

# Introduction

## Condition Critical

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### Abstract

The introduction to the ‘Condition Critical’ symposium explains the background to the series on the climatic and pandemic crises at the beginning of the 2020s. What is the role of the law in times of crisis? How does this force for continuity, predictability and order react to the discontinuity characteristic of disasters? The suspension of the law or its day-to-day operations is a moment of extreme danger, rivalling that of the disaster itself, in the licence it gives to powerful actors, governments and others to exercise unfettered force. Yet it also presents institutions, communities and disruptors with opportunities for reinvention and renewal. In this symposium, legal, political science, clinical psychology, history and sociology researchers investigate critical conditions from pandemic responses and extreme weather to terrorist attacks and parental disputes. Law courts have responded by modifying their operations and applying new technologies. This was observed in the United Kingdom and in cross-border European proceedings. A major terrorist trial in France established new architectural and information and communication technology configurations. Courts and the technologies they use can also cause critical incidents, including the disruption of artificial intelligence applications and the critical condition of the Italian justice system. Research into the Portuguese family courts investigated whether they alleviate or exacerbate disputes over the healthcare of children. Government responses to extreme weather events and the novel coronavirus (COVID-19) pandemic are studied at the intersection of law and politics in Australia. The individualising forces of neoliberal finance and law, and of urban communication technologies are criticised as dysfunctional when crises require solidarity.

**Keywords:** Law; crisis; disaster; court technology; dysfunction; solidarity.

The symposium in this edition of *Law, Technology and Humans* arose from a series of eight on-line seminars on the ‘condition critical’ theme. Both the title and the format were signs of the times: 2021. Record heatwaves, fires and floods brought home the urgency of the climate crisis. The novel coronavirus (COVID-19) outbreak quickly became a global pandemic, leading to the closure of borders between nations, states and parts of cities. Even the doors to our homes gained a new status as a legal boundary. We worked together via Zoom.

Rebecca Solnit’s reminder of the medical meaning of ‘crisis’ was timely. She defined it as ‘the crossroads a patient reaches, the point at which she will either take the road to recovery or to death.’<sup>1</sup> The COVID-19 crisis brought medical issues to front of mind, and the state of so many patients was a source of concern and reflection: condition critical.

In the aftermath of hurricanes and pandemics, the rich and powerful have been known to display ruthless disregard for life and wellbeing (e.g., by shooting ‘looters’, ordering workers to risk their lives by working through a pandemic and using ‘social distancing’ measures to break down social solidarity and protest movements). There have also been instances of mounting

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<sup>1</sup>Solnit, “The Impossible.”



solidarity and altruism, including among first responders and neighbours and in government actions that temporarily widened social ‘safety nets’ to include undocumented immigrants (in Portugal) or to house the homeless (in Australia).

The articles collected here respond to the crises of our times by delving into those that arise within institutions and within families and those imposed from the outside. All engage with the law in some way. Several articles study law courts as institutions that are affected by or respond to crises. Other articles look at the role of law in preparing for or responding to crises. This is informative because there is a contradictory relationship between law and crisis. The law is generally understood as a force for continuity, predictability and order. And yet disasters are characterised by discontinuity, in which ‘some sense and order must be reestablished, but the stable and solid ground on which we used to stand has collapsed, and we are left groping in muddy waters’.<sup>2</sup>

What then is the role of the law in responding to crises and disasters? A declaration of a state of emergency or exception is often the first response of law makers and governments. The suspension of the normal operation of the law is a moment of extreme danger, rivalling that of the disaster itself, in the licence it gives to powerful forces, governments and others to exercise unfettered force. Yet it also presents spectacular opportunities for reinvention to governments, civil society institutions, communities, entrepreneurs and other ‘disruptors’.

This symposium explores the heuristic and political potential of system breakdowns from empirical, theoretical and policy perspectives. These perspectives are, above all, critical because they study crises, because our condition is critical and because a return to an unexamined—uncriticised—normality is not an option. The range of perspectives is also informed by the locations of the authors and the sites of their research, which include Australia, France, Italy, the Netherlands, Portugal and the United Kingdom. The diversity of the authors’ academic and professional backgrounds (i.e., law, political science, clinical psychology, history and sociology) is reflected in their analyses, adding more range and critical density to the contexts under examination.

Disruptive events, such as pandemics, hurricanes, or similar disasters, trigger the need to keep the court system working at a basic level. The ready-at-hand solution to the COVID-19 crisis was to take advantage of the digital technologies already available in courts and among court users. The crisis became an opportunity to foster the digitisation of court proceedings. At the same time, legal adaptations are needed at various levels either to make legal the use of technologies or to establish new arrangements to ensure the unfolding of procedures.

