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COVID-19 and the ‘Myriad’: A Comparative Assessment of Emergency Responses from Europe & South America

*Kim Barker, Enrique Uribe-Jongbloed & Tobias Scholz**

Abstract:

The COVID-19 pandemic has highlighted – across intricate borders, different geographies, and legal jurisdictions – that there is only so much that can be done in the way of governance to tackle the challenge posed by a virus. The pandemic is a global problem, one which has affected almost every country in significant and seldom-felt ways. Governments have been forced to react, to respond with emergency measures, temporary rules and legislation, and impose restrictions on freedoms. It has brought to the fore a range of responses, locally, regionally, nationally, and internationally. What is particularly evident across the unfolding of the pandemic is the divergent approaches in introducing governance measures to control behaviour, to share data and information, and to report on the pandemic while holding decision-makers to account.

Much of the reporting of government reactions to the pandemic have focussed on emergency restrictions, lockdowns, the suspension of ‘normal’ gatherings, public health data, and tracing apps. Each of these is bundled up with concerns over the interferences with freedoms, a lack of scrutiny and holding to account of governance bodies and lawmakers, and privacy concerns. The new ways of working, governing, and communicating emergency rules is a COVID-19 legacy for governments, but is one that will shift our expectations? The balance between fundamental freedoms has been – to an extent – pitted against the public health agenda and the nature of the emergency response by governments across the world, but particularly in Germany, the UK and South America.

This paper explores the nature of the government responses through emergency measures (and restrictions) and tracing programmes in three countries: Germany, the UK, and Colombia. The assessment – and comparison – of three countries, across two diverse regions – offers a unique discussion from the perspective of pandemic responses to the COVID-19 emergency. The pandemic itself provides an opportunity to compare countries, governance responses, and legalities that may not otherwise be possible. The myriad of responses seen throughout the pandemic offers a unique opportunity for comparative discussion – this paper provides that discussion, but in so doing, assesses whether it is possible to recommend a ‘one size fits all’ approach to governance emergencies.

Keywords: COVID-19; emergency rules; government restrictions; pandemic laws.

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1 Introduction: COVID-19 Responses

Emergency regulations and responses have been – and continue to be – imposed as the pandemic unfolds. The challenges for governments have unfolded in much the same way as pandemic ‘milestones’ – unpredictable and confusing. The pandemic has presented itself as something of a metaphor for the imploding of legal scrutiny, accountability, and in some jurisdictions, transparency. It continues to threaten – in unprecedented ways – fundamental rights and freedoms, with responses imposed through oft-claimed ‘rapid’ means via emergency legislative procedures. In times of crisis, such as COVID-19, norms have shifted with remarkable speed – what was normal weeks ago is now the exception. The management of the pandemic responses has therefore played out through what can – at best – be described as piecemeal governmental reactions – but with an emphatic impact on daily life and freedoms.

The different responses to infections play out in the responses to the management of the virus within – and across – borders, whilst compounding existing governance problems. Local borders and emergency rules, temporary legislation and rapid reactions pose challenges for established norms of governance and law-making. These are particularly challenging when faced with the virus – the nature of the restrictions imposed to protect public health has meant that usual routes of scrutiny of emergency measures, and law-making have been bypassed. This paper explores the role of emergency governance and compares responses in Europe to those in South America, commenting on the nature of lessons that can be learnt in geographically, jurisdictionally, politically and governmentally diverse countries.

1.1. Comparator Jurisdictions

This paper will explore the responses to the COVID-19 pandemic played out through emergency regulations introduced in response to an unprecedented global pandemic from the perspective of what is an ongoing public health, but also governmental emergency. The changes made by Parliaments, Governments, and regional authorities are claimed to be in the best interests of society, to protect public health. Yet, as will become apparent in the following discussion, an examination of the myriad of responses to the pandemic in Germany, the responses across the UK, and selected South American states, shows that such changes have had profound impacts – arguably upon infection rates, but also on liberty.

The selection of the chosen jurisdictions – namely Germany, the United Kingdom, and South America, but especially Colombia – has been made based on the fertile ground for comparison, on political, societal, and not, least, regional grounds.¹ The reactions to the pandemic in Europe and the United Kingdom have been different to the responses experienced in South America. Of particular interest in the selection of these jurisdictions and countries is their political culture, governmental arrangements, and COVID-19 responses. In this regard, the German model is compared to the UK, and in turn, the centrist approach of Colombia. These comparisons offer a unique flavour to the discussion which brings together multi-jurisdictional examples. This assessment focuses on the governmental arrangements and responses, and their impact on fundamental freedoms (see below at 1.3.).

These perspectives have been selected because they represent areas of significant difference in national governance. Three countries with some shared similarities – including similar population sizes – and some substantial differences – constitutional and governance arrangements – offer significant potential to assess their respective emergency governance

responses to COVID-19. The three selected countries share other aspects. All three have consistently held a place in the top 20 countries by infection rate throughout the pandemic. Beyond this, these countries, while being geographically, jurisdictionally, culturally, politically, and socially diverse, are also legally diverse. As such, comparisons may not ordinarily be possible – the COVID-19 pandemic provides a unique point from which to undertake a comparative assessment.

1.2. Overview

The discussion in this paper focuses its attention on regional examples from three different regions, governance cultures, and legal systems. The regional responses from Germany, the constituent nations of the UK (notably, Scotland and England), and selected countries in South America – with an emphasis on Colombia – are considered here through specific instances of emergency reaction.

First, an exploration of the manners in which governments responded through emergency mechanisms – depending on the particular constitutional set up. Second, through an examination of technology as a specific element of the pandemic emergency response. Both of these dimensions are considered from national perspectives, with a critical eye on the transparency, accountability, and scrutiny usually deployed in these systems in non-pandemic times in Germany and the UK. South America is considered in greater depth from the perspectives of governance with a lesser emphasis on technological interventions - given the plethora of governance approaches available for comment.

