended to apply rather than analyzing possible effects of the law from an interpretation based on a reading of the Act itself. Such an application and use of law has not only had an impact on the place of law but also contributed in significant ways the re-adjustment of relations between state and society.

8.1.2. Political processes and social dynamics affecting the practice and relations of state and society participants involved in joint local governance mechanisms

Political processes and societal dynamics in the community entailing collective action, local policymaking and representation have had a significant contribution in shaping trajectory of

local policing in Kisii. State-society relations examined in the local policing groups in Kisii point to a shift towards improved interaction between government and society to the extent that it has embraced greater societal involvement in consonance with the concerns of society-centred accounts of State-society theorists. In the Taracha case, the relationship between different political actors has had an effect on the practice of community policing. Efforts towards widening the scope of involvement of the community in terms of who participates in local governance, has encouraged participation of groups in society not actively involved before in local policing mechanisms like the *sungusungu* vigilante group. Such groups include women, elders and former professionals. While the relationship between government and society in OCP is not without its strains, there is potential for interdependence between state and society different from the competitive display of autonomy between the state and *sungusungu* in the strategic and often tentative relationship in the instances that they cooperated.

In the Kisii central ward case, there are no clear mechanisms for participation of community members under the *sungusungu* organizational structure like those available under the OCP save for the times that an aggrieved party makes a complaint for *sungusungu* to investigate. Unlike the OCP, recruitment of new *sungusungu* members is not conducted in public and no elections are conducted by members to choose their leaders and officials.

In contrast, the Taracha case shows that in the rural areas, where vigilantism never fully took root, there has emerged societal mobilization that has adopted nuanced forms of community policing that fosters wide participation of its members. Such mobilization has also created a good working relationship with state officials like the chief and local police. In the OCP, there is an exhibition of significant collaborative state and societal interaction. The state depends on the citizens participating in community policing at the local level for governance of security and implementation of law and order. The chief whose mandate as a state official is to preserve public order and security relies on members of OCP to achieve his mandate. The daily operation on investigation, intelligence and patrol which are integral to the chief's mandate are undertaken by members of the Taracha community. The chief on the other hand facilitates OCP members in carrying out their role, by acting on intelligence,

also taking part in patrols and providing administration police bolstering security during patrols and raids on criminals.

Collaboration and interdependence between state and society has on occasion been strained. OCP members point fingers at the chief and the local police for compromising the policing process. The chief and local police have been accused of corruption and lack of transparency in the manner in which they handle suspects surrendered to them by OCP members. OCP members have often complained of release of suspects in unclear circumstances with no clear feedback to them having done all the difficult work of investigation and arrest. The grievance is that whereas the OCP members are open and transparent in their dealings with the local police, the police on the other hand, have not been accountable for the decisions taken, thereby making OCP members feel like subordinate actors in what is supposed to be an equal partnership. The trust invested by the partners in the state-society relationship is thus compromised by the local state officials who have been implicated in accepting bribes in exchange of releasing suspects. In reaction to corruption, OCP members have resorted to taking matters into the own hands and use of violence in punishing suspects. Even in such frustration, the OCP members are equally complicit and the retaliation for state's wrongs cannot absolve them from their part in compromising the relationship.

Political processes including increased citizen participation and inclusive representation, manifest in the structural organization of OCP have shaped the trajectory of local policing mechanisms. Partnership between government and the community towards joint tackling of crime reveals growth of a specific interdependence among the actors where each depends on the other to achieve their respective mandates. It is where there is a breach of the trust network by one party in the quest for circumventing the participation of the aggrieved party that effective governance is compromised.

Cultural precepts and societal dynamics also play an important part in determining the scope of local policing mechanisms in relation to the manner of operation and points of engagement for different demographics of the local population in Kisii. In the sungusungu structure, there is a minimal role in collecting intelligence for women but they are involved or eligible to take part in the daily processes of investigation, patrol or arrests of suspects.

