

Adaptation of Courts to Disruption

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Abstract

This article reflects on how courts in the USA and England have remained active and resilient in providing 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 emergencies and disruptive events that interrupt the functioning of courts and access to justice. The article provides a brief examination of some emergencies and disruptions and the expected responses to those interruptions. The question for this paper is: how do courts adapt (or are adapted) in times of emergencies that disrupt their ordinary operation, both in terms of continuity of operations and in terms of protection of rights through judicial review? This paper will primarily examine two common law examples (from England and the USA) of how the courts adapted to such disruptions.

Keywords: Constitutional law; court governance; emergencies; emergency planning.

Introduction: Operation of Courts and Access to Justice (Fair Trial Rights)¹

Courts are the dispensers of justice between the state and the citizen (public and criminal law) and between citizens (private law disputes) in 'ordinary' or non-emergency times. The basis for this duty is citizens' right to a fair trial, which is internationally recognised (e.g., under article 6 of the European Convention on Human Rights). People have a right to challenge government decision-making and a right to an independent and impartial court if they are being charged with a crime, as well as to defend their personal rights against another person. This right has traditionally been dependent on there being physical access to courts, representation, public hearing and public judgment. As such, procedures and structures are required to be in place for the right to be fulfilled.² The European Court of Human Rights has refused to interpret this right in a narrow way,³ including calling out countries that create new specialised courts or tribunals to undermine the ordinary judiciary.⁴

The operation of courts occurs at three levels. The governance structure includes the ministry of justice (or equivalent), the President of the Courts (Senior Judge) and the head of court administrations.⁵ Loosely put, the government supplies the financing for the courts; the President of the courts manages the judges, their comportment and performance expectations; and the court administration manages the day-to-day running of the courts, alongside judges, who (usually) must manage cases and ensure they 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.⁶ 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, typically, constitutions and legislation are 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. Implementing new legislation can also cause a flood of cases to a court; however, in this case, ordinary measures are available, such as mobilising additional resources to deal with the increased caseload.

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² Simonis, "Effective Court Administration," 47–48.

³ Simonis, "Effective Court Administration," 48.

⁴ *Juszczyszyn* (35599/20) ECHR 308.

⁵ Ng, Quality of Judicial Organisation.

⁶ Simonis, "Effective Court Administration," 51–53.



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However, emergency situations cause a different type of disruption—which can have consequences for the practical functioning of courts—compared to the regular problems courts might face. This article will examine how courts tackle those problems, investigating first-level responses (keeping continuity of operations for daily trials) and 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.⁷ Judicial review and ordinary litigation and adjudication may not be possible in these situations, which goes to the heart 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’.⁸ 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’.⁹

A 2021 call to present papers at a series of webinars titled ‘Condition Critical: Disruption, Disaster and the Challenges to Law’ followed the pandemic and lockdowns from the spread of COVID-19. During and following lockdowns, the news contained much material about how courts had to be closed worldwide 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, such as judges, administration, lawyers, a courthouse, computers, the internet and software. One can think of all 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 these ‘technologies’ reflect the functioning of access to justice? Much has been written about court operations during and following the pandemic lockdowns.¹⁰ The world has gone through and continues to 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’.¹¹ Further, disruptions can arise from emergencies as unforeseen consequences.

While this paper will cover only a couple of case studies from the USA and England, rather than the entire globe, 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 routinised 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 investigated an extreme level of disruption and how to keep access to justice functioning when an entire city is under water. The pandemic literature focused much on the digitisation of 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 on operational responses to disruptions caused by emergencies, some literature explored the constitutional framework for governments responding to disruptions when it came to the courts’ continued operations in England and (more so) in the USA.

These disruptions had different impacts on the operation of courts; in turn, these 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 protect rights of access to justice while also protecting court users from the disruptions caused by emergencies. Research into court responses and adaptations to disruptions is crucial due to this relationship—courts protect the citizens from state abuse of its powers.

The questions for this paper are: how do courts function in times of disruption and emergency? Is it even a priority for governments to keep courts operating when the 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. First is a brief discussion of emergencies, disruption and the use of a legal definition of ‘emergency’. The article will then investigate the courts’ role in checking government power in times of emergency and disruption before examining the impact of disruptions on courts in the USA (Hurricane Katrina) and England (COVID-19

⁷ Moosavian, “Coronavirus Legislative Responses in the UK,” 110.

