


RESEARCH ARTICLE

Informality in Governance: Evaluating Intergovernmental Relations in Kenya's Health Sector During the COVID-19 Pandemic

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Abstract

This article examines the impact of informal intergovernmental relations on the Kenyan government's handling of the COVID-19 pandemic. It argues that although informality in governance has been perceived negatively by many governance scholars, it nevertheless has the capacity to enhance the effectiveness and legitimacy of government. By virtue of informality's adaptability and recognition of the centrality of context, it can enhance efficacy particularly in unpredictable circumstances as occurred in the pandemic. Notwithstanding this reality, until recently, literature on informality, mainly informed by Eurocentric colonial perspectives on governance, has focussed on its negative elements, criticizing it for diverse governance ailments. Through the prism of the negotiated order theory, this article challenges this dominant narrative using an analysis of informal intergovernmental relations during the COVID-19 pandemic in Kenya. It argues that though informality was at times applied negatively, overall, it ensured vibrant intergovernmental relations, thus positively impacting health service delivery and enhancing the government's legitimacy in the management of the pandemic.

Keywords: COVID-19; governance; informality; intergovernmental relations; negotiated order

Introduction

The COVID-19 pandemic was the most severe global health emergency in a generation, demanding hitherto untested interventions if governments were to avert an unprecedented health calamity leading to extensive loss of life.¹ Globally, governments struggled to devise policies and programmes that would limit the devastation caused by the pandemic, introducing extensive health sanitation and security protocols amongst the population, particularly in the early days of the pandemic.² In Kenya, after the first case of COVID-19 was identified on 3 March 2020, the government immediately instituted far-reaching measures, including widespread lockdowns, personal hygiene and sanitation mandates.³ Managing the pandemic effectively required the active engagement of the national

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1 M Ciotti et al "The COVID-19 pandemic" (2020) 57/6 *Critical Reviews in Clinical Laboratory Sciences* 365.

2 DO Sotola, P Pillay and H Gebreselassie "COVID-19 in Africa: A comparative analysis of early policy responses" (2021) 55/1 *Revista de Administração Pública* 229.

3 RB Osoro "COVID-19 and first wave response in Kenya" in R Chattopadhyay et al (ed) *Federalism and the Response to COVID-19: A Comparative Analysis* (2021, Routledge).

and county governments, to whom the implementation of the right to health is constitutionally shared and to whom corresponding duties are reposed. The fourth schedule to Kenya's Constitution reserves the function of developing national health policy and of managing national referral facilities to the national government.⁴ This responsibility is further amplified in section 15 of the Health Act,⁵ which allocates the obligation to develop laws, administrative procedures and programmes to the national Ministry of Health. The Constitution allocates all other components of health service delivery to county governments.⁶

In view of this concurrent assignment of the health function, the two levels of government have, through the Health Act and the Intergovernmental Relations Act,⁷ designed various formal inter-governmental relations frameworks to enable effective coordination and consultation and thus ensure high-level service delivery standards.⁸ Intergovernmental relations, the formal or informal relations between a central government and its constituent units, and among the units, are the “life-blood” of federalism and other decentralized systems.⁹ The necessity of these relations was most acute in the management of the pandemic. Mishandling of scarce resources and uncoordinated implementation of interventions would have led to extensive loss of life. Unfortunately, the unprecedented nature of the pandemic meant that subsisting formal intergovernmental frameworks were strained and oftentimes inadequate or ineffective.¹⁰ This necessitated the reformulation of new consultation and coordination frameworks which were not provided for in the existing laws. These “informal” intergovernmental frameworks were either applied singly or intermixed with the existing formal frameworks. Numerous decisions were made and implemented pursuant to these informal frameworks influencing the government's handling of the pandemic. The introduction and application of these “informal” frameworks raises important questions about the value and implications of integrating informal institutions in governance frameworks and is the focus of this article.

Conceptualizing informality

At its basic level, informality in governance, including that evident in the Kenyan government's handling of the COVID-19 pandemic, is perceived merely in contrast with formality. Many scholars however reject this perspective of informality as simply a residual component of formality and contend that it has distinct credentials and diverse meanings.¹¹ Regarding formality, there is near consensus amongst scholars that formality in the context of governing refers to governmental processes which are coded, provided for in law or regulations and undertaken by state entities established legally. Formal institutions thus relate to legally established state organs or state-sanctioned rules, be they constitutions, statutes or other formal decrees.¹² The totality of this definition is however contested. Some writers argue that while the evident manifestations of formal institutions are codified and written down, these coded aspects of formal institutions subsist on the foundation of a vast

4 The Constitution of Kenya 2010 (The Constitution), item 28, pt 1, fourth sch.

5 The Health Act 2017 No 21 (The Health Act).

6 The Constitution, pt 2.

7 The Intergovernmental Relations Act 2012 No 2.

8 Id, sec 26, no 2; The Health Act.

9 J Poirier *Intergovernmental Relations: The Lifeblood of Federalism, Teaching Federalism* (2023, Edward Elgar Publishing).

10 W Ouma et al “Devolved healthcare: Is Kenya's two-tiered system of government hampering response to COVID-19?” (2021) 5/4 *Epidemiology International Journal* 1.

11 M Brie and E Stölting “Formal institutions and informal institutional arrangements” in T Christiansen and C Neuhold (eds) *International Handbook on Informal Governance* (2012, Edward Elgar Publishing) 19; MC Casson, MD Giusta and US Kambhampati “Formal and informal institutions and development” (2010) 38/2 *World Development* 137.

12 A Pratt “Formality as exception” (2019) 56/3 *Urban Studies* 510; W Kaufmann, R Hooghiemstra and M Feeney “Formal institutions, informal institutions, and red tape: A comparative study” (2018) 96/2 *Public Administration* 386; CM Johns, PL O'Reilly and GJ Inwood “Formal and informal dimensions of intergovernmental administrative relations in Canada” (2007) 50/1 *Canadian Public Administration* 21.

array of unwritten rules, norms and practices without which they would not operate effectively. Writing on the formalization of land law in Kenya, Okoth Ogendo¹³ argues that within the formal land laws imposed from England are age-old concepts and doctrines on tenure, rights and ownership that are based on its feudal origins. Kameri-Mbote and Kieyah¹⁴ and Meinzen-Dick and Mwangi¹⁵ agree with this contention and explain the challenges of fully operationalizing English law in African land tenure and the continuing persistence of customary land law despite written law from this disconnect. To then view formality as exclusively coded and written down when contrasted to informality as uncoded ignores this reality.

The meaning and limits of informality are themselves varied and contextual. On the one hand, studies on informality have applied the term to encompass a broad range of phenomena that transcend organizations and institutions. The term has been used to describe almost any phenomenon that is not reduced to writing or is unregulated.¹⁶ In its broadest sense it has been used to include practices, including social practices, that do not follow precise procedures and are not subject to organized sanctions.¹⁷ On the other hand, when applied to institutions, informality has been defined to mean uncoded and unwritten but patterned norms and practices through which organizations and societies operate.¹⁸

Some writers on informality recognize the embeddedness of informal norms and rules in formal settings and argue that informality generally complements the operations of formal institutions.¹⁹ In many instances formality and informality coexist, intertwine and impact each other. The dichotomization of formality and informality can therefore be viewed as illusory and inconsistent with how the two operate.

While this article recognizes the validity of the controversies surrounding the meaning and implications of formality and informality, it is concerned with the narrow area of informality described by Roger²⁰ and Kleine²¹ in their definition of informality in the context of governance. The paper thus uses informality in this context to denote any patterned rules, norms, practices, institutional structures and procedures that are not enshrined or anticipated in the constitutions or constitutive documents of formally constituted organizations but on the basis of which binding governmental decisions are developed and operationalized.

