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*COVID-19 Vaccine Mandates:
An International Perspective*

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INTRODUCTION

Mandatory vaccination laws and policies worldwide are center-stage as national and state governments seek to address low rates of COVID-19 vaccinations and the thorny issues of how, why, and where vaccine mandates can or should be put in place. To be sure, no vaccine comes with a guarantee of 100% effectiveness with no side effects, a fact of life that may contribute, along with other factors, to vaccine hesitancy. The pandemic response is also being impaired by a highly polarized and politically divisive nation led in some quarters by certain elected officials with amplification by a far right media. This extreme political polarization has been the source of a growing and vociferous anti-vaccination lobby and continued media efforts by a vocal opposition to legitimate efforts to protect the public from the ravages of the pandemic now in its fourth wave.

OVERVIEW: We will first give a broad overview of vaccine mandates from the perspective of the United States, starting with the current Administration's "Path Out of the Pandemic: President Biden's COVID-19 Action Plan" announced on September 9, 2021. We will then look carefully at this issue from an international perspective focusing on member states of the European Union, particularly Germany, as well as other nations throughout the world.

CONSTITUTIONALITY: Compulsory vaccination laws are constitutional under current U.S. law and are justified when there is an imminent public health threat and an available and effective vaccine. This black letter statement applies particularly with respect to vaccinations for children in order to attend school in all fifty states and the District of Columbia, for diseases such as diphtheria, tetanus, pertussis, measles, mumps, rubella, and polio, with fewer states requiring vaccinations for chicken pox (40 states), hepatitis B (39 states), hepatitis A (15 states), and human papillomavirus (6 states). While many state laws provide medical, religious and personal exemptions, the compelling conclusion, advanced by a host of constitutional experts that include Professor Irwin Chemerinsky is that every child and adult should be vaccinated unless there is a valid medical reason not to do so.

THE PANDMIC UNFOLDS: Effective February 4, 2020, the U.S. Department of Health and Human Services issued a Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19. Beginning in March 2020, the spread of COVID-19 across the United States led to suspension of in-person learning in thousands of school districts.

Piekarz-Porter, Schermbeck and Chriqui, *Preparing for a return to the classroom*, UIC Policy Practice and Prevention Research Center (P3RC Fact Sheet No. 101, January 2021); Chemerinsky and Goodwin, *Compulsory Vaccination Laws are Constitutional*, Legal Studies Research Paper Series No. 2015-71.

FDA APPROVAL: The FDA fully approved the first COVID-19 vaccine, the Pfizer-BioNTech COVID-19 vaccine, on August 23, 2021, which will now be marketed as Comirnaty, for the prevention of COVID-19 disease in individuals 16 years of age and older. Comirnaty contains messenger RNA, a kind of genetic material used by the body to make a mimic of one of the proteins in the virus that causes COVID-19, with the result that the immunity system of a person receiving the vaccine ultimately reacts defensively to the virus.

NEED FOR BIPARTISAN CONSENSUS: Turning from mandatory vaccination from the above childhood diseases for all children in the United States to mandatory vaccination for COVID-19, the black letter statement gets more nuanced and complicated, and the battle lines are solidifying. Attitudes and health-protective behaviors during the COVID-19 pandemic have been increasingly and highly polarized for political reasons, making this a culture war when the emphasis should be on protecting the public in an unprecedented pandemic. One recent study published online on April 1, 2021 reached the not-too-surprising conclusion that “COVID-19 attitudes and behaviors vary significantly between conservatives and liberals in the U.S.” and that in order to effectively manage the pandemic, “bipartisan consensus is required.”

Political Polarization on Covid-19 Response in the United States, Personality and Individual Differences 179(5):110892 (April 2021), accessible at

<https://www.researchgate.net/publication/350587938> Political polarization on COVID-19 pandemic response in the United States

This study also reported findings of high levels of polarization in communication by political elites to the public and lower support and concern for COVID-19 among conservatives compared to liberals in the United States. For example, the media’s role in contributing to this political polarization was addressed in one national survey that found about 50% of Fox News viewers believed Bill Gates created the coronavirus disease as part of a vaccination conspiracy and far-right leaning media such as Breitbart and Fox News had particularly facilitated the spread of misinformation about the coronavirus as compared to mainstream media.

The Seeds of Political Polarization and Vaccine Hesitancy

Throughout February and March 2020, then-President Donald Trump consistently downplayed the coronavirus as “mild” and “under control” while

opposition leaders and medical experts warned that the crisis was far worse. The consistent downplaying of the threat posed by the coronavirus by Trump's political messaging and minimizing of evidence-based courses of action led to unfortunate consequences. It effectively attacked science and de-emphasized threats to public health while shifting the focus to business impacts and blaming China. This political polarization has led people on opposite sides of the political aisle in the U.S. treating the coronavirus differently and gravitating toward different public health and economic policy positions.

HYPERPARTISANSHIP AND POLARIZATION: The politicization and polarization of COVID-19 has been amplified by right wing social media, extreme right wing elected officials, and the public they seek to influence in their respective echo chambers. These actions have exacerbated the public health emergency and partisan divide. Dr. Anthony Fauci garnered the approval of 78% of Americans for his high pressure position of advising then-President Trump on the government's response to the pandemic and just 7% disapproval. Undeterred, the right wing social media and extreme right wing politicians have routinely accused Dr. Fauci of being a "closet lefty" who overestimates the consequences of COVID-19. This was despite his reliance on repeatable and testable medical science and hard facts.

Florida's Ban on Vaccination Policies: the Cruise Line Fiasco

Many cruise lines are now requiring proof of vaccination against COVID-19, mask-wearing, and testing in order to board. Norwegian Cruise Line and Virgin Voyages are requiring all guests to be fully vaccinated before boarding, with no exceptions, taking advantage of the vaccine rollout to give guests peace of mind. Royal Caribbean and Celebrity Cruises have made vaccination optional for certain cruises but have implemented strict masking and test policies.

In Florida, Norwegian brought an as-applied constitutional challenge seeking to bar enforcement of a recently enacted Florida statute that prevented it from implementing its vaccination policy for cruise vessels departing from Florida. The statute prohibited the cruise line from requiring passengers to provide any documentation certifying COVID-19 vaccination or post-infection recovery prior to boarding. U.S. District Judge Kathleen Williams granted the cruise line's request for a preliminary injunction in *Norwegian Cruise Line Holdings v. Rivkees* (S.D. August 8, 2021) (Williams, J.), 59-page Order on Preliminary Injunction accessible at <https://www.politico.com/states/f/?id=0000017b-2848-d1e7-a1fb-3acd5a420000>.

The state appealed to the Eleventh Circuit where the matter is now pending.

Path Out of the Pandemic

Given the politically partisan nature of how citizens in the U.S. view the pandemic, there is a clear need to develop a pathway that will lead to a long-term solution such as herd immunity. This may compel consideration of such pragmatic policy measures as vaccine mandates that are COVID-19 specific, doing so in the

face of vaccine hesitancy, anti-vaxxers, persons with deeply held religious beliefs, medical reasons that prevent them from getting vaccinated and persons in thrall with, and irretrievably convinced by, misinformation and disinformation that COVID-19 is fake, a hoax, or not real. That pathway was announced by the Biden Administration on September 9, 2021, in the “Path Out of the Pandemic: President Biden’s COVID-19 Action Plan.”

Six-Pronged National Strategy

This action plan sets forth a six-pronged national strategy that employs a solid science-based approach and steps up our Nation’s medical response to the coronavirus to reduce deaths among those who are hit with the disease. The components of this national strategy, announced by Executive Order on September 9, 2021, are (1) vaccinating the unvaccinated, (2) further protecting the vaccinated, (3) keeping schools safely open, (4) increasing testing and requiring masking, (5) protecting our economic recovery, and (6) improving care for those with COVID-19. This national strategy for stopping the COVID-19 pandemic and its socioeconomic consequences is multifaceted, and it includes at its core one of the greatest success stories in public health: Vaccinations.

Using the best tools that are available to us now, this action plan centers on vaccinating the unvaccinated in what the President calls “a pandemic of the unvaccinated.”

KEY FEATURES OF ACTION PLAN: The specific features of the action plan to reduce the number of unvaccinated Americans are:

- a. Requiring all employers with 100 or more employees to ensure their workers are vaccinated or tested weekly. **Note that** despite the broad scope of President Biden’s push, most U.S. workers, more than 80 million, will still have the *option* of proving they are not carrying the virus by submitting to weekly Covid tests.
- b. Requiring vaccinations for all federal workers and for millions of contractors that do business with the federal government.
- c. Requiring COVID-19 vaccinations for over 17 million health care workers at Medicare and Medicaid participating hospitals, nursing facilities, home health agencies and other health care settings.
- d. Calling on large entertainment venues to require proof of vaccination or testing for entry.
- e. Requiring employers to provide paid time off to get vaccinated.

