COVID-19 Vaccine Mandates: An International Perspective

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Lessons from the European Court of Human Rights (ECtHR)

2015 *Vavricka v. Czech Republic*

App. No. 47621/13 (ECtHR 8 April 2015)

First decision regarding compulsory vaccinations in context of the European body of fundamental rights

Definition of Compulsory Vaccination

Vaccination system in which the enforcement of a duty to vaccinate is ultimately ensured by the compulsory administration of the vaccine

Anja Krasser, *Compulsory Vaccination in a Fundamental Rights Perspective: Lessons from the ECtHR* (June 3, 2021)

Anja Krasser, a member of the Faculty of Law at the University of Graz, provided an excellent and timely analysis of *Vavricka* and a clear and balanced perspective on the legal issues relating to the multiple COVID-19 vaccines developed over the past months to meet the challenges posed by the current pandemic. As she notes, public opinion on vaccines is heavily divided, and discussions about compulsory vaccination, often grounded on fundamental rights arguments, can tend to become heated. Her analysis of *Vavricka* and the issues addressed in that case decided by the European Court of Human Rights, provides a superb beginning point for a discussion of the ramifications of the decision and a good focus for further analysis of this complex legal issue from an international perspective.

Facts of *Vavricka v. Czech Republic*

Parents in the Czech Republic refused to have their children vaccinated for various reasons, including conflict with the children's fundamental right to bodily integrity, parents' right to manifest their religion and protected beliefs, violation of human rights, violation of right to private life and personal autonomy, perceived harmfulness of vaccines, and secular objection of conscience. Facing imposition of fines and sanctions, they asserted interference with and violations of Article 2 ECHR, Article 8 ECHR, and Article 9 ECHR.

Katarzyna Ważyńska-Finck, *Anti-vaxxers before the Strasbourg Court: Vavřička and Others v. the Czech Republic*, https://strasbourgobservers.com (June 2, 2021)

Findings and Rationale of the Court

1. Discretion: State enjoys a wide margin of appreciation in matters relating to public health policy, strengthened by a lack of European consensus as to appropriateness of a compulsory model of vaccination program.

2. Consensus: Court relied on scientific consensus and common position of European governments as to the necessity, efficacy and safety of vaccines.

3. Social Need: Vaccination scheme was set up in response to a pressing social need as State authorities were bound by their positive obligations under the right to health to ensure adequate immunization coverage, an aim which the State's experts opined could only be achieved if vaccination was a duty and not a mere recommendation.

Findings and Rationale of the Court (cont.)

4. Best interests: If voluntary vaccination programs did not suffice to achieve herd immunity, mandatory schemes may become necessary to protect the best interests of children, individually and as a group.

5. Proportionality: Interference with parents' right to care for children in accord with their own opinions, convictions and conscience was considered proportionate based on scientific consensus as to the safety and efficacy of vaccines, exemptions in cases of medical contraindications or conscientious objection, vaccines never forcibly administered since the duty is enforced indirectly through sanctions and fines, for which administrative and judicial remedies are available.

United States: Linking Vaccination to School Entry

Similar to the legal landscape that faced the parents of children in ***Vavricka v. Czech Republic,*** all 50 states in the USA have formally linked vaccination to school entry. While governments can never force a person to get themselves or their children vaccinated, based on the foundational principle of medical ethics that consent must be given for any medical procedure, the decision to make vaccination mandatory is thus a decision to impose some form of penalty of those who so not follow the law, whether in the form of a fine, withholding access to certain services or benefits, or denial of entry to school. Similar action has been taken by Australia, France and Italy. Liam Drew, *The Case for Mandatory Vaccination*, Nature, 27 November 2019.

Jacobson v. Massachusetts, 190 U.S. 11 (1905):

Lessons from the United States

In this case, SCOTUS held that it is within the police power of a state to provide for compulsory vaccination. States may require vaccinations via mandates accompanied by a criminal fine as long as the mandate is reasonable. "There are manifold restraints to which every person is necessarily subject for the common good. On any other basis, organized society could not exist with safety to its members."

Liberty interests under *Jacobson*

"The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint." *Jacobson* and cases following it recognized that a state may constitutionally delegate to a municipality the authority to determine under what conditions health regulations shall become operative. See *Zucht v. King*, 260 U.S. 174 (1922).

Individual Autonomy after *Jacobson*

The value the courts and society place on individual bodily autonomy has increased, and autonomy has been raised to the level of a fundamental rights.. Today, while U.S. adults have the right to decline even life-saving treatment, the state can act to protect persons other than the affected person, even at the cost of limiting fundamental individual liberties.

Shachar and Reisa, *When are Vaccine Mandates Appropriate?* AMA Journal of Ethics, Jan. 2020.

Ethical Justification for Limiting Individual Freedom

The following criteria have been suggested for limits on individual freedom with regard to vaccination:

1. Proportionality
2. Precedent
3. Context
4. Sufficiency of Access

Shachar and Reisa, *When are Vaccine Mandates Appropriate?* AMA Journal of Ethics, Jan. 2020.