Within the context used in this article, informal decision making has several defining characteristics. Firstly, unlike formal decision making which is characterized by the inclusion of formally defined decision makers, informal decision makers, while restricted, tend to be variable, dependent on circumstances and not formally defined. Secondly, while most formal meetings between actors are either public or accessible to the public, interactions within informal arenas generally occur away from public view. Thirdly, while interactions in the formal arena follow codified procedures

13 HWO Okoth-Ogendo, "Formalising 'informal' property systems: The problem of land rights reform in Africa" (Paper prepared for the Commission for the Legal Empowerment of the Poor, Nairobi, 2006).

14 P Kameri-Mbote and J Kieyah "Securing property rights in land in Kenya: Formal versus informal" in C Adam, P Collier and N Ndung'u (eds) *Kenya Policies for Prosperity* (2010, Oxford University Press).

15 R Meinzen-Dick and E Mwangi "Cutting the web of interests: Pitfalls of formalizing property rights" (2009) 26/1 *Land Use Policy* 36 at 36.

16 A Bailey et al *Global Encyclopaedia of Informality: Understanding Social and Cultural Complexity* (vol 2, 2018, UCL Press).

17 BA Misztal *Informality: Social Theory and Contemporary Practice* (2000, Routledge) at 19.

18 JR Azari and JK Smith "Unwritten rules: Informal institutions in established democracies" (2012) 10/1 *Perspectives on Politics* 37; O Franziska and Y Shu "The long shadow of informality: Challenges and policies" (2022, The World Bank Group).

19 P Kameri-Mbote *Contending Norms in a Plural Legal System: The Limits of Formal Law* (2020, University of Nairobi School of Law); M Koster and A Smart "Performing in/formality beyond the dichotomy: An introduction" (2019) 61/1 *Anthropologica* 20 at 20.

20 CB Roger *The Origins of Informality: Why the Legal Foundations of Global Governance Are Shifting, and Why It Matters* (2020, Oxford University Press).

21 M Kleine "Informal governance and legitimacy in EU politics" (2018) 40/7 *Journal of European Integration* 873.

enforceable by third parties, informal decision making is structured along informal or semi-formal rules enforced outside official channels. Finally, decisions arising from formal settings have legally binding capacity unlike informal settings where decisions have binding capacity due to their fitness and acceptability or when formalized.²²

There have been generally positive connotations of formal institutions. Unfortunately, most writers on informality, taking a predominantly Western conception, cite its corrosive effects on the formal structures of governance.²³ Informality is seen as potentially obscuring transparency and accountability in governance and, in part, encouraging personalization and abuse of state power.²⁴

This criticism of informality and informal institutions is however not generalized. Numerous studies of informal governance in international organizations point to its positive qualities, including its facilitation of efficiency and versatility.²⁵ In the Western world, informality is seen as rarely occurring and when it occurs, is recognized as being either facilitative or subversive depending on context.²⁶

In the developing world and the emerging democracies of Central Asia however, informality is generally perceived as an indicator of bad governance, an evil to be eradicated on the route to “good governance”. Informality is seen as undercutting legitimate formal institutions, altering and potentially supplanting them.²⁷ Burkhard argues that informality is thus a “three in one”. It is “rather crooked” in developing countries, useful in international organizations or dubious as part of Western world political activity.²⁸

This differentiating approach results from a predominantly Western appreciation of ideal states, conceptualized in Weberian terms. According to Polese,²⁹ there is an assumption that openness, objectivity and transparency are the essence of good governance. It is assumed that these qualities are missing in informality, thus placing informality on the “wrong side” of good governance. Even where informality exists in the West, the presumption is that regulation and formalization has proceeded sufficiently to the extent that informality is confined to spaces it can do no harm. Where it exists, it is infrequent and merely the “cartilage that keeps solid bones together”.³⁰

However, despite this widespread accusation, informal governance in emerging democracies does not always connote corruption and corrosion of democratic ideals. In the process of governing, particularly in complex governing environments, the behavioural outcomes that informality introduces generally complement formal rules and the institutions of governance.³¹ Some authors on governance in Africa also recognize the legitimacy and necessity of informal institutions especially when

22 C Reh “Informal politics: The normative challenge” in T Christiansen and C Neuhold (eds) *International Handbook on Informal Governance* (2012, Edward Elgar Publishing) 65.

23 H Aliyev “End to informality? Examining the impact of institutional reforms on informal institutions in post-Euromaidan Ukraine” (2016) 24/3 *Journal of Contemporary Central and Eastern Europe* 207; Azari and Smith “Unwritten rules”, above at note 18; CB Camargo and L Koechlin “Informal governance: Comparative perspectives on co-optation, control and camouflage in Rwanda, Tanzania and Uganda” in C Ammann and T Förster (eds) (2018) 10 *African Cities and the Development Conundrum. International Development Policy | Revue internationale de politique de développement* 78.

24 S Ayres “A decentred assessment of the impact of ‘informal governance’ on democratic legitimacy” (2022) 37/1 *Public Policy and Administration* 22.

25 Brie and Stölting “Formal institutions”, above at note 11.

26 R Isaacs “Nur Otan, informal networks and the countering of elite instability in Kazakhstan: Bringing the ‘formal’ back in” (2013) 65/6 *Europe-Asia Studies* 1055; Reh “Informal politics”, above at note 22.

27 M Akech “Abuse of power and corruption in Kenya: Will the new constitution enhance government accountability?” (2011) 18/1 *Indiana Journal of Global Legal Studies* 341.

28 C Burkhard “Informal politics” (2006) 1 *Hamburg Review of Social Sciences* 256.

29 A Polese “Informality crusades: Why informal practices are stigmatized, fought and allowed in different contexts according to an apparently understandable logic” (2015) 25/1 *Caucasus Social Science Review* 1.

30 Ibid.

31 B Rohregger et al “The politics of implementation: The role of traditional authorities in delivering social policies to poor people in Kenya” (2021) 41/3 *Critical Social Policy* 404.

addressing customary law questions. They recognize the incapacity of formal law to fully mediate many governance processes and hence see informal norms and practices as natural complements to formal law.³²

Despite the tacit recognition that the process of governance incorporates both formal and informal institutions, there has been scholarly inattention to the complementarity of informal structures in Africa, partly attributable to its negative connotation. Scholarly inquiries have primarily focused on the destructive effects of informal governance on transparency and accountability of the democratic order and governance practice.³³ Even where constructive aspects of informality have been analysed,³⁴ these have related to interactions between government and non-governmental organizations, traditional bodies or customary authorities and not to the role of informality within and between state institutions.

This article aims to challenge the dominant conceptions of informality as always negative and subversive, by recognizing its inevitable and positive role in governing. By analysing its positive use during the COVID-19 pandemic in Kenya, the article demonstrates that the multi-layered and even counterintuitive character of informality can have positive implications on service delivery and enhance political legitimacy.

This article is organized in seven parts. Part 1 introduces the key issues under discussion while Part 2 contains a conceptual discussion on informality. Part 3 provides the theoretical framework through which the issues in the article are analysed while Part 4 discusses the Kenyan Constitution and informality. Part 5 analyses the confluence between formality and informality in intergovernmental relations in Kenya. Part 6 outlines the formal structures of intergovernmental cooperation in the health sector and the informal structures that emanated during the COVID-19 pandemic and how they were utilized. Part 7 concludes with some reflections on the key issues arising in intergovernmental relations during the pandemic.

