Law and the political stakes of global crises

DOI: 10.1111/lapo.12203

ORIGINAL ARTICLE

LAW & POLICY UNIVERSITY OF DENVER WILEY

Law and the political stakes of global crises: Lessons from development practice for a coronavirus world

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Funding information
Swiss National Science Foundation

Abstract
Law has translated the coronavirus crisis into politically salient forms in people's lives, from states of emergency, to border closures, to mask mandates. Yet political theory work on these forms has focused on constraining arbitrary state power. In this paper, I try to broaden this focus. Substantively, I argue that policy and its implementation also matter to how we theorize the role of law in crises, in terms of how we understand the political power of society and its relationship to the state. Methodologically, I argue that thinking about law in this way is more than a complement to or replacement for thinking about constraints on arbitrariness. Rather, different forms of thinking about law and crisis should constantly be used to critique each other in order to pursue the sorts of legal innovations required by geomobile and interconnected crises. Given that the current pandemic and its broader consequences are still unfolding, I turn to development policy and practice to demonstrate the process and consequence of such ongoing critique in action. Studying rule of law reforms—including during the West African Ebola crisis—I show how practitioners continually reimagined law in ways that facilitated ongoing legal innovation that could adapt to the politics of the crisis.

1 | INTRODUCTION

Why is the relationship between law and crisis important? At the level of political theory, law is a way in which a crisis becomes politically salient in people's lives, by translating the crisis into familiar terms with political purchase, such as authority and right, or even states of emergency and vaccine mandates. In more abstract terms, "crisis" refers to conditions of rupture that

demand political formulation (Kohn, 2008, pp. 265–6).[1] Terms such as "exception" or "emergency" are thus examples of political formulations that are legal in nature.[2]

As ruptures, crises demand imaginative new legal forms to make sense of them, whether these forms are altogether novel or are novel combinations of existing laws.[3] Yet, I argue, prevailing political-theoretic rubrics for law in the coronavirus crisis have often returned to constraints on the exercise of arbitrary state power, such as emergency, exceptionality, and constitutionalism (Section 2). In this paper, I try to broaden these rubrics. Substantively, I argue that policy and its implementation also matter to how we theorize the role of law in crises. As some have begun to argue of the coronavirus crisis, we can only see and understand its politics—a combination of inequality and mutual vulnerability—through an engagement with administration in its various forms. For Lorenzini, the coronavirus crisis and administrative responses to it "reveal[] that our society structurally relies on the incessant production of differential vulnerability and social inequalities" (Lorenzini, 2021, S44). For Schubert, the biopolitics of the crisis is one "of differentiated vulnerability." This vulnerability "stem[s] from the multiplicity of different social positions and their respective patterns of vulnerability" (Schubert, 2022, p. 102). I contribute here by suggesting that the political stakes of thinking about law in terms of policy and implementation might be found not only in how it has *produced* the politics of the crisis, but also in how it shapes the political power of society, and its relationship to the state, as they *respond* to the crisis (Section 3).

Methodologically, I argue that thinking administratively about law in this way is more than a complement to or replacement for thinking about law in terms of constraints on arbitrary power. Rather, different forms of thinking about law in crisis can and should be used to critique one another in order to pursue the sorts of legal innovations required by geomobile and interconnected crises. Given that the current pandemic and its broader consequences are still unfolding, I turn to development policy and practice to demonstrate the process and consequence of such ongoing critique in action. I focus on "rule of law reform" practitioners, who produce law in the context of crisis and provide experiences to learn from. I go on to examine their response to the West African Ebola crisis and show how they continually developed and critiqued legal responses in ways that allowed them to adapt to the evolving politics of that crisis (Section 4). Finally, I extend both of these arguments—about the importance of the administrative dimensions of law to theorizing the politics of crisis, and about the political importance of subjecting different legal forms to mutual critique in crisis contexts—to the coronavirus crisis (Section 5).

2 | LAW AND CRISIS TODAY

States worldwide have grappled with what legal form to give to the COVID-19 crisis. Many turned to states of emergency, which citizens experienced through everything from border closures to vaccine mandates to lockdowns (Greene, 2020; Olewe, 2020; Verfassungsblog, 2020). These states of emergency have receded unevenly, over space and through time, with the possibility of their reimposition in the future.

As a result, "[c]oncepts that may have seemed obscure and or [sic] to have fallen out of one academic fashion, such as biopolitics or 'naked life,' have leapt from the page and become suddenly irrepressibly pertinent to our everyday experiences … [such as the] extreme, authoritarian measures taken to confront the pandemic" (Sotiris, 2020).

In late-February 2020, Giorgio Agamben himself weighed in, arguing that the Italian state had participated in, and taken advantage of, "the invention of an epidemic" (Agamben, 2020a) to install and expand a form of emergency rule.[4] In a subsequent post, he went on to argue:

> [What] the epidemic makes clear is that the state of exception, to which governments have long made us accustomed, has truly become the normal condition. There have been more serious epidemics in the past, but no one had ever thought of declaring a state of emergency like the current one, which even prevents us from moving. Men have become so accustomed to living in conditions of perennial crisis and emergency that they do not seem to notice that their life has been reduced to a purely biological condition and has lost every dimension—not only social and political, but even human and emotional. … No wonder war is invoked for the virus. Emergency measures effectively force us to live in curfew conditions. But a war with an invisible enemy that can lurk in other men is the most absurd of wars. It is, in truth, a civil war. (Agamben, 2020b)

Agamben recapitulates his well-known argument about the exception-as-the-rule for COVID-19. In this instance, the crisis takes the political form of a "civil war." The more general relationship between law and the exception remains the same. Referring to the Italian emergency decree promulgated to combat the epidemic, he argues that "there is once again the growing tendency to use the state of exception as a normal paradigm of government. … It would seem that once terrorism is exhausted as the cause of exceptional measures, the invention of an epidemic could offer the ideal pretext to extend them beyond all limits" (Agamben, 2020a). The law is, yet again, a fig-leaf over authoritarian creep.