Proportionality

Higher levels of risk justify more restrictive limitations on individual freedom, where risk is seen as

- a combination of risks posed by a disease and
- the ease of transmission of that disease in relevant local circumstances

Precedent

Precedent set by prior limitations on individual freedom matters – more coercive or restrictive approaches should only follow failures or less coercive or restrictive approaches. Adults should be free to exercise their autonomy to the extent that vaccination rates afford sufficient public protection, unless there is an immediate, severe risk.

Context

Consider the social and cultural context of liberty restrictions. Where government is unstable or trust in a society is fragile, coercive measures can undermine that stability and trust. Liberty restrictions and coercion can exacerbate distrust, making less restrictive and less coercive education-based approaches more appealing.

Sufficiency of Access

Restrictive, coercive legal approaches to limiting individual freedom require sufficient access to the service (vaccine) being mandated. It is important that the state have the capacity to provide adequate supply of the vaccine whenever a mandate creates demand. It is patently unfair and senseless to demand compliance with vaccination policies without making the vaccine sufficiently available.

Horvath v. City of Leander (5th Cir. Jan. 13, 2020)

A city employee (an ordained Baptist minister) objected on religious grounds to a city requirement for TDAP (tetanus, diptheria, pertussis) vaccinations and was given a choice either to transfer to another to a code enforcement job that did not require a vaccination or wear a respirator mask during his shifts, keep a log of his temperature and submit to additional medical testing. He was fired when he refused to accept either accommodation. His termination for defiance of a direct order by failing to select an accommodation was upheld by the Fifth Circuit, which held that the City had a legitimate, non-discriminatory reason for firing him. While the employee had a constitutional right to exercise his religion by refusing the vaccine, the respirator proposal would have enabled him to freely exercise his religion while maintaining his current job.

Bridges v. Houston Methodist Hospital (5th Cir. June 12, 2021)

In one of the most recent major judicial rulings upholding a hospital's COVID-19 vaccine mandate, the Fifth Circuit rejected 117 hospital employees' claims that they were being unlawfully forced to be injected with a currently available vaccine or be fired. The court rejected claims that this violated, *inter alia*, federal law, FDA regulations, and the Nuremberg Code.

Bridges v. Houston Methodist Hospital

The court rejected the notion that the hospital's employees are participants in a human trial or forced medical experimentation. They are licensed doctors, nurses, medical technicians, and staff members. As for the claim that the injection requirement violates the Nuremberg Code, it does not. "Equating the injection requirement to medical experimentation in concentration camps is reprehensible."

Bridges v. Houston Methodist Hospital

Bridges has not been coerced. She says she is being forced to be injected with a vaccine or be fired. “This is not coercion. Methodist is trying to do their business of saving lives without giving them the COVID-19 virus. Bridges can freely choose to accept or refuse a COVID-19 vaccine; however, if she refuses, she will simply need to work somewhere else.”

Bridges v. Houston Methodist Hospital

"If a worker refuses an assignment, changed office, earlier start time, or other directive, he may be properly fired. Every employment includes limits on the worker's behavior in exchange for his remuneration. That is all part of the bargain."

Klassen v. The Trustees of Indiana University (N.D. Indiana July 18, 2021)

On July 18, 2021, a district court in Indiana held that Indiana University had the discretion to act reasonably in protecting the public's health and acted constitutionally in mandating the COVID-19 vaccine for its students. Under guiding principles of federalism and precedent recognizing that our Constitution preserves the power of the states, within constitutional limits, to adopt laws to provide for public health and safety, the court recognized the students' significant liberty to refuse unwanted medical treatment. The implications for students were that students may be deprived of attending the university without being vaccinated or qualifying for an exemption, although they had real options such as taking the vaccine, applying for a religious exemption, applying for a medical exemption, applying for a medical deferral, taking a semester off, or attending another university or online.

Klassen v. The Trustees of Indiana University: SCOTUS

Holding that the students had failed to establish the requisite likelihood of success on the merits and thus were not entitled to injunctive relief, the District Court said: "The Constitution and longstanding precedent should endure. Recognizing the students' significant liberty to refuse unwanted medical treatment, the Fourteenth Amendment permits Indiana University to pursue a reasonable and due process of vaccination in the legitimate interest of public health for its students, faculty, and staff." Justice Amy Coney Barrett denied the students' emergency application for injunctive relief on August 12, 2021, without comment and without referring the request to the full court, suggesting this was not a particularly close case.

EEOC Technical Assistance

The Equal Employment Opportunity Commission on May 28, 2021 issued an updated technical assistance that employers can require employees to be vaccinated against COVID-19 subject to reasonable accommodations for employees with disabilities or sincerely held religious beliefs that preclude vaccination.
https://www.eeoc.gov/newsroom/eeoc-issues-updated-covid-19-technical-assistance . The four key updates provided by the EEOC are summarized as follows.

1. Federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, so long as employers comply with the reasonable accommodation provisions of the ADA and Title VII of the Civil Rights Act of 1964 and other EEO considerations. Other laws, not in EEOC's jurisdiction, may place additional restrictions on employers. From an EEO perspective, employers should keep in mind that because some individuals or demographic groups may face greater barriers to receiving a COVID-19 vaccination than others, some employees may be more likely to be negatively impacted by a vaccination requirement.