The breakdown between the *etureti* and the *sungusungu* also means that elders play no active role in the group. Under OCP membership is all inclusive for all adult members of the community. Nevertheless, the role of women and youth is affected by cultural constraints. Similar to constraints under the *sungusungu system*, women are not allowed to take part in night patrols as it is prohibited under culture prohibits ‘married women to walk around at night while the men are sleeping’. Participation of male youth in regard to ascending to leadership positions has been curtailed premised on cultural practices that did not allow elders to be led by youth whose role in decision making was limited to the enforcement of elders’ orders.

Having briefly discussed the main findings, what therefore are the implications in understanding *the place of law* and *state-society relations* in shaping local policing mechanisms? This question is addressed in next section in two ways; by examining the implication of the conclusions from the study and, by an evaluation of recommendations prospects for reform.

8.2. Implications of law and state-society relations on the nature of policing and suggested alternatives for better representations of the place of law and state-society relations for purposes of improving governance

Evaluation of the implications of main issues in this section is guided by the need to readjust prevailing assumptions and refocus attention on the centrality of law and state-society relations in local policing mechanisms.

8.2.1. Implications on the Place of Law

The diverse use(s) of law by the different actors involved in local policing in Kisii County, takes us back to fundamental questions about *understanding(s)*, *application*, *uses* and *implications of law* in social contexts. For the state, the best means of applying law in tackling crime is the introduction of POCA based on the *law and order* model. Examination of the place of law among local policing groups in Kisii problematizes the popular view on law and how it applies in society. Such a statist conception of law applies a rational domination approach to law, where the increased use of the force of law through enhanced

punitive measures effectively tackle the targeted crime (in this case organized crime). Faced with the ban after enactment of POCA, sungusungu exploited gaps in the provisions of the Act especially provisions that targeted formal aspects of the group to reinvent itself. Similar to Abrego's analysis, the sungusungu have managed to achieve this by utilization of language not in the particular law, to circumvent provisions within that law³⁹². For example the leader complied with provisions in Election Act and the Constitution to vie for elective office. This was achieved as by the time of the elections, sungusungu had changed its name to the Kisii community policing group. Because the Act targeted its formal aspects of the group, the chairman was eligible to contest elections as an "*ex-sungusungu*" as he was no longer a member of sungusungu having changed its name. In his campaign the *chairman* promised better security provision and redistribution of resources at the local effectively invoking new constitutional provisions. On the other hand OCP was established in the post Constitutional and post POCA period, sought to operate within the stipulations of new Constitution in adherence to stipulations on civil liberties and entitlements while also distancing itself from the "banned group" (sungusungu). OCP was established in 2011, a year after the adoption of the new constitution and the enactment of POCA.

What therefore is the place of law in determining the nature of local policing mechanisms? Does it play a role? Has it functioned to shape the trajectory of local policing? Have the intended outcomes been achieved? The place of the law in influencing local policing mechanisms much depends on its use and application (law in action) over and above the fact that it exists or the formality of its being (law in books). Different applications of laws have resulted in varied outcomes. POCA modelled along the law and order model and used for domination over organized crime groups has had different implications over other laws like the Constitution, with emphasis on inclusion of society members who wish to participate in local governance. Whereas the use of law for rational domination as a means of regulating policing by vigilante has borne minimal success in stamping out sungusungu, the application of law as a tool responsive to societal demands has found resonance in the ordering of the participants involved in new local policing mechanisms like OCP in Taracha.

³⁹² Abrego L. (2008) "Legitimacy, Social Identity, and the Mobilization of Law: The Effects of Assembly Bill 540 on Undocumented Students in California" *Law & Social Inquiry* Vol. 33 No. 3, 709–734 at p. 716

Such resonance is in tandem with Pound's view on the use of law as one that is effective where it is applied for the service of society rather than one that is fixated on sanctions. This also may have an implication of understanding the law as having different applications including, facilitative and regulative uses.

Society members use the facilitative aspect of the law to guide them in discharging their quotidian roles in OCP. They also use it to facilitate their participation in decision making, to infuse inclusivity by involving all adults including women. The law in this sense also aids the members to require accountability and feedback on action taken from their state counterparts. They also apply regulative aspects of the law; contained in POCA to dissociate from the *banned group*, in empowering them to arrest and hand over suspects, to patrol, stop and search.