In response, others have offered an alternative theoretical account of law and the coronavirus crisis. Sotiris (2020) suggests that the pandemic reveals a "democratic biopolitics," which Schubert (2020) elaborates as "collective care in a non-coercive way in which practices like social-distancing are deliberated democratically, thus not only based on 'the authority of experts' but on a 'democratization of knowledges.'" Where "traditional biopolitics focus[es] on the repressive state," à la Agamben, "democratic biopolitics focus[es] on the emancipatory agency of activists and the community." To do so, "democratic biopolitics needs a commitment to the rule of law and must always reflect the proportionality of measures taken" (Schubert, 2020).

Although on different sides of the argument, these scholars share the same problematic: how law might shape the exercise of arbitrary state power. We have seen how Agamben does so explicitly. Tewari (2020) defends Agamben's view of the pandemic as "war" and his concomitant concern with arbitrary power (cf. van den Berge, 2020). For Stelzenmüller (2020), law's role is to resist "[t]he coercive state," meaning that "other constitutional actors such as courts, governors and citizens [must] reassert their rightful roles, and demand that government actions be evidence-based, proportional, accountable and reversible." From her characterization of the crisis flows a liberal rule of law argument. Similar arguments flow from Swift (2021)—for whom the pandemic took form through unjust laws, unjustly made—and Ramsari (2020)—for whom it took form through unjust laws unequally applied.

Across a wide range of authors, the legal form of the *constitution of power* during the pandemic emerges as a core object of concern, with a range of well-established political stakes concerning liberty, violence, and constraints on the executive. For Delanty (2021), whatever the nature of the crisis, it is worth studying legal responses to it for their effects on liberty and control. For Mitropoulos (2021), law is relevant in the ways in which it structures the relationship between property and sovereignty, which then serves as a matrix through which the politics of the pandemic unfold (e.g., lockdowns vs. freedom). And for Meierhenrich (2021), law matters in the constitutional form given to executive violence, as well as the ways in which we might trace the continuities and changes of that form from colonialism to COVID-19. Thus, as Maduro and Kahn put it, as a result of the crisis, "maintaining democratic accountability within the organization of the nation state may be the defining question of constitutional construction for the next generation" (Maduro & Kahn, 2020, p. 10).

At the same time, crises demand new ways of thinking about law, or concerted works of legal imagination (Quintana & Uriburu, 2020, p. 14). Reiterating constitutionalist arguments may not be a sufficient response to the crisis at hand. Walker argues that the coronavirus crisis is "not merely an interlude of the imagination but a re-education in the art of the possible" (N. Walker, 2020, p. 37), demanding an alliance of legal imagination and practical politics. The invocation of this alliance shares an affinity with long-standing critical legal calls for "the development of [legal] alternatives, from the bottom up and from the inside out … [that are] understated or obfuscated by the prevailing analytic practice and the dominant legal theories" (Unger, 2015, p. 22). The crisis could be understood as awakening our inner critic, dislodging the prevailing analytic practice or dominant theories.

The task is and will remain pressing. As Chandler (2020) notes, "there will be no return to 'normal' after the lockdown is over." Even if, or as, the viral pandemic slowly unwinds, the institutional response and its legacies—for example, the evolving fate of those powers invoked and organized around this virus (everything from border controls to the ability to declare lockdowns across the globe) that have woven themselves into the machinery and institutional practices of the state—are still to play out. And as Posner and Vermeule (2009, pp. 1643–6) remind us in their study of the executive presidency, new legal forms birthed in crisis have a way of unfolding well past their conditions of conception. This is especially true of the pandemic, as it seems probable that the virus is here to stay, encoded into the legal and regulatory forms of the state (Tomic & Heims, 2022).

Yet it is difficult to specify *how* we ought to imagine new legal forms and anticipate their political consequences in medias res—a point highlighted in studies of the effects of the coronavirus on legalized spheres of life from corporate regulation to data and privacy, and many others besides (Pistor, 2020). My first step is to work through political-theoretic accounts of the relationship between law and crisis, and show the importance of incorporating the administrative dimensions of law into our legal imaginations.

3 | CRISES, EXCEPTIONS, AND LEGAL AUTONOMY

In this section, I provide three stylized ways to imagine the law–crisis relationship. These have legal idioms: nihilistic, constitutional, and administrative.[5] I begin with Huysmans' (2008) schematic distinction between two views of the law–crisis relationship, which he develops through a particular reading of Schmitt and Agamben.[6] First, law might be detached from or *irrelevant* to the political form of the crisis. That is, "law is still referred to in politics but does not have any significant bearing on it" (p. 166). Even though law might saturate zones or moments of exception—for example, the highly legalized context of Guantanamo Bay (Johns, 2005)—this law is "neither simply to be taken at face value as a matter of the necessity of balancing and rebalancing nor to be seen as the endgame of the validity of legal mediations of politics and life" (Huysmans, 2008, p. 179). Law and politics have no necessary relation (Aradau, 2007).

Second, law might give form to the crisis as a domain *autonomous* to politics. In this sense, the crisis is the "political moment … when the friend/enemy relation intensifies to such an extent that the normative procedural constraints upon political power have to give way to the necessity to face the enemy." We might associate this with assertions of "the autonomy of the political from law and the primacy of the exception over the norm. The authentic nature of the political act is a decision that cannot be constrained by any normative foundations" (Huysmans, 2008, p. 170). In this second view, the eventual legal form given to the crisis does not turn on the particularities of the crisis itself. Instead, Huysmans turns our attention to the dialectical relationship between law and the exception. Here, the rule of law is the set of rules giving form and force to a political act with no necessary prior rationale. The exception is a moment where a political act surpasses legal form and can be implemented in the world. And so on.