Informality and negotiated order theory

Intergovernmental relations, which this article discusses, are the lifeblood of federalism.³⁵ Intergovernmental relations, which are both formal and informal, are concerned with negotiations on the remit of the functions and powers of different levels of government in historically influenced and deeply contested political, resource, administration and fiscal spaces.³⁶ The conduct and implications of such relations is best evaluated through a theoretical frame that recognizes the role of formal institutions but also concedes the primacy of informality. Such theory needs to underline the role of negotiations in sustaining social order and the role of history, context, power and human agency in organizational behaviour. The negotiated order theory, most associated with the work of Anselm Strauss,³⁷ is an appropriate theory in which to analyse the phenomena discussed in this article. The theory depicts order in organizations as resulting from a succession of conflicts

32 B Bwire "Integration of African customary legal concepts into modern law: Restorative justice: A Kenyan example" (2019) 9/1 *Societies* 17; Kameri-Mbote *Contending Norms*, above at note 19.

33 Akech "Abuse of power and corruption in Kenya", above at note 27; Kaufmann, Hooghiemstra and Feeney "Formal institutions", above at note 12; M Ristei "Competing formal and informal institutions in a democratizing setting: An institutional analysis of corruption in Romania" (2010, Western Michigan University).

34 P Osei-Tutu, M Pregernig and B Pokorny "Interactions between formal and informal institutions in community, private and state forest contexts in Ghana" (2015) 54 *Forest Policy and Economics* 26; M Renders "Appropriate 'governance-technology'? – Somali clan elders and institutions in the making of the 'Republic of Somaliland'" (2007) 42/3 *Africa Spectrum* 439; Rohregger et al "The politics of implementation", above at note 31.

35 R Gibbins and J Stein *Canada by Picasso: The Faces of Federalism* (2006, Conference Board of Canada).

36 WV Mitullah and J Nguri "Intergovernmental Relations Act 2012: Reflection and proposals on principles, opportunities and gaps" (2012, University of Nairobi); R Agranoff "Intergovernmental relations in transition, reflections and directions" (2018) 48/4 *Journal of Federalism* e8.

37 AL Strauss *Negotiations: Varieties, Contexts, Processes, and Social Order* (1978, Jossey-Bass Inc Pub).

and dissensions which, through continual negotiations, result in accommodations and assimilations.³⁸ Even though the theory developed in the context of organizations and occupations, these basic tenets apply to broader governmental and institutional behaviour like that found in intergovernmental relations. The realignment of power and resource control that occurs as countries decentralize inevitably results in conflict between various levels of government.³⁹ As articulated by the negotiated order theorists, to bring about institutional order, such conflicts necessitate negotiations, at intergovernmental level, especially on sharing of functions and distribution of revenue, eventually ending up with accommodations and assimilations.

Strauss' theory was a reaction against the deterministic, static structural-functional and rational-bureaucratic explanations of complex organizations that traditionally explained the functioning of institutions.⁴⁰ These functional theories presumed that precise formal rules and formally defined hierarchies determined how institutions operated. Negotiated order theory recognizes that these formal rules and structures are incapable of comprehensive resolution of governing complexities.

Informal rules operate, firstly, as a method of actualizing formal rules. The latter are generally prescriptive without defining modes of implementation, thus requiring informal frameworks to "grease the wheels" of implementation.⁴¹ Informal frameworks also exist as "gap fillers" where rules are silent or inexact, thus incapable of resolving emergent challenges.⁴² These two roles of informality define the core components of the negotiated order theory. The theory thus resonates well with the analysis of complex and dynamic institutions, like Kenya's devolved system, which are evolving and thus necessitate extensive informal frameworks for effectiveness.

Four elements of the theory are critical in analysing the conduct of governments in their mutual relations. Firstly, the theory asserts that at the heart of all social order and social change is negotiation: there can be no organization without some form of negotiation.⁴³ The latter is reflective of the dynamics of Kenya's intergovernmental relations.

Secondly, the theory asserts that the nature and content of negotiations is contingent on the contextual and structural conditions of the organization.⁴⁴ In any analysis of institutional conduct within and between orders of government, it is only possible to understand the nature of intergovernmental relations by appreciating the institutional structures subsisting and the history that has defined the formal and informal rules that these relations operate within.

Thirdly, the theory asserts that rules have situational limits. Shared agreements are renewed, revised and reconstituted over time and occasionally to deal with emergent contingencies. This occurs particularly when formal rules and structures to govern the activities of organizations are inadequate or are not explicit. Informal structures then emerge in which parties develop tacit agreements and unofficial arrangements that enable them to function.⁴⁵

The theory also conceptualizes power and power relationships as being situational and contingent in nature and, therefore, needing to be understood within the broader social context in which they are embedded. The theory's recognition of the primacy of power relations is central to understanding how the power dynamic plays out in intergovernmental interactions in polities like Kenya where national and lower-level governments are in perpetual contestation for resources.

38 RE Park and EW Burgess *Introduction to the Science of Sociology* (1921, University of Chicago Press).

39 KR Hope "Devolved government and local governance in Kenya: Implementing decentralization underpinned by the 2010 constitution" (2014) 13 *African and Asian Studies* 338.

40 E Nadai and C Maeder "Negotiations at all points? Interaction and organization" (2008) 9/1 *Forum Qualitative Sozialforschung / Forum: Qualitative Social Research* 1.

41 O Franziska and Y Shu (eds) *The Long Shadow of Informality: Challenges and Policies* (2022, The World Bank Group) at 356.

42 Reh "Informal politics", above at note 22.

43 Strauss *Negotiations*, above at note 37.

44 R Day and J Day "A review of the current state of negotiated order theory" (2008) 18/1 *Sociological Quarterly* 126.

45 GA Fine "Negotiated orders and organizational cultures" (1984) 10 *Annual Review of Sociology* 239.

This article aligns with the approach of negotiated order theory to management of societal change through negotiation and the role of power in such negotiations. It avers that subsisting rules and structures of intergovernmental relations, especially in transitory environments like Kenya's devolution, are often unable to resolve novel challenges leading to the creation of informal frameworks. The situation is exacerbated when a novel crisis like the COVID-19 pandemic occurs and demands governmental attention. This inevitably demands renegotiation on different modes of interaction that are not covered by formal rules, but which enable the resolution of evolving contingencies and the stabilization of the social order. In those circumstances power, how it is obtained understood and exercised determines the character of negotiations and their ultimate implications, a situation that this article asserts were exhibited in the management of the COVID-19 pandemic in Kenya.

Informality and Kenya's constitutional framework

The extensive formalization of the Constitution of Kenya promulgated in 2010⁴⁶ was an acknowledgement that past governance challenges were partly attributable to informal governance through patronage and unrestrained abuse of discretion in governance.⁴⁷ The country had endured a system of governance dominated by presidents that relied extensively on informal power. The repealed Constitution, enacted as Kenya obtained its independence from Britain in 1963, but gradually amended, was widely seen as an impediment to constitutionalism.⁴⁸ The clamour to build strong institutions to check the presidency, the consequent departure from an "imperial presidency" and introduction of a devolved system of government was a rejection of this informal system of patronage.⁴⁹ It sought to institute a comprehensive formal governance architecture in which governance institutions would function independently⁵⁰ and allocation of resources would be rule-based and independent of the informality of politics.⁵¹

However, despite the promulgation of a new constitution and the introduction of far-reaching formal frameworks, the practical application of the Constitution has involved continuous innovation to make the institutions work effectively. Some of these innovations have involved political engineering that was predominantly informal.⁵² For instance, despite the establishment of a new infrastructure for elections in the Constitution, the operationalization of the same did not always accord with political expectations. In 2017, after a heavily contested presidential election that was successfully challenged at the Supreme Court and a repeat election ordered, the affirmation that the repeat election was valid did little to cure the tensions that enveloped the country.⁵³ It took an informal "handshake" that resulted from negotiations between the winning and losing candidates for the country to settle.⁵⁴

The Constitution also anticipates informality in other governance arenas and encourages its complementary potential. Article 4 of the Constitution recognizes customary law, an informal

46 The Constitution.

47 G Muigai "Constitutional amendments and the constitutional amendment process in Kenya (1964–1997): A study in the politics of the Constitution" (PhD thesis, University of Nairobi, 2001).

