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German Judge Investigated by Police after Ruling Compulsory Mask-wearing in Schools Unconstitutional

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On 8 April 2021, the Weimar District Family Court ruled in Amtsgericht Weimar, Beschluss vom 08.04.2021, Az.: 9 F 148/21) that two Weimar schools were prohibited with immediate effect from requiring pupils to wear mouth-nose coverings of any kind (especially qualified masks such as FFP2 masks), to comply with AHA minimum distances and/or to take part in SARS-CoV-2 rapid tests. At the same time, the court ruled that classroom instruction must be maintained.

This is the first time that expert evidence has now been presented before a German court regarding the scientific reasonableness and necessity of the prescribed anti-Corona measures.The expert witnesses were the hygienist Prof. Dr. med Ines Kappstein, the psychologist Prof. Dr. Christof Kuhbandner and the biologist Prof. Dr. Ulrike Kämmerer were heard. 2020NewsDe has published a summary of the judgment, the salient parts of which are set out in full below (translation by DeepL).

The reason for highlighting this judgment in such detail is because of the consequences reported by the news website to the judge of his decision. According to 2020NewsDe, "the judge at the Weimar District Court, Christiaan Dettmar, had his house searched today [26 April 2021]. His office, private premises and car were searched. The judge's mobile phone was confiscated by the police. The judge had made a sensational decision on 8 April 2021, which was very inconvenient for the government's policy on the measures." In a side note on the fringes of proceedings with other parties, continues 2020NewsDe, "the decision in question has been described as unlawful by the Weimar Administrative Court without comprehensible justification."

A cautionary note: I have been informed by Holger Hestermeyer, Professor of International and EU Law at King's Law School (@hhesterm), that cases quashing administrative acts (like the one at issue in the AG Weimar case) go to administrative courts in Germany. The case, says Professor Hestermeyer

> had, indeed, been brought to the administrative court, but the court had not quashed

> the administrative act. The attorney then (according to Spiegel reports) was looking for plaintiffs to bring the case before this particular judge via telegram (competence is based on first letters of surnames, so the attorney was looking for plaintiffs with the right surname). The judge then assumed his competence (unprecedented), ruled not just for the plaintiffs but all kids at the school (peculiar), excluded an oral hearing (hmmm), rejected all mainstream scientific advise to base the judgment exclusively on the minority of experts rejecting all such measures (again hmmm) and excluded an appeal.

So there are important procedural problems with this judgment which must be borne in mind when reading my summary with excepts both from the original judgment and the report by 2020De below.

The court case was a child protection case under to § 1666 paragraph 1 and 4 of the German Civil Code (BGB), which a mother had initiated for her two sons, aged 14 and 8 respectively, at the local Family Court. She had argued that her children were being physically, psychologically and pedagogically damaged without any benefit for the children or third parties. At the same time, she claimed this constituted a violation of a range of rights of the children and their parents under the law, the German constitution (Grundgesetz or Basic Law) and international conventions.

Proceedings under section 1666 of the Civil Code can be initiated *ex officio* both at the suggestion of any person or without such a suggestion if the court considers intervention to be necessary for reasons of the best interests of the child (section 1697a of the Civil Code).

After examining the factual and legal situation and evaluating the expert opinions, the Weimar Family Court concluded that the prohibitive measures represented a present danger to the child's mental, physical or psychological well-being to such an extent that substantial harm could be foreseen with a high degree of certainty.

The judge stated:

> These are the risks. The children are not only endangered in their mental, physical and psychological well-being by the obligation to wear face masks during school hours and to keep their distance from each other and from other persons, but they are also already being harmed. At the same time, this violates numerous rights of the children and their parents under the law, the constitution and international conventions. This applies in particular to the right to free development of the personality and to physical integrity under Article 2 of the Basic Law as well as to the upbringing and care by the parents under Article 6 of the Basic Law ….

With his judgement, the judge confirmed the mother's assessment:

> The children are physically, psychologically and pedagogically damaged and their rights are violated without any benefit for the children themselves or third parties.

According to the court, the school administrators, teachers and others could not invoke the state law regulations on which the measures are based, because they are unconstitutional and thus null and void, since they violated the principle of proportionality rooted in the rule of law (Articles 20, 28 of the Basic Law).