The different conceptions and applications of *law* is not confined to the societal groups but is also evident in the state institutions further demonstrating the disaggregated nature of the state. For the lawmakers faced with pressure on rampant nationwide crime levels, the fit model in tackling groups like sungusungu is through increased force of law which would ultimately result in the aggregate advantage of reduction in crime. Public pressure on insecurity levels and the action taken by politicians so that they are seen to be doing something about it is what Weatherburn refers to as *penal populism*. Its populism in the sense that parliament acts in response to pressure rather through well informed decision on the need for a new law. Parliament uses the law to discharge their roles, which is to pass new laws to respond to specific problems. In the case of POCA strategy is to pass tougher laws if the current laws do not seem to be working.

The police apply the law in different manner holding a divergent view from the prescriptions that Parliament provides in POCA. They do not seem to share this view preferring instead to use the Penal Code, which is the pre-existing law for tackling crime as the best framework to prosecute crimes involving sungusungu. There have been only a few number of cases relating to the prosecution of sungusungu members involved in commission of extrajudicial killings of suspects of crime. Where such prosecution is undertaken, the police and DPP opt to use provisions under the Penal Code rather than the Prevention of Organized Crime Act.

The perspective of the local directorate of public prosecution in terms of the appropriate law for prosecution of organized crimes appears not to be different from the police. However, the DPP primarily concerned with evidentiary value of prosecution, their point of contention is the depth of investigation undertaken by police. The judicial officers in Kisii Law courts have been keen to ensure that all technical and substantive requirements including evidentiary burden and evidentiary burden has been discharged to sustain a charge for a crime. The High Court have gone further in questioning the legality and constitutionality of sections of POCA and have shown a keenness on respecting procedural fairness and protecting rights of accused persons clamouring for secession and others charged for serious organized crimes including terrorism.

Legal Consciousness, Legal Pluralism or Mixed product

Abrego has described legal consciousness as ‘how individuals interpret laws the way people come to understand law as a result of continued lived experiences’. How does study of community policing and vigilantism contribute to understanding of legal consciousness or vice versa? Various possibilities arise on further research on whether the consciousness of *legal minimums* as gleaned from local policing cases in Kisii, is itself a source of law in the legal pluralist sense, or an everyday societal interpretation of state law. Cases arise where the source of law is state-sanctioned but the law is practiced in accordance to how and individual or members of the society interpret it. This will also require an understanding of legal pluralism that is not only firmly fixed on from which source norms come from but also the product of the norms once they are interpreted and applied. Another scenario may be that beyond being a source or a by-product of law, consciousness of legal minimum may be perceived as a contribution to expansion of one’s legal consciousness in itself and to the making or formations of *legal conscious persons*, so that it is understood as part of the study of legal consciousness. In sum, the implication of legal consciousness is to challenge conventional assumptions on the centrality of the determinacy of law in shaping behaviour in society.

8.2.2. Implications on State-Society Relations

The study on relations between government and community in local policing mechanisms in Kisii County nuances hitherto prevailing assumptions in state-society theory. Traditional statist conceptions theorize that important policy processes are best understood from the perspective of the state which is where they emanate from. That optimum structuring of state-society relations is when policy processes and implementation are determined by the state. The study of the nature of state-society relations in Kisii County in joint local policing mechanisms reveals that important impacts on policy decisions are also situated at society level and such societal contribute to success of policy implementation in important ways. In locating important factors in policy practice, action in society provides a good source for understanding what builds conditions that are conducive for introduction of certain policies and the means for its implementation³⁹³.

It also adjusts the presumption that state-society relations are appropriate when processes therein are state-led or state driven. Evaluation of local policing in Kisii County has shown that where asymmetries develop from state-driven processes, interdependence is compromised and relations between participants from state and society break down. Examples of relationship asymmetries arose between police and the community where the police arbitrarily released suspects arrested by the community. Such cases problematize the presumption of the appropriateness of a state-driven process as one that automatically produces a positive result in society.

Different treatment of local policing groups in Kisii –especially *sungusungu*–by different state agents the government in regulating vigilantism in Kisii attest to disaggregation within the state a view supported by society-centred state-society relations theorists. Society centred theorists hold that state is *disaggregated* in different ways and has distinct unique practices.