48 JB Ojwang *Constitutional Development in Kenya: Institutional Adaptation and Social Change* (1990, ACTS Press).

49 M Hassan "Continuity despite change: Kenya's new constitution and executive power" (2013) 22/4 *Democratization* 587.

50 W Mutunga "Transformative constitutions and constitutionalism: A new theory and school of jurisprudence from the Global South?" (2021) 8 *The Transnational Human Rights Review* 30.

51 W Mutunga "Kenya: A new constitution: Willy Mutunga on the culmination of almost five decades of struggles" (2013) 65 *Socialist Lawyer* 20.

52 G Muigai *Power Politics & Law* (2022, Kabarak University Press).

53 N Cheeseman (ed) *Institutions and Democracy in Africa: How the Rules of the Game Shape Political Developments* (2018, Cambridge University Press).

54 P Onguny "The politics behind Kenya's Building Bridges Initiative (BBI): Vindu vichenjanga or sound and fury, signifying nothing?" (2020) 54/3 *Canadian Journal of African Studies / Revue canadienne des études africaines* 557.

institution,⁵⁵ as a legitimate source of law, raising questions about its continued expression as an informal system.⁵⁶ Article 11 recognizes culture, another informal institution, not as a routine and habitual occurrence, but as the foundation of the nation. In article 68, the Constitution requires that land disputes be resolved through existing traditional dispute resolution mechanisms, while in article 159, the principles by which courts are to exercise judicial authority include “traditional dispute resolution mechanisms” consisting of informal norms, traditions and practices. Kenyan courts have consistently applied these informal norms in decision making.⁵⁷

Regarding devolution, one of the Constitution’s most transformative innovations,⁵⁸ articles 6 and 189 establish a framework for assigning functions and transferring responsibilities and resources to county governments. These foundational provisions require governments at both levels to conduct their mutual relations based on *consultation* and *cooperation*, requiring a vast array of intergovernmental relations. Intergovernmental relations, the mechanisms through which levels of governments in a decentralized or federal state coordinate their mutual relations, evidence an intermingling of formal and informal elements.⁵⁹

Convergence of formality and informality in intergovernmental relations in Kenya

Intergovernmental relations, the “workhorse” of every federal system,⁶⁰ are necessitated by the diverse challenges that decentralized states must contend with. These include conflicts over the juridical assignment of functions, competencies and responsibilities, as well as managing areas of confluence and divergence on the allocation and management of resources.⁶¹ Intergovernmental relations determine the health of federalism and other forms of decentralization since these systems are relational constructs.⁶² To drive intergovernmental relations, many jurisdictions exhibit a host of formal and informal institutions that facilitate the consultation and coordination of diverse governmental functions.

At the core of federal and decentralized systems are formal, constitutionally or statutorily defined structural foundational principles and institutions, around which intergovernmental relations occur.⁶³ In Kenya, the constitutional foundation for cooperation and consultation between the national and county governments is article 6 of the Constitution. The formal institutional structures for intergovernmental relations are then set out in the County Government Act,⁶⁴ which was explicitly enacted, according to the preamble, to give effect to constitutional provisions on devolution and the Intergovernmental Relations Act⁶⁵ whose role is to establish structures of intergovernmental relations.

55 K Cuskelly *Customs and Constitutions: State Recognition of Customary Law around the World* (2011, International Union for Conservation of Nature).

56 Kameri-Mbote *Contending Norms*, above at note 19.

57 F Kariuki “Traditional dispute resolution mechanisms in the administration of justice in Kenya” in ES Nwauche (ed) *Citizenship and Customary Law in Africa* (2020, Centre for African Legal Studies) 33; Bwire “Integration of African customary legal concepts”, above at note 32.

58 CM Bosire “Devolution for development, conflict resolution, and limiting central power: An analysis of the constitution of Kenya 2010” (2013, University of the Western Cape).

59 D Krane and R Leach “Federalism and intergovernmental relations: Theories, ideas, and concepts” in J Rabin et al (eds) *Handbook of Public Administration* (2007, Taylor & Francis) 481.

60 J Phillimore “Understanding intergovernmental relations: Key features and trends” (2013) 72/3 *Australian Journal of Public Administration* 228.

61 Poirier *Intergovernmental Relations*, above at note 9.

62 E Aiyede “Intergovernmental relations and the strengthening of the Nigerian Federation” in E Onwudiwe and RT Suberu (eds) *Nigerian Federalism in Crisis: Critical Perspectives & Political Options* (2005, Programme on Ethnic and Federation Studies, Department of Political Science, University of Ibadan) 220.

63 FO Egwakhide et al *Intergovernmental Relations in Nigeria* (2004, Programme on Ethnic and Federation Studies, Department of Political Science, University of Ibadan).

64 County Government Act 2012, No 17.

65 The Intergovernmental Relations Act.

The Intergovernmental Relations Act established several formal institutions, the principal of which are the National and County Governments Coordinating Summit (the Summit), the premier vertical coordination mechanism to facilitate joint national and county planning and oversight, and a horizontal coordination mechanism, the Council of Governors (COG), to facilitate intra-county consultations and cooperation. To emphasize the critical importance of intergovernmental relations, the statute also created a permanent institution, the Intergovernmental Relations Technical Committee, with full-time members who facilitate the execution of the decisions of the Summit. Recognizing the need for day-to-day management of intergovernmental consultations within sectors, the Intergovernmental Relations Act also required the respective cabinet secretaries to create sectoral intergovernmental relations institutions. Most ministries have established these formal structures, including in health, agriculture and water.⁶⁶

Whilst this core of intergovernmental relations institutions is defined formally, the relational nature of intergovernmental interactions necessitates the creation of numerous informal systems through which the formal institutions operate.⁶⁷ By their nature, intergovernmental relations define the interface between the formal frameworks and the practical application of those prescriptions in the everyday management of government. Because the formal intergovernmental relations interface is never prescribed with exactitude by the law,⁶⁸ execution of these relations, of necessity, involves informal processes.

Comparative studies on decentralized polities indicate that the effectiveness of intergovernmental relations depends on an abundant mix of formal and informal coordination and consultation frameworks.⁶⁹ Several reasons inform this trend. The process of joint policy formulation, negotiations on the sharing of functions, fiscal allocations and transfers necessarily demands informal knowledge sharing, extensive negotiations involving horse-trading and bargaining. It is argued that these processes, which involve extensive give and take, would be prejudiced if the public were active participants and observers and are, therefore, best managed away from public view.⁷⁰ Intergovernmental negotiations also require continual building of trust networks, which are necessary for effective networking. Stein argues that federalism is “given life” by informal networks, and the social glue and long-standing ties of friendship that underpin highly effective and functional networks are the lifeblood of intergovernmental relations.⁷¹

In facilitating robust intergovernmental relations, Kenya’s Constitution and the various statutes anticipate both formality and informality in governance. The transitional character of the devolved system enhanced the necessity of informality in intergovernmental relations in Kenya. Complex governmental transitions require decision making in arenas unanticipated in the elegantly enacted formal prescriptions, thus generating informality both in decision making and in implementation. For instance, under the 6th schedule,⁷² the Constitution provided for a three-year transition period to a fully devolved system to ensure the setting up of the necessary infrastructure at the county governments. The long transition was intended to facilitate the development of an effective legal and institutional architecture within the county governments to facilitate a seamless switch-over. However, in 2013, due to political pressure from governors who wanted an immediate transfer of

66 *Report On Emerging Issues on Devolution and Best Practices in Intergovernmental Relations* (2016, Intergovernmental Relations Technical Committee), available at: <<objidref><https://igrtc.go.ke/views/img/downloads/Report%20on%20Emerging%20Issues%20on%20Devolution%20and%20Best%20Practices%20in%20Intergovernmental%20Relations/Report%20on%20Emerging%20Issues%20on%20Devolution%20and%20Best%20Practices%20in%20Intergovernmental%20Relations.pdf>> (last accessed 5 December 2024).

