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# Adaptation of Courts to Disruption<sup>1</sup>

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## Abstract

This article reflects on how courts in the USA and UK have remained active and resilient to provide access to justice, or due process, during times of emergency and disruptive events.. The focus here is not to define emergencies per se, but to analyse the impact of the emergencies and disruptive events that interrupt the functioning of courts and access to justice. The article provides a brief examination of the emergencies and the disruptions and the expected responses to those interruptions. The question for this paper is how do courts, adapt (or be adapted) in times of emergencies that disrupt their ordinary operation, both in terms of continuity of operations, but also in terms of protection of rights through judicial review? This paper will examine mainly two common law examples (England and USA) of how the courts adapted to such disruptions.

## Introduction: Operation of Courts and access to justice (fair trial rights)

Courts are the dispensers of justice between the state and citizen (public and criminal law), and between citizens (private law disputes) in “ordinary” or non-emergency times. The basis for this duty is that of citizens’ right to a fair trial, which is internationally recognised (for example under article 6 European Convention on Human Rights). People have a right to challenge government decision making, a right to an independent and impartial court if they are being charged with a crime as well as defending their personal rights against another person. This right has traditionally been dependent on there being physical access to courts,

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<sup>1</sup> An earlier version of this article was presented at XXX, online webinar, in 2021. My thanks to Dr Francesco Contini, IRSIG-CNR, Bologna, Italy, and to the two blind reviewers for their comments and feedback. All mistakes remain my own.

representation, public hearing, and public judgment. As such, procedures and structures are required to be in place for the right to be fulfilled.<sup>2</sup> The European Court of Human Rights has refused to interpret this right in a narrow way,<sup>3</sup> including calling out countries which create new specialised courts or tribunals to undermine the ordinary judiciary.<sup>4</sup>

The operation of courts occurs at three levels. There is the governance structure, with the ministry of justice (or equivalent), the President of the Courts (Senior Judge), and the head of court administrations.<sup>5</sup> Loosely put, the government supplies the financing for the courts, the President of the courts manage the judges, their comportment, and performance expectations, and the court administration manages the day to day running of the courts, alongside judges, who (usually) have to manage cases and ensure that cases are dealt with in a reasonable time. These aspects are essential to ensuring a fair trial, and that judges are and remain independent and impartial.<sup>6</sup> Do things go wrong? Yes absolutely. Any situation can disrupt the management of a court, including incompetent or corrupt judges, administrators and politicians, which can cause further delays and backlogs. However, constitutions and legislation are normally set out to mitigate situations in which judges and court administrators can be corrupt or incompetent, and thereby minimise the impact they can have on court performance. Implementation of new legislation can also cause a flood of cases to a court, but also in this case ordinary measures are available, such as mobilising more resources to deal with the increased caseload.

Emergency situations, however, cause a different type of disruption, that can have consequences for the practical functioning of courts than the regular problems that courts

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<sup>2</sup> Mindaugas Simonis, "Effective Court Administration and Professionalism of Judges as Necessary Factors Safeguarding the Mother of Justice-the Right to a Fair Trial" (paper presented at the IJCA, 2019). *International Journal For Court Administration* vol 10, iss.1, Winter 2019 pp47-48

<sup>3</sup> *Ibid.* p48

<sup>4</sup> *Juszczyzyn v. Poland* (application no. 35599/20) ECHR 308 (2022), 06.10.2022

<sup>5</sup> Ng, Gar Yein, *Quality of Judicial Organisation and Checks and Balances* (Antwerp: Intersentia, 2007).

<sup>6</sup> Simonis. pp51-53

might face. This article goes onto looking at how courts tackle those problems looking at first level responses (keeping continuity of operations for daily trials), as well as second level responses (continuity of constitutional function of judicial review).

There is a general understanding that legislation in response to emergencies will be considered “draconian” in terms of restricting liberties and rights. Judicial review and ordinary litigation and adjudication may not be possible in these situations, which goes to the heart of question of whether procedural requirements can be fulfilled, in terms of fact-finding, finding witnesses willing to testify, and understanding that some “systemic” crimes go further than “individual lapses.”<sup>7</sup> The courts also have an important role to play in the separation of powers in emergencies for the protection of individual rights but they “have tended towards the marginalisation of judicial adjudication as a force for change or constitutional governance in emergency cases.”<sup>8</sup>