The local policing groups examined in Kisii County by design and in their operational aspects have shown that the state is not a complete separate entity from society. In both *sungusungu* and OCP, the government is central to their operations and *raison d'être*. The *sungusungu* are indebted to governmental support for their establishment in Kisii. By design

³⁹³Tevir M. (ed.) (2011)*Handbook on Governance* (Sage: London) at p. 3

the OCP subsists as joint initiative of the community in Taracha and local government and subsists as an arena for interaction and interdependence in the realm of policing and law enforcement. In the Migdal sense, both “state and civil society are needed as a strong civil society provides a base of legitimacy and a capacity for activity on which the state can build, and civil society also needs the State for provision of certain services”.

Society-centred studies have long advanced the increasing need to shift from Weberian conceptions of a unitary state in conceptualizing state-society relations. It also demonstrates important political processes can be gleaned by training our attention to governance rather than government; and to look out for the *interdependence* between state and society as opposed to independence of state from society and vice versa.

8.2.3 Implications on Vigilantism and Community Policing

Vigilantism and community policing have often been examined and conceptualized as completely different groups, often taking the perspective that the two phenomena are distinct groups in terms of legality, use of violence, authorization and stateness. Popular presumptions view vigilantism as illegal, violent, unauthorized and non-state while community policing is legal, non-violent, authorized and sanctioned by the state. The cases in Kisii County demonstrate that in many instances vigilantism and community policing are bound by similar challenges and that they share a number of similarities. The examination of community policing and vigilantism as two contrasting entities, may miss interesting similarities that exist between policing groups like the sungusungu and OCP.

A refocus is urged on theorization of vigilantism and community policing as completely different entities. The study has examined effect of law and socio-politics dynamics on sungusungu and OCP operating in the same geographical region in Kisii County. It also studied the operation of OCP in a policing landscape where sungusungu was the dominant actor. More attention ought to be invested in characterization and analysis of community policing and vigilante groups generally, especially examination of scope, nature and dynamics of community policing organizations that have emerged as offshoots of vigilante groups. It would be important to accumulate knowledge on under what conditions have such groups emerged and the place of law in such groups and the nature of interaction with

the state. Comparison across different geographical regions would also contribute to literature on policing and wider understanding of such groups.

Further, the debate on the exact nature of relationship between vigilante and the state has not been settled and the study of contemporary vigilantism in Kisii does not claim to do that. Instead it seeks to contribute to that debate. Diverse views have been advanced on the nature of vigilante groups with the state and implications. In describing the vigilante-state relationship, Abraham characterized relationship as conventionally ambivalent. For Heald, a good working relation with the state led to success of vigilantism in curbing crime. The relationship is in constant flux, at times strengthening state capacity and other times eroding it. This is determined by interests and expediencies of either party over time.

Evaluation of the effect of law vis-a-vis the effect of policy as employed by the state in tackling vigilantism in rural areas has also not been accorded much attention in Kenya. There is equally much to learn from rural studies in terms of making implementation of laws and policy work in settings outside the urban areas.

Common academic interpretations on violence as definitive of non-state policing groups will also require adjustment and qualification. Violence also exists in community policing whereas in certain instances non-violence is a characteristic in policing among vigilante groups. Future academic enterprise may need to shift focus to study of non-violence which is arguably under-theorized in the study of vigilante groups in Africa.

8.2.4. Traditional Governance and Culture

Analysis of *sungusungu* through the cultural lens has been a popular approach in studies on vigilantism, in particular advancement of the proposition that the group was aligned to the *etureti* system. Traditionally *etureti* elders guided the community on cultural norms. However, the contemporary practices *sungusungu* in Kisii paint a different picture. While this was the position in the beginning, frustrations about actions of local chiefs –to whom *etureti* reported- resulted in souring of relationship between *sungusungu* and the elders culminating in *sungusungu* working independently. Ultimately, with such autonomy, the

sungusungu developed rules to govern their operations and dispute resolution, different from cultural norms and state legal system.