⁸ Walker, “The Commodity of Justice,” 165.

⁹ Walker, “The Commodity of Justice,” 168. For more discussion on the protection of rights during emergencies, please see Dyzenhaus, “States of Emergency.”

¹⁰ Fabri, M. “Foreword by the Editors.”

¹¹ Hällgren, “A Matter of Life or Death,” 125.

pandemic) during emergencies, as well as issues of court governance and management, before exploring 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’.¹² Lanzara has asked the following 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?’¹³ The concept of emergency encompasses a broad range of events, including natural disasters, global pandemics and war (internal or external). More recently, the term has also included economic emergencies (global market meltdowns), which can trigger mass losses of savings and recessions.¹⁴ As discussed above, disruptions are events that catch society unawares and unprepared, such as acts of terrorism.

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 should decide on 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 to each emergency or disruption individually and proportionately.¹⁵ 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’.¹⁶

There are different ways to use the concept of emergency, depending on the degree 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 disruptions and emergencies to an end.¹⁷ Research has explored the ‘cycle of emergency planning’, which includes detecting, preventing, handling and recovering from disruptions arising from emergencies.¹⁸ However, understanding responses to disruptions is also about understanding the nature of disruptions and opportunities to innovate and prevent future disruptions.

Why a Legal Definition of Emergency Matters to Court Operations

The legal definition of emergency matters insofar as it affects access to justice. In times of emergency and disruption, the rule of law often takes a back seat while the executive seeks to resolve the challenges they face.¹⁹ A state will normally derogate from protecting certain rights in these times, including procedural rights and access to justice (access to courts).²⁰ 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 Article 5 of the same Convention (right to liberty and due process), this is subject to derogation in times of emergency.²¹ This is relevant because courts may be closed as a proportionate measure when facing extreme disruptions or emergencies.

Another way that legal definitions can affect access to justice, especially the disruption caused in times of war or terrorist threat, is that it can limit who has access. The result 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 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, which limits their access to courts and due process rights.²²

¹² Anderson, “Governing Events and Life,” 30.

¹³ Lanzara, *Shifting Practices*, 5.

¹⁴ Kilpatrick, “On the Rule of Law.”

¹⁵ Anderson, “Governing Events and Life.”

¹⁶ Lanzara, *Shifting Practices*, 3.

¹⁷ Anderson, “Governing Events and Life,” 26; see also Greene, “Separating Normalcy from Emergency,” 1764.

¹⁸ Anderson, “Governing Events and Life,” 29–32.

¹⁹ Aoláin, “Individual Right of Access to Justice.”

²⁰ Aoláin, “Individual Right of Access to Justice,” 59.

²¹ Aoláin, “Individual Right of Access to Justice,” 69–72.

²² Aoláin, “Individual Right of Access to Justice,” 78.

The former discussion considers 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.

Courts as a ‘Deferring’ Authority During Emergencies

There is literature discussing the ‘deference thesis’ in times of emergencies.²³ 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.’²⁴ 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.²⁵

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.²⁶ 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 per cent.²⁷

The general watchword for judicial review in times of emergency or when dealing with cases of national security is ‘deference’. In an English case to the Supreme Court on an issue of national security and the 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 the Home Department.²⁸

In England, the *Coronavirus Act 2020* has been shown to lack transparency in its creation and execution in that ‘scant oversight mechanisms have been applied to this sprawling legislative edifice’.²⁹ The Act has also been argued to be overly complex, difficult to enforce and, arguably, illegal.³⁰ Further, within this Act, there was a lack of attention to rights protection.³¹ The courts gave wide latitude and broad interpretation to the restriction of rights within the Act itself,³² and the majority of cases that challenged the Act failed.³³ However, people have successfully challenged the fixed penalty for breaching rules about large gatherings in court.³⁴ As such, although 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 arise from emergencies, courts will not do more to protect future rights. The approach of the US Supreme Court in upholding rights during emergencies has been somewhat questionable.³⁵ Cole has argued that one can take a more optimistic view of the Supreme Court’s approach than a blanket accusation that the Supreme Court has failed to protect all rights during emergencies, especially if one takes a longer view of their cases, after the emergency is over.³⁶ 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 the political culture more generally, must explain their reasons in a formal manner that then has precedential authority in future disputes.³⁷

²³ Posner, “Deference to the Executive.”