When there was a call to present papers on a series of webinars titled 'Condition Critical: Disruption, disaster and the challenges to law' in 2021, it followed the pandemic and lockdowns from the spread of the coronavirus (Covid 19). During and following lockdown, the news contained a lot of material about how courts had to be closed across the world to protect staff and court users from the virus. When thinking about the continuity of operations in courts (at any level), it is useful to think in terms of what makes a court operate- judges, administration, lawyers, a court house, computers, internet, software. One can think of all of these as “technologies” that make the courts operate. What happens if one or more elements cannot work? Can other elements be made to work, or do all of these “technologies” reflect the functioning of access to justice? Quite a lot has been written about court operations during and following the pandemic lockdown.<sup>9</sup> The world has gone through and continues to

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<sup>7</sup> Walker, Cole "The Commodity of Justice in States of Emergency'," *NILQ* 50 (1999). p.165

<sup>8</sup> Ibid. p.168

<sup>9</sup> International Journal For Court Administration Special Issue: The COVID-19 Crisis- Lessons for the Courts Volume 12 - Issue 2 – 2021: <https://iacajournal.org/issue/36> accessed 17/01.2023

go through many emergencies and disruptions. “One of the key differences between these categories is the fact that emergencies allow for preparation (insofar as they are related to core activities) whereas disruptions typically catch organizations unawares.”<sup>10</sup> Disruptions can arise from emergencies as unforeseen consequences.

Whilst this paper will not cover the world, but only a couple of case studies in the USA and UK, it is important for future disruptions (caused by emergencies) to understand what responses can be made by the courts (from these two case studies) when they do occur- whether disruptions can be accounted for and routinized in terms of preparation, and whether the technologies can be adapted to provide access to justice.

Research material on the aftermath of Hurricane Katrina in New Orleans, looked at an extreme level disruption, and how to keep access to justice functioning when an entire city is under water. The pandemic literature focused a lot on digitisation of the courts to allow for online hearings, with some debates on the parallels between the two and the meeting of fair trial rights requirements. Beyond literature that looked at operational responses to disruptions caused by emergencies, there was also some literature that looked at the constitutional framework for governments responding to disruptions when it came to the courts’ continued operations in England and (more so) in America.

These disruptions had different impacts on the operation of courts, which in turn led to varying responses through discussion and legislation. This has created tensions within legal systems, from an operational perspective, on how to keep courts running, and protecting rights of access to justice whilst protecting court users from the disruptions caused by emergencies. Research about court responses and adaptations to disruptions is important due to this relationship- courts protect the citizens from state abuse of its powers.

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<sup>10</sup> Hällgren, M., et al. (2018). "A matter of life or death: How extreme context research matters for management and organization studies." *Academy of Management Annals* **12**(1): 111-153.

The questions for this paper are: how do courts function in times of disruption, not just pandemics. Is it even a priority for governments to keep courts open when basic normal functioning of society has been severely disrupted? And beyond that, what have courts learned from these disruptions? Would they do things differently in future?

This article is structured as follows. There will be a brief discussion of emergencies disruption, and the use of a legal definition of “emergency”. The article will then look at the courts role in checking government power in times of emergency and disruption, before going on to examine the impact of disruptions on courts in the USA (Hurricane Katrina) and England (Covid-19 pandemic) during emergencies, examining issues of court governance and management, before going on to look at how courts in these countries adapted to those situations. The article then concludes by answering the questions set out in the above paragraph.

### Emergencies and Disruptions

Emergencies are not static in nature or definition, they “... are surprises that are in process, unique, and disruptive.”<sup>11</sup> Lanzara has asked the question, ““What happens in an established social setting when a disruptive event, such as a flood or an earthquake, breaks into the normal course of daily life?”<sup>12</sup> The concept of emergency encompasses a broad range of events, including natural disasters, global pandemics, and war (internal or external). More recently, emergency has also included economic emergencies (global market meltdowns) which can trigger mass losses of savings, and recessions.<sup>13</sup> Disruptions, as discussed above, are events that catch society unawares and unprepared such as acts of terrorism.

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<sup>11</sup> Ben Anderson and Peter Adey, 'Governing events and life: 'Emergency' in UK Civil Contingencies' (2012) 31 Political Geography 24 p30

<sup>12</sup> Giovan Francesco Lanzara, *Shifting practices: Reflections on technology, practice, and innovation* (Mit press 2016) p5

<sup>13</sup> Claire Kilpatrick, "On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts," *Oxford Journal of Legal Studies* 35, no. 2 (2015).