An important part of the action plan is to keep schools safely open, and to that end the plan requires staff in Head Start programs, Department of Defense schools, and Bureau of Indian Educated-Operated schools to be vaccinated, calls on all states to adopt vaccine requirements for all school employees, providing additional funding to school districts for Safe School Reopening that includes backfilling salaries and other funding withheld by a few states as punishment for implementing COVID safety measures.

Los Angeles Unified School District Vaccine Mandate

The day before President Biden announced this action plan, the leadership of the second largest school district in the Nation, the Board of Education for the Los Angeles Unified School District, serving over 600,000 students, unanimously approved an order that all children 12 and older in Los Angeles public schools must be fully vaccinated against COVID-19 by January 2022 to enter campus. This is the first vaccine mandate among the nation's largest school systems and a decision that triggered immediate pushback. **L.A. school officials order sweeping student vaccine mandate, a first by a major district**, Los Angeles Times, September 9, 2021, <https://www.msn.com/en-us/news/us/la-school-officials-order-sweeping-student-vaccine-mandate-a-first-by-a-major-district/ar-AAOh0ii?ocid=uxbndlbing>

New York City's KEY to NYC PASS

On the public sector side, New York City recently announced its “Key to NYC Pass” that requires proof of vaccination for access to most indoor activities, including gyms, restaurants and performances. Yet over a dozen states have also enacted laws or issued executive orders prohibiting vaccine passports or COVID-19 vaccine mandates restricting private businesses, schools, colleges and universities from asking for proof of vaccination, tying the hands of health officials to act quickly and decisively. The issue of vaccine passports, along with the Florida cruise line litigation pushed by Governor DeSantis, may lead to a showdown sooner than later over the legal enforceability under the Supremacy Clause of the U.S. Constitution in light of imminent implementation of the Path Out of the Pandemic: President Biden’s COVID-19 Action Plan, as discussed in more detail infra.

Lessons from the European Court of Human Rights (ECtHR)

2015 *Vavricka v. Czech Republic* App. No. 47621/13 (ECtHR 8 April 2015)

Vavricka is the most recent decision regarding compulsory vaccinations in context of the European body of fundamental rights. While there have been previous decisions on compulsory vaccination, e.g., *Solomakhin v. Ukraine*, App. No. 24429/03 36 (ECtHR, 6 May 2008); *Boffa et al v. San Marino*, App. No. 26536/95 27 (Commission Decision, 15 January 1998), it appears that due to the unique circumstances presented by the pandemic, the decision in *Vavricka* stating the rationale of the court is the clearest.

Definition of Compulsory Vaccination

Compulsory vaccination means a vaccination system in which the enforcement of a duty to vaccinate is ultimately ensured by the compulsory administration of the vaccine. There is an important difference between absolute or direct compulsory vaccination and relative or indirect compulsory vaccination.

Anja Krasser, a member of the Faculty of Law at the University of Graz, has 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, written at the time she was a Ph. D. candidate, 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.

As Anja Krasser clarifies in her timely article, states for the most part opt for vaccination systems that mandate indirect and negative forms of enforcement

“which imply negative consequences in the case of the refusal to vaccinate but do not include compulsory administration. Such indirect means may be fines or the linking of one’s vaccination status to the enjoyment of certain (non-essential) services, like preschool, or situations, e.g., attending a concert. Considering that medical interventions are only to be carried out with the free and informed consent of the person concerned, it seems appropriate to define every consequence as a result of refusing to carry out a vaccination as ‘compulsory vaccination’ subject to justification, as these consequences can (and are intended to) influence one’s decision to get vaccinated.”

This is in accord with the definition of compulsory vaccination underlying the Court’s recent decision *Vavricka v Czech Republic*.

Specifically, the ECtHR in *Vavricka*, while speaking of ‘compulsory vaccination’, made it clear that the duty cannot be directly imposed. The fine for not vaccinating one’s child could not exceed EUR 400, and could only be imposed once. As the ECtHR noted, moreover, “the consequences [of non-compliance] borne by the applicants cannot be meaningfully dissociated from the underlying duty. On the contrary, they flow immediately and directly from the applicants’ attitude towards it and are therefore intrinsically connected to it.”

Anja Krasser, *Compulsory Vaccination in a Fundamental Rights Perspective: Lessons from the ECtHR* (June 3, 2021), accessible online at <https://www.degruyter.com/document/doi/10.1515/icl-2021-0010/html> (fn omitted)

Facts of *Vavricka v. Czech Republic*

A parent in the Czech Republic refused to have his 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

finer and sanctions, the parent asserted interference with and violations of Article 2 ECHR, Article 8 ECHR, and Article 9 ECHR. The case was ultimately heard and decided by the European Court of Human Rights, whose Grand Chamber Judgment was handed down in Applications No. 47621/13 et seq. on April 8, 2021.

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

On April 8, 2021, the Grand Chamber of the European Court of Human Rights issued its judgment in *Vavricka v. The Czech Republic*, at a time when the worldwide COVID-19 pandemic was about to enter its fourth wave with the increasingly virulent Delta variant. The ECtHR Judgment was seen by many as timely and a source for useful guidelines on whether and under what circumstances compulsory COVID-19 vaccinations could be deemed compatible with the European Convention on Human Rights (ECHR).

CONSEQUENCES OF NONCOMPLIANCE: The *Vavricka* case originated from a parent's application on his own behalf and five other applications on behalf of children. All six applications were discussed together because of their similar circumstances. The parent was found to have committed a minor offense in failing to have his children vaccinated. The five child applicants either had not been admitted to nursery school or their enrollment had been cancelled because they had not been vaccinated in compliance with relevant national legislation. The parent and child applicants all complained about the consequences of non-compliance with mandatory vaccinations, relying on European Convention on Human Rights (ECHR) Articles 8, 9, 2, 6, 13 and 14, and Article 2 of Protocol 1. According to the ECtHR, the applications were assessed only under Article 8 governing the right to respect for private life. While the vaccinations had not been actually performed, the ECtHR held that the mere vaccination duty and the direct consequences of noncompliance with that duty amounted to an interference.

POSITIVE OBLIGATION: The ECtHR noted that States are under a positive obligation to take appropriate measures to protect the life and health of those within their jurisdiction and found that the Czech Republic had imposed children's compulsory vaccination as an answer to the pressing social need of protecting individual and public health and of preventing a downward trend in the vaccination rate among children.

In assessing the proportionality of the mandatory vaccination measure, the ECtHR emphasized that the national law did not allow vaccinations to be forcibly administered and that the duty was enforced indirectly through sanctions, which had a protective character.

POSSIBLE GUIDANCE ON COVID-19 VACCINE: The *Vavricka* judgment rendered by the European Court of Human Rights and the analysis employed by

that Court concerned the standard and routine vaccination of children against diseases that are well known to medical science. Its analysis and assessment of the necessity of compulsory vaccinations in democratic society provides at least some guidance on the compatibility of compulsory COVID-19 vaccinations with the European Convention on Human Rights (ECHR). It does not, however, address the specific aspects of the individual vaccines. One can thus assume that the ECtHR's assessment of the COVID-19 vaccine would result in the same conclusion. Thus far no clear guidelines have been established to determine which vaccines are suitable for compulsory vaccination and which are not.

Of course, the COVID-19 vaccine is very likely to be considered suitable to compulsory vaccination, but one cannot yet conclude that the ECtHR's judgment does not provide clear guidance in light of the lack of any consideration of several relevant aspects surrounding this issue. Under this analysis, compulsory vaccinations can be reasonably introduced for an appropriate level of protection, and mandatory vaccinations can be deemed a reasonable response to COVID-19, if the vaccination is considered safe by the scientific community and it indirectly imposed through sanctions of a protective character. The ECtHR's judgment does not completely rule out the direct imposition of the duty, and there may be circumstances under which even that could be considered necessary. The court only discussed what it brought before it and thus far, no absolute vaccination scheme was part of the relevant case law. Nonetheless, the fact that the duty is only imposed indirectly makes the measure all the more proportionate.

Spyridoula Katsoni, What Does the Vavříčka Judgement Tell Us About the Compatibility of Compulsory COVID-19 Vaccinations with the ECHR?, *Völkerrechtsblog*, 21.04.2021, doi: [10.17176/20210421-100920-0](https://doi.org/10.17176/20210421-100920-0), <https://voelkerrechtsblog.org/what-does-the-vavricka-judgement-tell-us-about-the-compatibility-of-compulsory-covid-19-vaccinations-with-the-echr/>

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.

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: It should be noted that the decision focuses primarily on Article 8 ECHR, and in *Vavricka*, the court found that the claim of the parent under Article 9 (convictions and conscience of the parent) to be inadmissible. Interference with parents' right to care for children 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. Proportionality was thus considered in the context of the focus of the bodily integrity and autonomy of the children.

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. There nonetheless remains a potentially difficult ethical issue arising from the exclusion of children from school based on a parental decision not to vaccinate, and a risk that some children may be overburdened relative to the benefits, even though a mandatory vaccination policy may be justified. This is an ethical issue that may have to be resolved in favor of exclusion from school entry in the presence of a true public health emergency.

Lessons from the United States

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

The U. S. Supreme Court in *Jacobson* 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.