Further research needs to be undertaken on erosion of traditional governance systems tracing it back from the colonial era to independence to modern day Kisii especially the Abagusii traditional systems. These systems appear to have been gradually eroded by competing institutions. While much literature focuses on chiefs, indirect rule system and LNCs, there is a dearth of attention to the evolution of traditional social control systems. They are dispersed in literature and deserve more attention in order to understand evolution, functions and limitations, erosion, displacement, relation to new *formal* structures during the colonial period and independence. The concept of *petite bourgeoisie* as fronted by Maxon and comparison of its applicability in today in political and economic spheres of the Gusii would also bear interesting insights and dimensions. The lack of central authority as advanced by Akama may also need to be explored further and its relevance to the current political processes in Gusii land, with a possibility to understand lack of block voting patterns and the centrality of clans in shaping electoral behaviour and choices.

8.2.5. Youth

The study of local policing mechanisms often conjures up the image of such organizations as *youth* groups. Study of local policing groups in Kisii challenges popular assumptions on the composition of the group. Discussions in Part II of the study revealed that Taracha OCP is not a preserve of male youth. Applying the new constitutional definition, it was revealed that contrary to popular assumptions, the majority of the members were not 'youth'. There was no documentation of the membership of sungusungu. However, its top leadership comprised men middle-aged men with an average of 45-50years. This requires us to have a refinement of assumptions into the membership of such groups. It also has an implication on the need to re-conceptualize the definition of "youth".

There is no one definition that comprehensively delimits the concept of "youth". According to Nolte, youth is "not so much circumscribed by biological age (category) as by status and behaviour, the group includes all those who do not (yet) have the material means and the

recognition to establish themselves as providers for others”³⁹⁴. Brennan defines “youth” as both an abstract social *category* and an empirically definable *group* whose members are eligible to participate in specific institutions³⁹⁵. Youth is also understood as a period for transition where a person undergoes transition from childhood to adulthood, with corresponding responsibilities. This stage involves varied individual experiences where each individual experiences biological, socio-economic and political changes³⁹⁶. An interesting description of youth is that advanced by Honwana of youth conceptualized as *waithood*-, that is, a period where individuals are blocked in a stage of permanent youth or prolonged youth, their time for family formation is delayed and they are exposed to unemployment³⁹⁷.

The conception of youth itself is not unproblematic but the Kenyan position complicates is further. Under Article 260 of the Constitution of Kenya, youth is defined as “an adult who has attained 18 years but is below 35 years of age”. Constitutional definition of youth applies the “category” conception of the youth by defining them using age. Even within the “category” concept school of thought, there is no consensus on the age-set to apply when defining youth. While, the Constitution sets it at between 18 years and 35, the Youth Policy³⁹⁸ stipulates that Kenyan youths are persons resident in Kenya in the age bracket of 15 to 30 years while the United Nations, defines youth as persons between the age of 15 and 24 years.³⁹⁹ This conception of youth as including adolescents below the age of 18 years, is supported by arguments by Muthee that transitional period may begin earlier than the age of 15 and extend into the mid to late 30s⁴⁰⁰. It is clear that the policy and the law are conflicting in defining the youth. This inconsistency requires adjustment.

³⁹⁴ Nolte I. (2004) Identity and Violence: Politics of Youth in Nigeria, *Journal of Modern African Studies*, 42, no.1 p. 62

³⁹⁵ Brennan J. (2010) “Youth, the TANU Youth League, and Managed Vigilantism in Dar es Salaam, Tanzania 1925-1973” in A. Burton and H. Charton Generations Past: Youth in East African History 196-220

³⁹⁶ Muthee M. (2011) “Hitting the target, Missing the Point: Youth Policies and Programmes in Kenya” Retrieved from [http://www.wilsoncenter.org/sites/p. 37,38](http://www.wilsoncenter.org/sites/p.37,38)

³⁹⁷ Honwana A. (2013) Waithood and Protest Movements in Africa, Lecture at European Conference on African Studies, Retrieved From <http://www.africanarguments.org/2013/08/12youth-waithood-and-protest-movements-in-africa-by-alcinda-honwana>