The core argument is that while existing governmental responses and political systems all have quirks and unique features in addressing the legalities of the pandemic, the competing tensions have led to substantial challenges in balancing the public health agenda against the protection of fundamental freedoms. While the overarching goal is to protect citizens' health and welfare, what we see is also a competition between scientific advice, political opportunity, and an unprecedented desire for control – at least in Western democracies. It is to be hoped that the pandemic response can be reversed because – as this paper argues – if not, the changes to the norms are potentially hugely damaging to society, and fundamental freedoms.

1.3. COVID-19 and 'Rights': Governing the Balance

The COVID-19 pandemic has challenged norms of governance like few other instances previously seen. The greatest challenges posed by the impact of emergency responses fall upon some of our fundamental rights – taken here to be: public health; privacy and data protection; transparent government, and free movement.

The discussion highlights the ways in which emergency modes of governance have come to the fore over the course of the pandemic and considers the manners in which these emergency reactions impact upon these fundamental rights. These rights are no less important in non-pandemic times, but during the COVID-19 emergency, they have taken on a greater level of sanctity, especially where they have been put at risk in consistent and enduring ways, rarely seen before on such widespread national and regional scales. The comparison of responses in Germany, the UK, and South America – but especially Colombia – highlights the shared value placed on these rights across different countries and allows for insights to be made as to common responses and concerns. In making such comparisons, the balancing of rights and responses is considered, with lessons – common and distinct – being drawn to offer a holistic overview of response by governments.² This paper considers lessons for maintaining a balance between fundamental freedoms – and concludes with lessons from the pandemic for emergency governance.

2. The Pandemic Problem – Comparing Reactions from Germany, the UK and Colombia

Countries have vastly different responses to the pandemic. For some countries, this pandemic is a governance test rarely seen before. Governmental systems all over the world have been challenged in reacting to the pandemic while attempting to uphold the legal foundations on which their society is built. Amongst this challenge, the competing interests of protecting public health, maintaining law and order, supporting a functioning state, and upholding fundamental rights have persisted as priorities. Many of the immediate policies introduced to react to the pandemic outbreak restricted the fundamental rights enshrined in constitutions, and in international legal instruments, often granted after a long history of struggle for such protections.

The balancing act in managing these interests across Germany, the UK, and Colombia is considered in turn here.

2.1. COVID-19 in Germany

The onset of COVID-19 in Germany was, in comparison to neighbouring countries like Austria, relatively mild. Germany has, on average, around 1,000 new cases per 100,000 inhabitants per day while the rate in Austria is around 3,000 cases per day (Johns Hopkins University of Medicine, 2020). That said, debates persist over the exertion of influence by the government. As Germany is a federalist country, the response to the pandemic also reflects a battle over legal responsibilities. Significantly, this has arisen in respect to the Infection Protection Law (Infektionsschutzgesetz) (IPL) 2000, which was only occasionally changed before the breakout. Given the limited legislative attention this legislation received, lines of responsibility in the early days of the COVID-19 reaction were unclear. From 2000 to 2020 the IPL had changed 25 times while in 2020 alone, there were eight changes (Infektionsschutzgesetz, 2020). Still, the law remains heavily debated, and responsibility for its enforcement remains unclear (Deutscher Bundestag. 2020a.)

Given these governmental and legal obstacles, the COVID-19 response has not been problem-free in Germany. The discussion here will focus on selected elements of the COVID-19 reaction and responses from German lawmakers. It will therefore be considered from two perspectives. First, Germany's political culture and constitutional arrangements will be considered, and second, discussions will turn to the Corona-Warn-App deployed as part of the German track and trace response.

2.1.1. COVID-19 in Germany - A Governance Crisis?

The COVID-19 crisis revealed a fundamental flaw in the German model, posing the federalist ideal as inflexible (Behnke, 2020). Interestingly, the German government worked with the local governments of federal states while bypassing the German Parliament (Taz, 2020). In terms of a 'response' the Parliament is typically an integral part of the decision-making and local governance process. It has a legal right to be informed and to raise issues, but due to the time pressures of COVID-19 responses, this right was temporarily suspended. It has therefore become evident that the usual procedures implemented to protect and uphold democracy, democratic rights, and fundamental freedoms have had to be adjusted – or, arguably, curtailed – due to the current situation. The bypassing of the Parliament is a clear indicator of the pitched battle between the public health agenda and infection containment, and the upholding of fundamental freedoms. Despite this, the German government has circumvented the democratic framework, arguably weakening it, and showing that the Parliament is not an 'essential' element of the governance structure in

Germany's model. Especially based on the undemocratic regimes in the history of Germany, this development sparked a major discourse throughout society.

The German government 'acted first' and asked for permission later (Casdorff, 2020) – a strategy which may have helped to keep the pandemic at bay, but one which has led to equal resentment by the Parliament and the public (BR24, 2020b). Such upset has led to an increasing closeness between the right-wing party AfD and the Anti-COVID-19 demonstration group "Querdenken" (COVID-deniers) who claim that there is a "Merkel-Dictatorship" happening. (Jansenn, 2020). With a perceived lack of democratic backing, such decisions are vulnerable, with citizens increasingly using their rights to fight against them,³ and protect their freedoms.

Such developments can be observed in the aftermath of responses such as the introduction of mandatory face mask requirements, and citizens suing (unsuccessfully) against those perceived curtailments (Illner, 2021). The legal basis is rooted in the IPL and it is still unclear if this law is sufficient to legitimately interfere with fundamental rights (Haufe, 2020b). Suddenly, the mandated provisions introduced by the national government and regional governments were trialled in front of local courts, (Haufe 2020a) provoking unrest and widespread public protests (Knight, 2020). Even though there is a clear policy from the national government (Die Bundesregierung, 2020b) regulations vary from city to city, for example, in the city of Passau (Passau Rathaus Politik, 2021) there are strict restrictions, limiting movement as well as access to the city, yet in other places, like Siegen, people can move about freely. These are contradictory reactions yet, governmental and legal developments have led to societal dissatisfaction, not least because nobody knows which rules apply in which city or regional area. The federal model of different levels of response leading to differing regulations has caused not only a lack of clarity, but dissatisfaction because of the confusion. This has been compounded by a circumvention of the usual checks and balances whereby the parliament has been brushed aside in favour of speed. Consequently, other methods have proved necessary to assist with the pandemic management – for instance, there is now an App available called "Darf ich das?" showing information about the regulations based on your location, such is the divergent response across municipal and regional governments.