Emergency and disruption are arguably as much about the event, as they are about the response to that event. Responses to emergencies and the disruption to “normal life” can occur at three levels (which can also change depending on the specificities of the country), government level (risk assessment and policy), regional level (planning for emergency), and street level (undertaking exercises). This can complicate matters when thinking about who needs to decide on the continuity of operations in the courts (or any other public services for that matter).

One can argue against a “global state of emergency” and consider and respond each emergency or disruption individually and proportionately.<sup>14</sup> Emergencies and disruptions can also be seen as “opportunities for change and redesign, for exploration and innovation, but also as holes for penetrating into the underlying fabric of a practice.”<sup>15</sup>

There are different ways to use the concept of emergency, depending on the level of disruption to “normal” life, just as different events may cause disruption but may not be classified as an emergency per se. Operational responses are about bringing the disruptions and emergencies to an end.<sup>16</sup> Research looks into the “cycle of emergency planning” which includes detecting, preventing, handling and recovering from disruptions arising from emergencies.<sup>17</sup> However, it is also about understanding the nature of the disruptions and opportunities to innovate and prevent future disruptions.

#### [Why a Legal Definition of Emergency Matters to Court Operations](#)

The legal definition matters in so far as it impacts access to justice. In times of emergency and disruption, the rule of law often takes a back seat, whilst the executive seeks to resolve

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<sup>14</sup> Anderson and Adey, 'Governing events and life: 'Emergency' in UK Civil Contingencies'

<sup>15</sup> Lanzara, *Shifting practices: Reflections on technology, practice, and innovation* P3

<sup>16</sup> Anderson and Adey, 'Governing events and life: 'Emergency' in UK Civil Contingencies' P26; see also Alan Greene, 'Separating normalcy from emergency: the jurisprudence of Article 15 of the European Convention on Human Rights' (2011) 12 German Law Journal 1764 P1764

<sup>17</sup> Anderson and Adey, 'Governing events and life: 'Emergency' in UK Civil Contingencies' P29-32

the challenges they face.<sup>18</sup> A state will normally derogate from protecting certain rights in these times, including procedural rights and access to justice (access to courts).<sup>19</sup> The right to an independent and impartial tribunal is one of the first criteria under article 6 of the European Convention of Human Rights. However, according to the article 5 of the same Convention (right to liberty and due process), is subject to derogation in times of emergency.<sup>20</sup> This is relevant because courts may be closed as a proportionate measure when facing extreme disruptions or emergencies.

Another way that legal definitions can impact access to justice, especially the disruption caused in times of war or terrorist threat, is that it can limit who has access. The result of this is that even if a country can keep its courts open during times of conflict or other types of disruption, access may be limited in principle depending on legal definitions given to persons seeking to enforce due process rights, as well as the context in which they are seeking it. One example of this is the definition of “prisoners of war”, “terrorism” and similar. If a person captured does not fall under the definition of prisoner of war, they are not subject to the protections of international law of war, and this limits their access to courts and due process rights.<sup>21</sup>

The former discussion looks at our right to access a court under “normal” conditions, whereas, the latter discussion tells us who lacks those rights under “emergency” conditions such as war and terrorism. In light of this possibility to restrict access to courts, it is useful to see how the courts may respond in a constitutional way- reviewing government decisions in this area,

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<sup>18</sup> Fionnuala Ní Aoláin, "The Individual Right of Access to Justice in Times of Crisis: Emergencies, Armed Conflict, and Terrorism," in *Access to Justice as a Human Right*, ed. Francesco Francioni (Oxford University Press, 2007).

<sup>19</sup> Ibid. p.59

<sup>20</sup> Ibid. pp69-72

<sup>21</sup> Ibid. p78

### Courts as a “deferring” authority during emergencies

There is literature discussing the "deference thesis" in times of emergencies.<sup>22</sup> However, there

are two possible arguments against deference to the executive in times of emergencies- the

first "is that rules dominate standards at moments of crisis. An executive that is

unconstrained... will make worse policy choices than an executive that is bound by rules." <sup>23</sup>

This is a strong checks and balances argument, which suggests that it is possible for the

judiciary to have constitutional oversight of the executive as in normal times.