In Huysmans' readings of Schmitt and Agamben, they are little concerned with the specificity of the crisis and the law's relationship to it. So framed, Huysmans (among others) calls for studies of specific legal and governance *practices* as they relate to crises. Others have developed this call into yet another distinct view of the relationship between law and crisis. In this view, law helps constitute the substantive quality of the crisis itself. As Neocleous (2006, p. 208) puts it, "emergency measures … are part of the everyday exercise of powers, working alongside and from within rather than against the rule of law, as part of a unified political strategy in the fabrication of social order." While a crisis may take form at the limits of the law, its specific nature is in part an effect of its *entanglement* with the everyday administrative operations of law.

Clearly, the foregoing analysis is non-exclusive and non-exhaustive. It is also limited: the closer one looks, the blurrier the distinctions between irrelevance, autonomy, and entanglement become. But the purpose of this schema is to develop an account of the political importance of the law–crisis relationship that is broader than a concern with constitutional constraints on the exercise of arbitrary state power.

First, irrelevance: to the extent that law and politics have no necessary relation, and law is "in force without significance" (Agamben, 2017, p. 47), law's autonomy with respect to politics collapses (McLoughlin, 2010). "[T]he juridical condition of the normalised exception … [throws] into crisis the system of legal meaning" (McLoughlin, 2009, p. 256). The boundaries (or lack thereof) between authentic politics and law continually evanesce: "political *nihilism* and the moral law find their conjunction in an irreducible uncertainty" (McLoughlin, 2009, p. 246, emphasis added). In this collapse, we find "the elimination of the societal as a constitutive part of politics. [The notion of] the exception-being-the-rule ontologically erases the problematique of the political capacity and significance of 'the people' as a multidimensional differentiated sociality" (Huysmans, 2008, p. 176). As "the dialectic between law and politics collapses … 'the problematique of the societal' is no longer visible" (Huysmans, 2008, p. 176). This is law in a *nihilistic* idiom, where the politics of rule is one-directional. The sovereign does not relate to society, but instead governs bodies.

Second, autonomy: as noted above, in this account, law is autonomous with respect to politics and dialectically related to it. The sovereign "guard[s] the dialectic by deciding on legal transgressions as well as on conditions in which the institutionalized normative processes have become inoperable and demand a decision on a new constitutional order" (Huysmans, 2008, p. 180). He is able to guard the dialectic on the basis of "a politics of fear by making enemy/friend distinctions the organizing principle of politics" (p. 180). This, in turn, erases "the 'people' as a political multiplicity" (p. 180), replacing it with "the people" as a unity, in a relationship of "caesaristic identification … [by which 'the people'] transfer their political autonomy absolutely to the leaders" (p. 170). Thus, law—as something external and autonomous to the exception, but ultimately grounded by it—gives political form to the crisis. And this form necessarily reimagines the social body as one body.

This reading of Schmitt is useful for my purposes. Other readings might foreground a different Schmittian account of politics. Such readings are organized around a fear of the enemy, which in turn provides an analytical frame to understand the political consequences of crises—including work on exclusion and othering in developmental crises such as the West African Ebola outbreak (e.g., Kirk, 2020). However, I draw our attention to an alternative account of the political consequences of the form of law in Schmitt: how "society" operates as a *constitutive* body.

This account of politics enables us to analyze a range of constitutional and rule of law-like claims about the COVID-19 crisis. For example, it puts into relief the stakes of Schubert's (2020) effort to imagine a democratic biopolitics governed by the rule of law. Democratic biopolitics, in Schubert's account, "relies on a pluralist understanding of the political" (Schubert, 2022, p. 102). At the same time, law remains autonomous to the crisis and gives it

political form (here, the rule of law)—but in doing so, law is capable of embracing political plurality, based on a politics of mutual vulnerability rather than the friend/enemy distinction. Law, as a domain, continues to contain the politics of the "social," including that which the latter legitimates and to which it consents. In other words, for law to be autonomous and in relationship to the COVID crisis, we are concerned with law in a *constitutional* idiom.

Third, entanglement: in the context of the coronavirus, this view draws attention to the ways in which regulation enabled the virus to attain crisis status. For example, "anti-competitive regulation[s]" of markets (such as vitiating intellectual property in ventilator designs) have to be justified as exceptional and "in the light of overwhelming scientific evidence," rather than forming the basis for the design of public health systems (Tzouvala, 2020). As a result, the responses to the COVID-19 crisis can be characterized as the "familiar disguised as the extraordinary" (Saeed, 2020) in global legal arrangements. Yet at the same time, these responses can be described as remarkably novel and solidaristic: "The ethics of withdrawal before Covid is a show of a planetary collectivity, where we finally understand that our bodies are all connected, and that taking precautions in London will mean that more people will survive in the refugee camps or in the less developed world with more fragile health systems" (Philippopoulos-Mihalopoulos, 2020). In this view the relationship between law and crisis is complex and practical, encompassing "a multiplicity of places and times, and traditions of thinking the political, thus taking exception to the erasure of the societal and the catastrophic conceptions of the political in the jargon of exception" (Huysmans, 2008, p. 179).

Such a view is sensitive to the legal practices of implementation that give form to the crisis (Johns, 2005; Riles, 2013, p. 557)—practices which range across different domains of human activity, and could be formal or antiformal, technocratic or ethical, and so on. As such, this view rests on a legal idiom that "is thus not primarily constitutional but *administrative*" (Huysmans, 2008, p. 179, emphasis added), in that it is concerned with the "everyday exercise of powers" (Neocleous, 2006, p. 208) through law. This view retains an undogmatic sense of the autonomy of law—we can speak of the legal form of the same crisis in terms of both technocratic international economic law and solidaristic practices of isolation.[7] And law contains a complex and spatially variegated politics of the "social," one capable of encompassing self-interest, domination, and control as much as solidarity, mutuality, and care. Clearly, any concerted effort at legal imagination in response to a crisis would benefit from working with the complexities of this administrative idiom.

Table 1 outlines these different visions of the relationship between law and crisis. It names these three different ideas about the law–crisis relationship. It sets out the legal idiom through which these ideas are articulated in practice, identifies the visions of the autonomy of law and politics of "society" contained within them, and sketches their political consequences.