The 'containment' strategy (Die Bundesregierung, 2020a) changed in Fall 2020, moving from a widespread national prohibition to one focusing on regional outbreaks. Consequently, some cities had to implement stricter rules due to superclusters than others. For example, Berchtesgader Land locked down in October for two weeks to flatten the curve (BR24, 2020a). In Leipzig, the city allowed a concert in August as an experiment to analyse the virus (Grenier, 2020). Even though this helped to slow the curve, people became even more wary about these regional differences. The October lockdown did not prevent a second wave and in November, Germany went into (another) partial lockdown, (DW News, 2020) which led to further debate in the courts as to the legal basis for such further interferences in movement (Schütze, 2020). Even though the goal is to keep schools open as long as possible and suspend cultural events may sound reasonable, it is seen as the unjust treatment of certain groups – and of course, has limitations that reduce the protections for liberty, curtailing fundamental freedoms.

Given the disparate impact of partial lockdowns, it has become evident that COVID-19 has intensified social injustice (Myers, 2020). The crisis highlights the importance of legal decisions, but also of governmental transparency and accountability, even when reacting timeously to crisis situations. In Germany, the government was able to bypass the standard procedure of enforcing regulations and govern the country in this crisis (Jacobsen, 2020). While a minority of the public resisted these measures, the majority is accepting of the imposed rules – despite the criticisms of curtailment of freedoms. Majority support is

gradually decreasing in number (Köcher, 2020), yet there remains a route for the government to enforce a top-down strategy and give its COVID-19 reaction legal effect.

Obedience of the law remains the cornerstone of any legal system, but so too are checks and balances that ensure liberty and protect freedoms. Consequently, the court will always lag behind the pandemic, but nonetheless it has a significant role to play in protecting citizens and ensuring that there is some scrutiny of legal measures, even after their introduction. As the IPL was deemed to need amendment, the judiciary has been left to play catch-up. By positioning judicial and constitutional concerns as a hinderance to the COVID-19 response, it is unsurprising that there has been – and continues to be – uncertainty and tentativeness in Germany about the enforceability of COVID-19 laws, and the role of the Parliament in law-making.

That said, Germany is not the only country that was ill-prepared in terms of battling a pandemic – so too was, for example, the UK. However, the German response and its constitutional nature highlights the struggle of balancing swift policymaking against creating a legal basis for these policies across differing levels of governance. While the circumvention of parliamentary scrutiny may have become a necessity during the pandemic, judicial accountability remains – it is therefore to the credit of the judicial system that courts have remained able to hear complaints in respect of the enforceability of COVID-19 restrictions during the pandemic, and – to an extent – assuage some of the concerns surrounding interferences with fundamental rights. It is therefore, apparent that the court system needs time to consider these interferences, with such time leaving interferences unchecked.

2.1.2. Corona-Warn-App

The challenges posed by the COVID-19 pandemic also highlight the limitations of the German government mechanisms in responding to time-sensitive emergencies. This is notable with the Corona-Warn-App, which complied with data-protection laws precisely and was even praised by data-protection experts for doing so (Rzeka, 2020). Despite this, the app struggled to track chains of infection because of the anonymised and decentralised structure necessary to protect privacy and uphold data protections (Beckedahl, 2020). Exposure notifications from the app informed users of potential infection, but users are not told where and when they were exposed. Striking a balance between the utility of a track and trace system while maintaining fundamental protections has been shown to be particularly difficult – not just in Germany, but also in the UK (see below at 2.2.2).

Interestingly, German politicians and media debated the potential harm caused to data protection protections in light of COVID-19 amidst reports of lists of infected people being passed to local police to ‘assist’ with responding to the pandemic (Delcker, 2020). Such an example indicates that data protection, privacy, and information rights are placed at a lower level of importance than might otherwise be the case in a non-pandemic situation.⁴ Of greater concern to the track and trace system is the way in which data was being passed and circumvented outside of the Corona-Warn-App. COVID-19 responses through app tracking systems prove concerning, not least given the lack of utility of the German app, but also the visible erosion of protections for privacy evident in responding to the pandemic, suggesting a hierarchy of fundamental rights – public health playing out as ‘superior’ to privacy and data protection, albeit in times of emergency. Some even stated that data protection is the last ‘holy cow’ of Germany (Iken, 2020) but despite this, data protection concerns seem to play second place during COVID-19. From a legal perspective, it is clear that the app is legally compliant with the developers of the app aware of their potential liabilities.

The contrast between rights which are protected and regarded as inviolable represents a fluctuating set of principles – one which changes depending on the particular elements of the

pandemic at any specific point in time. In considering which rights should be restricted in a pandemic, and how much restriction is justifiable, it is clear that there is a presumptive hierarchy, played out through emergency responses.

2.2. COVID-19 in the UK: A Notifiable Emergency

The management of the COVID-19 pandemic across the UK, from the central UK Government, and across the devolved jurisdictions, is a messy picture. That said, there are some similarities – as well as notable differences – in the ways in which the pandemic response has been managed, both within the UK and across other countries such as Germany and Colombia. These are especially prevalent in terms of the track and trace mechanisms, the legislation and emergency regulations that have been required, and the response to concerns surrounding public health, fundamental rights, and especially, data protection.

The UK Government has stumbled through the management of the COVID-19 pandemic (Barker, Uribe-Jongbloed & Scholz, 2020) Claims by Prime Minister Boris Johnson of a ‘world-beating’ system to tackle COVID-19 (Reuters, 2020) have not come to fruition, with the increasingly fragmented system of competing rules across unmonitored borders within the UK proving to be difficult to enforce.