These arguments are potentially flawed, because “the type of emergency that calls for

deference is not” routine. Constitutional norms arguably operate under "normal"

circumstances- where the legislature and courts can offer clear oversight of executive action

for routine situations.<sup>24</sup> Emergencies create situations outside of the norm and the executive

will have to contemplate actions outside of that norm. Following 9/11 the US courts gave the

executive deference, but not 100%.<sup>25</sup>

The general watchword for judicial review in times of emergency or when dealing with cases

of national security, is “deference.” In a UK Case to the Supreme Court on an issue of

national security and decision to strip someone of their citizenship, and the appeals against

tribunal and lower court decisions, the Supreme Court deferred to the Secretary of State for

Home Department.<sup>26</sup>

The Coronavirus Act 2020 in England has also been shown to lack transparency in its

creation and execution. Similar to the experience of the USA, “[s]cant oversight mechanisms

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<sup>22</sup> Eric A Posner, "Deference to the Executive in the United States after September 11: Congress, the Courts, and the Office of Legal Counsel," Harv. JL & Pub. Pol'y 35 (2012).

<sup>23</sup> Ibid. p213

<sup>24</sup> Ibid. p214

<sup>25</sup> Ibid. p215

<sup>26</sup> R (on the application of Begum) (Respondent) v Secretary of State for the Home Department (Appellant) [2021] UKSC 7

have been applied to this sprawling legislative edifice.”<sup>27</sup> The Act has also been argued to be overly complex, difficult to enforce, and arguably illegal.<sup>28</sup> Furthermore, within this Act, there was a lack of attention to the rights protection.<sup>29</sup> The courts gave wide latitude and broad interpretation to the restriction of rights within the Act itself,<sup>30</sup> and the majority of cases that challenged the Act failed.<sup>31</sup> However, people have successfully challenged the fixed penalty for breaching rules about large gatherings in court.<sup>32</sup> As such, even though people have not successfully challenged the legislation, they have successfully challenged the interpretation of it.

However, this is not to say that following disruptions that come out of emergencies, that courts won’t do more to protect future rights. The approach of the Supreme Court of the USA in upholding rights during emergencies has been somewhat questionable.<sup>33</sup> Cole has argued that one can take a more optimistic view of the Supreme Court’s approach though, especially if one takes a longer view of their cases, after the emergency is over.<sup>34</sup> It has been shown that

*“... courts have at least sometimes been able to take advantage of hindsight to pronounce certain emergency measures invalid for infringing constitutional rights. And because courts, unlike the political branches or*

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<sup>27</sup> Coronavirus legislative responses in the UK: regression to panic and disdain of constitutionalism Rebecca Moosavian and Clive Walker, Andrew Blick, Northern Ireland Legal Quarterly Spring Vol. 73 No. 1 (2022) p106

<sup>28</sup> Ibid p.111 & 121

<sup>29</sup> Ibid p128

<sup>30</sup> R (Dolan) v Secretary of State for Health & Social Care [2020] EWCA Civ 1605 [92]–[94]. See also Terkes v Romania App no 49933/20, 20 May 2021; as cited by Moosavian et al (2022).

<sup>31</sup> Moosavian R. et al, “Coronavirus legislative responses in the UK: regression to panic and disdain of constitutionalism” Northern Ireland Legal Quarterly Spring Vol. 73 No. 1 (2022)

<sup>32</sup> Ibid p126

<sup>33</sup> Cole, David "Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis'," *Michigan Law Review* 101 (2003).

<sup>34</sup> Ibid. p.2566.

*the political culture more generally, must explain their reasons in a formal manner that then has precedential authority in future disputes.”<sup>35</sup>*

Whilst a judiciary will be predictably deferential during an emergency or disruption, they have been shown, both during and after (in the USA and England) to make an effort to strengthen those rights and set a precedent for the following emergency, and as such, the picture is not as pessimistic as pre-supposed.<sup>36</sup>

This brief discussion also tells us that if the courts’ powers are blunted in times of emergency at the highest level, it is arguable that the lower courts in these countries will struggle to operate where the emergencies and disruptions create other priorities for public resources (such as health care).

In what follows, we shall see that in some emergencies, courts cannot open, whether due to being closed or there being no court buildings left due to the nature of the disruption, let alone a functioning local government to ensure access to justice. It is important therefore to understand how courts are governed during emergencies and the disruptions that arise from them.

#### Court Governance During Emergencies

Once a state of emergency is declared, for example due to war, global pandemic, or environmental destruction, it automatically affects all state structures and public services, including the courts. The institution that is able to declare such a state for the courts will automatically have the “power to curtail court operations due to the emergency.”<sup>37</sup> The structure of decision making within any given state in this sense is extremely important-<sup>38</sup> firstly for the speed at which decision makers can respond to the disruption or emergency and

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<sup>35</sup> Ibid. p.2566

<sup>36</sup> Ibid. Ibid. p.2585

<sup>37</sup> Lurie. p.2 However, as discussed, eventually such measures, in a democratic state, will usually be subject to both legislative and judicial oversight. See e.g. the discussion by Aoláin.