²⁴ Posner, “Deference to the Executive,” 213.

²⁵ Barsa, “Regulating During Emergencies” 225.

²⁶ Posner, “Deference to the Executive,” 214.

²⁷ Posner, “Deference to the Executive,” 215.

²⁸ *Secretary of State UKSC 7*.

²⁹ Moosavian, “Coronavirus Legislative Responses,” 106.

³⁰ Moosavian, “Coronavirus Legislative Responses,” 111, 121.

³¹ Moosavian, “Coronavirus Legislative Responses,” 128.

³² *R (Dolan) EWCA Civ 1605*; see also *Terkes* 49933/20 (as cited by Moosavian).

³³ Moosavian, “Coronavirus Legislative Responses.”

³⁴ Moosavian, “Coronavirus Legislative Responses,” 126.

³⁵ Cole, “Judging the Next Emergency.”

³⁶ Cole, “Judging the Next Emergency,” 2566.

³⁷ Cole, “Judging the Next Emergency,” 2566.

While 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 presupposed.³⁸

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. Therefore, it is important 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, such as 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'.³⁹ The structure of decision-making within any given state in this sense is extremely important:⁴⁰ (1) for the speed at which decision-makers can respond to the disruption or emergency and keep the courts operating, and (2) 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, layers of bureaucracy 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 for reopening when there were so many other issues to deal with in terms of lives lost and city infrastructure that required rebuilding.

Following Hurricane Katrina, it was recognised 'that the law itself operated to hamper emergency criminal justice response'.⁴¹ There are several 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'.⁴² This concerns the protection of the status of the judge in terms of granting tenure and a permanent position. Constitutions, such as the US one, restrict the possibility to close down courts and move judges without their consent, thereby protecting the independence and integrity of the judiciary.⁴³ Due to the principle of immovability of judges, it was not possible 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'.⁴⁴ 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 Session, 2005)'.⁴⁵

The Louisiana Criminal Justice Emergency and Disaster Act dealt with issues of jurisdiction for the state courts in terms of allowing for emergency sessions outside 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',⁴⁶ and adapting the procedures to the emergency.

In these situations, both state-level and federal-level legislatures needing to take time out of their normal legislative programming and understand their priorities slowed down progress in getting the courts back up and running and providing access to justice to those who needed it most.⁴⁷

³⁸ Cole, "Judging the Next Emergency," 2585.

³⁹ Lurie, Ministerial Emergency Powers," 2. However, as discussed, eventually such measures, in a democratic state, will usually be subject to both legislative and judicial oversight; see e.g., Aoláin, "Individual Right of Access to Justice."

⁴⁰ Anderson, "Governing Events and Life."

⁴¹ Boland, "Criminal Justice Systems," 31.

⁴² Boland, "Criminal Justice Systems," 31.

⁴³ Kosař, "Conceptualization(s) of Judicial Independence."

⁴⁴ Boland, "Criminal Justice Systems," 31.

⁴⁵ Boland, "Criminal Justice Systems," 31.

⁴⁶ Boland, "Criminal Justice Systems," 31.

⁴⁷ Garrett, "Criminal Justice Collapse," 129.

In the other case study, in England, the main obstacle to a smoother response to the COVID-19 pandemic by the government appears to have been the ‘disdain which they show for constitutionalism’.⁴⁸ It has been argued that they brought into force legislation to respond to the pandemic that was unnecessary due to existing legislation, which had already 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).⁴⁹ 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’).⁵⁰ 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 reopening, which led to a massive backlog of cases.