INTERVENTION TO PREVENT AVOIDABLE HARM: Moreover, interventions such as mandatory vaccination to protect the public health must adhere to *Jacobson’s* holding that such intervention by the state is necessary in order to prevent an avoidable harm, has a real and substantial relationship to avoiding that harm, avoids burdens that are disproportionate to the benefits and does not cause undue risk to an individual. Applying the *Jacobson* criteria, now that an effective and safe vaccine is available, as the FDA recently gave its approval on August 23, 2021, of the Pfizer-BioNTech COVID-19 vaccine, now marketed as Comirnaty, there is an avoidable harm, and the vaccine would thus have a real and substantial relationship to avoiding that harm, without exemptions for philosophical, non-medical or religious reasons. Paquette, *In the Wake of a Pandemic: Revisiting School Approaches to Nonmedical Exemptions to Mandatory Vaccination in the U.S.*, The Journal of Pediatrics, vol. 231, April 2021 accessible online at <https://www.researchgate.net/publication/348645506> [In the Wake of a Pandemic Revisiting School Approaches to Non-Medical Exemptions to Mandatory Vaccination in the United States](https://www.researchgate.net/publication/348645506)

Ethical Justification for Limiting Individual Freedom

Criteria 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. Let's look at each of these criteria.

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*, 946 F. 3d 787 (5th Cir. Jan. 13, 2020)**

A city employee objected on religious grounds to a city requirement for TDAP (tetanus, diphtheria, 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 refused to accept either accommodation and was terminated for defiance of a direct order by failing to select an accommodation. The Fifth Circuit held 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, 2021 US Dist. LEXIS 110382 (S.D. Tex. June 12, 2021), *notice of appeal filed*, (5th Cir. June 14, 2021)

Upholding a private hospital's COVID-19 vaccine mandate, the District Court rejected 117 hospital employees' claims that they were being unlawfully forced to choose to be injected with a currently available vaccine or be fired. The court held there was no violation of federal law, FDA regulations, and the Nuremberg Code. The court rejected the notion that the hospital's employees were participants in a human trial or forced medical experimentation.

They were licensed doctors, nurses, medical technicians, and staff members. Rejecting the claim that the injection requirement violates the Nuremberg Code, the court said: "Equating the injection requirement to medical experimentation in concentration camps is reprehensible."

The court also rejected Bridges' claim that she had been coerced and that she was 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."

The court concluded that "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."

SCOTUS WEIGHS IN: *Klassen v. The Trustees of Indiana University*, No. 1:21-CV-238 DRL, 2021 WL 3073926 (N.D. Ind. July 18, 2021), *aff'd*, ***Klassen v. Trustees of Indiana University***, No. 21-2326, 2021 WL 3281209 (7th Cir. Aug. 2, 2021), Emergency Application for Writ of Injunction denied, ***In re Ryan Klaassen, et al.***, Case No. 21A15 (Aug. 12, 2021).

The U.S. District Court for the Northern District of Indiana held that Indiana University acted constitutionally in mandating the COVID-19 vaccine for its students. Under guiding principles of federalism and precedent recognizing that the U.S. 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 while upholding the university's discretion to act reasonably in protecting the public's health. The implications for students are 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.

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.” The full text of the District Court’s 101 page ruling is accessible online at <https://www.courthousenews.com/wp-content/uploads/2021/07/klaassen-indiana.pdf>

The 7th Circuit denied the plaintiff’s motion for injunction pending appeal, stating in its August 2, 2021 order that “if conditions of higher education may include surrendering property and following instructions about what to read and write, it is hard to see a greater problem with medical conditions that help all students remain safe when learning. A university will have trouble operating when each student fears that everyone else may be spreading disease.” Following the 7th Circuit’s denial of emergency relief, the students pursued an emergency application for injunctive relief in the U.S. Supreme Court that was assigned to Justice Amy Coney Barrett. Justice 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

On May 28, 2021 the Equal Employment Opportunity Commission 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.

See <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. **REASONABLE ACCOMODATION:** 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. **INCENTIVES AND CONFIDENTIALITY:** 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. **NON-COERCIVE:** 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. **EDUCATION AND TECHNICAL ASSISTANCE:** 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.

OSHA Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace

On August 13, 2021, OSHA updated its Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace, adopting the July 27, 2021 CDC public health recommendations for fully vaccinated people. In this most recent Guidance, OSHA recognized the impact of the Delta variant and noted that fully vaccinated people should wear a mask in public indoor settings if they are in an area of "substantial or high transmission" as that term is defined by the CDC. OSHA also recommended that fully vaccinated employees who have come into close contact with someone with suspected or confirmed COVID-19 be tested 3-5 days after exposure, and to wear a mask in public indoor settings for 14 days or until they receive a negative test result. Finally, OSHA emphasized that employers should facilitate their employees getting vaccinated, by granting paid time off for employees to get the vaccine and recover from any side effects, a concept carried forward in the *Path Out of the Pandemic: President Biden's COVID-19 Action Plan* as announced on September 9, 2021.

OSHA first issued this Guidance on January 29, 2021, with an update on June 10, 2021. The guidance does not apply to health care employers covered by OSHA's COVID-19 Emergency Temporary Standard

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.

On the public sector side, New York City recently announced its “Key to NYC Pass” that requires proof of vaccination for access to most indoor activities, including gyms, restaurants and performances. Yet over a dozen states have also enacted laws or issued executive orders prohibiting vaccine passports or COVID-19 vaccine mandates restricting private businesses, schools, colleges and universities from asking for proof of vaccination, tying the hands of health officials to act quickly and decisively. This may lead to a showdown sooner than later over the legal enforceability under the Supremacy Clause of the U.S. Constitution in light of imminent implementation of the Path Out of the Pandemic: President Biden’s COVID-19 Action Plan.

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-fits-all approach, a voluntary program may be more likely enforceable and reduce the risk of legal challenges under local law.

Beyond the United States: Other Countries’ Approach to Vaccine Mandates

“Green Passes” or vaccine certificates are now being widely used in many EU countries and countries outside the EU to determine who should be allowed to dine, attend sports events, drink indoors, enter nightclubs, attend concerts, go to movie theatres, shopping malls, stadiums, hotels, cultural events, board airplanes, trains and cruise ships.

Spain has led Europe’s vaccination drive against COVID-19 due to a deep trust in the public health system and close knit family ties that encourage people to get vaccinated to protect relatives. Spain’s trust in the health system translates to very little vaccine hesitancy and high vaccine acceptance as something that contributes to the common good in a way that goes far beyond individual benefit. With over 61% of its population of 47 million fully vaccinated, and 90% of health care staff and care home workers also vaccinated, this nation is a model for others to emulate. *How*

Spain Took the Lead on Vaccinations Against COVID-19, France24.com, August 12, 2021, accessible online at <https://www.france24.com/en/live-news/20210812-how-spain-took-the-lead-on-vaccinations-against-covid-19>

Indonesia initiated a mandatory COVID-19 vaccination program in February 2021, as Southeast Asia faced a deadly coronavirus wave. It also threatened fines of up to 5 million rupiah (\$357) for noncompliance.

Turkmenistan has made the coronavirus vaccination mandatory for all residents 18 or older unless they have a medical exemption. Turkmenistan is making vaccination mandatory for all residents aged 18 and over.

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. Moscow city authorities on June 16, 2021 ordered all workers with public facing roles to be vaccinated against COVID-19. Companies were given a month to ensure at least 60% of staff had received first doses, or face fines or temporary closure. Moscow residents no longer have to present a QR code demonstrating they have been vaccinated or have immunity in order to sit in cafes, restaurants and bars from July 19.

In France, lawmakers recently approved a controversial law in July 2021 that gives vaccinated people privileged access to restaurants, cafes, and public transportation beginning August 2, 2021. According to a July 31, 2021 Vox report, France has historically been one of the more vaccine-skeptical countries in the West and has struggled more than some of its peers to get people vaccinated. Its new requirement that it would require proof of vaccination for everyday activities, like restaurants and shopping centers, led to a record rush for vaccine appointments, with 1.3 million people signing up in less than one day. It also led to protests. In approving legislation that would make vaccinations mandatory for health workers as well as require a bolstered health pass in many social venues, the French parliament announced that a planned 45,000 euro (\$53,456) fine for businesses that do not check that clients have a health pass will be much lower initially, starting at up to 1,500 euros and increasing progressively for repeat offenders.

Israel's use of “green passes,” proof of vaccination that is required for everyday activities like going to restaurants and movie theaters, has been a requirement for as long as that country has been administering the vaccines and is cited as a key reason Israel has led much of the world in vaccination, with over two-thirds of its population having received at least one shot and over 60 percent fully vaccinated. Claire Parker, *Here's How Countries Around the World Have Approached Vaccine Mandates*, The Washington Post, July 29, 2021.

Australia decided in late June 2021 to make vaccinations mandatory for high-risk aged-care workers and employees in quarantine hotels. It also made vaccinations obligatory for Paralympic athletes heading to Tokyo because unvaccinated members on the team could pose a health risk.