4 | RULE OF LAW REFORM, THE NEGOTIATION OF LEGAL AUTONOMY, AND THE POLITICS OF "THE SOCIAL"

Having set out the political stakes of doing so, I return to the question of how we might incorporate the administrative dimensions of law into our legal imaginations in times of crisis. I examine the legal responses adopted in the face of other crises (a methodological path that is well-trodden: see Ní Aoláin & Gross, 2006, pp. 3–9).

One of the lessons of the literature from the mid-2000s on Agamben, Schmitt, and crisis is that the *specific* form that a crisis takes shapes its political consequences. As Walker (2006, p. 79) points out, we need "purchase on how these exceptions are in fact made." Yet such specificity has not necessarily been a strength of that literature, as Griffin (2010, p. 283) laments. Thus, in this section, I map the framework above onto international development practice, and

TABLE 1 Some political stakes of the law–crisis relationship.

Law–crisis relationship	Law is irrelevant (exception-as-rule)	Law can be autonomous (law-exception dialectic)	Entangled
Legal idiom of articulation	Nihilistic (emphasis on law's irrelevance to politics)	Constitutional (emphasis on rule of law and its relationship to pure political act)	Administrative (emphasis on legal doings)
Autonomy of law	Collapsed	Autonomous	At least semi-autonomous
Political nature of "society"	Non-existent (politics of the body)	Legitimation of and consent to decisions	Complex, variegated, contested—reconfiguring who or what is "society," and what is politically salient to it
Political consequences	Politics as relentless domination by the sovereign, who holds power of decision over life itself	Politics as the relationship between sovereign and society (who may in turn be reconstituted through that relationship)	Politics as redefining, contesting, and making plural sovereigns, societies, and crises

specifically efforts to build "the rule of law" in the global South, in order to demonstrate legal innovation in practice and to consider what we might learn from the process.[8]

Development agencies and practitioners, backed by billions of dollars of aid, pursue these rule-of-law reform practices in order to produce legal and institutional change across diverse development activities, including peacekeeping, security, humanitarianism, human rights promotion, and other global governance activities, usually in the global South. Given the diversity of "rule-of-law reform" work, I make no generalized claims about it here. Rather, I use several examples to demonstrate how rule-of-law reformers have negotiated the autonomy of law from politics in contexts framed as crises.

The examples below all relate to the basic question of how to reform laws in legally plural contexts. For some development practitioners, legal pluralism is antithetical to development and an indicator of state weakness; it reveals the state's failure to assert its law, and its presence thus justifies continued developmental intervention (Clarke, 2009, pp. 141–3). Other practitioners take a softer view, seeing legal pluralism as both a social fact and normatively ambivalent, although they also see it as a phenomenon which is particularly pronounced in the specific conditions that mark "weak" Southern states (Tamanaha et al., 2013). Either way, engaging with legal pluralism requires development practitioners to come up with a variety of legal responses to some sort of crisis of the state.

The complexity of these examples means they cannot be easily schematized—and indeed, they all overlap in practice. Nevertheless, I relate them to the above schema of irrelevance, autonomy, and entanglement to show the legal idioms that practitioners use, the legal imaginations and political stakes that they contain, and the ways in which practitioners have contested these idioms.

First, consider how development actors understand the politics of post-genocide justice in Rwanda. For Rwanda, crisis upon crisis. First, there was the genocide, which itself produced a need for truth and reconciliation before Rwanda could transition back onto a path towards modern statehood—at least according to many international lawyers (Clarke, 2009, pp. 13–15). Where the international and national justice systems were not equipped to deal with an atrocity of this scale, these lawyers turned to *gacaca* courts—community-level institutions described as a locally owned and legitimate solution, autonomous from the political interference that plagued those other justice systems (Clark, 2010; Drumbl, 2005).

Soon, however, it became apparent that *gacaca* courts, far from being local and autonomous, were vehicles of surveillance and control for the autocratic Kagame regime (Waldorf, 2006). Beneath the romance of local ownership (which the regime sought to promote), the *gacaca* court system was "part of a state-imposed veneer of reconciliation" (Thomson & Nagy, 2011, p. 13) and a mechanism of state repression (Thomson & Nagy, 2011, p. 25).

Development actors now have two distinct accounts of law in Rwanda. Some continue to characterize *gacaca* courts as locally embedded and politically autonomous. They pursue their reforms on that basis, turning to *gacaca* courts for everything from criminal justice to land reform. However, other development actors have widely internalized a politically nihilistic account of these courts, in which no necessary link exists between law and politics (O'Connell, 2010, p. 133). As a result, "the social" as a political domain can move between being characterized as either (cloyingly) harmonious and horizontal, or surveilled and depoliticized through fear of the regime.

Second, take legal empowerment programs, defined as "process[es] of systemic change through which the poor and excluded become able to use the law" (Commission on Legal Empowerment of the Poor, 2008, p. 3). The "dominant model of legal empowerment" in development today (Waldorf, 2019, p. 439) involves deploying community paralegals. These are local actors who "have the merit often of possessing deep understanding of prevalent social norms and local practices, as well as local power structures" (Domingo & O'Neil, 2014, p. 8). Development actors provide paralegals with limited legal training so that they can "perform a range of legal roles: education, accompaniment, mediation, mobilisation, advocacy, and … litigation support. … They also aid their clients to navigate among plural legal orders" (Waldorf, 2019, p. 439). As Maru (2006) points out, "legal empowerment" is a profoundly political concept. It explicitly takes legal pluralism as its starting point, rejecting development efforts that focus on building state legal capacity (Golub, 2003). Its overall normative orientation is to build the legal capacity of the poor and excluded in order to help them use the law against the rich and powerful by, for example, helping ordinary citizens challenge large and land-expropriating mining firms (Maru et al., 2018).