The discussion here will focus on selected elements of the COVID-19 reaction across the UK through two examples. First, the emergency regulations introduced in response to COVID-19 becoming a ‘notifiable disease’,⁵ and second in respect of the evolution – and arguably disastrous – roll out of NHSX track and trace apps.

2.2.1. Emergency Law-Making – *Vires v* Accountability

COVID-19 was listed as a Notifiable Disease under the Public Health (Control of Disease) Act 1984 at 6.15pm on 5 March 2020, through a statutory instrument. The addition of COVID-19 to the Health Protection (Notification) Regulations 2010 requires all doctors to report cases of COVID-19 to Public Health England. This reaction marked the first of the serious steps taken by the UK Government in response to the emerging pandemic. The use of secondary legislation in the form of a statutory instrument (SI) to add to the Notifiable Diseases list was also the first of many fast-track pieces of legislation that have been unveiled in 2020 in response to different aspects of the pandemic. It also highlights the use of secondary legislation – not per se problematic unless the review provisions are circumvented to allow legislative interventions without scrutiny.

Interestingly, while the UK Government made the change to the Notifiable Diseases list on 5 March, the Scottish Government made changes to the Public Health (Scotland) Act 2008 on 20 February 2020, which came in to force on 22 February⁶ to ensure, in the words of the Health Secretary, that ‘the health service in Scotland can quickly respond’ (Scottish Government, 2020). While Scotland was ahead of the UK Government, and was pro-active, Wales adopted a similar timescale to that of the UK Government in respect of England, and did not list COVID-19 as a Notifiable Disease until 5 March 2020, with the Regulations (Health Protection (Notification) (Wales) (Amendment) Regulations 2020, No 232 (W. 54)) coming into force on 6 March 2020. The different – and divergent approaches on this aspect of notification is one which highlights the distinct approaches taken by the devolved governments within the UK. Similarly, to Germany, different regional governments have adopted differing measures within their territorial scope.

Importantly, the UK Government included within the Coronavirus Act 2020, the powers that would allow the devolved legislatures of Wales, Scotland and Northern Ireland to respond to the outbreaks of COVID-19 within their respective geographical territories (Coronavirus Act

2020)⁷ – all as part of the Coronavirus action plan (Department of Health & Social Care, 2020). What this – in effect – resembles is the ability to make emergency regulations quickly, and without the need to follow the full legislative process in each of the Scottish Parliament, Welsh Parliament, or Northern Ireland Assembly. The ability of the appropriate Government minister to table legislation in a fast-track procedure was one of the measures taken early in the pandemic's management to ensure that appropriate steps could be implemented. While there is a necessary – and understandable – need for speedier than usual legislation, given that some of these regulations impede upon liberty, and freedoms such as the restrictions on movement, the lack of the usual scrutiny processes comes into tension with the freedoms that are regarded as 'norms' in everyday life pre-pandemic. This is particularly objectionable given the democratic process of scrutinising draft legislation, especially where draft laws have the potential to interfere with fundamental rights such as movement, and privacy, or erode democratic principles. For instance, the Coronavirus Act 2020 included provisions to suspend or postpone elections due in England in 2020 (s60).

The approach to COVID-19 regulations – through secondary legislation, with much less scrutiny – is one which falls into the category of emergency powers available to the relevant Minister. The powers granted under the Public Health (Control of Disease) Act 1984, allow regulations to be introduced without parliamentary consideration where there is a 'serious and imminent threat to public health' (s45C) in the interests of – it is suggested here – a 'rapid' response. While there is a circumvention of the usual legislative debate and scrutiny, there is little evidence to suggest that the Secretary of State for Health and Social Care has acted *ultra vires*. There are also distinct similarities with the acts taken in Germany to bypass Parliament – both the UK and Germany have utilised mechanisms to ensure rapid reactions but without the usual legislative processes being followed.

In respect of the UK's reaction, Jeff King, in particular, is clear that the regulations introduced through the procedure⁸ in the overarching legislation are lawful, (King, 2020) and there is no concern about whether there has been an abuse of process or an abuse of power. Contrary opinions emerge that there have been steps taken in introducing legislation which go beyond the scope of the powers granted to introduce secondary legislation.

Francis Hoar argues convincingly that the Coronavirus Regulations represent a disproportionate interference with the fundamental freedoms guaranteed under the European Convention on Human Rights and the Human Rights Act 1998 (Hoar, 2020). Similarly, Robert Craig indicates that there are problems with the *vires* of the Regulations and indicates that there are some serious constitutional concerns about the emergency regulations introduced by the Secretary of State (Craig, 2020). Craig and Hoar are not alone in voicing such an argument, with David Anderson (2020) indicating that the phrasing of some of the restrictions are too broadly drafted, and as such would raise questions as to their validity, especially because of the difficulties of provisions which are non-exhaustive in nature. Anderson finds common ground with Tom Hickman, Emma Dixon and Rachel Jones (2020), who express similar concerns about whether the Regulations are *vires* or not, arguing that there are 'significant question mark[s]' over whether or not the special requirements in the Regulations can be legitimately enforced.

Meanwhile, the concerns of Hickman, Dixon and Jones (2020) focus on the notion that people can be forced to stay at home, querying whether this is a legitimate restriction – and interference with fundamental freedoms – given the breadth of the limitation,⁹ and highlighting that such restrictions on movement could amount to what the Supreme Court has considered as common law imprisonment.¹⁰ Other concerns are raised by Benet Brandreth and Lord Sandhurst (2020), who take the view that the Public Health Act (Control of Disease) Act 1984 does not provide a basis for the broad ranging limitations and powers enacted in the Regulations. They take their argument further and indicate that where the Government fails to curtail the powers, challenges to the lawfulness of the Regulations could

amount to civil liabilities for those deemed to be ‘relevant persons’ such as – for example – police officers (Brandreth and Sandhurst, 2020). Concerns about the ways in which restrictions on movement, gatherings, travel, and the ability to introduce additional, wide-ranging regulations¹¹ persist – not least because of the potential for these to be subjected to abuse.