2. Federal EEO laws do not prevent or limit employers from offering incentives to employees to voluntarily provide documentation or other confirmation of vaccination obtained from a third party (not the employer) in the community, such as a pharmacy, personal health care provider, or public clinic. If employers choose to obtain vaccination information from their employees, employers must keep vaccination information confidential pursuant to the ADA.

3. Employers that are administering vaccines to their employees may offer incentives for employees to be vaccinated, as long as the incentives are not coercive. Because vaccinations require employees to answer pre-vaccination disability-related screening questions, a very large incentive could make employees feel pressured to disclose protected medical information.

4. Employers may provide employees and their family members with information to educate them about COVID-19 vaccines and raise awareness about the benefits of vaccination. The technical assistance highlights federal government resources available to those seeking more information about how to get vaccinated.

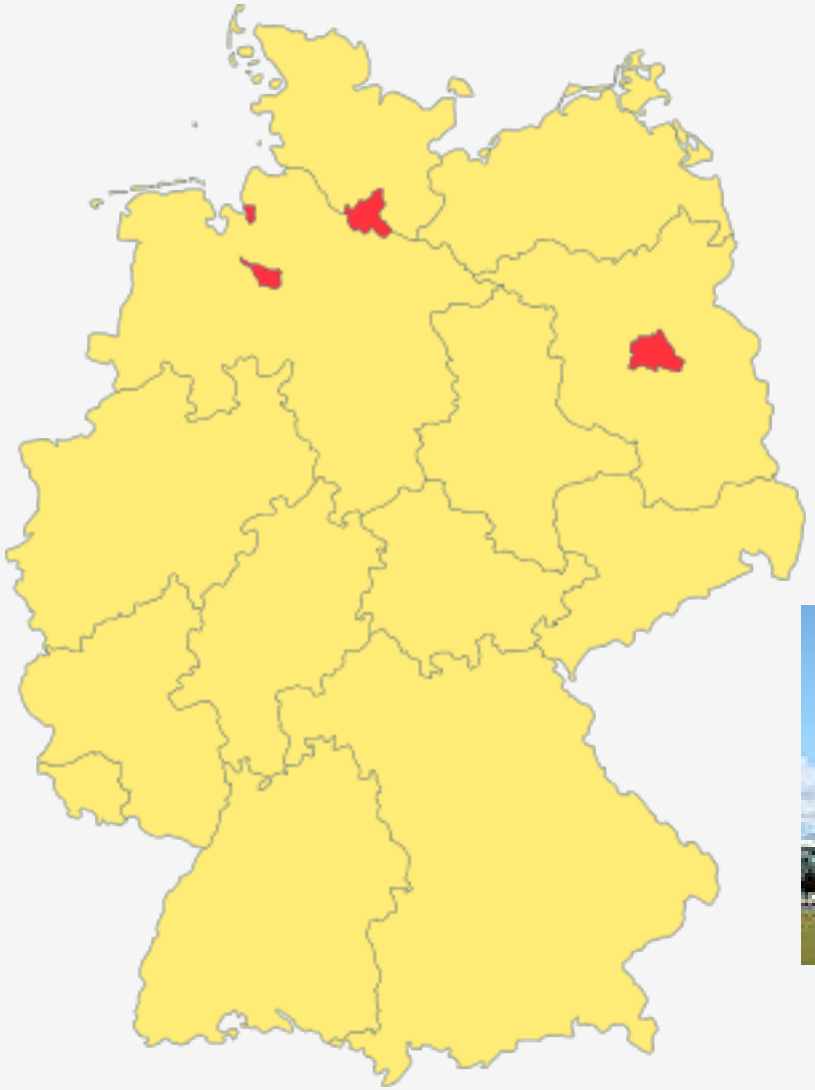
Private Sector Vaccine Mandates

Companies in the USA private sector, from Disney, Google, Facebook, Netflix and Walmart, to Saks Fifth Avenue, Morgan Stanley, Goldman Sachs,Twitter, Lyft and Uber, have recently begun mandating that their employees get vaccinated against COVID-19. Some have even extended the mandate to their customers and patrons. Alexis Benveniste, *From Offices to Restaurants, Companies are Requiring Proof of Vaccination*,CNN Business, August 4, 2021. International employers must be sensitive to the divergent cultural and legal issues as they consider a global approach to mandating their workforce get vaccinated, the upshot being that rather than a one-size-sits-all approach, a voluntary program may be more likely enforceable and reduce the risk of legal challenges under local law.

Approach to Vaccine Mandates in Other Countries

Indonesia initiated a mandatory COVID-19 vaccination program in February 2021, as Southeast Asia faced a deadly coronavirus wave.
Turkmenistan requires all citizens 18 or older to get a coronavirus vaccine unless they have a medical exemption.
Russia has placed the burden on businesses, requiring them to ensure at least 60% of their employees are fully inoculated by mid-August, with harsh penalties for failing to meet this target.
French lawmakers recently approved a controversial law in July 2021 that gives vaccinated people privileged access to restaurants, cafes, and public transportation beginning in August. Claire Parker, *Here's How Countries Around the World Have Approached Vaccine Mandates*, The Washington Post, July 29, 2021.