Here, law is autonomous from politics. For example, Gisselquist (2019) points out that development actors imagine paralegals as "midwives" for legally constituted community power, especially in political struggles between the rich and poor. This reflects what I have referred to as the "constitutional" idiom, which in turn produces a vision of "the social" (here, "community") as a political domain. However, development actors have at best a thin understanding of the paralegal's "administrative" role or the practical details of her work, such as intermediation in interpersonal boundary disputes (Boone, 2019), and of how that role is entangled with alternative political struggles that might evoke other social and political relationships: for example, whether she is part of a program of state surveillance, a potential future state governor on the make, etc. The constitutional idiom thus brackets a more complex view of the politics of "the social" that implicates many overlapping arrangements and scales of power.

Third, consider recent efforts at legal experimentation (Desai & Woolcock, 2015). These efforts convene local stakeholder groups to develop legal experiments that tackle a shared problem, such as reducing teacher absenteeism. These experiments should "function" (normatively and practically) within the local context, meaning that the experiment itself should work though legal forms that already exist in the legally plural environment, and the stakeholder group should ensure broad-based political buy-in from "society" more broadly. So, an experiment might turn to customary chiefs to compel teacher attendance, allowing chiefs to conduct spot checks and collect community complaints; in turn, the stakeholder group would continually assess the experiment and its implementation, ensuring the continued support of chiefs, teachers, and parents for the measure. The stakeholder group continually adapts the problem, their own composition, and the legal experiment itself to the evolving context.

Legal experimentation efforts are concerned with how to turn "administrative fiction" into "administrative fact." One leading version of these efforts begins with the assertion that "[s]tate power creates administrative facts—it is what they [state actors] say it is …" (Pritchett, 2012, p. 5). When the state "fails," in the sense that it lacks that performative power, legal experimenters also search for other institutions that might have sufficient performative power to turn administrative fiction into administrative fact. Thus, for legal experimenters, the act of administering is practical. Experimenters build political alliances among social groups to support that act (Desai, 2020).

In legal experimentation, the view of the law is administrative. Law's autonomy from politics must be continually negotiated (Desai, 2020). The legal experiment is entangled with the specificity of the development problem, as well as the specificity of the legally plural environment. Sometimes the experiment relies on the formal authority of the law; at other times on its contextual embeddedness. "The social" emerges as an explicitly political entity, complex and always comprised of different configurations of stakeholders. Different and shifting alliances, coalitions, and contestations produce the social environment in which the legal experiment unfolds.

The different legal idioms through which legal pluralism is expressed in *gacaca*, legal empowerment, and legal experimentation imply different visions of legal autonomy and the politics of "the social." I make a further argument here. Development practitioners *explicitly* contrast and contest these visions as they pursue legal innovations in response to crises.

To further elaborate this point, consider development agencies' responses to the West African Ebola outbreak of 2013–2016 (an example that moves us a little closer to the specificity of the coronavirus crisis). Highly lethal, but rather difficult to transmit (requiring close and direct physical contact with infected bodily fluids), Ebola killed nearly 40% of the 28,600 people who contracted it—almost all in Liberia, Guinea, and Sierra Leone. The Ebola crisis gave rise to legal declarations of states of emergency in the three most-affected countries. Foreign donors also piled in: UN agencies, multilateral development banks, and bilateral donors provided funding, resources, and manpower to prop up these states and their failed healthcare systems. The responses were militarized: foreign and regional armies delivered aid and organized temporary health systems (Abramowitz, 2017; Enria, 2019; Wilkin & Conteh, 2018).

Given that Ebola spreads through close physical interaction, development practitioners rapidly concerned themselves with stemming local transmission. This, in turn, led them to confront various questions linked to legal and normative pluralism. In all three countries, practitioners had to engage with a complex fabric of laws, policies, and enforcement. Take burial practices, which were central to Ebola outbreaks, given that they necessarily entail interaction with the bodily fluids of the infected deceased. During their anthropological fieldwork in rural Sierra Leone during and after the outbreak, Richards et al. (2020) found that transmission had to be understood in the context of "the elaborate funeral rituals of … sodalities," particularly "the distribution of duties in preparing and taking leave of the corpse"—a set of rules known "only to members of the sodalities." These in turn intersected with "where the key elders came from across a chiefdom or chiefdom section," since the efficacy of state rules about interactions with dead bodies would depend on the nature and level of "collaboration with chiefdom administrations," owing to Sierra Leone's "dualist" legal system of national and Chiefdom law (p. 15; see also Sesay, 2019, pp. 19–20). In particular, these rules might be variably encoded into local bylaws and then variably enforced by different Chiefs. And the relevance of national law versus Chiefdom bylaw for people's behavior was also fluid and variable from chiefdom to chiefdom, and even within chiefdoms. For example, one interlocutor noted that burial practices had to change because "[w]e heard it from the Government that we should stay away from touching any sick person and if you do, then you are a carrier of the sick[ness] as well, and there is no treatment for the sick. The message was so intense that we have to be afraid of the sick, and that makes us to abide by the Government laws" (Richards et al., 2020, data appendix for

S1 village, p. 1). Yet within the same village, another interlocutor noted that "[w]e keep away from everyone, as we got it from the chiefdom that it is a law" (data appendix for S1 village, p. 2).

In such an environment with multiple and overlapping traditional and formal authorities, which actors needed to be persuaded to successfully enforce quarantine and lockdown? And (how) should the emergency health response account for traditional healing and burial practices?

In response, practitioners' debates ranged across a set of legal themes now familiar from previous sections of this paper. Should national and foreign militaries be deployed to enforce emergency measures, eliminating other political authorities and loci of social meaning such as burials? In Liberia, "[o]n empty fields, barracks-style accommodations were built for epidemiologists, lab technicians, and clinicians. Barbed wire fences enclosed these spaces," through which they communicated with patients. In Sierra Leone, in 2014, "President Ernest Bai Koroma transferred Ebola leadership from the Ministry of Health and Sanitation … to the Ministry of Defense … citing the military's enhanced capacity for coordinating logistics and other activities related to the Ebola response road map. For some political commentators in Sierra Leone, the shift of operations … was a political statement in which the president conferred greater legitimacy for handling national crises—public health or otherwise—to the military" (Benton, 2017, pp. 37, 43).