67 Aiyede “Intergovernmental relations”, above at note 62.

68 Phillimore “Understanding intergovernmental relations”, above at note 60.

69 *Poirier Intergovernmental Relations*, above at note 9.

70 GJ Inwood, CM Johns and PL O’Reilly *Intergovernmental Policy Capacity in Canada: Inside the Worlds of Finance, Environment, Trade, and Health* (2011, McGill-Queen’s University Press).

71 Gibbins and Stein *Canada by Picasso*, above at note 35.

72 The Constitution, sec 15, sixth sch.

the lucrative health function,⁷³ the Summit, a formal organ, agreed to a complete “big bang” transfer of most functions immediately after the elections, even before the county governments had set up any of the operational and coordinating infrastructure as anticipated by the transitional laws. Consequently, numerous informal mechanisms were created to manage the transition.⁷⁴

Scholars on governance also recognize that laws and regulations in periods of transition are vague in their implementation, leaving considerable room for discretion by implementers.⁷⁵ This was true of Kenya, where implementing the newly enacted decentralising laws entailed discretionary acts by officials at both levels of government. Perspectives on the meaning and implication of such laws would naturally vary between officers at each level of government. Reaching consensus on these variable and partisan interpretations necessitated informal negotiations between the parties to ensure harmony and coherence in interpretation and implementation.⁷⁶

Intergovernmental relations in the health sector during the COVID-19 pandemic

The formal legal framework for intergovernmental relations in the health sector in Kenya

The COVID-19 pandemic directly impacted all aspects of health service provision, overwhelming existing health provision infrastructure and prejudicing progress towards full realization of the right to health. In Kenya the right to health is guaranteed under article 43(1)(a) of the Constitution which obliges the government to provide the highest attainable standard of health to every citizen. Managing the COVID-19 pandemic effectively required cooperation between the national and county governments, to whom the implementation of the right to health is shared and to whom corresponding duties are reposed.

In relation to the COVID-19 pandemic and other health emergencies, the national Ministry of Health is responsible for coordinating, through the established intergovernmental relations mechanisms, all health aspects of disaster and emergencies and ensuring, through intergovernmental mechanisms, that financial resources are mobilized to ensure uninterrupted access to quality health services countrywide.⁷⁷

The county governments, on the other hand, are responsible for providing county health services, outlined in the Health Act and the implementation of national health policy.⁷⁸

The Constitution recognizes the possibility of overlaps in the functional areas of national government and county governments. To address concurrency of functions, article 6(2) and article 189(2) of the Constitution stipulate that the two levels of government must cooperate in performing their functions and exercising their powers. The implementation of these articles demands robust intergovernmental systems if the two levels of government are to meet their constitutional obligations.

Section 21 of the Health Act provides the framework for coordinating healthcare services in a manner that respects the distinct levels of government while respecting the principles of cooperation and coordination as outlined in the Intergovernmental Relations Act. Section 26 of the Health Act provides the framework for establishing inter-governmental structures in the health sector, namely a Health Sector Inter-Governmental Consultative Forum comprising national and county-level officials as a platform for mutual consultation, coordination and collaboration on all matters related to health.

73 L Kimathi “Challenges of the devolved health sector in Kenya: Teething problems or systemic contradictions?” (2017) 42/1 *Africa Development* 55.

74 “Report on the consultative forum between transition authority and the senate” (2015, Transition Authority).

75 Inwood, Johns and O’Reilly *Intergovernmental Policy Capacity in Canada*, above at note 70.

76 JK Mutakha “An interpretation of the constitutional framework for devolution in Kenya: A comparative approach” (PhD dissertation, University of Western Cape, 2014).

77 The Health Act 2017.

78 The Constitution, item 2, part 2, fourth sch.

The Kenya Health Sector Partnership and Coordination Framework 2018–2030 establishes several intergovernmental structures.⁷⁹ These are the Health Sector Advisory Oversight Committee (HSAOC), the Health Sector Inter-Agency Steering Committee, the Inter-Agency Coordination Committees (ICCs) and the Kenya Health Forum. The HSAOC is the highest level of the partnership and coordination structure, providing high-level strategic leadership and governance oversight towards the realization of national health sector objectives, while the ICCs, which are built around five health system blocks, serve as the technical arm of the partnership and coordination arrangements.

The establishment of these intergovernmental structures arises from a recognition that poor health sector coordination is a potential source of inefficiencies in the health sector with capacity to compromise the ability of both levels of government to achieve their constitutional edicts. Their formalization in statute underlines a belief in the centrality of formal structures in key areas of governance. The practical realization of the objectives of intergovernmental cooperation and consultation, however, demands more than formal structures as was evident in the management of interventions during the pandemic.

The practical reality of informality in intergovernmental relations in the health sector during the COVID-19 pandemic

The first case of COVID-19 was confirmed in Kenya in March 2020. In the first month of the epidemic, the national government used formal and informal powers in a highly centralized response process, leaving county governments as mere implementers of national government decisions.⁸⁰ Kenya's approach was not unique; global and regional experiences especially in the first phase of the epidemic disclosed a centralised approach that defied pre-existing decentralised governance structures. In South Africa for instance, the African National Congress government centralized responses ignoring the role of South Africa's sub-national governments which are constitutionally responsible for the management of hospitals and public schools.⁸¹

In Kenya, the national government, without consulting county governments, applied high-handed security interventions, informally expanding police powers to brutally enforce the decreed lockdowns and curfews, and forcing quarantines in sanitary risky environments.⁸² These initial approaches, commonplace in most of Africa, manifested abuses of power and of discretion, commonly associated with the negative aspects of informality. Many were successfully challenged in courts either as breaches of fundamental rights or lacking legal foundation.⁸³ These acts grossly prejudiced the legitimacy of the government's interventions.

Other abuses of discretion and power and jurisdictional overreach involved the national government implementation of a process of bulk purchases of COVID-related pharmaceutical products through a national government agency, the Kenya Medical Supplies Agency,⁸⁴ without any

79 "The Kenya Health Sector Partnership and Coordination Framework 2018–2030" (2019, Ministry of Health), available at: <http://guidelines.health.go.ke:8000/media/Kenya_Health_Sector_Partnership__Coordination_Framework_2018_-_2030_-Pg1-15March2020.pdf> (last accessed 5 December 2024).

80 B Bukenya et al "Understanding the politics of COVID-19 in Kampala, Nairobi and Mogadishu: A political settlements approach" (2022, African Cities Research Consortium).

81 "Intergovernmental fiscal relations and the COVID-19 crisis: Early lessons" in *Fiscal Federalism 2022: Making Decentralisation Work* (2021, OECD) 251.