The Look to Germany – Political and legal Situation

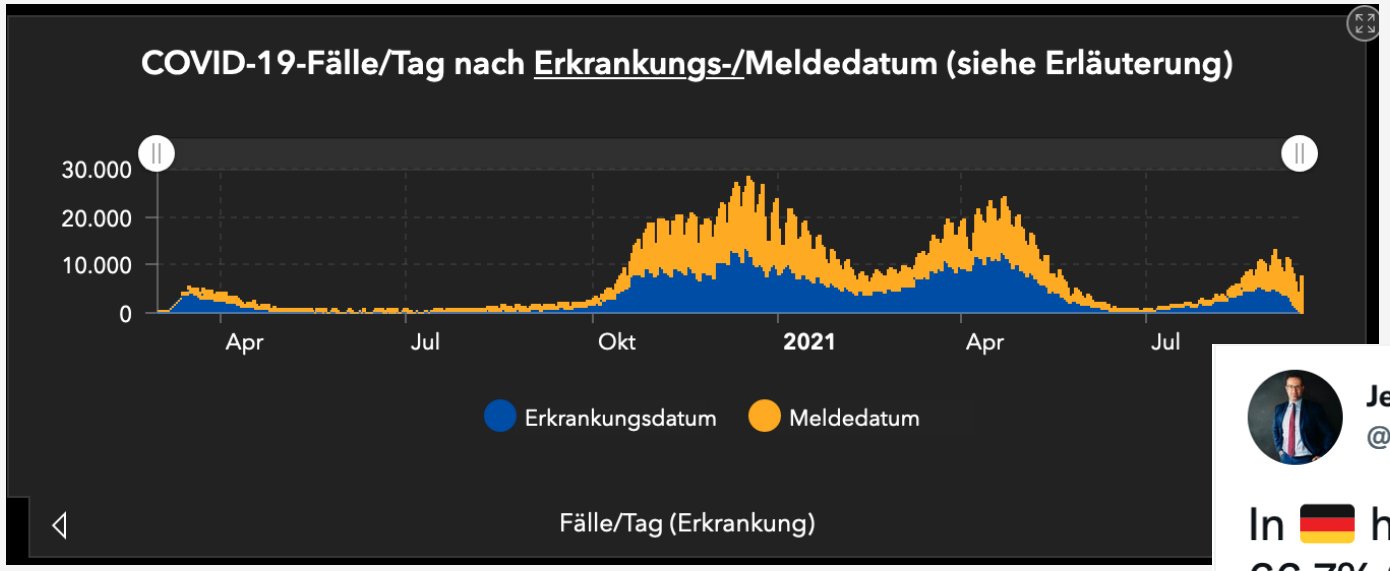


- Federal State – 16 sovereign federated states
- German Bundestag - responsible for the federal legislation
- state parliaments in each of the federal states





Quick Numbers



Habitants: 83 Mio

Infections: 4,1 Mio

Deceased: 92.779 (As by: Sept 15th 2021)



Quotes about mandatory vaccination

The Vice Chancellor and SPD candidate for Chancellor Olaf Scholz has ruled out a mandatory vaccination in the Bundestag. Instead, he wants to advertise that even more people get vaccinated. (07.09.2021)

Members of the German Ethics Council plead for mandatory vaccination for certain professions (05.09.2021)

Health Minister Jens Spahn recently spoke out against mandatory vaccination again. From his point of view, however, part of the nursing profession is to be vaccinated. (04.09.2021)

Berlin's governing mayor has not spoken out in favor of mandatory vaccination, but that one "Serious and express advice" given that the vaccination offers will be accepted. "Do it, otherwise it will be complicated and possibly more expensive for you." (08/11/2021).