<sup>38</sup> Anderson, B. et al (2012). "Governing events and life: 'Emergency' in UK Civil Contingencies." *Political Geography* **31**(1): 24-33.

keep the courts operating; and secondly for the impact it can have on scheduled hearings, not only those (few) of a politically sensitive nature, but also those (many) in pre-trial detention. In terms of response time, bureaucracy and layers in a legal system can hinder more than it can help. Hurricane Katrina was a natural disaster of epic proportions, which destroyed most of the city, including the homes of many people who worked in the criminal justice system. The courts were inoperable. During such an emergency, the courts were not high on the list of priorities to re-open when there were so many other issues to deal with in terms of lives lost and infrastructure of the city to rebuild.

Following Hurricane Katrina, it was recognised "... that the law itself operated to hamper emergency criminal justice response."<sup>39</sup> There are a number of examples where there were separation-of-powers issues delaying the courts from reopening. The first example given was that "... the legislature had to act to permit courts to function outside their jurisdictions."<sup>40</sup> This concerns the protection the status of the judge in terms of granting tenure and a permanent position. Constitutions, such as the USA one, restrict the possibility to close down courts and move judges without their consent, thereby protecting the independence and integrity of the judiciary.<sup>41</sup> Due to the principle of immovability of judges, it wasn't possible therefore to physically move judges from a situation of severe disruption to one where they could operate normally. Another example, similar to the first, is that Congress had to legislate to allow one of the federal district courts to operate outside of its normal "geographic jurisdiction."<sup>42</sup> Again, these rules are there, for the same reason, to protect the status and independence of the judiciary. Eventually, the "Louisiana legislature adopted Louisiana's Criminal Justice Emergency and Disaster Act (ACT No. 52 of the First Extraordinary

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<sup>39</sup> Mary L Boland, "Will Your Criminal Justice Systems Function in the Next Disaster," *Crim. Just.* 22 (2007). p31

<sup>40</sup> Ibid. p31

<sup>41</sup> David Kosař and Samuel Spáč, "Conceptualization(S) of Judicial Independence and Judicial Accountability by the European Network of Councils for the Judiciary: Two Steps Forward, One Step Back," *International journal for court administration* 9, no. 3 (2018).

<sup>42</sup> Boland. p.31

Session, 2005).<sup>43</sup> This dealt with issues of jurisdiction for the state courts in terms of allowing for emergency sessions outside of normal jurisdiction, allowing for different places for these sessions to take place, and expanding the “jurisdiction for law enforcement, prosecutors, public defenders, and clerks related to emergency sessions of court”,<sup>44</sup> and adapting the procedures to the emergency.

In these situations, having both state and federal level legislatures needing to take time out of its normal legislative programming and understanding its priorities, slowed down progress in getting the courts back up and running and providing access to justice to those who needed it most.<sup>45</sup>

Looking at the other case study, in England, the main obstacle to a smoother response to the coronavirus pandemic by the government appears to have been its “disdain which they show for constitutionalism.”<sup>46</sup> It has been argued that they brought into force legislation to respond to the pandemic which was unnecessary because of existing legislation, which fully prepared the country for such a scenario. However, existing legislation would also have required oversight by parliament and other safeguards (including preservation of due process in the courts).<sup>47</sup> The legislation itself became overly complex and difficult to understand, not only for citizens, but also for the government (which was made clear in the event of “partygate.”)<sup>48</sup> As a result of the distraction of creating new and seemingly unnecessary legislation, as discussed above, the government suspended criminal trials and was then slow to adapt the courts for re-opening, which led to a massive backlog of cases.