³⁹⁸ The Kenya National Youth Policy 2006, adopted in Parliament as Sessional Paper No. 3 of 2007

³⁹⁹ United Nations Definition of Youth Fact Sheet Retrieved from <http://www.un.org/esa/socdev/documents/youth/fact-sheets/youth-definition.pdf>

⁴⁰⁰ Muthee M. (2011) “Hitting the target, Missing the Point: Youth Policies and Programmes in Kenya” Retrieved from [http://www.wilsoncenter.org/sites p. 37,38](http://www.wilsoncenter.org/sites/p.37,38)

Youth programmes have failed to achieve objectives of empowerment and increased participation of the youth, instead they constitute low levels of involvement of youth. In her study of youth programmes Muthee finds that youth involvement is restricted to the basic levels of “ad hoc” input and “structured consultation”. The youth are not trusted with the higher levels of participation which include delegation, influence or actual control of the programmes. Wamuyu also states that “youth locked out of *decision making processes*, while used to mobilize supporters, distribute campaign material, fill up stadiums where campaign rallies are held and in some cases to harass and intimidate political opponents”⁴⁰¹ The history of failed policies from *Kazi kwa Vijana* to the *Uwezo* Youth Fund has done little to improve the position of the youth and to redeem to Kisii youth indifference to government policies which have dogged by inefficiency and corruption. The Uwezo Fund has had little impact on youth and to redeem to Kisii youth indifference to government policies which have dogged by inefficiency and corruption.

The adjustment in Kenya Youth Policy therefore should not be limited to the definition of “youth” only but ought to extend to the content on empowerment and participation of the youth. Failed youth empowerment programmes have been linked to the content in the youth policy and poor implementation 11 years into its operation. A policy review is necessary to rectify inconsistencies in characterization of the youth and to infuse it with sound implementation mechanisms. Such review will provide an opportunity for the new Youth Policy to align its strategies to the new Constitution.

Overall, interventions other than instrumentalization of the force of law need to be evaluated for the potential of having a more positive impact in the regulation of local non-state policing. The study suggests that alternatives are viable in reform in implementation and enforcement of policies and laws. How the law is used and enforced will be more productive than enactment of law and mechanical application of the law in books. The primary challenge has always been an enforcement challenge even with pre-existing laws like Penal Code. With different parts of the state like the police, provincial administration and the prosecution, pulling in different directions, it is not surprising that there are no

⁴⁰¹Wamuyu M. (2013) in K. Njogu (ed) *Youth and Peaceful Elections* (Nairobi: Twaweza Communications) p. 47

reports of convictions on organized crime in Kisii since passing of POCA over six years ago. Therefore the study suggests here that energies be refocused to enforcement rather than introduction of new laws and increase of sanctions. Reforms on enforcement must begin but not stop with the police. Reform of enforcement mechanisms will not only require refocusing our energies in police reforms, which has been the second challenge. There is also a case for greater cooperation of members of the society with state so that is tackled jointly and comprehensively. With the resource and logistical constraints faced by police, the assistance of citizens is much needed to bridge gaps in provision of intelligence and information. Hence, policies are also needed to lay down strategies on synergizing government and society in policing initiatives at the local level. This has been lacking in the area of community policing despite advocacy on its contribution to fostering security.

8.3. Prospects

Positions taken on recommendations for reform in this study should be tempered with the need for further research (as discussed above in 8.2) for better representations of the place of law and governance in the regulation and facilitation of local policing mechanisms. In Pound's view, law is a social institution which may be improved by human effort. Therefore law ought to be understood as a tool for social reform. As such we need to pose the questions; what in law can be improved to make it effective in society? How can such improvements be effected?

The study seeks to contribute to informed legal reform and policy formulation target enforcement and improved state-society relations. Such reforms should be pursued through robust implementation of constitutional stipulations on police reforms and linkage of legislation to policy.