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’.⁵¹ 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).⁵² The government also attempted to modify the right to jury trial; however, those plans did not come to fruition.⁵³ 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”’.⁵⁴

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 of 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-order and second-order consequences. First-order consequences refer to what happens immediately following extreme events that affect a situation, whereas second-order consequences come afterwards.⁵⁵ The first-order consequences discussed here relate to what happened following Hurricane Katrina in New Orleans and what happened in response to the pandemic in English courts. A brief example of second-order 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.⁵⁶ As we can see in the news, the world is full of disasters: 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 (CJS; which should arguably extend to all parts of the justice system).⁵⁷ 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 discovered was that continuity planning for natural disasters was insufficient for all emergencies. Hurricane Katrina wiped out the CJS in New Orleans. Given that it was already under pressure, after the Hurricane, there were only six defence attorneys remaining to help 4,500 defendants, the police force was reduced, and it took nine months before they could run hearings again, with a backlog of 7,000 cases.⁵⁸ Further, the recent COVID-19 pandemic shut courts across the world.

⁴⁸ Moosavian, “Coronavirus Legislative Responses,” 115.

⁴⁹ Moosavian, “Coronavirus Legislative Responses,” 112–115.

⁵⁰ Lilly, “Commons Privileges Committee.”

⁵¹ Moosavian, “Coronavirus Legislative Responses,” 105.

⁵² Moosavian, “Coronavirus Legislative Responses,” 107–108.

⁵³ Moosavian, “Coronavirus Legislative Responses,” 108.

⁵⁴ Moosavian, “Coronavirus Legislative Responses,” 108.

⁵⁵ For further details, see Lanzara, “Shifting Practices.”

⁵⁶ Boland, “Criminal Justice Systems,” 28.

⁵⁷ Boland, “Criminal Justice Systems,” 28.

⁵⁸ Boland, “Criminal Justice Systems,” 28–30.

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, including people who are authorised to make decisions. Further, the relationship between different levels and regions of government and the private sector must be clear, they must be ready to respond, and training must be adequate to implement such plans.⁵⁹ This is also important for public trust in public bodies.⁶⁰

In the other case study, in England, in a joint report by the Criminal Justice Chief Inspectors on the CJS's response to COVID-19 (a very different emergency to that of Hurricane Katrina but one that was also severely disruptive to the CJS), the inspectorates examined a 'cross-system view of how the CJS reacted to the immediate aftermath of the first national lockdown ... and of how the system has managed since'.⁶¹

The report shows that the immediate response of the CJS 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'.⁶² The CJS was able to take advantage of the fact that much of their work was already online and could be accessed remotely for home working.⁶³ 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 police forces had adapted to it.⁶⁴

The report also notes that while half the courts had to close down in the initial lockdown, they were able to reopen many of them, using 'The Criminal Courts Recovery Plan' to help minimise delays while, at the same time, keeping the public safe from infection.⁶⁵ This includes measures such as employing more staff, making the existing courtrooms COVID-safe, using 'Nightingale courts' (adapted buildings for court hearings to keep staff and users safe) and the use of technology.⁶⁶

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'.⁶⁷ This has been especially important for 'detainees to have their remand hearings from a police station'.⁶⁸ However, the joint report is particularly critical of the infrastructure in place, as the work is placing too much strain on police forces—some police forces planned to withdraw from the virtual system with HMCTS and recommend a new system to iron out the problems.⁶⁹

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 smartphone, and during lockdown closures, allowed prosecutors to cover multiple courts and allowed 'real benefits in continuity of representation'.⁷⁰ The 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'.⁷¹ 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'.⁷²

The report further highlights concerns about backlogs caused by court closures during the pandemic, which have also been reported in the news. In fact, the backlog is in the courts and not with the police or the prosecutors, who have managed to work through charging backlogs during lockdowns.⁷³ However, there is a concern 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.⁷⁴ This is a concern, as people's fair trial rights are not being secured.

⁵⁹ Boland, "Criminal Justice Systems," 30; see also Anderson, "Governing Events and Life."

⁶⁰ Boland, "Criminal Justice Systems," 34.

⁶¹ Criminal Justice Joint Inspection, *Impact of the Pandemic*, 6.

⁶² Criminal Justice Joint Inspection, *Impact of the Pandemic*, 8.

⁶³ Criminal Justice Joint Inspection, *Impact of the Pandemic*, 8.

⁶⁴ Criminal Justice Joint Inspection, *Impact of the Pandemic*, 9.

⁶⁵ Criminal Justice Joint Inspection, *Impact of the Pandemic*, 9.