As one Sierra Leonean Office of National Security official noted:

> In some chiefdoms that I don't want to name, it was the lawlessness that made the sickness spread. … Why do you think they [invoked] this state of emergency? If [the state] had just relaxed, the thing would have been worse, so they saw that the best thing they could do was to bring in security. It was not violence per se, but just for people to comply with the law and for them to be able to listen to the medical advice. (Enria, 2019, p. 1613)

Here, the law starts to give way to militarized violence under a state of emergency.

Alternatively, should foreign donors support the state in extending its patchwork civil and secular legal authority over the country? For Dhillon and Kelley, writing on Guinea, the fundamental challenge to the state's ability to effectively promulgate and enforce restrictions, such as those on burials, concerned the rule of law: "Despite gains in establishing rule of law and economic growth since 2010, the legacy of past misrule and political upheaval lingers. … Such complex historical circumstances fuel distrust of formal power structures—and Ebola response efforts" (Dhillon & Kelly, 2015, p. 788). Thus, some policy responses directly engaged with the state's effectiveness in upholding the rule of law. For example, legal empowerment practitioners pursued projects to strengthen the rule of law framework around the Sierra Leonean state's Ebola response, which for them meant building the ability of the population as a whole to uphold their rights from and against the state, such as demanding the right to free healthcare where possible, even in a lockdown context (e.g., Achilihu, 2015, pp. 43–52). Or, at the level of the state, the British-led International Security Advisory Team (ISAT) had funded reforms of the Sierra Leonean armed forces and police since 2013. In 2014, ISAT's head commented that both bodies "demonstrated, beyond expectations, an ability to uphold the Rule of Law in a way which is sympathetic to the suffering and grief of the population" (Haenlein & Godwin, 2015, p. 4)—a claim which, whatever its empirical merits, is made in a constitutional idiom.

Or, in an administrative idiom, one might ask the following question: Should development actors work "more systematically through non-state actors" such as chiefs, traditional healers, and community health workers to respond to the exigencies of the crisis (Denney & Mallett, 2014, p. 4)? Here, development policymakers and practitioners pursued a range of contextual institutional experiments, piecing together, through the interactions of this diverse range

of actors, a mosaic of authority that might generate and enforce rules that would restrict the spread of Ebola (Fraser & Prudon, 2017, pp. 105–9; Richards, 2020, pp. 121–44).

For the purposes of my argument, it is important that development actors themselves were well-aware of how any given position in these debates would result in different political implications for the "social." For instance, in October 2015, in the midst of the Ebola outbreak, the International Crisis Group (ICG)[9] released a report titled "The Politics Behind the Ebola Crisis" (ICG, 2015). The report discusses the possibility that the crisis should be understood in terms of *legal irrelevance*, noting, for example, that some UN officials viewed the government's legal declarations of exception as masked efforts to justify quarantining or harming its political opposition. But the report immediately goes on to criticize this view. It expressly argues that such a view of the law–crisis relationship is in fact reductive of "society" as a political entity:

> Simplifying these tragedies … ignores existing dissatisfaction. Combined with poorly crafted messages of near-certain death if infected by Ebola and stigmatisation of survivors, rejection of government health information in historically excluded or exploited regions becomes somewhat more comprehensible. (p. 15)

The report goes on to offer an alternative view of law and crisis, which it argues is better because it turns "society" into a more complex political entity. To do so, the report contrasts the reactions of international actors for whom the crisis generated "a security response stoked by fear" and who in turn pursued a response based on the application of "strict guidelines" with those "who had long been in the area" and were attuned to the political possibilities of "local authorities," "local customs," and "cultural practices" (13). Here, the crisis of Ebola emerges not only as the virus itself, but also as a crisis *entangled* with the pre-existing administrative rules and practices of both development actors and "societies" (or communities) in West Africa.

The variety and availability of these positions demonstrate how development actors continually worked on their legal imagination in real time, by setting different legal idioms against each other. And this process can be put to productive use today.

5 | LAW, CRISIS, AND COVID-19

The immediate legal and policy responses to the coronavirus crisis have been surprisingly similar across the globe (including in many countries of the South: Macamo, 2020). "[P]ublic health experts have not proposed alternatives to comprehensive lockdown," irrespective of country contexts (De Waal & Richards, 2020). The University of Oxford has identified a limited toolkit of state responses and is tracking which tools governments are adopting at any given time (Hale et al., 2020).

These responses are predicated on a view of COVID-19 as a biological threat to the general good. In the first instance, it disproportionately harms the elderly and those with underlying conditions. However, it can also harm others. As the World Health Organization reminded the world, the young are not invincible (Nebehay, 2020). And if left unchecked, the virus could overwhelm healthcare systems, resulting in undifferentiated harm. The "general" good is thus specifically configured, your body could fail, you might need a scarce hospital bed, or you might lose someone from your intimate or broader social community. National-level policy responses follow: "school closings, travel restrictions, bans on public gatherings, [fiscal and monetary measures,] and other interventions to create social distancing or to augment public health provision" (Hale et al., 2020, pp. 3–4). These responses may differ in terms of intensity, but they share that particular view of the general good.

These legal and policy responses have been understood in terms of security and militarization, and more generally as legally nihilistic, in a manner reminiscent of one set of responses to the Ebola crisis outlined above. Recall Agamben's (2020b) claim that we should understand national governments' policy responses in terms analogous to a civil war. His use of "civil war" implies a threat from within the body of the general populace, to the body of the general populace, leading to a biopolitics of and over bodies.

Alternatively, some claim that state responses are about the relationship between the autonomous legal order and the crisis, in ways that might recall responses to the Ebola crisis concerned with consolidating state control or claiming rights from the state. This might be seen in specific instances, such as in analyses of Orbán's emergency rule in Hungary (Scheppele, 2020) or in broader concerns about how the response to the coronavirus erodes checks and balances and facilitates "caesaristic politics" in the form of recrudescent nationalism and authoritarian rule (Duffy Toft, 2020; Halikiopoulou, 2020).