82 DC Chau "The geography and politics of Kenya's response to COVID-19" (2022) 9/4 *PRISM* 213.

83 Cases where government overreach was successfully challenged include *Law Society of Kenya and Others v Inspector General of Police and Others* [2020] eKLR; *Charles Mwenda v Inspector General of Police and Others* [2020] eKLR where government actions were deemed unconstitutional and government required to use less restrictive measures in enforcing mandates respectively and *Okiya Omtatah v Cabinet Secretary for Health and Others* [2020] eKLR where a government directive for compulsorily quarantined persons to pay for their upkeep was deemed unlawful.

84 S Ochieng'-Springer "Governance and public administration during the COVID-19 pandemic: Issues and experiences in Kenya's health system" (2021) 49/1 *Politikon* 1.

intergovernmental consultation. The national government, taking advantage of the crisis character of the pandemic, applied emergency non-competitive bidding, a procurement method that has often been used by governments to formally bypass critical procedural requirements to reach perverse ends.⁸⁵ This action was criticized by the COG as a violation of law, as medical services, including drug procurement, was a county function.⁸⁶ Allegations of massive overpricing and corruption in relation to these national procurements irreparably tainted the legitimacy of the nation's COVID-19 interventions. In a survey on citizens perspectives during the COVID-19 pandemic an overwhelming 91 per cent of the population believed massive public monies had been lost to corruption during the pandemic creating what were termed "COVID billionaires".⁸⁷

This loss of legitimacy had the potential of weakening the government's capacity to effectively intervene in the crisis as legitimacy is widely considered to be a crucial determinant of efficacious crisis management.⁸⁸ Legitimacy fosters profitable citizen behaviour including compliance cooperation and obedience and is a driving force behind law abiding conduct.⁸⁹ Illegitimacy of government during emergencies can lead to high compliance enforcement costs and, in the case of health, increase disease prevalence and mortality.⁹⁰

As the pandemic progressed, formal and informal intergovernmental consultations and negotiations led to more harmonized approaches on the management of the interventions,⁹¹ a practice replicated in many countries, as evidenced in a study on intergovernmental cooperation in the BRICS countries (Brazil, Russia, India, China and South Africa).⁹² In South Africa, a country that shares similar intergovernmental structures with Kenya, formal fiscal rules were lifted to facilitate expedient COVID-19 financing and ad hoc intergovernmental structures were informally established where the existing institutional architecture for crisis response was insufficient.⁹³ In Kenya, the unprecedented nature of the emergency led to the use of subsisting structures of intergovernmental coordination, hitherto underutilized due to intergovernmental power struggles.⁹⁴ Until the pandemic for instance, the Summit hardly met, even failing to comply with the statutory requirement for meetings in 2018 and 2019.⁹⁵ In the first six months of COVID-19, the same Summit held three extraordinary meetings which were critical in formalizing many of the decisions arrived at during informal consultations.⁹⁶

Outside of the formal Summit, numerous informal intergovernmental meetings were held and reached key decisions that were necessary for calming an apprehensive citizenry.⁹⁷ Between April

85 K Griffore et al "Corruption risks in health procurement during the COVID-19 pandemic and Anti-Corruption, Transparency and Accountability (ACTA) mechanisms to reduce these risks: A rapid review" (2023) 19/1 *Globalization and Health* 91.

86 "Council of Governors Annual Statutory Report 2019/2020" (2020).

87 "Summary of results: Afrobarometer Round 9 survey in Kenya" (2022, Institute for Development Studies, University of Nairobi) 18.

88 D Beetham *The Legitimation of Power* (1991, Macmillan Education UK).

89 L Noyon, JW De Keijser and JH Crijns "Legitimacy and public opinion: A five-step model" (2020) 16/4 *International Journal of Law in Context* 390.

90 RA Blair, BS Morse and LL Tsai "Public health and public trust: Survey evidence from the Ebola virus disease epidemic in Liberia" (2017) 172 *Social Science & Medicine* 89; D Devine et al "Trust and the coronavirus pandemic: What are the consequences of and for trust?: An early review of the literature" (2021) 19/2 *Political Studies Review* 274.

91 Chau "The geography and politics of Kenya", above at note 82.

92 Jose Puppim de Oliveira et al "The role of intergovernmental relations in response to a wicked problem: An analysis of the COVID-19 crisis in the BRICS countries" (2021) 55/1 *Revista de Administração Pública* 243.

93 Phillip Harrison et al "Leadership, governance and institutional arrangements: South Africa COVID-19 country report" (2021, Government Technical Advisory Centre).

94 Osoro "COVID-19 and first wave response in Kenya", above at note 3.

95 "Council of Governors Annual Statutory Report 2018-2019" (2019).

96 Chau "The geography and politics of Kenya", above at note 82.

97 EM Ireri et al "Influence of conspiracy theories and distrust of community health volunteers on adherence to COVID-19 guidelines and vaccine uptake in Kenya" (2023) 3/3 *PLOS Global Public Health* e0001146.

2020 and September 2021, the COG issued a total of 30 statements on COVID-19 interventions carried out by county governments or jointly with the national government.⁹⁸ These statements and the annual reports of the COG in 2020 and 2021 expose extensive levels of intergovernmental cooperation, the majority of which occurred outside the subsisting formal intergovernmental frameworks. These frameworks were not mere ad hoc casual engagements but forums in which substantive decisions were made which determined the course of intergovernmental actions on COVID-19.

The official reports by the COG on what were largely informal interactions raises significant questions about the link between informality, transparency and legitimacy. One consistent concern on informality has been its opaque nature which is presumed to breed illegitimacy.⁹⁹ Transparency is not just a principle of good governance but is also one of the national values in article 10 and one of the principles of devolved government in article 174 of the Constitution. The myriad COG public reports on the informal meetings and decisions made therein challenge the opacity presumption by their compliance with the transparency principle. A comprehensive evaluation of informality would need to assess the extent to which providing official records of informal governmental processes provides a sufficient response to concerns about transparency.

By May 2020, the COG statements disclosed that the national and county governments had already instituted consultations outside the existing formal intergovernmental frameworks. These consultations resulted in national agencies entering into informal agreements to provide needed supplies direct to county governments. The COG also negotiated with the National Treasury outside of the formal processes prescribed by the Public Finance Management Act for additional conditional funding to county governments' health sectors and the non-reduction of the equitable share.¹⁰⁰ In the same month, the COG reported on an agreement with the Ministry of Health for the latter to employ health workers to support county governments.¹⁰¹ By law, the engagement of health sector personnel is the exclusive responsibility of the county governments and these employments, later renewed through similar informal arrangements,¹⁰² were effected outside of the formal legal frameworks. Disjointed hiring processes through county government mechanisms would have greatly delayed the interventions. The additional personnel, though hired through informal arrangements, enhanced the ability of county governments to tackle the pandemic and thus enhanced governmental legitimacy. In other informal undertakings in April 2021, the COG held numerous collaborative and consultative meetings with various ministries and agencies including the National Treasury, the Ministry of Health, and National Aids and STIs Control Program.¹⁰³ Such forums are not provided in the subsisting intergovernmental laws, yet they managed to resolve key issues including much needed interventions of non-COVID-19 diseases that were compromising the health of citizens.

Other agreements entered through these informal mechanisms included pharmaceutical-related interventions on shorter mode of procurement of emergency goods including personal protective equipment and for flexible budgeting processes.¹⁰⁴ These interventions, agreed through informal processes, enhanced the availability of critical equipment in critical phases of the pandemic and reduced its negative consequences.

98 "COVID-19" (Council of Governors press statements), available at: <<https://www.cog.go.ke/media-multimedia/statements/category/109-COVID-19>> (last accessed 7 April 2021).

99 Ayres "A decentred assessment", above at note 24.

100 "Press statement on the corona virus pandemic" (Council of Governors press release, 7 April 2021), available at: <<https://www.cog.go.ke/media-multimedia/statements/category/109-COVID-19>> (last accessed 4 October 2023).