In Tasmania, vaccines became mandatory for aged care workers as of September 17, 2021.

In Great Britain it will be mandatory for care home workers to have vaccinations from and after October, and nightclubs and other venues with large crowds will require patrons to present proof of full vaccination from the end of September.

Canada announced on August 13, 2021, that it would require all federal public servants and many other workers to be vaccinated against COVID-19, and that the vaccine mandate would also include air, train and cruise ship travelers.

British Columbia is mandating COVID-19 vaccines for all staff working in long-term care homes and assisted living facilities, officials announced on Aug. 12, becoming one of the first Canadian provinces to do so.

In Fiji, as of August 15, 2021, unvaccinated public servants would be forced to go on leave, and public servants who will remain unvaccinated by November 2021 will be dismissed.

On July 12, 2021, Greece made vaccinations mandatory for nursing home staff with immediate effect and healthcare workers from September. As part of new measures, only vaccinated customers are allowed in bars, cinemas, theatres and other closed spaces.

In Italy, the government decreed in March 2021 that vaccine mandates would be imposed upon health workers, including pharmacists, and that those who refuse could be suspended without pay for the rest of the year. This nation is moving ahead with its COVID-19 vaccination campaign once the European Medicines Agency (EMA) and the Italian drug regulatory agency AIFA have given full authorization and approval for the use of four COVID-19 vaccines, with a target of 80% of the population over age 12 by the end of September. Prime Minister Mario Draghi on September 3, 2021 said that all Italians of eligible age could soon be obliged to get a shot as soon as that approval had been given.

Hungary's government has decided to make vaccinations mandatory for healthcare workers.

Kazakhstan will introduce mandatory vaccinations or weekly testing for people working in groups of more than 20.

Lebanon will limit entry to restaurants, cafes, pubs and beaches to people holding vaccine certificates or those who have taken antibody tests. Non-vaccinated employees of these establishments would be required to receive a PCR test every 72 hours.

Malta has banned visitors from entering the country from July 14, 2021 unless they are fully vaccinated.

The South Pacific island nation of The Federated States of Micronesia has mandated that its adult population be inoculated against COVID-19. Micronesia's government said on July 29 that everyone over 18 years will have to receive a COVID-19 vaccine.

Poland will make vaccinations obligatory for some people at high risk from COVID-19 from August.

In May 2021, Saudi Arabia mandated that all public and private sector workers wishing to attend a workplace get vaccinated, without specifying when this would be implemented. read more vaccination will also be required to enter any government, private, or education establishments and to use public transport as of August 1, 2021. Saudi citizens will need two doses before they can travel outside the kingdom from August 9, state news agency SPA reported on July 19, citing the ministry of interior.

Sri Lanka announced on Aug. 13 that citizens would require vaccination cards to travel between provinces and in public spaces as of Sept. 15, 2021.

Fact Box: Countries Making Covid-19 Vaccines Mandatory, Reuters, August 16, 2021, <https://www.reuters.com/world/countries-make-covid-19-vaccines-mandatory-2021-07-13/>

THE LOOK TO GERMANY

1. Political and legal situation

(A) Political Situation - Executive Summary

Germany is a federal state and consists of the federal government and the 16 partly sovereign federated states. The German Bundestag is responsible for the federal legislation; there are state parliaments in each of the federal states. The German

Constitution (Grundgesetz, Basic Law) regulates which legislative body is responsible. Chancellor of the Federal Republic of Germany is Angela Merkel, and during the pandemic the Minister of Health, Jens Spahn, also had a prominent role as the responsible minister. Spahn therefore also gained supraregional importance. The CDU and SPD have formed a coalition in the Bundestag since 2017 and provide the federal ministers. The next elections to the German Bundestag will take place on September 26th, 2021.

The 16 federal states are headed by the prime ministers. The Prime Minister of Berlin, the Governing Mayor Michael Müller, gained notoriety throughout Germany because he has been Chairman of the Prime Minister's Conference since October 2020. All 16 Prime Ministers belong to the Prime Minister's Conference¹. The Prime Minister's Conference is not an official constitutional body. Therefore, their resolutions are of a purely informal, non-binding nature and may first have to be legally implemented through legislative procedures in the individual federal states or in the Bundestag.

The Infection Protection Act (federal act) forms the basis for measures during the pandemic. Due to the federal legislation in Germany, however, various measures are the responsibility of the federal states.

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. (07.09.2021²)

Members of the German Ethics Council plead for mandatory vaccination for certain professions (05.09.2021³)

Health Minister Jens Spahn recently spoke out against mandatory vaccination again. In an interview with Tina Hildebrandt, chief correspondent of ZEIT, and Roman Pletter, head of the economic department, the Federal Minister of Health should not lead to any divisions from the current social tensions and an "anyway heated mood". "Vaccinated versus non-vaccinated" debates are currently emerging in every family, neighborhood and at work. His "great concern" is that he will lose too much of it "because people are no longer participating in the debate and are just confronting". From his point of view, however, part of the nursing profession is to be vaccinated. (04.09.2021⁴).

¹ https://en.wikipedia.org/wiki/Conference_of_Ministers-President

² <https://www.waz.de/politik/scholz-schliesst-neuen-lockdown-und-corona-impfpflicht-aus-id233251659.html>

³ <https://www.welt.de/videos/video233608103/Steigende-Corona-Zahlen-Ethikrat-Mitglied-plaediert-fuer-Impfpflicht-in-bestimmten-Berufen.html>

⁴ <https://www.presseportal.de/pm/9377/5011465>

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." (08/11/2021⁵).

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 (23.08.2021⁶)

Chancellor Angela Merkel and Health Minister Jens Spahn used a July 13, 2021 visit to the government's agency for disease control and prevention, the Robert Koch Institute (RKI), to urge the public to get vaccinated. Merkel also said there were currently no plans to make the jab compulsory. Merkel said "We are still a long way off" from meeting the vaccine quota needed to stop aggressive new variants, and said stopping the spread of the virus and defending against new variants would require 85% vaccination among 12-to-59-year-olds and 90% among those over 60.

Despite a slow start, about 43% of Germany's population is now fully vaccinated. Merkel stressed there would be no obligation to vaccinate in Germany, saying that mandating shots could endanger public trust. In outlining her preference for voluntary rather than mandatory vaccination, Merkel said: "I think we can gain trust by advertising vaccination and also by letting as many people as possible become ambassadors for the vaccine from their own experience. And that's why I tell everyone who is still unsure whether to get vaccinated: A vaccination not only protects you, but also those close to you, someone who is important to you, someone you love." COVID: Angela Merkel says no plans for mandatory vaccines in Germany, DW, July 13, 2021, <https://www.dw.com/en/covid-angela-merkel-says-no-plans-for-mandatory-vaccines-in-germany/a-58250471>

On August 10, 2021, after months of offering free coronavirus antigen tests to all residents, Chancellor Merkel announced that Germany would stop subsidizing the tests for adults who choose not to get vaccinated. Germany will stop paying for virus tests for people choosing to remain unvaccinated, The New York Times, Aug. 10, 2021, <https://www.nytimes.com/2021/08/10/world/europe/germany-covid-test.html>

Starting October 11, when the changes take effect, the tests will continue to be available at no charge for people under 18, pregnant women or others who have

⁵ <https://www.rbb24.de/politik/thema/corona/beitraege/2021/08/berlin-impfen-bund-laender-bschluesse.html>

⁶ <https://www.spiegel.de/politik/deutschland/annalena-baerbock-schliesst-corona-impfpflicht-fuer-bestimmte-berufsgruppen-nicht-aus-a-ab787f05-8753-43cc-9e22-89c0ad466b8f>

medical reasons not to get vaccinated. German authorities have agreed on new rules requiring proof of vaccination, recent recovery or a negative test for certain indoor activities, including going to a restaurant, hairdresser or gym, once the weekly local infection rate surpasses 35 per 100,000 inhabitants.

For the last few months, however, a number of senior politicians in Germany have begun floating the idea of imposing restrictions on unvaccinated people or even mandatory vaccines, a move that would put Germany on the same path as France, where the French government under the Macron administration has made vaccines compulsory for health workers and has required proof of vaccination for certain outdoor events. German Politicians Float Bans, Mandatory Jabs, for Unvaccinated, Bloomberg, July 25, 2021, accessible online at <https://www.bloomberg.com/news/articles/2021-07-25/german-politicians-float-bans-mandatory-jabs-for-unvaccinated>.

(B) Legal classification

(I) Infection Protection Act⁷ (German: Infektionsschutzgesetz)

The Infection Protection Act was 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. Essentially, it regulates infection protection as a special area of danger prevention. The The Infection Protection Act reacted to the results of the investigation committee of the German Bundestag "HIV infections through blood and blood products" and set the EU directive on the quality of water for human consumption as well as the decision of the European Parliament and the Council on the creation of a network for to implement epidemiological surveillance and control of communicable diseases in the community. It institutionalized the Robert Koch Institute as an epidemiological center in place of the Federal Health Office, which was dissolved in 1994, and combined the repealed laws and ordinances into a uniform set of rules.