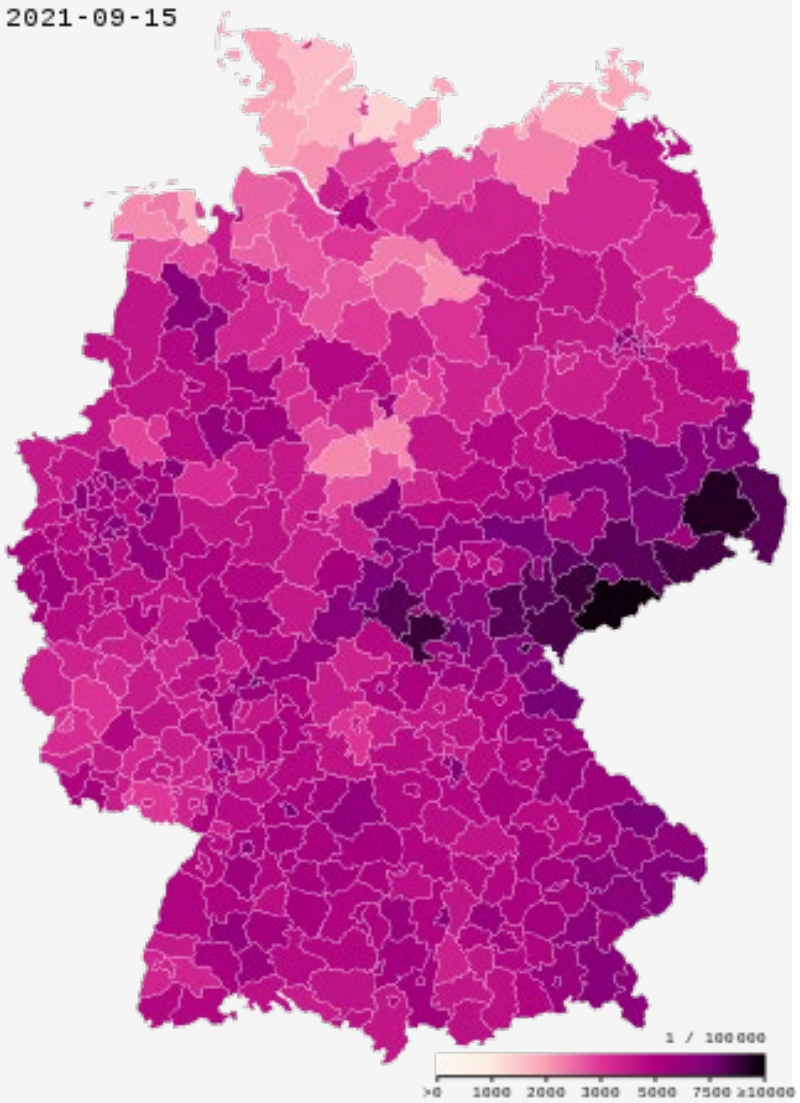
The Chancellor candidate of the green party Annalena Baerbock does not rule out mandatory vaccination for certain professional groups in the event of a drastic worsening of the corona situation (23.08.2021)

Infection Protection Act

- passed on May 12, 2000 by the German Bundestag with the consent of the Bundesrat on July 20, 2000 and came into force on January 1, 2001

- institutionalized the Robert Koch Institute as an epidemiological center

- The US Centers for Disease Control and Prevention served as a model.



Infection Protection Act – legislative competence

- Protection against infection and combating epidemics are part of the prevention of dangers, for which the federal states generally have the legislative competence.
- Article 74 (1) No. 19 of the German Constitution, the federal government has competing legislative competence for “measures against publicly dangerous or communicable diseases”.
- With the enactment of the Infection Protection Act, the federal legislature took advantage of this.
- Insofar as the federal government has made use of competing legislative powers, the federal states have no further regulatory powers Article 72 (1) of the German Constitution.



Infection Protection Act and critics

The "orders" provided for in Section 5 (2) No. 1, No. 2, No. 5 and No. 6 Infection Protection Act are administrative acts:

> "The order concludes an official administrative procedure and directly determines the subjective public rights or obligations of those involved [...] with state authority and the final and final force of effect [...]."

"I consider it [...] unconstitutional if a ministry can amend laws of the Bundestag by means of an emergency ordinance without the Bundestag having any way of preventing this." Kingreen

"With the authorization of a federal ministry to issue statutory ordinances, the parliament is contradicting the central norms of the constitution." Gärditz

"This is not about the repeal of individual regulations within the framework of experimental clauses, for which such statutory ordinances are discussed, but about the derogation of large, non-delimited parts of the law. This cannot be reconciled with Article 80 (1) of the German Constitution." Möllers

Jurisprudence in the pandemic

(A)Mask requirement in school:
As a necessary protective measure, the mask requirement in class can probably be based on the Infection Protection Act (Administrative Court of Munich, 20 NE 20.1981, 07.09.2020).

(B) School Lessons:
Even in view of the coronavirus pandemic, a student has no general entitlement to homeschooling and exemption from classroom instruction in the school (Hanover Administrative Court, 6 B 4530/20, 09/10/2020)



Jurisprudence in the pandemic

(C) Compensation for the closure of restaurants in the state of Berlin: In the specific case, however, the disadvantages suffered as a result of the temporary restaurant closure in the period from March 14, 2020 or March 23, 2020 to May 9, 2020 should not be regarded as such an unreasonable special sacrifice and would be in the area of an acceptable general life and health Move entrepreneurial risk.
(Berlin Regional Court, 2 O 247/20, October 13, 2020)



Jurisprudence in the pandemic

(F) Mask requirement in churches:The obligation to wear a mask undoubtedly affects priests in their religious and pastoral work and thus in their religious freedom, which is protected by fundamental rights. After weighing up the consequences, however, the restrictions would have to take a back seat to the public goal of protecting the health of the population and preventing the health system from being overloaded. Administration Court Frankfurt a.M., 5 L 2749/20, October 27, 2020)



Jurisprudence in the pandemic

Urgent applications by the Federal Constitutional Court: (May 2021)