101 "Press statement on preparedness of county governments on COVID-19" (Council of Governors press release, 6 May 2020), available at: <<https://www.cog.go.ke/media-multimedia/statements/category/109-COVID-19>> (last accessed 5 October 2023).

102 "Press statement on the corona virus pandemic", above at note 100.

103 Ibid.

104 M Kiruga "Kenya's fight against coronavirus difficult with its Two-tiered governance system" (2020, Africa Report).

It is clear from the COG reports on deliberations at the Summit¹⁰⁵ that many of the decisions made in the informal frameworks were adopted by the Summit. Decisions made through informal processes were also actualized through statute. For instance, to regularize a decision on the funding to county's COVID-19 interventions arrived at informally, the COG developed model regulations on County Emergency Funds, which were adopted in the counties. The latter provided the legal framework through which COVID-19 funds were disbursed and utilized.¹⁰⁶

This intermingling of formal and informal processes where decisions made in informal arrangements are then adopted formally, giving them legal force, or where informally procured decisions are converted into formal law, is typical of complimentary informal institutions as typologized by Helmke and Levitsky.¹⁰⁷ These informal institutions are gap fillers which deal with contingencies unforeseen by existing formal rules generally enhancing the latter's performance. Complimentary informal institutions point to the necessity of informality especially in crisis situations where creating new formal frameworks could severely prejudice effective interventions.

Other instances of informal consultations included consultations between the COG and the Ministry of Tourism to discuss interventions to rescue domestic tourism.¹⁰⁸ These consultations had no formal framework but made decisions that were implemented inter alia by including 29 counties' tourism offerings in national agency databases by September 2020.¹⁰⁹

The national and county governments also implemented unprecedented, stringent mitigation measures to restrain the rapid spread of coronavirus and its adverse effects. County surveillance teams comprised of national and county governments officials and co-chaired by governors and county commissioners¹¹⁰ ensured effective coordination of interventions in the counties. This collaboration had no supporting legal framework but was responsible for extensive decision making at the county level. Other frameworks set up informally were the intergovernmental emergency committees at county and sub-county level to enforce compliance with the nationally issued COVID-19 requirements on handwashing, masks and social distancing and to undertake drills to prepare citizens for more serious outbreaks.¹¹¹ These multi-agency teams are not anticipated in the subsisting intergovernmental relations legal infrastructure. Through informal consultations within these frameworks, the national government, for instance, progressively provided direct support to county healthcare facilities dependent on the nature of the disease burden. This included financial support to adapt external facilities like hotels and schools into isolation facilities. These informal frameworks were very effective in coordinating security, food relief, sanitation and vaccination operations that were being rolled out by the two levels of government at the local level.¹¹²

105 "COG Annual Statutory Reports for 2018-2019", available at: <<https://www.cog.go.ke/media-multimedia/reportss/category/92-council-of-governors-statutory-annual-reports>> (last accessed 5 December 2024); "COG Annual Statutory Reports for 2019-2020", available at: <<https://www.cog.go.ke/media-multimedia/reportss/category/92-council-of-governors-statutory-annual-reports>> (last accessed 5 December 2024).

106 Osoro "COVID-19 and first wave response in Kenya", above at note 3.

107 G Helmke and S Levitsky "Informal institutions and comparative politics: A research agenda" (2004) 2/4 *Perspectives on Politics* 725.

108 "Press statement on preparedness of county governments on COVID-19" (Council of Governors press release, 20 August 2020), available at: <<https://www.cog.go.ke/media-multimedia/statements/category/109-COVID-19>> (last accessed 5 October 2023).

109 "Press statement on preparedness of county governments on COVID-19" (Council of Governors press release, 3 September 2020), available at: <<https://www.cog.go.ke/media-multimedia/statements/category/109-COVID-19>> (last accessed 5 October 2023).

110 "Press statement on preparedness of counties on COVID-19" (Council of Governors press release, 3 June 2020), available at: <<https://www.cog.go.ke/media-multimedia/statements/category/109-COVID-19>> (last accessed 4 October 2023).

111 Ibid.

112 The reports on the activities of these informal intergovernmental institutions can be found in the county COVID-19 reports in the Council of Governors official news platform, available at: <<https://www.maarifa.cog.go.ke/>> (last accessed 5 December 2024).

Many of these decisions, though arrived at within informal fora, were acted upon and implemented without being subjected to formalization through subsisting legal frameworks whether at county or national level. This type of informality is analogous to substitutive informal institutions in the Helmke and Levitsky typology.¹¹³ They replace formal rules when the latter fail to achieve the objectives for which they were instituted. They however operate as coping strategies and thus enable formal institutions to achieve their objectives. The question that arises is whether decisions made in these informal environments, however legitimate and effectual can be challenged on the basis of “legal validity”. Are suitability, effectiveness and legitimacy an appropriate test of the validity of decisions of this nature as opposed to technical legal validity? The rule of law, based on a foundation of formal law, has traditionally been the primary test for legitimacy.¹¹⁴ Should this approach to legitimacy be subjected to review to take into account the reality, acceptability and effectiveness of informality? These issues remain moot in the discourse on informality especially where informality enhances the quality of governmental interventions.

Initial actions of the national government and subsequent intergovernmental relations consultations align with the negotiated order theory. Novel occurrences in emergent circumstances favour negotiations to reach accommodation ideal solutions. In circumstances where power dynamics favour one party, such party will attempt to enforce its position inevitably producing conflict.¹¹⁵ This was evident in the national government’s use of its extensive fiscal powers resulting in intergovernmental conflict and disruption in COVID-19 management. The conflicts were then informally resolved consensually incorporating county government preferences or by coercion where the decisions reflected assimilation into the national government preferences.¹¹⁶

The result of these informal processes, whether obtained through consensual negotiations or imposed on county governments through coercion resulted in a stable social order, in the manner espoused in the negotiated order theory, enabled the government to manage a crisis which would have been difficult to manage through subsisting formal processes.

There were, however, instances where the intergovernmental mechanisms failed, compromising the effectiveness of the responses to the pandemic. In a comprehensive survey of intergovernmental relations in health sector, Nyawira et al¹¹⁷ established that while formal mechanisms of horizontal and vertical coordination were prescribed, the same were dysfunctional, and actors within the sector compromised their effectiveness. County governments, in violation of the law and commitments to integrity that had been publicized during intergovernmental consultative forums, were reported to have engaged in extensive graft practices leading to overpricing of COVID-related materials or excess purchases of materials that were then dumped, leading to massive loss of public funds.¹¹⁸ These practices resulted in severe challenges in providing health services by increasing transaction costs due to inefficiencies and duplication and generally compromised effective health services provision. The same was established in a review of health sector coordination in Wajir County.¹¹⁹ A comprehensive analysis of the nature of fiscal, administrative and jurisdictional coordination established that there needed to be more coordination between the national and the county governments. The result was a delay in the release of critical funds, absorption challenges, wastage and

113 Helmke and Levitsky “Informal institutions”, above at note 107.

114 M Krygier “The rule of law and state legitimacy” in W Sadurski, M Sevel and K Walton (eds) *Legitimacy: The State and Beyond* (2019, Oxford University Press) 106.

115 I Lapsley et al “Government budgeting, power and negotiated order” (2011) 22/1 *Management Accounting Research* 16.

116 Bukenya et al “Understanding the politics of COVID-19”, above at note 80.

117 L Nyawira et al “Examining the influence of health sector coordination on the efficiency of county health systems in Kenya” (2023) 23/1 *BMC Health Services Research* 1.

118 J Lugulu “Corruption in Kenya during the COVID-19 pandemic and the right to health: Lessons learnt and future prospects” (2022) 6 *Journal of Anti-Corruption Law* 12.