However, it is possible to think of different framings of the crisis. One might broaden the aperture to engage in a discussion of political trade-offs between different and interlinked disasters. For example, writing of the Indian context, Ray et al. (2020) argue that the socio-economic effects of "India's lockdown" were not "a choice between lives on the one hand and loss of economic production on the other. Because India is so poor and because her occupational structure so un-amenable to being shifted online, it is a question of lives versus lives" (p. 1).

This argument sees the crisis as interconnected and complex, with differentiated effects. The policy response will have major impacts that can be counted in lives lost. The relevant political question is how to account for and distribute those impacts. Preferable distribution could be achieved by an enlightened sovereign, but it could also be achieved by pricing risk in insurance markets (e.g., individuals might drive less during a crisis, thereby decreasing the likelihood that they have an accident and end up in a hospital at a moment when hospitals are overwhelmed and they cannot afford preferential treatment: Kristian (2020)).

The framework for analysis that I have offered above suggests that the idioms of law in these examples are, in the end, similar to those in the previous set of examples. The crisis continues to be framed as a threat to the general good, with its particular vision of "society." It is only differentiated by its perceived effects. In other words, rather than offering a fundamentally different take, this view asks for a more complete account of the crisis. In this view, law remains either irrelevant or autonomous, in a nihilistic or constitutional idiom. Thus, we debate the nature, form, and scope of emergency laws. Should they be time limited? Should they serve international cooperation, or the national interest (as discussed in the EU: Krastev, 2020)? Should the transborder dimensions of the crisis be handled through rules or emergency powers? If the latter, should the exercise of those powers subsequently be understood as establishing derogations or new norms (Crawford, 2020)?

"Society," in turn, emerges as politically undifferentiated. It encompasses a range of interests—but insofar as the crisis impacts "society," "society" remains a singular constituent entity. This view of the relationship between legal autonomy and society is succinctly represented by Jonathan Sumption, a former judge of the UK's Supreme Court (Sumption, 2020): in response to the crisis, "[w]e have resorted to law … and banished common sense." The problem with laws under emergency, for Sumption, is that they produce "authoritarian patterns of life" (Sumption, 2020), in contrast to other, better modes of lawmaking which reflect the "common sense" of society as a whole.

Alternatively, one might think of ways in which the crisis is entangled with law, and in an administrative idiom. For example, consider a *communal* framing of the COVID-19 crisis and the concomitant response. In a way that might remind us of an institutionally experimental response to Ebola, this would require seeing the "crisis" as entangled with the pre-existing rules and practices through which communities administer their social lives. Alex de Waal, Paul Richards, and others have drawn on development actors' experiences of fighting Ebola and

HIV in sub-Saharan Africa to understand the COVID-19 crisis in this way (Ahmed et al., 2020; De Waal, 2020; Richards, 2020). They have used the Ebola crisis to show that "[i]t is useful to think of Covid-19 not as a single global pandemic, but as a simultaneous outbreak of innumerable local epidemics" (De Waal & Richards, 2020).

As an illustration, they have contrasted the elderly population of Italy with the young population of sub-Saharan Africa. At their time of writing, while 23% of Italians were more than 65 years old—and thus at comparatively high risk of dying from COVID-19—the corresponding rate was less than 2% in sub-Saharan Africa (De Waal & Richards, 2020). In addition to highlighting the differential distribution of harms (as in the example of India above), this approach points to the local political plurality and the embeddedness of epidemics, as summed up in the mantra "know your [local] epidemic, act on its politics" (Buse et al., 2008; De Waal, 2020). "Acting on its politics" describes different ways of *administering* the crisis through law: for example, developing and enacting "local variants of isolation, movement restriction, contact tracing and quarantine" (De Waal & Richards, 2020). Thus, in response to violent resistance to quarantines during the Ebola crisis, the Liberian government ceded control of local disease management to community leaders, who developed their own communal approaches based on "rapid local learning" (Richards, 2016, pp. 40–41, 134).

De Waal and Richards argue for the contemporary relevance of one of these approaches. Believing that there were not "enough respirators or intensive care units" to treat a serious outbreak of COVID-19 in much of sub-Sahara, they suggested establishing a series of "field hospitals" (as simple as "tents in a school field or even thatched sheds in the bush") that would allow "family members [to] nurse patients with Covid-19 without disabling local hospitals or health centres" (De Waal & Richards, 2020).

The authors here challenge the assumption that the only way to manage the risk of death from COVID-19 is to reduce that risk. Their proposed field hospitals become sites through which communities would reimagine the rules and rituals for the administration of death—and *the value of death itself*. In other words, the field hospitals are not just physical sites, but also legal forms for the crisis. Through these forms, communities negotiate norms and processes onto the lethal risk of the virus. The legal arrangements around the field hospital become a site through which society rethinks death as well as holds onto life. Similarly, during the Ebola crisis, a core question was the extent to which field hospitals should be governed by communal values as opposed to autonomous laws and standards (e.g., regarding burial practices). In turn, these decisions implied different imaginations of the community as a political entity (Pronyk et al., 2016).

An administrative idiom is practical, differentiated, and continually engaged in framing and reframing social organization through administrative trade-offs. In this idiom, COVID-19 could be an existential matter, or not. It could be universal, or communal. Legal responses might be developed in the name of the general good, or in a pro-poor fashion (as debated during the Ebola crisis: see Sanders et al., 2015, p. 648). Turning back to the Indian context, consider two framings that put my argument into relief. So far, scholars have generally focused on affected populations: for example, the likely disproportionate suffering of migrant laborers under lockdown. But we might instead follow Mukhopadhyay and Naik and ask: how it is even possible for the Indian government to consider a lockdown when a massive (but uncounted) proportion of its working population is both poor and mobile? This points to the administrative conditions of the political "invisibility" of such groups, and how they might be incorporated in a different political vision of "society" if those conditions were to change (Mukhopadhyay & Naik, 2020).