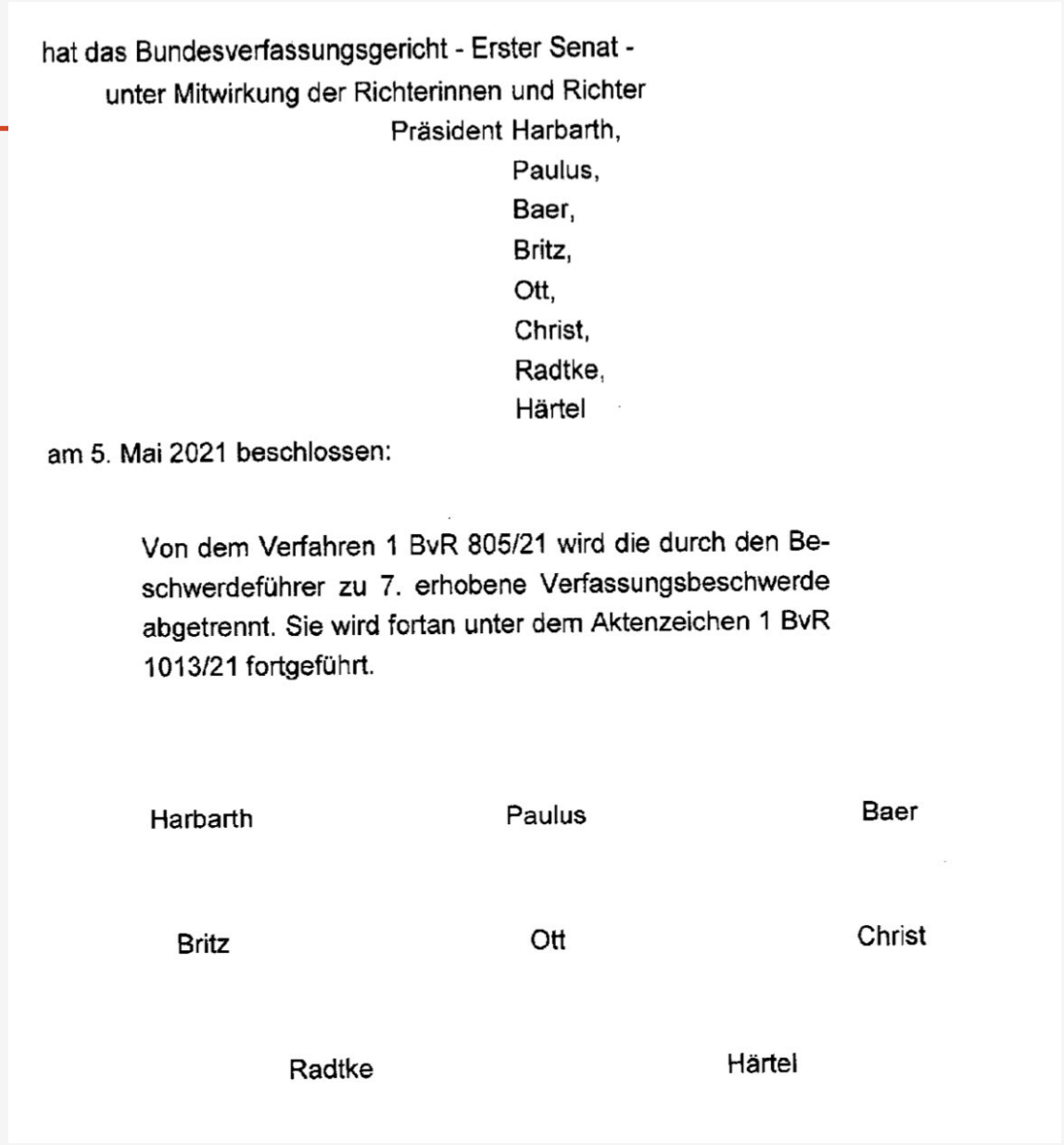
With a decision published today, the First Senate of the Federal Constitutional Court has rejected applications for an interim order that was intended to temporarily suspend the night-time exit restriction regulated in Section 28b (1) Sentence 1 No.2 Infection Protection Act This does not mean that the exit restriction is compatible with the German Constitution.



Jurisprudence in the pandemic

Urgent applications by the Federal Constitutional Court: (May 2021)

In the procedure 1 BvR 805/21, the constitutional complaint of a complainant who submitted that he was immunized after surviving COVID-19 disease was separated.



hat das Bundesverfassungsgericht - Erster Senat -
unter Mitwirkung der Richterinnen und Richter
Präsident Harbarth,
Paulus,
Baer,
Britz,
Ott,
Christ,
Radtke,
Härtel

am 5. Mai 2021 beschlossen:

Von dem Verfahren 1 BvR 805/21 wird die durch den Beschwerdeführer zu 7. erhobene Verfassungsbeschwerde abgetrennt. Sie wird fortan unter dem Aktenzeichen 1 BvR 1013/21 fortgeführt.