After the success of post-war epidemics such as typhus, dysentery, epidemic hepatitis A or polio and tuberculosis, the fight against infectious diseases in the German health system had taken a back seat. The occurrence of AIDS and BSE, the

⁷ <https://de.wikipedia.org/wiki/Infektionsschutzgesetz>

increase in multi-resistant pathogens in hospitals and fears of other pathogens that have not yet been discovered or are known, but whose virulence and resistance behavior has changed, have rekindled public and scientific interest in infection-epidemiological issues in the 1980s. At the same time, in 1994 the German Bundestag committee of inquiry uncovered existing structural deficits in the reporting system and in risk management in the early detection of communicable diseases that had led to preventable HIV infections via blood and blood products. In addition to the passing of the Transfusion Act in 1998, the legislature therefore saw a need for action to prevent communicable diseases by reviving the classic fields of activity of the public health service. The US Centers for Disease Control and Prevention served as a model.

(II) Legal Report by the Scientific Service of the German Bundestag

“1. Question

The Bundestag passed amendments to the Infection Protection Act on March 25, 2020.¹ The amendments to Section⁸ 5 and Section 28 The Infection Protection Act came into force on the day after their promulgation, i.e. on March 28, 2020.² In its paragraph 2, the new version of the Section 5 Infection Protection Act the Federal Ministry of Health to issue orders and ordinances. The question arises as to whether this new authorization is compatible with Article 80 of the German Constitution and the distribution of competencies between the Federation and the federated states.

2. Legislative competence of the federal government

Protection against infection and combating epidemics are part of the prevention of dangers, for which the federal states generally have the legislative competence. According to Article 74, Paragraph 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).

⁸ Germany: § 5

3. Ordinances (Section 5 Abs. 2 Infection Protection Act)

3.1. Deviation from the priority of law

In Section 5, Paragraph 2, No. 3, No. 4, No. 7 and No. 8 Infection Protection Act, the legislature authorizes the legislature to allow exceptions to statutory provisions by means of statutory ordinances. The Federal Constitutional Court considers this to be fundamentally permissible to a certain extent:

“The legislature determines the scope of every legal provision as well as its content. He is also free to restrict the applicability of a provision by attaching subsidiarity to certain state expressions of will of lower rank.

This authority is not affected by the primacy of the law. The legislature cannot remove the primacy of the law as a principle. But it can give a single regulation or a group of regulations a subsidiary character. [...]

There are no general reservations about the use of these legislative forms of restricting the application of laws. The German Constitution presupposed their existence and their permissibility.⁹”

However, the Federal Constitutional Court sets clear limits for such "application-restricting ordinances":

“This does not mean, however, that the use of these forms is unlimited. The limit lies where the legislature declares regulations of such importance and to such an extent to be subsidiary that this results in a shift in weight within the state structure between legislative power and administration.¹⁰”

In the case to be decided by the Federal Constitutional Court, the Burdens Equalization Act (LAG) provided for in Section 345 a “procedure for compensation payments” to which there was no legal entitlement. In Section 346, the law authorized the President of the authority to regulate “the procedure differently”. In doing so, the President had to move “within the framework of this law, the statutory ordinances issued for it and the guidelines of the federal government”. The President's regulation concerned the application (“responsible compensation office”),

⁹ BVerfGE 8, 155 (170 f.)

¹⁰ BVerfGE 8, 155 (171)

the form (“prescribed form”) and organizational details of the further decision-making and objection procedure. The Federal Constitutional Court found:

“The subsidiarity stipulated in Section 345, 346 LAG is kept within a narrow framework. There can be no question of them bringing about a significant change in the balance between legislation and administration. [...]

The limits are clear: only the provisions given in Section 345 should be subsidiary to the general administrative regulations of the President of the Federal Equalization Office - and only to these. There is therefore no violation of the requirement of legislative clarity [...]. ¹¹”

In later decisions, the Federal Constitutional Court further specified this relationship between legislator and regulator:

“The purpose of the regulation in Article 80 (1) of the German Constitution to prevent Parliament from relinquishing its responsibility as a legislative body. It should not be able to transfer part of its legislative power to the executive without considering the limits of this power and having outlined them according to tendency and program so precisely that it is already recognizable and foreseeable from the authorization what should be permissible to the citizen [...]. ”

Against the background of this case law, the authorizations in Section 5 (2) Infection Protection Act to issue statutory ordinances are at least considerably problematic:

- Statutory ordinances in accordance with Section 5 (2) No. 3 Infection Protection Act can create exceptions to the Infection Protection Act "in relation to the prevention and control of communicable diseases [...] in order to maintain the health care system and the supply of the population". In this way, Section 5 (2) No. 3 Infection Protection Act authorizes the executive to deviate from a vast number of statutory provisions of the Infection Protection Act: According to Section 1 Infection Protection Act , “The purpose of the law [...] to prevent communicable diseases in humans is to admit infections at an early stage recognize and prevent their spread. ”A large part of the 77 paragraphs of the Infection Protection Act should be

¹¹ BVerfGE 8, 155 (171)

relevant“ to maintain the processes in the health care system and the supply of the population ”. Which of these paragraphs this can be, to what extent and with what “precisely defined program” is “not recognizable and foreseeable” for the citizen and probably also for the legislature itself from the authorization.

- In comparison to this, the legislator has made the authorization for legal ordinances more narrowly programmatically in Section 5 (2) No. 4 Infection Protection Act: Exceptions to legal regulations relate to drugs, medical devices, laboratory diagnostics, aids, protective equipment and disinfectant products. At the same time, exceptions to an unmanageable number of statutory provisions in a total of 5 laws are possible here as well. These exceptions are at least thematically outlined: "Production, labeling, approval, clinical testing, use, prescription and dispensing, import and export, transportation and liability, as well as [...] operation of pharmacies including management and staffing". Nevertheless, it is at least questionable whether the “limits” of this authorization are “clear” in the sense of the Federal Constitutional Court.

- The authorization to issue ordinances according to Section 5 Paragraph 2 No. 7 Infection Protection Act is programmatically more narrowly defined than Section 5 Paragraph 2 No. 3 Infection Protection Act: This affects the "maintenance of health care" in certain facilities. Furthermore, at first glance, the authority to deviate is essentially limited to the Social Security Code V (SGB V) and to “referenced” laws. SGB V, however, contains 339 paragraphs. In the first 5 paragraphs, SGB V already refers to 12 different laws (Law against Unfair Competition, Second Law on Health Insurance for Farmers, Artistic Social Insurance Law, Federal Supply Law, Federal Training Promotion Law, Foreign Pension Law, Law on the Compensation of National Socialist Injustices in Social Insurance, Vocational Training Law, Early Retirement Law, Asylum Seekers Benefits Act, Residence Act, Freedom of Movement Act).

- What is mentioned in relation to Section 5 (2) No. 7 Infection Protection Act applies accordingly to Section 5 (2) No. 8 Infection Protection Act, here in relation to the “maintenance of nursing care” and the relevant SGB XI.

The aforementioned measures are predominantly concerned with significant encroachments on fundamental rights, in particular the right to life and physical integrity in accordance with Article 2 (2) sentence 1 German Constitution. The

legislature itself refers to this in Section 5 (5) Infection Protection Act. This fact also speaks against the admissibility of a comprehensive delegation of the deviation from the law to the executive:

“The legislature itself can and must take responsibility for the release of inadequately tested drugs.”

Constitutional lawyers have reacted critically in the short time since the law was passed:

"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."¹²

"With the authorization of a federal ministry to issue statutory ordinances, the parliament is contradicting the central norms of the constitution."¹³

"According to According to Section 5 (2) No. 3 Infection Protection Act, the Federal Ministry of Health is now to be able to allow exceptions to the provisions of the Infection Protection Act, by means of a statutory ordinance without the consent of the Bundesrat. This is simply not compatible with the requirements of Article 80 (1) of the German Constitution. The fact that a single ministry and not the federal government is empowered as a collegiate body makes the matter even more worrying."¹⁴

"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."¹⁵

¹² Kingreen (Universität Regensburg), Süddeutsche Zeitung vom 26. März 2020, S. 6; derselbe, Whatever it Takes? Der demokratische Rechtsstaat in Zeiten von Corona, Verfassungsblog vom 20. März 2020, <https://verfassungsblog.de/whatever-it-takes/> (Hervorhebung durch Autor), siehe auch Steinbeis, Sancta Corona, ora pro nobis, Verfassungsblog vom 27. März 2020, <https://verfassungsblog.de/sancta-corona-ora-pro-nobis/>: „Kompetenzen [...] die dem Verfassungsjuristen die Augen aus den Höhlen treten lassen“.