Those working in a Foucauldian register of techniques and technologies of power have begun identifying the ways in which administrative techniques during COVID-19, such as data models and the medicalization of political discourse, have acted on populations to reconfigure the social as a site of political power (Degerman, 2020; Johns, 2022). But these authors see such

reconfigurations as anomic (e.g., Degerman, 2020, p. 71). Supiot (2021), for example, argues against scientistic strands of COVID governance (its governance "by numbers"), which he believes are anti-social, in the sense of undermining society as a site of political power (pp. 134–6).

I am not so sure. As I have argued, a theoretical engagement with administrative practices and techniques in times of crisis can point to the complexity and pluralization of the political power of society rather than its attenuation, and can certainly enrich a legal imagination otherwise concerned with arbitrary state power. Through an engagement with law and policy, we might be able to imagine new social relations being forged, while others are extinguished. For example, Desai et al. (2020) show how the administrative transfer of unspent welfare funds in India and Italy to COVID vaccination programs diminished social relations of care for particular vulnerable groups in favor of strengthening them for society as a whole. As Pahuja and Baskin (2020) put it, the legal and policy forms we continue to deploy in response to the coronavirus crisis might transform the variegated relationship between "*bonhomie* and *anomie*" in our societies.

6 | CONCLUSION

In an effort to think concretely about how to keep our legal imaginations and practical politics open in extraordinary times, I have sketched out a schema to understand the politics of the law–crisis relationship; in doing so, I have foregrounded the political importance of incorporating administrative legal forms in our theoretical apparatus.

I have also proposed that we might learn from the ways in which development practitioners—and specifically rule-of-law reformers—approach law in times of crisis. Setting administrative, constitutional, and nihilistic legal idioms against each other is not an exercise in finding one idiom to prefer. Instead, this exercise, when worked through as rule-of-law reformers might, brings into focus some of the political stakes of responding to the pandemic. Consider De Waal and Richards, and Sumption, together. Both are making strong claims for the repoliticization of "society" through particular legal and administrative arrangements—the former with respect to death, the latter with respect to the state. This repoliticization, we might infer, could be an important consequence of the legal forms we imagine during the crisis—and one not to lose sight of.

Learning from development practitioners in this way, I have argued, might enlarge our sense of our legal imaginations—and its political consequences—in response to the crisis.

ACKNOWLEDGMENTS

I am grateful to John Haskell, Anna Leander, Rebecca Tapscott, Rene Uruena, Neil Walker, and the editors of the special issue for their time and conversation. I also gratefully acknowledge support from the Swiss National Science Foundation Sinergia grant "Reversing the Gaze: Towards Post-Comparative Area Studies" (Project number CRSII5_193795).

ENDNOTES

[1] These conditions could be factual or performative (i.e., the political formulation could precede or follow the conditions of rupture: see Kyriakopoulos, 2011).

[2] This solution certainly is not perfect: "crisis" itself could be understood as a political formulation. As an example of the complexities of the term "crisis" here, see McLoughlin (2012). Working through Agamben's oeuvre, McLoughlin tries to draw a distinction between crisis as conditions of rupture—or "crisis politics"—and crisis as a collapse of political formulations—for example, a "crisis of law." However, my argument does not turn on whether crisis is conceptually prior to a collapse of political formulations—I am simply interested in nuancing a set of theoretical ideas about the relevant legal forms that might give shape and respond to the coronavirus crisis. So for the sake of simplicity, I use

"crisis" in a rather mundane sense of conditions of rupture—and I am in good company (Griffin, 2010; Hanafi & Long, 2010; Kuo, 2014).

[3] This novelty also pluralizes our sense of what might count as a "legal form," as many have noted of the coronavirus crisis (e.g., Deakin & Meng, 2020, pp. 546–51; Golia & Teubner, 2021), and may, in some iterations, blur boundaries between "law" and "policy" as formal categories. This plural orientation towards legal form fits well with my call to engage with policy and its implementation as we think about the role of law in the coronavirus crisis (see Sections 3 and 5).

[4] Quotes from Agamben's blog are translated by the author.

[5] I use "idiom" in the generic sense of an esoteric and non-compositional grouping of forms (Roy, 2009, pp. 79–80; Sterett, 1990, p. 754). I am not thus referring to particular fields of law when I use the terms "constitutional" and "administrative"; rather, each word connotes some sort of shared formal quality, that I go on to describe as concerned with "autonomy" and "entanglement."

[6] To signal that this is *not* an exegetic project, but the development of a heuristic framework, I deliberately read Schmitt and Agamben through secondary literature in the service of stylizing and schematizing a set of arguments.

[7] See also Posner and Vermeule (2009), who describe the construction of a "series of legal grey holes" (p. 1658) in the laws and policies giving form to the bank bailouts in the United States following the 2008 financial crisis. They describe their view as "Schmittian," although their analysis of the varied responses to the 2008 crisis in fact fits well within my administrative idiom here.

[8] Suggesting that we should learn from development practice demands care, so I make explicit here what I am not doing. I am not arguing that this learning takes the form of the transfer of good practices or technical knowledge from the South to the North (whether the South is figured as a comparative "success" or endemic "failure" with respect to the North in dealing with COVID-19: Pilling, 2020). That would reproduce a political dynamic of extraction from the South (if a success), or its construction as pathological (if a failure) that is normatively and analytically problematic (Kapoor, 2008, pp. 19–38). At the same time, I am also *not* pursuing the project of understanding concrete responses to the current crisis from the perspectives of, and conducted by, Southern political actors, intellectuals, administrators, and others (Al-Jazeera, 2020; Fonseca, 2019; Ndlovu-Gatsheni, 2020). That project is urgent; however, it is not excluded by mine, and I am neither politically nor analytically apt to pursue it.

[9] In 2014, *Third World Quarterly* dedicated an entire special issue to the ICG and its "construction of political knowledge" about crises and emergencies, illustrating the think-tank's centrality in this area (see Bliesemann de Guevara, 2014, and the allied contributions).

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How to cite this article: Desai, Deval. 2023. "Law and the Political Stakes of Global Crises: Lessons from Development Practice for a Coronavirus World." *Law & Policy* 1–19. https://doi.org/10.1111/lapo.12203