The merits and *vires* – or otherwise – of the UK Government reactions through secondary legislation without review evidences the ways in which governments have been compelled to react to an unfolding and unpredictable situation. Similarities exist between two of the comparator jurisdictions considered here – Germany and the UK have both shown that they can – and will – act to circumvent the usual governance mechanisms and processes to prioritise their reactions to emergency situations. Further similarities emerge in respect of track and trace systems.

2.2.2. Track & Trace in the UK – X Marks the Spot

One of the cornerstones of the UK response to the COVID-19 pandemic – similar to the response in other nations, including Germany – has been to develop a track and trace system. While contact tracing itself is not new and has been widely used for dealing with infectious diseases generally, (Rorres, Romano and Miller et al, 2018) the roll-out of the track and trace systems based on apps has given rise to further concerns relating to fundamental rights, and the erosion of protections in the name of ‘public health’ amid times of emergency.

The UK NHS Track and Trace app, unveiled in early June 2020, was swiftly abandoned (Donnelly, and Wright 2020) due to technical issues when its trial was rolled out across the Isle of Wight. The abandoning of the app was predicated by a number of significant flaws, which included the ability of people to download it more than once, but also the ability of people not based on the Isle of Wight to also download the app – compromising the trial data (Morgan, 2020). The technical flaws were just some of the concerns raised about the notion of a track and trace app. Broader concerns relating to privacy also arose, not least because of the Government’s backing of the app. In that respect, the intrusive nature of the app – and its tracing potential – is particularly chilling, and even more so in light of the restrictions on movement. A more reliable, privacy-conscious approach to tracing systems was implemented instead.

In Scotland for example, NHS Scotland Protect Scotland app was unveiled to allow contact tracing, but on the basis of anonymous tracing (NHS Inform), rather than capturing significant amounts of personal data, and information which are subsumed into data storage – just one of the concerns that the Open Rights Group raised in respect of the NHSX app in England (Open Rights Group, 2020a). It is particularly interesting that the NHS Scotland Test and Protect website makes specific and comprehensive explanations as to the ways in which data will be used (NHS Scotland) addressing issues from the mildly curious to the privacy conscious app user.¹² This is in stark contrast to the NHSX app, but is also more aligned with the German Corona-Warn-App’s privacy conscious initial offering.

In England and Wales, the NHSX app was abandoned, in favour of the NHS COVID-19 app (NHS Test and Trace). Of greater significance is that the UK Government learnt from its previous failures in this area, especially when dealing with the privacy rights and concerns of its citizens – whose co-operation it needs in order to allow the track and trace apps to function as part of the COVID-19 response. In introducing a different app, the UK Government has now complied with its obligations to undertake a Data Privacy Impact Assessment¹³ in respect of the NHS COVID-19 app in England and Wales, something it had previously omitted in respect of the NHSX app through mid-2020. This prior omission in respect of the former tracing app in England and Wales was one of the elements found to be unlawful (Open Rights Group, 2020b).

In addressing the unlawful elements of the NHSX app, the UK Government has managed to respect some fundamental rights in respect of the COVID-19 response by complying with the Data Privacy Impact Assessment requirements, and distinguishing between personal and special category data, as required under the Data Protection Act 2018.¹⁴ That said, the overall ‘success’ of the COVID-19 track and trace programmes in the UK is questionable, especially given the relatively poor performance of apps in England – even discounting the NHSX fiasco within that assessment. One survey indicates that the track and trace system reaches only half of all contacts ‘at best’ (McNeill and Gray, 2020), while reports suggest that the NHS track and trace app has cost £35 million (Lazarevska, 2020), and is full of glitches – causing spikes in case numbers (Cochrane, 2020) – while running on a platform that is not necessarily fit for purpose (Lazarevska, 2020).

It is questionable as to whether the damage to privacy rights, and the trade-off between public health needs and protection for fundamental rights – including the right to respect for your private life (European Convention on Human Rights, Article 8) – have been worth the cost of the NHS track and trace apps. The shambolic management of the app in England and Wales is a further indicator of the way in which scrutiny, transparency, and abuses of fundamental rights have been perpetuated as part of the response to the COVID-19 crisis, evident not only in the UK, but also through the German experiences with the Corona-Warn-App.

The responses, reactions, and experiences of Germany and the UK – in governmental responses as well as technological mechanisms – have shown similarities in the handling of the pandemic from two countries, and one region. The discussion now shifts to consider a vastly different experience from a different region – South America – where the focus falls on governmental responses to the emergency.

3.3. COVID-19 in South America

South America has been considered as a site of contrasts as the pandemic has unfolded. While Chile, Peru and Ecuador were quickly seen as the countries where the COVID-19 spread managed to overcome hospital space, Colombia and Argentina applied some of the longest lockdowns to contain the spread of the virus. Each of these instances indicate differing government responses in different territories, all of which aimed to address the unfolding pandemic.

Uruguay meanwhile was heralded (Parks, 2020) as a leading example of appropriate containment (Moreno and Moratorio et al, 2020). As of 29 November 2020, Peru, Argentina, Brazil, Chile, Bolivia, Ecuador and Colombia were all amongst the top 25 countries with the most deaths per million people, with Peru coming third in the world with over 1,000 deaths and Colombia in the lower 21st place with over 715 deaths per million (Worldometers, 2020). This represents a different rate of success in addressing the pandemic through governmental responses – which have taken a different approach to those seen in Germany and the UK. Not only does this indicate a continent of contrast, but it showcases – at least in part – the manner in which the different pandemic responses in various territories have played out, with the South American emphasis falling on immediate, very lengthy lockdowns, and a lesser emphasis on tracing systems. Equally, the responses across South America, Germany, and the UK all show a particular focus on protecting the health system in the early phases of the outbreak.