¹³ Gärditz (Universität Bonn) und Meinel (Universität Würzburg), FAZ vom 26. März 2020, S. 6

¹⁴ Thielbürger/Behlert (Universität Bochum), Verfassungsblog vom 30. März 2020, COVID-19 und das Grundgesetz: Neue Gedanken vor dem Hintergrund neuer Gesetze, <https://verfassungsblog.de/covid-19-und-das-grund-gesetz-neue-gedanken-vor-dem-hintergrund-neuer-gesetze/>

¹⁵ Möllers (Humboldt-Universität Berlin), Parlamentarische Selbstentmächtigung im Zeichen des Virus, Verfassungsblog vom 26. März 2020, <https://verfassungsblog.de/parlamentarische-selbstentmaechtigung-im-zeichen-des-virus/>.

“On March 25, the Bundestag hastily passed a law amending the Infection Protection Act, which constitutional lawyers consider unconstitutional in various respects

is viewed (e.g. Gärditz / Meinel, Möllers), in particular because it makes the law binding of the executive at disposal and authorizes the Federal Minister of Health to deviate from legal norms.”¹⁶

3.2. Content, purpose and extent (Article 80 (1) Sentence 2 of the German Constitution

Art. 80 (1) sentence 2 German Constitution stipulates that when a statutory ordinance is issued, “the content, purpose and extent of the authorization granted must be determined in the law”. The Federal Constitutional Court examines this requirement on the basis of the following three criteria in particular:

Self-decision formula: The legislature itself has to make the decision "that certain questions should be regulated, [...] must set the limits of such a regulation and [must] state the aim which the regulation should serve"

Program formula: It must be possible to determine from the law "which 'program' set by the legislator is to be achieved by the ordinance".

Predictability formula: The restriction required according to Art. 80 (1) Sentence 2 of the German Constitution is missing, “if the authorization is so indefinite that it can no longer be foreseen in which cases and with what tendency it will be used and what content the ordinances issued on the basis of the authorization may have ”.

The content, purpose and extent of the authorization granted are to be determined using the general principles of interpretation from the entire law. Overall, a decision must be made “on a case-by-case basis”. The legislature is not prevented from using general clauses and indefinite legal terms in the enabling norm. The certainty requirements are

¹⁶ Murswiek (Universität Freiburg), Tichys Einblick vom 31. März 2020, Raus aus dem Ausnahmezustand!, <https://www.tichyseinblick.de/daili-es-sentials/raus-aus-dem-ausnahmezustand/>.

"Depending on the particularities of the respective subject matter and the intensity of the measure [...]. Lower requirements are to be set especially in the case of multifaceted circumstances [...] or if it is to be expected that the actual circumstances will change soon [...]. If the regulation significantly interferes with the legal status of the person concerned, higher requirements must be placed on the degree of certainty of the authorization than if it is a regulatory area that affects the exercise of fundamental rights less."

The “multifaceted facts” of infection protection, which ultimately affects the entire health care system in all its complexity, speak in favor of the permissibility of the authorizations, which are rather broad and indefinite in Section 5 (2) Infection Protection Act. Furthermore, “the actual circumstances” can change quickly due to contagion or reactions in the population and the health industry.

The necessity of a self-decision of the programmatic requirements, the predictability of the contents of the ordinance and the intensity of fundamental rights speak against the admissibility of the rather broad and indefinite authorizations (see above under Section 3.1). Overall, serious concerns remain.

3.3. Approval of the Federal Council (Article 80 (2) German Constitution)

Apart from Sections 5 and 5a Infection Protection Act, the Infection Protection Act contains a large number of authorizations to issue statutory ordinances. The word “ordinance” can be found in Section 6 ff. Infection Protection Act a total of 91 times. Only the Infection Protection Act expressly provides for the authorization to issue a “statutory ordinance with the consent of the Bundesrat” 12 times (Sections 13, 14, 15, 20, 24, 36, 38 (1) and (2), Sections 42, 43, 50a, 53 Infection Protection Act), “without the consent of the Bundesrat” only 6 times (Sections 15, 18, paragraphs 9 and 10, Sections 36, 38, 42 Infection Protection Act).

The reservation of consent in favor of the Bundesrat is constitutionally required if the corresponding statutory provisions are “carried out on behalf of the federal government or as a separate matter” (Article 80 (2) of the German Constitution. The ordinary legislature - and especially the ordinance - cannot deviate from this constitutional approval requirement. For this reason, too, there are considerable reservations about the enactment of statutory ordinances “without the consent of the Bundesrat” provided for in Section 5 (2) Infection Protection Act.

Whether the statutory ordinances possible under Section 5 (2) Infection Protection Act “without the consent of the Bundesrat” lead to deviations from other statutory ordinances that require the approval of the Bundesrat according to further provisions of the Infection Protection Act (and other laws) can be determined on the basis of the broad authorizations do not clarify abstractly. Therefore it cannot be clarified whether only reservations of consent are affected that are based on a simple legal basis or that are required under Article 80 (2) of the German Constitution. In any case, from a purely statistical point of view, the Infection Protection Act is dominated by authorization bases that expressly require the consent of the Federal Council.

4. Orders (Section 5 (2) Infection Protection Act)

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 [...]."

According to Article 83 of the German Constitution, the federal states execute the federal laws as their own affairs, unless the German Constitution stipulates or permits otherwise. For protection against infection, the German Constitution does not provide for any special regulation in favor of a federal authority, such as Art. 87 (1) sentence 2 German Constitution for the "Federal Border Guard" (Federal Police). Furthermore, the legislature relies expressly on the legislative competence on "communicable diseases" (Article 74 (1) No. 19 German Constitution). The implementation of the Infection Protection Act is therefore a matter for the federal states. According to the competency regulation of the German Constitution, only the federal states can issue orders according to Section 5 (2) Nr. 1, Nr. 2, Nr. 5 and Nr. 6 Infection Protection Act. According to the wording, Section 5 (2) Infection Protection Act does not grant them this power.

For this reason, too, the authority to issue orders under Section 5 (2) Infection Protection Act “without prejudice to the powers of the federal states” may apply. This formulation is new from a legislative point of view. As far as can be seen, no applicable law contains a corresponding reservation. However, the wording of the reservation is clear: The authority to issue orders can only come into effect if the federal states have no “powers”. The administrative competence and thus the

authority of the federal states to issue orders are extensive. After all, there should be no room for the Federal Ministry of Health in practice to apply the regulatory powers of Section 5 (2) No. 1, No. 2, No. 5 and No. 6 Infection Protection Act.

In contrast, the justification for the law seems to assume that the reservation “without prejudice to the powers of the federal states” only affects the “enforcement competence of the federal states in the implementation of the orders and ordinances issued on the basis of this paragraph”, and thus not the issue of the orders themselves German Constitution, such a restriction of the administrative competence of the federal states is incompatible.

2. The jurisprudence in the pandemic

During the pandemic, the German courts had to deal with legal measures and their legality or illegality in a variety of ways (just an overview).

(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)

(C) Compensation for the closure of restaurants in the state of Berlin:

There is no legal or factual claim to compensation from the State of Berlin. The order to close restaurants was legitimate. The restriction of the restaurant operators associated with the closure order to be able to make sales beyond an out-of-home sale was caused by the lock-down at that time and should be viewed as proportionate, taking into account the knowledge at the time.

In principle, it is possible to pay restaurant operators compensation for the consequences of a lawful restaurant closure if the impairments suffered are to be regarded as so-called unreasonable special sacrifices. 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)

(D) Ban on accommodation:

Also in view of the currently strong increase in the number of infected people in many parts of Germany and Lower Saxony, the legal requirements for government action through infection protection measures are met.

The prohibition of accommodation specifically stipulated in the “Lower Saxony Corona Accommodation Ordinance”, however, proves to be illegal on a summary examination. The prohibition is not sufficiently determined. It records people "from" risk areas without specifying whether these people should have a place of residence or habitual abode there or whether a short-term residence is sufficient.

The prohibition is also not a necessary protective measure under infection protection law. In view of the narrow scope and numerous exceptions, the prohibition covers only a very limited section of travel events from the outset and can only have an effect on the infection process to that extent. It is doubtful whether such a limited ban is appropriate and necessary. (Higher Administration Court Lüneburg, 13 MN 371/20, October 15, 2020)

(E) Closing time for restaurants:

The curfew for restaurants imposed by the “Berlin SARS-CoV-2 Infection Protection Ordinance” does not withstand a legal review. According to the court, the measure pursues the legitimate aim of reducing the speed of the spread of the communicable disease COVID-19 within the population and thus avoiding overloading the public health system. A curfew may also be appropriate to achieve this goal. In a summary examination, however, it is not evident that the measure is necessary for a significant fight against the infection process. According to the data published by the Robert Koch Institute, restaurants had not had such a significant share in the infection process under the protection and hygiene measures that had been in place to date that a curfew was required as a further measure due to the sharp increase in new infections that has now been recorded. The respondent had already taken milder means in the form of various protective and hygiene measures and now also a ban on serving alcohol, which seemed equally suitable for combating the risk of infection from restaurants if these measures were consistently enforced as a

priority. (Administration Court Berlin, 14 L 422/20, October 15, 2020 / Higher Administration Court Berlin, I-33/20, October 16, 2020).