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<sup>43</sup> Ibid. p.31

<sup>44</sup> Ibid. p.31

<sup>45</sup> Brandon L Garrett and Tania Tetlow, "Criminal Justice Collapse: The Constitution after Hurricane Katrina," *Duke LJ* 56 (2006). p.129

<sup>46</sup> Moosavian et al pp115

<sup>47</sup> Ibid pp112-115

<sup>48</sup> <https://www.instituteforgovernment.org.uk/article/explainer/commons-privileges-committee-investigation-boris-johnson> accessed 20/01/2023

Eventually, procedural rights, especially in criminal justice, were altered under the Coronavirus Act 2020. This especially allowed “various pre-trial hearings [to] take place by live video links.”<sup>49</sup> The backlog generated by the suspension of trials was alleviated somewhat by the use of video links and “adapted ‘Nightingale’ courts” (buildings adapted for court hearings, to keep court users and staff safe from the virus).<sup>50</sup> The government also attempted to modify the right to jury trial, but those plans did not come to fruition.<sup>51</sup> However, the “House of Commons Constitution Committee has made various criticisms of the ‘crisis level’ backlogs in the criminal justice system, deeming them ‘neither acceptable, nor inevitable’.”<sup>52</sup>

The different approaches in these countries to governing the courts during different types of disruption and emergency do show that it matters, in the immediate aftermath of severe disruptions, who responds, and how, which will have an impact on the continuity on the operation of the courts.

### Continuity of Operations During Emergencies

The options for continuity will vary depending on the nature and degree of the disruption and emergency. I have framed this section in two parts: first and second order consequences. First order consequences refers to what happens immediately following extreme events that impact a situation, whereas second order consequences will come after.<sup>53</sup> The first order consequences look at what happened following Hurricane Katrina in New Orleans and what happened in response to the pandemic in English court. A brief example of second order

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<sup>49</sup> Moosavian et al p105

<sup>50</sup> Ibid pp107-108

<sup>51</sup> Ibid p108

<sup>52</sup> Ibid. p108

<sup>53</sup> For a more, please see: Lanzara, G. F. (2016). Shifting practices: Reflections on technology, practice, and innovation, Mit press.

consequences is given in terms of the USA's response to 9/11 and the setting up of special criminal tribunals.

#### First order consequences

Hurricane Katrina showed that emergency preparedness was necessary for future emergencies- whatever their nature.<sup>54</sup> As we can see in the news, the world is full of disaster- fires destroying entire communities; floods destroying communities; earthquakes; war; terrorism; even solar flares can disrupt communications. All organisations prepare for emergencies such as fires with fire drills; and countries susceptible to earthquakes have drills to prepare their communities. An argument has been made for an "all hazards" approach to the criminal justice system (which should arguably extend to all parts of the justice system).<sup>55</sup> Sometimes, as discussed above, the entire system can break down, causing a dissolution in law and order on the one hand, and people being left in pre-trial detention on the other, with the courts, police, prosecutors, and defenders left unable to cope.

What all legal systems recently discovered was that continuity planning for natural disasters were insufficient for all emergencies. Hurricane Katrina wiped out the Criminal Justice System in New Orleans. Given that it was already under pressure, after the Hurricane, there were only six defence attorneys remaining to help 4500 defendants, the police force was reduced, and it took 9 months before they could run any hearings again, with a backlog of 7000 cases.<sup>56</sup> The recent covid pandemic shut courts across the world.

What they have learned from this is that there must be plans in place for future disasters. There must be a structure in place to take over when disaster strikes with people authorised to make decisions, the relationship between different levels and regions of government and the

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<sup>54</sup> Boland p.28

<sup>55</sup> Ibid. p.28

<sup>56</sup> Ibid. p.28-30

private sector must be clear and ready to respond, and training must be adequate to implement such plans.<sup>57</sup> This is also important for public trust in public bodies.<sup>58</sup>

In the other case study, England, in a joint report by the Criminal Justice Chief Inspectors on the Criminal Justice System's response to Covid-19 (a very different emergency to that of Hurricane Katrina, but severely disruptive to the criminal justice system) the inspectorates examined a "cross-system view of how the CJS [Criminal Justice System] reacted to the immediate aftermath of the first national lockdown... and of how the system has managed since."<sup>59</sup> [added]

The report shows that the immediate response of the CPS to the pandemic was "swift and sensible. Agencies reviewed their processes and practices, identified areas of risk and threats to the fundamental running of their parts of the CJS and acted accordingly."<sup>60</sup> The CPS were able to take advantage of the fact that much of their work was already online and they were able to access it remotely for home working.<sup>61</sup> As the CJS was already going through a process of digitisation for the sharing of evidence and other material prior to the lockdown, the pandemic accelerated the process, and nearly all forces had adapted to it.<sup>62</sup>

The report also notes that whilst half of the courts had to close down in the initial lockdown, they were able to re-open many of them, using "The Criminal Courts Recovery Plan" to help to minimise delays whilst at the same time, keeping the public safe from infection.<sup>63</sup> This includes measures such as employing more staff, making the court rooms they have covid-

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<sup>57</sup> Ibid. p.30; see also Anderson, B. and P. Adey (2012). "Governing events and life: 'Emergency' in UK Civil Contingencies." *Political Geography* **31**(1): 24-33.