119 HA Yussuf and W Subbo “The effect of inter-governmental relations on healthcare provision in Wajir County” (2019) 6/4 *Strategic Journal of Business & Change Management* 688.

inefficiencies that prejudiced the ability of the county to provide effective health services. These acts align with competing informal institutions within the Helmke and Levitsky typology whose effect is subversion of the objectives of formal institutions.¹²⁰

The impact of informal intergovernmental relations during the COVID-19 pandemic

Although the outbreak of COVID-19 in Kenya triggered a proactive response by the whole of the government, with both tiers strengthening intergovernmental relations, the coordination of government interventions was largely through structures that were outside the formal intergovernmental structures provided by the various legislation, particularly the Intergovernmental Relations Act and the Health Act. Understandably, COVID-19 being a global health emergency and with limited scientific knowledge of the virus, the risks posed by the virus to the healthcare system called for extraordinary measures.¹²¹

The negative use of informal authority, where the national government made some interventions without the constitutionally mandated consultation with county governments, in a matter that the Constitution concurrently assigns to both levels of government, substantially weakened the effectiveness and legitimacy of the COVID-19 response. At the height of the abuses of law, civil society organizations including the Law Society of Kenya and religious bodies protested about the way the interventions were carried out and even threatened court intervention. Parliamentary investigations resulted in a damning report on the manner in which government agencies had wasted public funds.¹²² Devolution was intended to localize problem-solving in services like health, and the pandemic provided an opportunity for effective intergovernmental relations to ensure optimal health service delivery.¹²³ However, the management of pandemic interventions by the national government exclusively in the early days of the pandemic reflected a negative use of formal and informal power and tainted the legitimacy of the interventions.

Numerous intergovernmental arrangements that followed in later phases of the pandemic facilitated better management. The latter involved formal consultation or informal mechanisms that complemented formal intergovernmental institutional arrangements. Budgetary processes were shortened through consultations in informal organs leading to faster access to funds that were necessary for emergency interventions.¹²⁴ Enforcement of security measures at the county level was coordinated through intergovernmental mechanisms.¹²⁵ Though security is an exclusive national government function, this informal approach recognized the critical role played by the county governments in local security arenas. The mass vaccination programme was also coordinated by both levels of government through an intergovernmental institutional framework unknown to the law, with decisions therein adopted through formal processes thus combining both formal and informal processes.¹²⁶

120 Helmke and Levitsky "Informal institutions", above at note 107.

121 J Mavedzenge (ed) *COVID-19 Pandemic and Socio-Economic Rights in Selected East and Southern African Countries* (2020, Jua and Company).

122 *PIC Report on Utilization of COVID-19 Funds by the Kenya Medical Supplies Agency* (2021, The National Assembly), available at: <<http://www.parliament.go.ke/sites/default/files/2021-09/PIC%20report%20on%20utilization%20of%20COVID%2019%20fund.pdf>> (last accessed 6 December 2024).

123 Ochieng'-Springer "Governance and public administration during the COVID-19 pandemic", above at note 84.

124 F Kinyanjui et al 'Hits and misses: Budget credibility in the context of COVID-19 in Kenya' (International Budget Partnership-Kenya Working Paper, 2021).

125 "Press statement on preparedness of county governments on COVID-19", above at note 108; "Press statement on preparedness of county governments on COVID-19", above at note 109; "Press statement on preparedness of counties on COVID-19", above at note 110.

126 "National COVID-19 vaccines deployment and vaccination, 2021" (2021, Ministry of Health), available at: <<http://www.parliament.go.ke/sites/default/files/2021-10/Scan-Third%20Progress%20report%20on%20the%20COVID%20situation%20in%20Kenya-Part2.pdf>> (last accessed 5 December 2024).

The gradual reopening of the economy followed protocols that were agreed at informal intergovernmental negotiations,¹²⁷ many of them formalized by being adopted in formal intergovernmental organs. The latter essentially “greased the wheels” of the formal bureaucracy. As the pandemic progressed, most of the interventions resulted from innovative informal governance arrangements as the formal frameworks were not “fit for purpose”. The informal intergovernmental networks resulted from a pragmatic search for an effective and proactive response to a ravaging pandemic that looked beyond the formal intergovernmental structures that were at times paralysed by bureaucracy.

Informal intergovernmental coordination at the local level was, for instance, more transparent, enabling the engagement of key actors at both levels of government to coordinate activities in ways that lessened the impact of the pandemic and improved overall health service delivery. The result was a positive perception by the citizenry on the government’s overall handling of the pandemic with 71 per cent of the population affirming the government’s efforts.¹²⁸

Conclusion

The Kenyan Constitution ordains robust, independent and functional institutional intergovernmental frameworks with corresponding obligations to cooperate and coordinate their affairs to advance the Constitution’s core commitments. The framework for consultation, cooperation and coordination was particularly essential in the handling of the COVID-19 pandemic in light of the concurrent nature of the health function and the unforeseen nature of the pandemic. Failure to effectively coordinate interventions between the two levels of governments would have resulted in massive resource wastage and loss of life from disjointed interventions across different levels of governments. While there existed numerous formal intergovernmental relations, such novel and contingent circumstances required complementary and supplemental informal intergovernmental arrangements. As argued in the negotiated order theory, the resolution of novel realities, like the COVID-19 pandemic, requires new solutions unanticipated in the subsisting formal structures, hence the extensive application of informal intergovernmental relations to manage emergent contingencies.

Evidence shows that informal mechanisms robustly supplemented the formal intergovernmental consultation and coordination mechanisms, and the combined measures contributed to the better management of the pandemic and better service delivery to the populace. On the other hand, the misuse of informal authority by both the national and county governments through corrupt acts often compromised the effectiveness of the interventions. The extensive use of go-it-alone and coercive approaches by the national government are however consistent with the way power and power relations are conceptualized in the negotiated order theory; the unequal power between the national and county governments affected the character of intergovernmental relations and negotiations thereunder.

Kenya’s experience affirms that informality is an extricable component of governance. The intermixing of formal and formal institutions is acute in complex environments like Kenya’s devolved system where functions are shared across orders of government. Being a system in transition, it must deal with new and emerging issues unforeseen in the setting up of the formal governance infrastructure. The creation of novel modes of interaction through negotiation reduces the disharmony that would result from the absence of rules to resolve emergent contingencies. Informality in those circumstances can promote service delivery and political legitimacy depending on the context in which it is operationalized, the political environment’s sensitivity and the constitutional order’s vitality. Informality in governance can secure a legitimating effect if anchored on acceptable public good conduct, good faith negotiations, comprehensive reporting and accountability to affected

127 Osoro “COVID-19 and first wave response in Kenya”, above at note 3.

128 “Summary of results: Afrobarometer Round 9 survey in Kenya”, above at note 87.

constituencies but can also be delegitimising where used to achieve perverse objectives, including unjust enrichment through corruption.

The legitimacy of the decisions made, and actions performed through formal or informal mechanisms, will ultimately be determined by their capacity to impact the lives of citizens positively in accordance with the objectives of the Constitution generally, and, in the present case, on health-care specifically. To the extent that informal governance frameworks contributed to improvements in service delivery during the COVID-19 pandemic, they enhanced the legitimacy of government and contributed to an improved social order. Where applied negatively, informality resulted in loss of the government's legitimacy. Ultimately, the use of informality in governance raises fundamental questions on how to balance its effectiveness against its impact on the rule of law, in particular, on certainty, transparency and accountability. These questions demand further research on this pervasive area of governance which does not commence with an intuitive condemnation of its efficacy.

Competing interests. None