(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. It should also be taken into account that the Catholic Church itself ordered the wearing of a mouth and nose cover and thus saw the dignified performance of all services, as stated by the applicant, as guaranteed. Any differentiation required by the applicant according to the spatial conditions or the design of the respective gatherings - passive or active participation -, i.e. a differentiation according to religious communities, would run counter to the constitutional requirement of neutrality. (Administration Court Frankfurt a.M., 5 L 2749/20, October 27, 2020)

(G) Urgent applications against federal nighttime exit restrictions rejected by the Federal Constitutional Court

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. The Federal Constitutional Court cannot make such a decision in an urgent procedure. This check is reserved for the main proceedings. 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 (*). His complaint is handled in a separate procedure (Federal Constitutional Court, decision of May 5, 2021 (1 BvR 781/21, 1 BvR 889/21, 1 BvR 854/21, 1 BvR 820/21, 1 BvR 805/21)¹⁷

(*) In proceedings 1 BvR 805/21, one of the plaintiffs was Sven Kohlmeier, whose complaint was separated and is being conducted in a separate proceeding. The lawsuit has not yet been decided.

¹⁷ <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2021/bvg21-033.html>

The Federal Constitutional Court announced a decision in the main proceeding for October this year.

3. Mandatory vaccination in Germany

a) Federal Republic of Germany (BRD)

In the Federal Republic of Germany there was already mandatory vaccination up until 1983 - against smallpox. The Federal Administrative Court ruled in 1959 that the mandatory vaccination was compatible with the German Constitution. Since the federal states were responsible for vaccinations after the Second World War, there was still mandatory vaccination against diphtheria in several states, such as today's Baden-Württemberg, from 1946 to 1954¹⁸. Since the beginning of 2020, a measles vaccination has also been mandatory in daycare centers. The Infection Protection Act stipulates that children who are cared for in a kindergarden or day care center must be vaccinated against measles - or they must have measles immunity. Two pairs of parents have sued this before the Federal Constitutional Court. In its urgent decision, the Federal Constitutional Court announced for the time being: The mandatory vaccination will remain in place until further notice. 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 (Federal Constitutional Court: *1 BvR 469/20 und 1 BvR 470/20*).

The Federal Constitutional Court states:

(...)

a) The constitutional complaint is at least not inadmissible from the outset or obviously unfounded. This requires a detailed examination, which is not possible in the context of an urgent procedure.

(...)

¹⁸ <https://www.tagesschau.de/inland/impfpflicht-119.html>

aa) If the interim order were not issued and the constitutional complaints were successful, the legal ban on childcare would have been wrong. As a result, the minor complainants could not be looked after as intended due to a lack of measles vaccination and their parents would have to look after childcare elsewhere, which could have negative economic consequences. Due to the measures to contain the SARS-CoV-2 coronavirus, this is currently necessary in some cases anyway.

bb) If, on the other hand, the requested interim order were issued and the constitutional complaints were unsuccessful, the requested temporary suspension of section 20 (8) sentences 1 to 3, section 20 (9) sentences 1 and 6, section 20 (12) sentences 1 and 3 and section 20 (13) sentence 1 Infection Protection Act, the interests of a large number of third parties that are protected by fundamental rights are very important. The basic obligation to demonstrate and prove adequate vaccination protection against measles prior to care in a community facility (Section 33 No. 1 Infection Protection Act) according to Section 20 (8), section (9) sentence 1, section 20 (13) sentence 1 Infection Protection Act, its compatibility with Article 2¹⁹ (2) sentence 1 of the German Constitution, Article 6 (2)²⁰ sentence 1 of the German Constitution and Article 3²¹ (1) of the German Constitution must remain open in the urgent procedure, serves to provide better protection against measles infections, especially for people who regularly work in community and health facilities come into contact with other people (see German Bundestag 19/13452, pg. 16). Vaccinations against measles in certain community facilities are not only intended to protect the individual against the disease,

¹⁹ **Article 2 [Personal freedoms]**

- (1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.
- (2) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.

²⁰ **Article 6 [Marriage – Family – Children]**

- (1) Marriage and the family shall enjoy the special protection of the state.
 - (2) The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty.
- (...)

²¹ **Article 3 [Equality before the law]**

- (1) All persons shall be equal before the law.
- (2) Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.
- (3) No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith or religious or political opinions. No person shall be disfavoured because of disability.

but at the same time prevent the spread of the disease in the population if the measures ensure that the vaccination rate in the population is high enough. In this way, people could also be protected who, for medical reasons, cannot be vaccinated themselves, but who are at risk of severe clinical progress in the event of an infection. The aim of the Measles Protection Act is, in particular, the protection of life and physical integrity, to which the state is in principle also required by virtue of its fundamental right to protection under Article 2 (2) Sentence 1 of the German Constitution (cf. BVerfGE 77, 170 <214>; 85, 191 <212>; 115, 25 <44 and 44>).

cc) When comparing the expected consequences, the interest of the applicants in having their children cared for in a community facility without a measles vaccination or in being cared for there themselves must subordinate themselves to the interest in averting infection-related risks to life and limb of a large number of people. The disadvantages that would be associated with the entry into force of the challenged provisions of the Measles Protection Act after it was later determined to be unconstitutional do not outweigh the extent and severity - and certainly not clearly - the disadvantages that would arise in the event of a provisional prevention of a law that proves to be constitutional.

It is still unclear when the Federal Constitutional Court will make a final decision.

b) German Democratic Republic (GDR)

In the GDR there was a legal vaccination requirement from 1953, which was expanded in the following years. At first there was an 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. Only those who were vaccinated were allowed to take part in children's holiday camps or be admitted to childcare facilities. Studies and certain professions were also dependent on the vaccination status.²²

4. What happens next? A look into the present and the future

²² <https://www.tagesschau.de/inland/impfpflicht-119.html>

(A) Interview with constitutional Hans-Jürgen Papier about fundamental rights and the pandemic situation in the newspaper Berliner Zeitung²³. From April 2002 to March 2010 Hans-Jürgen Papier was President of the Federal Constitutional Court.

Berliner Zeitung (BZ): Mr Papier, you have been fighting against the erosion of fundamental rights for many years. In the Corona times, the situation has not gotten any better. How is the situation today?

Hans-Jürgen Papier (HJP): For the past year and a half, we have to admit that this time has been a great challenge for the rule of law. Fundamental rights are at the top of the constitution not only for formal reasons. But of course they are not guaranteed unlimited. The freedom of the individual must sometimes recede in order to safeguard and assert the common good and to guarantee the freedom of others. However, the basic rights must not be restricted indefinitely and without limits. The German Constitution imposes strict limits on the state and its organs for restrictions. The time that lay behind us was certainly the greatest challenge since the Federal Republic of Germany came into being. The principle of proportionality must be observed in any case. And the state has to prove if it restricts the rights of freedom.

(...)

BZ: But why are fundamental rights so endangered or restricted, and you don't get any further along the way of legal action?

HJP: This is due to the great challenge in a difficult time. The task of the state and its organs is to adequately protect the life and health of the population. At the same time, however, he must take into account the principle of freedom and must limit his intervention measures to what is immediately necessary. We have the tension between freedom and security in a similar way with terrorism and internal security. Here, too, it is a matter of the legislature and the executive finding the right measure. Incidentally, we do not yet have a legally binding fundamental decision on measures to combat pandemic. So far, there have essentially only been judicial decisions in urgent proceedings. And there the courts saw the endangerment of the general public as more worthy of protection than threatening disadvantages for the applicant. The matter has not yet been clarified by the highest court. The only thing that is clear is that fundamental rights must not be disregarded or overridden in general and across the board.

²³ <https://www.berliner-zeitung.de/politik-gesellschaft/verfassungsrechtler-vorsorgliche-verbote-sind-nicht-mehr-zulaessig-li.182522>

BZ: Why have the courts not yet decided on the main issue? The pandemic has been going on for 18 months, so it should be possible to make a decision?

HJP: First, it must be said that the courts are overburdened. The Federal Constitutional Court is also overburdened, so I don't want to blame anyone. In addition, the third power, i.e. the courts, are also dealing with a constant change in the situation. Therefore, the case law in the urgent proceedings focused primarily on the size of the risk, and otherwise there was a great deal of uncertainty.

(...)

BZ: Does the regulation of the epidemiological situation hold up before the Constitutional Court?

HJP: The regulation of section 28a in connection with section 5 of the Infection Protection Act is in my opinion in no way sufficient. Because the Parliament only determines the epidemic situation of national scope. The actual restrictions on fundamental rights are then still carried out solely by the executive. I think that is highly questionable. It is not enough for Parliament to determine the epidemic situation without at the same time precisely and decidedly deciding which restrictions on fundamental rights are based on this determination and under which more precisely defined conditions. Currently, we largely have a “carte blanche” for the executive. That doesn't work in my eyes. The representative elected by the people has to make essential decisions about the realization of fundamental rights. It cannot be that they keep silent and leave all difficult and fateful questions to the executive. This also includes the switching conference between the Chancellor and the Prime Minister, which makes such key decisions either in closed rooms or in digital conferences. That is not appropriate for a democracy based on the rule of law.