The first two articles critically analyse this ubiquitous phenomenon, identifying the potentials and limits of the new technological arrangements. They clarify that the emergency measures taken to re-establish access and the continuity of operations can lead to solutions that do not necessarily protect the rights of those involved in the proceedings and that rebalancing the system becomes pressing. **Elena Alina Ontanu**’s analysis of measures to ease access to justice in cross-border proceedings highlights the limited practical results of this technological innovation and the institutional and organisational intricacies limiting its deployment. Digital technologies could potentially improve access to justice; however, they require a sound institutional framework to be effectively implemented. A pandemic crisis is not the best time to unravel such issues. **Gar Yein Ng** considers the effects of disruptive events, such as COVID-19 in England and Hurricane Katrina in the United States courts, focusing on the legal, organisational and technological means adopted. Ng discusses the adaptations of court operations in the aftermath of events that disrupt their ordinary working. The urgency is to re-establish the continuity of the operation and the legal oversight granted by the fair and effective administration of justice.

In her article, **Valérie Hayaert** discusses the implications of digital justice, in particular the potential disruption introduced by visual technology inside the courtroom by analysing a recent and highly significant trial of 14 defendants accused of planning and executing attacks on the Stade de France, the Bataclan theatres and bars and terraces in Paris on Friday 13 November 2015. Hayaert explores settled expectations, the economy of attention and the sense of interaction within a new scenography for the court: the omnipresence of screens. She juxtaposes this fine-grained analysis of the presence of communications technology in the court with the symbolic imperative of reasserting the unity and authority of the state in the face of a crisis.

Technologies can be used as a means to keep courts in operation during disruptions; however, they can also cause disruptions. Indeed, failures and incidents are common in technology deployment and are essential to improve understandings of the interplay between humans and technology for technology regulation. Moving from this starting point, **Giampiero Lupo** investigates the role of incidents in better understanding and regulating the operation of artificial intelligence (AI). In his article, Lupo analyses how technological incidents have contributed to the development of technology regulation. Gathering data about

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<sup>2</sup>Lanzara, *Shifting Practices*, 7.

AI incidents becomes essential to capture the hidden features of this specific technology, its interaction with human agency and the regulation of its use.

Formal regulations can precipitate crises even when they are acknowledged as an international gold standard. This can be observed in the Italian justice system, where the Constitution splits governance between the executive Ministry and the Judicial Council. This arrangement proved effective in protecting judicial independence; however, in his article, **Francesco Contini** argues that it is one of the reasons for the enduring critical condition of the system. The governance functions shared between the Ministry and the Judicial Council, institutions with different constituencies, priorities and agendas, make it difficult, if not impossible, to tackle inefficient resource allocation and court inefficiencies, which are the direct reasons for the excessive length of proceedings.

**Paula Casaleiro, Patrícia Branco and Luciana Sotero** discuss how Portuguese family courts deal with parental conflicts over healthcare issues involving children. Looking at the Portuguese legal framework and the perception of mothers involved in family court conflicts over joint parental responsibility disagreements, the authors reach two main conclusions: 1) the legal response to family crises, which aims to decrease disruption, appears to have inflamed it instead; and 2) the focus of the courts in finding a balance between the opposing demands of the parents appears to preclude or delay concerns about the welfare of children. Thus, the findings reinforce the critical nature of family law and policies and the effects on family conflicts.

**Jocelyne Scutt** considers governmental approaches to disasters, ranging from cyclones and fires to the COVID-19 pandemic. Scutt compares proactive immediate action for remediation and recovery with denial and inaction. These stances are crucial in the immediate aftermath of a disaster and also provide lessons on preparation and prevention. Governments need to be proactive in preventing global heating and better prepared for public health emergencies. This will make the difference between a liveable future for humanity and a never-ending series of worsening catastrophes.

**Richard Mohr**'s approach begins with the preparedness of people to respond to common threats, such as climatic and pandemic disasters. Mohr notes that the liberal individualism that has developed and become amplified in the West over the past two centuries was well suited to an environment of capitalist competition and free trade between states. Yet, it is dysfunctional in a world in which global threats require cooperation and mutual consideration. In his analysis, Mohr considers the drivers of individualism, from ideology to the technologies of law and finance, of mobility and urban form and of changing media. Private property, debt, cars, suburbia and social media have all contributed to the construction of individualist subjectivities. The future requires the rethinking and reconstruction of our way of being in the world and of our mutual interactions.

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