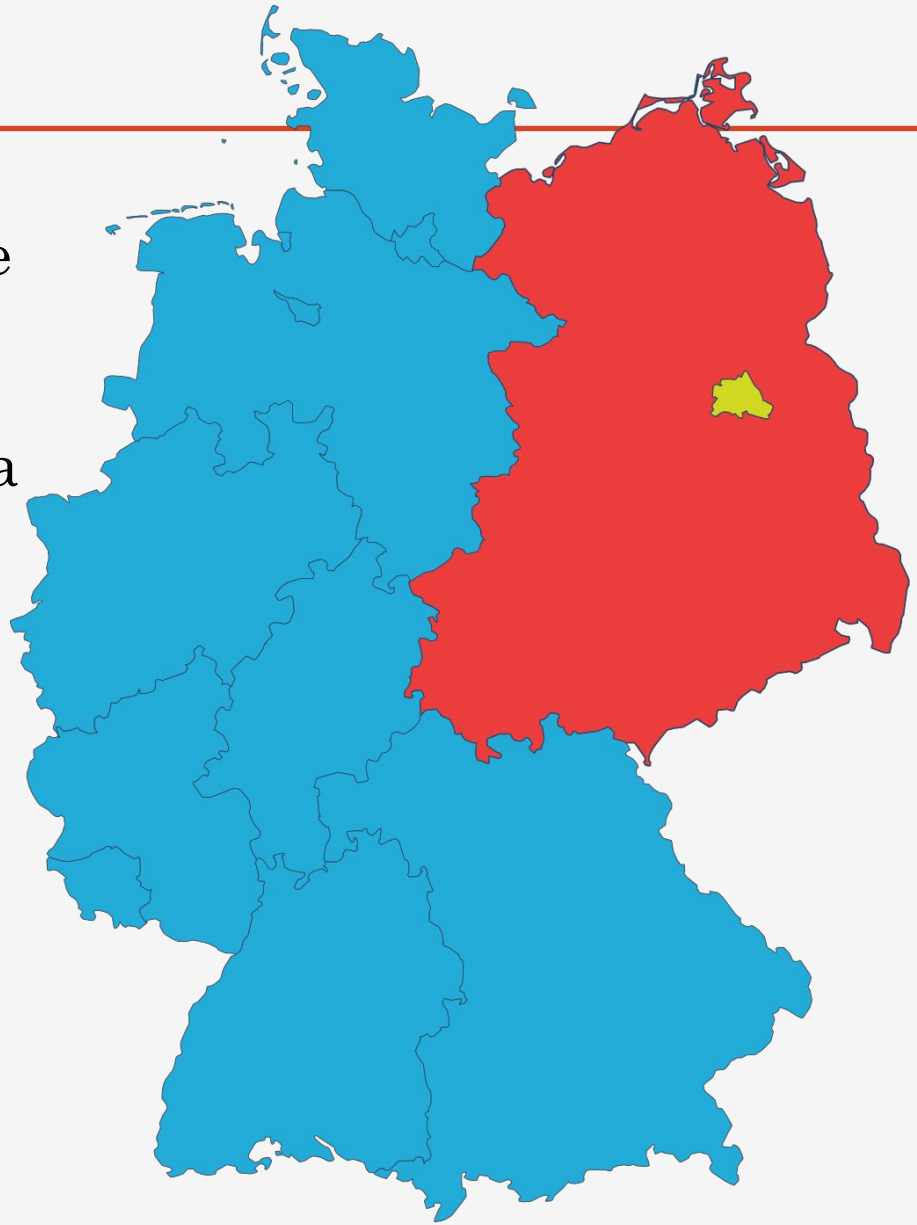
Harbarth Paulus Baer

Britz Ott Christ

Radtke Härtel

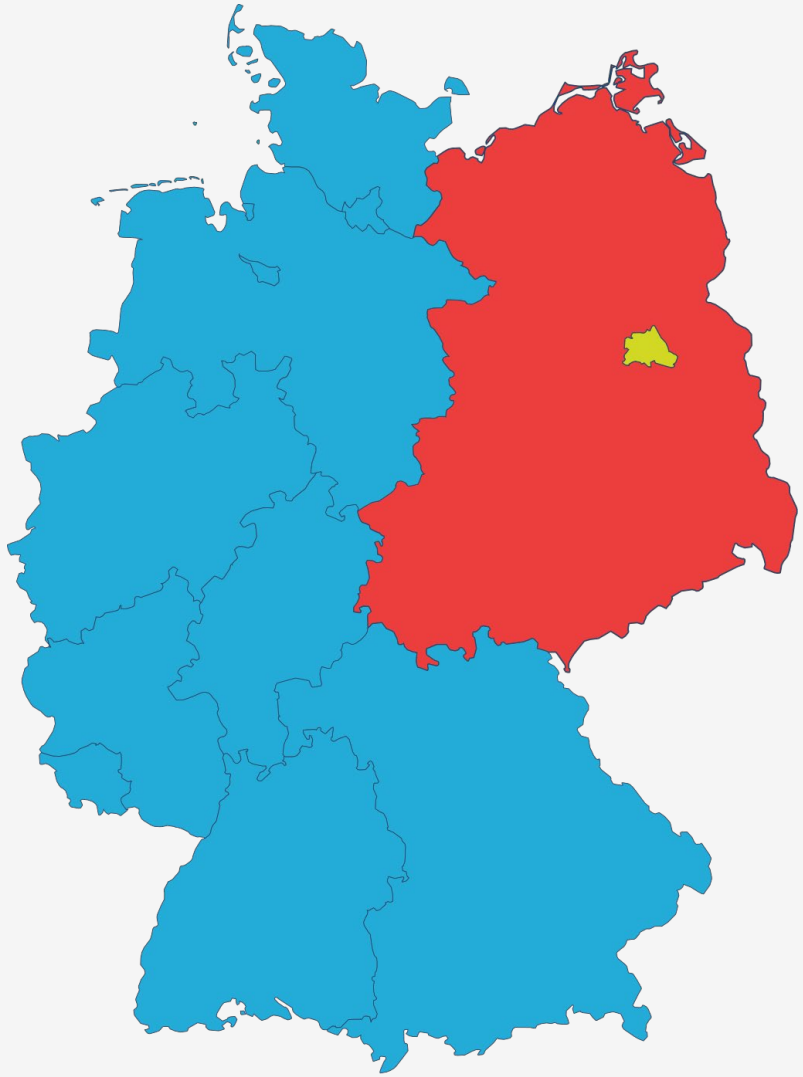
Mandatory vaccination in Germany

- In the Federal Republic of Germany there was already mandatory vaccination up until 1983 - against smallpox
- mandatory vaccination against diphtheria in several states, such as today's Baden-Württemberg, from 1946 to 1954
- The Federal Administrative Court ruled in 1959 that the mandatory vaccination was compatible with the German Constitution.
- Since the beginning of 2020, a measles vaccination has also been mandatory in daycare centers.



Mandatory vaccination in Germany (East-Germany – Red)

- In the GDR there was a legal vaccination requirement from 1953, which was expanded in the following years
- obligation to get vaccinated, only against smallpox and tuberculosis
- In the 1960s, vaccination against polio, diphtheria, tetanus and whooping cough also became mandatory
- In 1970 the measles vaccination was added.



Mandatory vaccination – Federal Constitutional Court 2020

Case: vaccinated against measles - two pairs of parents have sued this before the Federal Constitutional Court

Decision:

- The judges weighed up the consequences and checked: Which consequences weigh more heavily?
- What if the children are not allowed to go to daycare or kindergarden without a vaccination? Or if the children are allowed to do this and then possibly infect others?
- The judges decided that mandatory vaccination should continue to apply, as this is about protecting a large number of people's fundamental rights.