8.3.1. Police Reform

Broadly, prospects for reforming security sector and strengthening joint local policing groups in the future must be the ultimate realization of transition from regime policing to more accountable and responsive forms of policing within the police and in relation to

partnerships with communities. As discussed in chapter 4, the successful implementation of the proposed reforms as set out in the Constitution and enabling provisions as laid down in the National Police Service Act, National Police Service Commission Act, and Independent Policing Oversight Authority Act will certainly contribute to such a transition. However, the police reform must not over-rely on a pure legalist approach. Too great a focus on enactment of laws and legislation, though important, leaves little room for implementation and policy development. It would be foolhardy to think that because the Constitution was promulgated and legislation was enacted in good time, the reform agenda is complete. Such a perspective would be narrow and minimalist. The challenges relating to political goodwill, institutionalization of new police bodies, accountability and transparency must be addressed. The milestones gained in setting up new legislative framework, decentralization of policing and initiatives towards police welfare must be harnessed to sustainable transformation of the police into an institution that is accountable and that undertakes effective enforcement of laws to tackle crime and insecurity.

The qualities that citizens aspire for in the police service are responsiveness, efficiency, accountability to parliament and directly to the citizen which are reflective of the core attributes of accountable policing. Ideally, this can be achieved within the current constitutional and legislative framework which paves way for democratic policing. Further, there must be a convergence between people's aspirations on the role of the police (preserving law, public order and security for all) and the police's vision on their role of policing public order. This would enhance the legitimacy of the police. Currently there is a divergence where the police regulate public order to defend the incumbent political interests at the expense of providing security to majority of the citizens. In the language and spirit of the Constitution, there is potential of meeting expectations of citizens and consolidating legitimacy of police service for better service delivery. However, provisions of in the legislative framework including National Police Service Act and Independent Policing Oversight Authority must be implemented to capture the aspirations of the people. The focus should now move away from lauding constitution and enactment of legislation to implementing comprehensive operational reforms and supporting police officers who also face a number of welfare and logistical challenges.

8.3.2. Legislation and Policy Reform

There ought to be an attempt to bridge the gap on legislation and policy on institutionalization of community policing as part of the security sector reforms in Kenya. Constitutional and legislative reforms are aimed at improving institutions in security sector gearing them towards serving its citizenry and providing overall contribution to the nation's state of security. However, although these laws provides framework for reform of state policing in accordance with constitutional prescriptions, there is gap between legal framework and policy especially on facilitation of participatory forms of security governance for citizens. There is a lack of clarity in laws on the establishment and regulation of community policing despite repeated indications and pronouncements on its importance. Increased rhetoric among public officials has not resulted in development of policy with prescriptions on facilitation of community policing. Equally, repeated reference to the importance of government and community partnerships has not been reduced formally into a policy adopted by the government despite mention of several drafts. Thus, although there has been a wide acceptance of its projected benefits and the need for community policing policy has for long been the subject of parliamentary discussion and debate, a *community policing policy* has not been forthcoming.

In putting forward the combined model on the *social bases of governance*, that is a combination of legal sociology and society centred state-society relations theories, two main propositions are advanced. First, we need to view law as part of state-society relations. That application of law affects state-society relations. The law can be used to improve relations between government and society. Does that therefore mean that the law is *the* foremost dimension of state-society relations? The answer is no, because there are other dimensions including political processes and socio-cultural practices that are equally of value. However, the law also needs to be privileged alongside political and social dynamics in the understanding of state-society relations.

Secondly we also need to understand the nature of state-society relations as having an effect on law and its implementation. Questions then arise, *how, why and where can we* form such a perspective? In the current study, such a perspective is developed by examining by examining aspects of joint local policing groups involving the state and society. It places a

focus on local governance mechanisms as a way of thinking and understanding about how the state-society relations occurring in such mechanisms impact on the law and its implementation. Where then can we form this perspective? Such a perspective can be developed by examining activities of such joint governance mechanisms at the local society level.

Applying this approach at the local level, the study entailed an exploration of the effect of law in shaping the nature of local policing as examined in Kisii County. Following the approach above, the study makes an overall conclusion that: in joint governance arrangements where there is increased dominance by the state through use of law and political power, coupled with; displacement of society as stakeholder in decision making, minimal collaboration between state and society actors; then, there is likely to be compromise on interdependence resulting in ineffective governance mechanisms.