⁶⁶ Criminal Justice Joint Inspection, *Impact of the Pandemic*, 22; see also HM Courts & Tribunals Service, *Covid-19: Update*.

⁶⁷ Criminal Justice Joint Inspection, *Impact of the Pandemic*, 10.

⁶⁸ Criminal Justice Joint Inspection, *Impact of the Pandemic*, 17.

⁶⁹ Criminal Justice Joint Inspection, *Impact of the Pandemic*, 17–18.

⁷⁰ Criminal Justice Joint Inspection, *Impact of the Pandemic*, 18.

⁷¹ Criminal Justice Joint Inspection, *Impact of the Pandemic*, 18.

⁷² Criminal Justice Joint Inspection, *Impact of the Pandemic*, 18.

⁷³ Criminal Justice Joint Inspection, *Impact of the Pandemic*, 21.

⁷⁴ Criminal Justice Joint Inspection, *Impact of the Pandemic*, 21.

However, the courts have seen a massive rise in cases since the pandemic and lockdowns began.⁷⁵ The report states that the backlogs continue to grow in courts, with increasing numbers on remand in prison, with cases started in 2020 not set to go to court until 2022.⁷⁶

Although 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 have posted weekly operational updates and run webinars for all professionals.⁷⁷ However, it seems that there are some disjointed approaches between the courts and the rest of the CJS, which may lead to further erosion of fair trial rights.⁷⁸ It is noted that there is 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 the COVID pandemic.⁷⁹

Both legal systems were unprepared for certain types of disruption. While 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.

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 British Government ignore previous preparations in place to take on the pandemic, they did not appear to follow their own preparations for such an eventuality. Moreover, 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 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 as a second-order consequence. A prime example of this is as follows:

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.⁸⁰

There can be a conflict between access to justice and the competing desire (and requirement) to keep the public safe and secure. There are several cases where the US Supreme Court gave itself jurisdiction over the cases from Guantanamo Bay to protect the rights of inmates there and the rule of law in emergency situations.⁸¹ 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.

There is also arguably importance in acknowledging the impact on communities' access to justice in relation to tolerance, inclusivity and non-discrimination. Courts play an important role in community building—as such, it must be understood that lack of access to justice for individuals can 'alienate communities'.⁸²

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

⁷⁵ Criminal Justice Joint Inspection, *Impact of the Pandemic*, 22.

⁷⁶ Criminal Justice Joint Inspection, *Impact of the Pandemic*, 23.

⁷⁷ Ministry of Justice and HM Courts and Tribunals Service, "Nightingale Court"; this is another emergency plan, set out in in Washington DC in 2005: Siegel, *Planning for Emergencies*.

⁷⁸ Rawlinson, "Judge Refuses to Stand Aside amid Row over UK Covid Trial Delays."

⁷⁹ Cabinet Office, "Guidance."

⁸⁰ Aoláin, "Individual Right of Access to Justice," 88.

⁸¹ Aoláin, "Individual Right of Access to Justice," 89–90.

⁸² Aoláin, "Individual Right of Access to Justice," 89.

Conclusion

The question for this paper was: how do courts function in times of disruption and emergency? Is it even a priority for the government to keep courts operating when the 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?

Countries are not short of people willing to help. In New Orleans, following Hurricane Katrina's destruction of the CJS, universities' law schools, students and staff stepped in to 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'.⁸³

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 we know that they are connected), there may be space for technological solutions in the future, as long as they are part of 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 interrelated. We have seen that issues of separation of powers can hinder the restarting of a CJS after a disaster. Constitutional principles are arguably not supposed 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 while the legislature went through processes to reopen courts elsewhere. During the pandemic, the courts in England went online and adapted other buildings for hearings.

Is the court system even a priority when the 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 during disruptions and emergencies, courts, their judges and staff are arguably central to maintaining the rights of people who would otherwise be forgotten by the system.

And, beyond that, what have courts learned from these disruptions? The US Supreme Court has demonstrated 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. However, routinisation of emergency planning would be ideal for all types of extreme events. Would courts in any country do things differently if faced with similar disruptions in the future? We will not know until the next disruption arises; however, 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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⁸³ Boland, "Criminal Justice Systems," 28.

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