<sup>58</sup> Ibid. p.34

<sup>59</sup> Criminal Justice Joint Inspection, "Impact of the Pandemic on the Criminal Justice System: A Joint View of the Criminal Justice Chief Inspectors on the Criminal Justice System's Response to Covid-19," ed. HM Crown Prosecution Service Inspectorate, et al. (HM Crown Prosecution Service Inspectorate 2021 Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services Her Majesty's Inspectorate of Probation HM Inspectorate of Prisons, 2021). p.6

<sup>60</sup> Ibid. p.8

<sup>61</sup> Ibid. p.8

<sup>62</sup> Ibid. p.9

<sup>63</sup> Ibid. p.9

safe, using ‘Nightingale courts’ (adapted buildings for court hearings to keep staff and users safe) and the use of technology.<sup>64</sup>

In its response to the pandemic, Her Majesty’s Courts and Tribunals Services (HMCTS) has “worked to roll out a courts’ video platform which allowed court users to attend virtually, and also increased the use of prisoner video links.”<sup>65</sup> This has been especially important for “detainees to have their remand hearings from a police station.”<sup>66</sup> However, the joint report is particularly critical of the infrastructure in place, as the work is placing too much strain on police forces, and they planned to withdraw from this system with HMCTS and recommend a new system to iron out the problems.<sup>67</sup>

HMCTS had also delivered a “cloud-based video platform, with the benefit of the early experience of virtual hearings in courts.” This can be used by anyone with a smart phone, and allowed prosecutors to cover multiple courts and allowed “real benefits in continuity of representation.”<sup>68</sup> This report highlights that since September 2020, its use has been in decline, which the report puts down to “a clear judicial preference for in-person court attendance.”<sup>69</sup> As listing is a local judicial function, and there are no national protocols for remote participation, they have reduced its use, which the report describes as “a lost opportunity.”<sup>70</sup>

This joint report further highlights concerns about backlogs caused by court closures during the pandemic, that have also been reported in the news. The backlog is in fact in the courts and not with the police or the prosecutors, who have managed to work through charging

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<sup>64</sup> Ibid. p.22; see also HM Courts & Tribunals Service, "Covid-19: Update on the Hmcts Response for Criminal Courts in England & Wales," (HM Courts & Tribunals Service, 2020).

<sup>65</sup> Inspection. p.10

<sup>66</sup> Ibid. p.17

<sup>67</sup> Ibid. p.17-18

<sup>68</sup> Ibid. p.18

<sup>69</sup> Ibid. p.18

<sup>70</sup> Ibid. p.18;

backlogs during lockdown.<sup>71</sup> There is a concern however about the increase in the remand population, and legislation has allowed for custody time limits to be extended for people on remand as a result of the court delays.<sup>72</sup> This is a concern, as people's fair trial rights are not being secured.

The courts have, however, seen a massive rise in cases since the pandemic and lockdown started.<sup>73</sup> The report states that the backlogs continue to grow in courts, with increasing numbers on remand in prison, and cases started in 2020 not set to go to court until 2022.<sup>74</sup> Though the joint report appears to point at certain issues in HMCTS response to the pandemic, HMCTS and the Independent Judiciary do not appear to have been idle either and have set out guidelines on operating the courts in a covid safe way. They posted weekly operational updates and run webinars for all professionals.<sup>75</sup> However, it would appear that there are some disjointed approaches between the courts and the rest of the Criminal Justice System, which may lead to some further erosion of fair trial rights.

It is noted that there is in fact a government website for "Emergencies: preparation, response and recovery" with a breakdown by sector on how to prepare for emergencies. It is somewhat unclear if the government used any of it in response to Covid 19 pandemic.<sup>76</sup>

Both legal systems were unprepared for certain types of disruption. Whilst no one could predict the ferocity of Hurricane Katrina, there could have been a plan in place to animate other actors who came forward in the wake of Katrina to provide access to justice.