The study has advocated for the analysis of local policing mechanisms in Kisii through the lens of both legal sociology and society centred state-society relations. Part of the defence for this approach is because the two themes of law and politics share similarities in their focus and interest. It has sought to show that local governance mechanisms are one of those ways in which the two themes are brought together. On a broader scale, prospects open up for the adoption of applying the combined model of legal sociology and society centred state-society relations to inspire attempt to reform public sector and development of new policy instruments especially where governance mechanism involves collaboration between state and society. According to Tevir, the importance of new approaches is the extent to which proposals for reform have an impact on policy. This is the effect that this study anticipates to contribute towards.

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Appendix II: List of Respondents per Region

Nyaribari Constituency
Kisii Central Ward

SGK 1 Sungusungu Leader, Kisii Central
 SGK 2 Sungusungu Official, Kisii Central
 SGK 3 Sungusungu Official, Kisii Central
 SGK 4 Sungusungu member, Kisii Central (Town)
 SGK 5 Sungusungu member, Kisii Central (Town)
 SGK 6 Sungusungu member, Kisii Central (Mwembe)
 SGK 7 Sungusungu member, Kisii Central (Mwembe)
 SGK 8 Sungusungu member, Kisii Central (Mwembe)
 SGK 9 Sungusungu member, Kisii Central (Nyanchwa)
 SGK 10 Sungusungu member, Kisii Central (Nyanchwa)
 SGK 11 Sungusungu member, Kisii Central (Nyamage)

SOK 1 State official, Kisii Central (DPP)
 SOK 2 State official, Kisii Central
 SOK 3 State official, Kisii Central
 SOK 4 State official, Kisii Central
 SOK 5 State official, Kisii Central (Nyamage)

REK1 Resident, Elder, Kisii Central
 REK 2 Resident, Elder, Kisii Central
 REK 3 Resident, Businessman, Kisii Central
 REK 4 Resident, Businessman, Kisii Central
 REK 5 Resident, Businessman, Kisii Central
 REK 6 Resident, Kisii Central
 REK 7 Resident, Kisii Central

Taracha Location, Birongo Ward

OCP 1 Community Policing Leader, Taracha
 OCP 2 Community Policing Official, Taracha
 OCP 3 Community Policing Official, Taracha
 OCP 4 Community Policing Official, Taracha
 OCP 5 Community Policing Member, Taracha
 OCP 6 Community Policing Member, Taracha
 OCP 7 Community Policing Member, Taracha
 OCP 8 Community Policing Member, Taracha (Irondi)
 OCP 9 Community Policing Member, Taracha (Irondi)
 OCP 10 Community Policing Official, Taracha (Nyabiosi)
 OCP 11 Community Policing Member, Taracha (Nyabiosi)
 OCP 11 Community Policing Member, Taracha (Nyabiosi)
 OCP 12 Community Policing Member, Taracha (Nyabiosi)

RET 1 Resident Taracha
 RET 2 Resident Taracha
 RET 3 Resident Taracha
 RET 4 Resident, Taracha
 RET 5 Resident, Taracha

RET 6 Resident, Taracha
RET 7 Resident Taracha
RET 8 Resident Taracha
RET 9 Resident Taracha
RET 10 Resident Taracha
RET 11 Resident Taracha
RET 12 Resident Taracha

SOT1 State Officer, Taracha Location
SOT 2 State Officer, Taracha Location
SOT 3 State Officer, Irondi sub-location

PT1 Officer, Police Post, Birongo Ward
PT2 Officer, Police Post, Birongo Ward

Bonchari Constituency

Bomorenda-Suneka

SGS 1 Sungusungu Leader, Suneka
SGS 2 Sungusungu official, Suneka
SGS 3 Sungusungu member, Suneka
SGS 4 Sungusungu member, Suneka
SGS 5 Sungusungu member, Suneka

RES 1 Resident, Suneka
RES 2 Resident, Suneka
RES 3 Resident, Suneka
RES 4 Resident Suneka
RES 5 Resident, Suneka

Nairobi

HR1 Human Rights Activist
HR2 Human Rights Activist

PRC 1 Police Officer Reforms Committee
PRC 2 Police Officer Reforms Committee