- **The vaccination serves to provide better protection against measles infection. It is also about preventing it from spreading to the population. This is particularly important.**

Look into the future

F+ Interview

Verfassungsrechtler Papier: „Vorsorgliche Verbote sind nicht mehr zulässig“

Hans-Jürgen Papier sagt: Weil viele Menschen geimpft sind, kann der Staat nicht mehr einfach auf Verdacht Maßnahmen verordnen.

Michael Maier, 13.9.2021 - 21:24 Uhr

Artikel anhören



dpa/Ronald Wittek

Der frühere Präsident des Bundesverfassungsgerichts, Hans-Jürgen Papier (links)

„Precautionary prohibitions are no longer permitted“

Look into the future

Unvaccinated people have to stay outside:

2G (recovered, vaccinated)

Vs.

3G (recovered, vaccinated, tested)



Look into the future

Berlin:

Sept 13th 2021: 2G in Clubs
Sept 14th 2021: Senate: 2G events are now possible in restaurants, leisure events, private celebrations, major events, body-friendly services, tourist offers, sports as well as saunas, zoos and amusement arcades
Sept 15th 2021: Rollback: 2G plus – Kids under 12 allowed in restaurants



Ärger um Corona-Maßnahmen

Nach gegenseitigen Schuldzuweisungen: Berliner Senat kippt 2G-Regel für Kinder

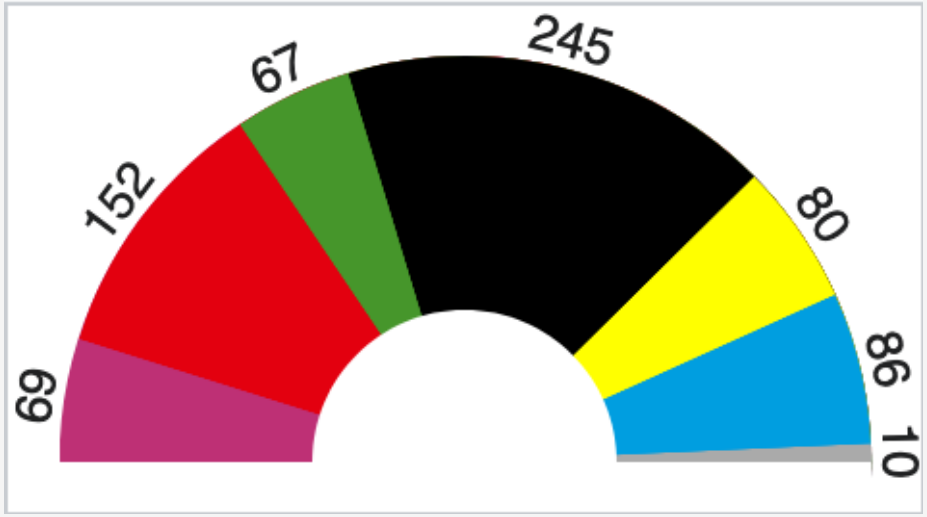
Rot-Rot-Grün streitet mal wieder, diesmal um Regeln für Ungeimpfte und die Rolle der Kinder. Die unter Zwölfjährigen werden nun doch nicht ausgeschlossen.

Look into the future

* Sept. 26th 2001:

German Election +

Berlin Election



* My point of view to the future:

2G +

sooner or later: mandatory vaccination will be come

Thanks for your attention

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