The discussion here focuses on the government responses across South America, highlighting the different nature of the reactions to the pandemic to those adopted in Germany and the UK. The discussion that follows addresses governmental reactions to borders within nations and within municipalities – similar to those considered above – before

moving to consider the approaches adopted to protecting fundamental freedoms. The data protection discussion is more nuanced given the differing cultural and political systems in South America.

3.3.1. COVID Responses in South America – Governing the ‘Borders’

The predominant challenge for local and national governments across Colombia and Argentina arises in the largest capital cities, particularly those with geographical features making border controls across municipalities particularly tricky. In Colombia for instance, the cities of Leticia (pop. ca. 50,000), at the southernmost tip of the country on the Amazon riverbed, and Puerto Nariño (pop. ca. 8,000), on one of the tributaries to the Amazon river northwest of Leticia, represent the largest settlements on the Colombian side of this trinational ‘soft border’ as part of the Departamento (political unit) Amazonas. This ‘soft border’ is one that governments have struggled to address in terms of controls on movement, even after the lockdown. When the lockdown measures were introduced in Colombia¹⁵ and, hence, to Leticia, the border city of Tabatinga in Brazil (pop 65,840), was still open for business, following the *laissez faire* attitude of the Bolsonaro government (Anderson, 2020). While the central street connecting the two towns was closed to all forms of traffic, the many informal paths that link them were still used by people to bring goods from one country to the other, circumventing national government orders for lockdown. As a further challenge to the movement restrictions, backyards became additional informal routes between Colombia and Brazil (El Tiempo, 2020a) allowing for free movement between two countries with very different government responses in the initial stages of the pandemic. The porous border with dirt paths and backyards was unpoliceable, not only in terms of enforcing the movement restrictions (El Tiempo, 2020a) (and subsequent restrictions on commerce) but also in terms of containing the virus on either side of the border.

Further examples of ineffective and unenforceable government reactions to the pandemic emerge in other Amazonian contexts, the Peruvian city of Iquitos, and the Brazilian city of Manaus – both considered hotspots of the COVID-19 epidemic in their respective countries (Valencia, 2020). The trinational trade route between Tabatinga, Iquitos and Manaus is the main connection for the local inhabitants. It circumvents traditional and formal border crossings, and has proven throughout the pandemic to be one where it is difficult to enforce movement restrictions. The area can be easily defined with reference to Canclini’s description of many parts of South America as simultaneously “different, unequal, and disconnected” (Canclini, 2020), with a large indigenous population, high poverty levels and low internet access. These factors serve to indicate one of the biggest obstacles in enforcing movement restrictions – lack of opportunities. Remaining at home during the lockdown is an impossibility when informal work accounts for survival, and where internet penetration is way below the major cities. When mandating movement restrictions, enforcement is necessary. By reacting through lockdowns, the government has addressed only one element of its response, failing to follow through on ensuring its restrictions are complied with, particularly in border regions. This example serves to highlight a common theme in government reactions to the pandemic – the confusing mismatch of different restrictions in different bordering regions, municipalities, and legal jurisdictions, something very much evident in Germany, and the UK, as well as the Amazon region of South America.

The poor enforcement of government movement restrictions did not prevent the transit of people from Leticia to Tabatinga and allowed for COVID-19 to make it across informal borders. By June 18 2020, Leticia had the highest number of cases and deaths per 10,000 people in the country with 469 and 25 respectively.¹⁶ When cases started to rise, it became clear that resources at the Leticia Hospital were inadequate, suggesting that even the trade-off between healthcare protection and the restrictions on freedoms had not paid off despite the lockdown, and exemplifying the dangers of failing to police informal border crossings.

Eight months after the borders were notionally ‘locked down’; a seroprevalence study by the National Health Institute (INS) showed that 60% of Leticia’s population had COVID-19 antibodies - very close to achieving functional herd immunity (El Tiempo, 2020b). Although these results have not yet led to an easing of restrictions, they show how their original situation as hotspots puts them in a better longer-term position than the rest of the country, suggesting that the lack of enforcement of border restrictions may have not had a detrimental impact on infection rates. Nevertheless, the government reaction to COVID-19 in imposing a lockdown in Colombia highlights the fragile nature of national responses without greater thought being given to regional responses – exemplified here through the difficulties exposed by informal borders and contradictory rules across different neighbouring governments and municipal authorities. It also highlights that a response in one country, for example Germany, cannot be uniformly replicated with expectations of success in others with different characteristics or features.

3.3.2. Balancing Reaction(s) – Emergency Law Making and Fundamental Rights?

While in Germany the municipal and national responses to the COVID-19 situation have been questioned, and the UK’s confusing approach across its four nations has come under scrutiny, in Colombia it was the centralised approach to the pandemic that seemed to be under fire. In all of the comparator states considered, the governmental responses have taken on a different emphasis, but all have been subject to assessment for the manner in which balances are being accommodated between public health and interferences with freedoms.

In Colombia, the emergency powers of the government also included a modification of the information petition time frames. Institutionally, public and private bodies are required to answer petitions and complaints by citizens within a period of 15 days, with the risk of being found in contempt or the allegation being granted to the citizen due to administrative silence. However, under the emergency regulations (Decree 491 of 2020), the time window was expanded to 30 days, with powers of the relevant civil servant permitting extensions of a (potential) further 30 days (Guzmán, 2020). The Foundation for Press Freedom (FLIP) has stated that this difficulty in accessing to information is a threat to press freedom. The argument advanced is that guaranteeing basic rights, (FLIP, 2020) such as the right to information, is particularly important in a global pandemic but has been prejudiced in favour of ‘other priorities’ – a common theme in Germany and the UK in respect of data and tracing apps.