Whereas in England, criminal justice courts were especially caught off guard and were forced to close, creating an immense backlog of cases. Not only did the UK government ignore

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<sup>71</sup> Ibid. p. 21

<sup>72</sup> Ibid. p.21

<sup>73</sup> Ibid. p.22

<sup>74</sup> Ibid. p.23 (This paper was originally presented in 2021)

<sup>75</sup> <https://www.gov.uk/government/news/new-nightingale-court-opens-at-university-of-hull> last accessed 28.01/2021; here is another emergency plan, set out in in Washington DC in 2005:

<https://www.american.edu/spa/jpo/upload/2151.pdf> accessed 23/09/2022

<sup>76</sup> <https://www.gov.uk/guidance/emergency-response-and-recovery> accessed 20/01/2023

previous preparations in place to take on the pandemic, they did not appear to follow their own preparations for such an eventuality. Not only that, but the courts fought back on the application of video technology to help combat backlogs.

This section has briefly examined first order consequences of court responses to disruptions and emergency situations.

### Second order consequences

Second order consequences are those that are triggered after the first order consequences (discussed above). Sometimes, a democratic country takes action to sidestep the protection of any rights to protect its citizens from harm. A prime example of this is

*“...the creation of Special Military Tribunals by Executive Presidential Order allowing those charged with terrorism to be processed by specially created military tribunals; the creation of designated detention sites, most infamously the detention site at Guantanamo Bay Cuba, for questioning and detaining persons suspected of terrorism indefinitely; and denial and restricted access to legal advice for those arrested on charges related to terrorism.”<sup>77</sup>*

There can be a conflict between access to justice and the competing desire (and requirement) to keep the public safe and secure. There are a number of cases where the US Supreme Court which gave itself jurisdiction over the cases from Guantanamo Bay to protect the rights of inmates there and the rule of law in emergency situations.<sup>78</sup> It can be argued that the court system is needed to re-establish and protect constitutional rights that have been hampered by emergencies and disruptions.

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<sup>77</sup> Aoláin. P88

<sup>78</sup> Ibid. pp89-90

There is also arguably importance in acknowledging the impact on communities on access to justice in relation to tolerance, inclusivity and non-discrimination. Courts have an important role in community building, as such it must be understood that lack of access to justice for individuals can “alienate communities.”<sup>79</sup>

This tells us that the continuous operation of courts is essential, not just for access to justice, but also for the continuity of communities. It is important then that courts are able to respond, at all three levels (courts, regional management, and at the political level) to disruptions to their operations.

## Conclusion

The question for this paper was how do courts function in times of disruption and emergency situations. Is it even a priority for the government to keep courts operating when basic normal functioning of society has been severely disrupted? And beyond that, what have courts learned from these disruptions? Would they do things differently for the next disruption? Countries are not short of people willing to help- in New Orleans, following Hurricane Katrina’s destruction of the criminal justice system. Universities’ law schools, students and staff, stepped into help when the defence attorney’s office was reduced to six members. They learned several specific lessons from this, that there was a need for: “leadership”; “centralized emergency information about criminal justice operations” and “legal oversight in the fair and effective administration of justice.”<sup>80</sup>

For adaptability of a legal system to emergencies, whether protection of the constitutional principles underpinning the legal system or continuity of operations following a disaster (and

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<sup>79</sup> Ibid. p89

<sup>80</sup> Boland p.28

we know that they are connected) there may be space for technological solutions in future, as long as it is part of the contingency plans.

Separation of powers and checks and balances, lack of leadership and understanding of the problems before plans are even laid out for future disasters, are all inter-related. We have seen that issues of separation of powers can in fact hinder the restarting of a criminal justice system after a disaster. Constitutional principles are arguably not supposed there to hinder recovery, rather they are there to protect rights and ensure that governments are held to account for poor decision making.

The answer as to how courts function in times of disruption, is that court buildings are but one representation of the technology that represents access to justice. Following Hurricane Katrina, lawyers and students gathered to do the work that could be done whilst the legislature went through its processes to reopen courts elsewhere. In the pandemic, the courts in England went online and adapted other buildings for hearings.

Is it even a priority when basic normal functioning of society has been severely disrupted? Yes, it is a priority. As we saw from the discussion above on how justice is served as a result of disruptions and emergencies, courts, their judges and staff, are arguably central to maintaining rights of people who would otherwise be forgotten by the system.

And beyond that, what have courts learned from these disruptions? The Supreme Court in the USA has shown a learning curve in respect to protecting rights during emergencies and disruptions. The courts in England have been adapting their technologies to cope with future disruptions. Routinization of emergency planning however would be ideal for all types of extreme events.

Would courts in any country do things differently if faced with similar disruptions in future? We won't know until the next disruption arises, but they are, arguably, not solely responsible

for their own operations- there is a polycentricity that must be acknowledged in keeping courts running and access to justice available.

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