(...)

BZ: Although the question of the criteria arises beforehand, for example for those who have recovered. The definition is now arbitrary and is based on a positive PCR test. But I should also be able to present my antibody level to the host.

HJP: That is a big problem. The question of full recovery arises. It's a medical question. However, the purpose of the protective measures must also be asked. The point is to largely exclude the risk of infection.

BZ: Doesn't that show that we are dealing with rather vague regulations that are actually incomprehensible - and should therefore be legally overturned?

HJP: In the first phase, many courts proceeded according to the motto: “We can't know any better, so we follow the legislature or regulation in its risk assessment.”

However, as time progresses, the level of knowledge should solidify. The requirements for the legal admissibility of state regulations must be increased as the state of knowledge progresses.

BZ: Will the courts soon take action after all? And can we hope that the legislature will also be shown limits if it has passed excessive resolutions?

HJP: The suitability, necessity and appropriateness of the respective restrictions on fundamental rights must be given in each case. In this respect, the intervening state is obliged to provide evidence. Mainly due to the existing and hopefully increasing vaccination rate, it is no longer possible to rely solely on the incidence values of the reported new infections. The hospitalization rate and the functionality of intensive medical care for the population are also very decisive. So the primary goal is to keep the health system from becoming overloaded and from collapsing. Precautionary bans solely due to exceeding a certain incidence value with regard to the reported new infections are no longer permissible, especially because of the vaccinations that have been carried out, especially for the risk groups.

**(B) Discussion about 3G (recovered, vaccinated, tested) vs. 2G (recovered, vaccinated)
(As of: 13.09.2021)**

Unvaccinated people have to stay outside: In which federal states 2G applies and where there are corresponding plans²⁴

The 3G rules still apply almost everywhere, that is, anyone who has been vaccinated or recovered or who has a daily negative rapid test can go to restaurants, cinemas or bars. But since a negative rapid test result is considered a relatively large source of undersecurity, there is growing political pressure to switch to 2G rules when the number of infections increases. Specifically, this means that unvaccinated people are no longer allowed to go into the interiors of cinemas, restaurants and museums. (...) Business Insider explains the current status of the debate in your state (as of September 13).

Baden-Württemberg: From September 13th, the strictest corona rules will apply nationwide, as research by Business Insider has shown. Up until now, the 2G rule was optional for restaurants, events and hotels. The operators could decide for themselves whether they would only give those vaccinated and recovered access to indoor spaces. But there are no restrictions. In the future, however, 2G will be

²⁴ <https://www.businessinsider.de/politik/deutschland/ungeimpfte-muessen-draussen-bleiben-in-welchen-bundeslaendern-2g-gilt-und-wo-es-entsprechende-plaene-gibt/>

mandatory everywhere in Baden-Württemberg as soon as more than a total of 390 intensive care beds are occupied nationwide. The regulation does not currently apply, because only 174 intensive care beds are occupied.

Saxony: The eastern federal state is pursuing a strategy similar to that of Baden-Württemberg. The Ministry of Social Affairs in Saxony explained to us that 3G rules currently still apply, but once the overload level has been reached (reaching the threshold of 1,300 hospital beds occupied with COVID-19 patients in normal wards or 420 beds occupied in intensive care units in Saxony) only vaccinated and convalescent patients have access to most facilities. However, currently only 36 of the intensive care beds are occupied by Covid patients.

Hamburg: The Hanseatic city was the first federal state to introduce an optional 2G model: a 3G rule is binding for everyone. But for those organizers of facilities and events who voluntarily decide to only admit those who have recovered and who have been vaccinated, fewer corona-related requirements apply. In concrete terms, this means that curfew hours for pubs and bars will no longer apply, more people will be allowed to dance in clubs, cinemas and museums will again be able to receive more guests in confined spaces, and mask requirements will no longer apply - if unvaccinated people stay outside.

Lower Saxony: The 2G model based on the Hamburg model already applies here to discos and clubs. Additional 2G rules are being discussed, but a decision will only be made in around two weeks, when the current regulation expires. "We are thinking about 2G, but the new regulation remains to be seen," explains the Lower Saxony State Chancellery on request.

Rhineland-Palatinate: A separate rule also applies here: "2G +". Any number of vaccinated and genesis patients can take part in events at the same time, "to which a certain contingent of non-immunized people can be added. As a rule of thumb, we no longer see a lockdown as a protective mechanism: Shops, restaurants, hotels, theaters and cinemas should remain open - even if the incidence increases. Instead, the entry of non-immunized people will be gradually reduced in order to prevent overloading the health system ". Currently, 250 non-immunized participants are allowed to participate in addition to the immunized participants.

Bremen: When asked by Business Insider from the smaller Hanseatic city, "There is currently no 2G regulation in Bremen. In the coming week, the Senate will probably deal with new indicators for assessing the infection rate and also advise on measures. "

Saxony-Anhalt: The Hamburg model, i.e. the 2G rule, is to be practiced here from September 16.

Brandenburg: The cabinet will devote itself to the question on September 14th. Until then, there will be no comment on the state of the debate, said a government spokesman for Business Insider.

Berlin: The Hamburg model already applies to clubs in Berlin and partying without a mask is currently possible. Further 2G rules will also be discussed in the capital on September 14th. The decision has not yet been made, but 95 percent of all corona patients in hospitals are unvaccinated, explained Mayor Michael Müller (SPD) to the rbb. Therefore, the Senate must now formulate new warning levels - and 2G also plays a role, Müller continued.

Update Sept. 14th: The Berlin Senate has decided that at events to which only vaccinated and convalescent people (2G) are admitted, the mask and distance requirements can be omitted. In Berlin, according to the Senate resolution, 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.

North Rhine-Westphalia: A spokesman stated that the districts and cities, in consultation with the Ministry of Health, are able to apply stricter rules than 3G. Speak 2G.

Schleswig-Holstein: Here, too, a separate solution is planned: As of September 20, "that in the future, if the corona situation worsens, a transition to a 2G regulation with a 3G option is planned". The exact key figures that apply to this have not yet been communicated. In Schleswig-Holstein, however, private broadcasters can still opt for 3G even with nationwide 2G rules, but then have to adhere to more stringent requirements. Nothing is known about the exact editions either.

Bavaria: A ministry spokeswoman said on request that it would stay with 3G. "The new 14th Bavarian Infection Protection Measures Ordinance has not adopted a 2G rule. At this point in time, no statement can be made as to which specific measures are indicated in the future. "

Saarland: When asked by Business Insider, the Saarland only stated: "The state government is currently giving internal advice on this question".

Mecklenburg-Western Pomerania: In the federal state, events in closed rooms from 1,251 participants and those in the open air from 2,501 participants may only take place in compliance with the 2G rules.

CONCLUSION

As of September 13, 2021, the number of COVID-19 deaths reported worldwide has climbed to over 4,645,629. The total for the USA is now reported above 677,988, for the UK 134,200, Italy 129,919, France 115,517, and Germany 93,128. <https://www.statista.com/statistics/1093256/novel-coronavirus-2019ncov-deaths-worldwide-by-country/>

LIMITS ON INDIVIDUAL FREEDOM: While the trend in many countries appears to favor imposition of narrowly tailored limits on individual freedom with regard to COVID-19 vaccination, the courts, legislative bodies and regulatory entities will have to continue striving for a balance. From the U.S. perspective, time will tell whether that balance has been reached in the September 9, 2021 “Path Out of the Pandemic: President Biden’s COVID-19 Action Plan.” It is our hope that a similar balance can be reached internationally.

MULTI-FACETED OBJECTIVES: The totality of actions and decisions that have been carefully taken during the last several months indicate that this Action Plan will likely achieve its multi-faceted objectives to do all that can be done to protect the public and promote the public health as we move toward the end of the second year of this pandemic.

BALANCE REQUIRED: For government bodies throughout the world as they face the matter of imposing vaccine mandates during this health emergency and take actions in a circumspect but urgent manner, they must balance considerations of proportionality, precedent, context, and sufficiency of access. They must insist that any form of medical intervention be carried out with free and informed consent, hopefully in a manner consistent with the spirit and intent of the *Vavricka* decision. To do so will call for employment of indirect as opposed to direct means, as clarified by Anja Krasser in her excellent analysis of that decision. Rather than compulsory administration of vaccines in the form of an involuntary subjection of a human being to a jab, it appears that more indirect and voluntary means of enforcement will succeed through being linked to one’s vaccination status.

CONSEQUENCES: There are consequences for some people in this pandemic of the unvaccinated. For the unvaccinated this may extend to fines or monetary penalties, loss of certain non-essential services, or restrictions on access to public schools, institutions of higher learning, major sports events, restaurants, theatres, concerts and other large entertainment venues, federal employment and federal contractor-related employment, private sector employers with over 100 employees (subject to an option of submitting to weekly COVID tests), health care, nursing, hospital and home health agencies participating in the Medicare and Medicaid programs, and public accommodations. As the President put it on September 9, “This is not about freedom or personal choice. It’s about protecting yourself and those around you.”