The Interamerican Commission in Human Rights (CIDH, 2020) understood early the risk that such emergency regulations posed to human rights and issued Resolution No.1 of 2020 to bring attention to the basic limitations that these restrictions would have under the pandemic. The risk is significant, with emergency regulations pitting public health risks against movement restrictions in lockdown with the changes in governmental procedures to ensure timely changes in laws. Under exceptional measures that skip legislative debates, South American presidents have taken actions that would otherwise be unacceptable (see above at 2.2.1.). These measures include some steps seen in the UK – such as the postponement of elections – as well as measures that are more concerning, such as attempting to curtail the right to assemble to prevent demonstrations. While the justification for this has been made on the grounds of the public health risks of mass gatherings, it has been matched with demonising those who are protesting against their governments (Murillo, 2020), suggesting that the reasons to curtail protests are less COVID-19 specific and represent something more nefarious.

Argentina and Colombia pressed for extreme lockdowns in mid-March 2020 that started to subside somewhere in July, but were prolonged well into September, with international passenger flights returning only in October to Colombia, and November to Argentina (Gonzalez, Hopkins and Horwitz et al, 2020). Despite lockdowns, their respective contagion

curves fared similarly, making it evident – with hindsight – that an inability to contain the virus was clear from the onset. The limitations on movement, travel, and other fundamental freedoms were governmental reactions to attempt to enact containment. These restrictions were presented as being in the public interest to protect public health. To achieve this aim, fundamental freedoms were limited for almost half a year in 2020. Contrastingly, Uruguay won praise for its comparative ‘success’ versus its neighbouring countries (Brazil and Argentina), and the effectiveness of its tracking and tracing infected patients. While the border challenges of Colombia and Peru fostered the creation of virus hotspots, Uruguay managed to contain the spread, thanks to its efficient healthcare system and a political consensus (Anarte, 2020) aimed at governing during the emergency.

In situations where there are health risks, even unprecedented ones, the ability to govern without scrutiny puts precarious fundamental freedoms at even greater risk. What is also apparent from the diverse approaches developed across South America, is that there is no ‘right’ way to do things when faced with unprecedented emergency situations. That said, it is also clear that what appears as an emergency response in the interests of public health can be implemented during times of crisis and yet can still undermine public trust, compounded by the absence of the usual checks and balances.

4. COVID-19 Responses as Comparative Lessons for Pandemic Governance?

The responses to the COVID-19 pandemic have naturally shifted in focus as the pandemic has unfolded (and continues to unfold). Initial reactions focussed on the medical aspects, often starting with coverage in territories that were affected early into the spread, with a changing narrative continuing to emerge. The changing responses and phases are mirrored by the impact – across government responses, changes to rules and restrictions, and emerging protests amid prolonged limitations (BBC News, 2020; Huggler, 2020; Latin American News, 2020). These shifts are reflective of other changes witnessed during the unfolding of the pandemic, which have resulted in a new set of social norms, but also a new set of governmental norms across different countries – Germany, the UK, and Colombia – here Europe and South America – and governing bodies within each. Accountability does not disappear during emergency situations. Instead, there is a shift in the ways in which those in power are held to account, and that is what is playing out across states in Europe and South America.

4.1. A ‘Norm’ for Pandemic Responses?

The variety of responses to the pandemic by different governments has arguably resulted in very different measures being used to tackle the pandemic. In Germany, contentious alterations to the Infektionsschutzgesetz resulted in controversy, as has the fiasco of the UK tracking app, and the lack of enforcement of border restrictions in South America. In the UK, the discontent surrounding restrictions on movement, and the stay at home instructions, have been scrutinised from a position of incompatibility with human rights protections, as have the challenges to data protection in Germany, and the bypassing of usual legislative scrutiny for emergency declarations in South America.

What is common across the jurisdictions and regions considered here has been the outcry at the restrictiveness of the emergency measures. This is a snapshot of some of the fallout from the pandemic, and the risks that persist in respect of fundamental rights and their protections. The unprecedented nature of the pandemic, and the ease with which COVID-19 spread across the world has triggered something of a governmental crisis along with a public health crisis. The crisis responses focused (understandably) on the medical aspects of the pandemic, prioritising public health. Less attention was paid to the scrutiny of emergency measures, emergency legislation, and rapid government reactions to an unfolding situation.

The response therefore was one that was facilitated as a stepping-stone to allow other mechanisms to respond. In all of this, where changes to governing and laws were required, no longer were these measures – which have significant impacts upon fundamental freedoms – subjected to the usual, often protracted, debate, scrutiny, and procedures. All of this has come in response to the pandemic, and while ostensibly reasonable at the time in which action is required, raises questions concerning the maintenance of law and order, and the preferred routes of law-making.

The essence of law and order rests where there is accountability (Dicey, 1959; Pfander, 2003; Delaney, 2014). This manifests itself in the procedures of oversight, scrutiny, and transparency in governmental processes. It is within this that quirks of domestic law-making and procedural niceties are followed to allow the development of legislation, which is presented for debate and scrutiny as per the rules of the specific legislature – be it through debates in the House of Commons (UK Parliament) or through scrutiny in the second and third readings of proposed acts before the Deutscher Bundestag, or its various committees.

During the pandemic, the usual routes of scrutiny, methods of assessing draft legislative impact, and the finer points of soon-to-be law have been temporarily suspended, or fit into alternative frameworks.¹⁷ It is possible to perceive of these responses as ones which undermine the veracity and scrutiny of legislation, particularly where restrictions on movement, on economic fluidity, and on social gatherings have all been introduced not as Acts of Parliament, but rather through emergency regulations applicable to a specific legal territory or region. This raises questions about the process of drafting law, but also about the powers which are being exerted by members of the government of the day charged with the issuance of such regulations.

4.2. Transparency before Scrutiny?

The political staging of announcements of emergency responses has, on numerous occasions, come the day before the publication of the legal regulations. What has been particularly striking during the pandemic is the increased use of press conferences and press announcements in disseminating these changes in restrictions (Wetherby, Child and Cruse et al, 2020). In some respects, this is unsurprising. But what has been revealing during the media broadcasts and political showcasing of COVID-19 press conferences by national and regional governments is that there has been a significant effort to explain the legal measures to the wider populace in advance of their coming into force as law. This is not something that is always widely seen or reported in non-pandemic situations, and while it is – perhaps obviously – because the nature of such regulations demands advance explanation, it still signals a shift in norms.

Therefore, at the very time when it seems that legal systems are not being subjected to usual levels of scrutiny, it is instead apparent that there are shifting ideas of transparency. The protracted legislative drafting stages may have been skipped in favour of emergency regulations, but there have still been some efforts – albeit different – to subject these to scrutiny. Emergency regulations may not have been subjected to several legislative stages and parliamentary debates, but they have been published and covered widely in the print and news media, and presented by governments at daily, or periodical press conferences. In this way, modes of government, as well as the law itself – and changes to it – have been put at the forefront of public awareness in ways rarely seen before. Circumstances may have demanded an alternative approach, and while there is no desire to not scrutinise laws, making a concerted effort to engage with the public about the restrictions on liberty, and social norms, has been one of the good things to emerge from the COVID-19 pandemic. It may, at the very least, make the law-making process, and the role of parliaments in scrutinising the role of governments (and therefore upholding the separation of powers) more accessible. In itself, this is a particularly valuable lesson.

5. Conclusion: Governing in Emergencies?

The pandemic highlights an inherent struggle in modes of government, and emergency law-making – a fair, just, and equal treatment of all people in a society requires a delicate balance of resources and most importantly time. Time is the one thing that governments do not have in a pandemic. The responses need to be quick and often harsh, in order to literally preserve life.

The restrictions imposed in various regions, in different governing systems, all show that there are common concerns throughout. The ways in which emergency restrictions (prejudicing movement and freedoms) are introduced are done in a manner that circumvents the usual processes of transparency and accountability. These circumventions are justified in the interests of timeliness, and the need to protect society, often from itself. That said, the freedoms and rights that have become commonplace have been interfered with, suspended, or brushed aside in the pursuit of pandemic control. The holding to account of law-makers – no longer full parliamentary processes – has also changed and become much less stringent at the very time when arguably it needs to be more so.

This is the governing emergency at its core – the need to respond quickly means that we set aside the usual transparency. But in so doing, we put our freedoms at ever-greater risk, when the scrutiny should be even greater. This trend is particularly concerning given the ever present calls for 'legitimate' interferences in rights. All of these changes have come about through emergency legal instruments, some of which are not standalone laws, but derogations, permitted in times of crisis. Democratic countries with constitutional rights have to ponder the consequences of restricting fundamental rights. Is this pandemic an exception to the norm, are the policies legitimate and how do the populace respond to their government? These questions reflect the quandary that evolves out of such situations, especially when transparency is set aside in times of emergency.

The COVID-19 challenge highlights that there needs to be some form of orderly governance to fight against the pandemic, but it leads to emergency responses. These responses have profound – and potentially – long-lasting impacts on our freedoms, our holding to account the government, and the ways in which our governance systems can recover. It is to be hoped that the COVID-19 emergency responses – like the pandemic itself – are time-limited, and a return to 'normal' is swift. It is also to be hoped that lessons can be learnt from the myriad of reactions and responses that have been utilised. Lessons from our neighbours can have a benefit. The comparative discussions outlined here show that even where there is a variety of responses, it is not possible to conceive of a 'one size' fits all approach. Governments are different – so too are their emergency responses.

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Notes

¹ The selection of these jurisdictions also reflects the geographical expertise of each of the co-authors and ensured ready access to contemporary developments.

² Governments are taken in this paper to include local, regional, and national governments, and includes municipal rule-makers, as well as devolved governments and local council bodies.

³ Around Easter, several courts had to deal with the prohibition of church services and that the restrictions are against the right of freedom of religion.

⁴ Interestingly, to put aside data protection in order to facilitate a tracing app would put domestic law into conflict with the European Union, and the General Data Protection Regulation 2016, which member states were required to transpose into national law.

⁵ Where an infectious disease has the potential to cause significant outbreaks, and / or is likely to reach epidemic levels of infection, Public Health England requires notification of clinical suspicion under the Public Health (Control of Disease) Act 1984 together with the Health Protection (Notification) Regulations 2010.

⁶ The Public Health etc (Scotland) Act 2008 (Notifiable Diseases and Notifiable Organisms) Amendment Regulations 2020, No 51.

⁷ Coronavirus Act 2020, ss 94-96 which outline the procedures to be followed where regulations are to be made by Ministers of the devolved legislatures.

⁸ The Emergency Procedure as outlined in s45R of the Public Health (Control of Disease) Act 1984.

⁹ Under the Public Health (Control of Disease) Act 1984, s45G(2).

¹⁰ As in *R (Jalloh) v Home Secretary* [2020] UKSC 4.

¹¹ Public Health (Control of Disease) Act 1984, s45F.

¹² Addressing for instance, elements of anonymous and personal identifiable data flows through the apps. See e.g. NHS Scotland Test & Protect (2020).

¹³ A Data Privacy Impact Assessment is required under s64 Data Protection Act 2018 which states that wherever there is a type of data processing “which is likely to result in a high risk to the rights and freedoms of individuals” a data protection impact assessment is required.

¹⁴ Special data includes data revealing racial or ethnic origins; political opinions; religious or philosophical beliefs; trade union membership; genetic data; biometric data; health; sex life; sexual orientation. See Data Protection Act 2018, Schedule 1. See further: Barker, Uribe-Jongbloed and Scholz (2020).

¹⁵ A first recommendation to prevent contagion for vulnerable groups was issued on March 13, urging local and regional health services to inform indigenous, ethnic and other protected communities to avoid contact with people from outside their territory, remain in their individual or collective spaces and develop protocols in the event of potential COvid-19 cases. Moreover, the preemptive mandatory isolation – as the lockdown is officially dubbed – issued on March 22, 2020, required that the whole population stay indoors.

¹⁶ Compare with the second highest, the Special District of Barranquilla, with 51 cases and 2 deaths per 10,000 people. See: INS, 2020.

¹⁷ See above at: 3.2.1. A Notifiable Disease – Emergency Law-Making.