> According to this principle, also referred to as the prohibition of excess, the measures

> intended to achieve a legitimate purpose must be suitable, necessary and proportionate in the narrower sense – that is to say, when weighing up the advantages against their disadvantages. The measures that are not evidence-based, contrary to Section 1(2) IfSG, are already unsuitable to achieve the fundamentally legitimate purpose pursued with them, to avoid overloading the health system or to reduce the incidence of infection with the SARS-CoV- 2 virus. In any case, however, they are disproportionate in the narrower sense, because the considerable disadvantages/collateral damage caused by them are not offset by any recognisable benefit for the children themselves or third parties

The judge clarified that it had to be pointed out that it was not for the parties involved to justify the unconstitutionality of the encroachments on their rights, but conversely for the Free State of Thuringia to prove the necessary scientific evidence that the measures it prescribes are suitable to achieve the intended purposes and that they are proportionate, if necessary. So far, this has not been done to any degree.

The judge heard expert evidence from Prof Kappstein on the lack of benefit of wearing masks and observing distance rules for the children themselves and third parties

Prof. Kappstein, after evaluating all the international data on the subject of masks, stated that the effectiveness of masks for healthy people in public is not supported by scientific evidence.

The ruling states:

> Plausibility, mathematical estimates and subjective assessments in opinion pieces cannot replace population-based clinical-epidemiological studies. Experimental studies on the filtering performance of masks and mathematical estimates are not suitable to prove effectiveness in real life. While international health authorities advocate the wearing of masks in public spaces, they also say that there is no evidence for this from scientific studies. On the contrary, all currently available scientific evidence suggests that masks have no effect on the incidence of infection. All publications that are cited as evidence for the effectiveness of masks in public spaces do not allow this conclusion. This also applies to the so-called “Jena Study”- like the vast majority of other studies a purely mathematical estimation or modelling study based on theoretical assumptions without real contact tracing with authors from the field of macroeconomics without epidemiological knowledge …the decisive epidemiological circumstance remains unconsidered that the infection values already decreased significantly before the introduction of the mask obligation in Jena on 6 April 2020 (about three weeks later in the whole of Germany) and that there was no longer any relevant infection occurrence in Jena already at the end of March 2020.

The masks are not only useless, they are also dangerous, the judge concluded.

> Every mask, as the expert further states, must be worn correctly in order to be effective in principle. Masks can become a contamination risk if they are touched. However, on the one hand they are not worn properly by the population and on the other hand they are very often touched with the hands. This can also be observed with politicians who are seen on television. The population was not taught how to use masks properly, it was not explained how to wash their hands on the way or how to carry out effective hand

> disinfection. It was also not explained why hand hygiene is important and that one must be careful not to touch one's eyes, nose and mouth with one's hands. The population was virtually left alone with the masks. The risk of infection is not only not reduced by wearing the masks, but increased by the incorrect handling of the mask. [The expert sets this out in detail] as well as the fact that it is "unrealistic" to achieve the appropriate handling of masks by the population.

The judgement goes on to say: "The transmission of SARS-CoV-2 through 'aerosols', i.e. through the air, is not medically plausible and scientifically unproven. It is a hypothesis that is mainly based on aerosol physicists who, according to the expert, are understandably unable to assess medical correlations from their field of expertise. The 'aerosol' theory is extremely harmful for human coexistence and leads to the fact that people can no longer feel safe in any indoor space, and some even fear infection by 'aerosols' outside buildings. Together with 'unnoticed' transmission, the 'aerosol' theory leads to seeing an infection risk in every fellow human being.

The changes in the policy on masks, first fabric masks in 2020, then since the beginning of 2021 either OP masks or FFP2 masks, lack any clear line. Even though OP masks [the standard blue masks with filter cloth and three layers of purifying dust] and FFP masks are both medical masks, they have different functions and are therefore not interchangeable. Either the politicians who made these decisions themselves did not understand what which type of mask is basically suitable for, or they do not care about that, but only about the symbolic value of the mask. From the expert's point of view, the policy-makers' mask decisions are not comprehensible and, to put it mildly, can be described as implausible.

The expert further points out that there are no scientific studies on spacing outside of medical patient care. In summary, in her opinion and to the conviction of the court, only the following rules can be established:

1. "keeping a distance of about 1.5 m (1 – 2 m) during vis-à-vis contacts when one of the two persons has symptoms of a cold can be described as a sensible measure. However, it is not scientifically proven; it can only be said to be plausible that it is an effective measure to protect against contact with pathogens through droplets of respiratory secretion if the person in contact has signs of a cold. In contrast, an all-round distance is not an effective way to protect oneself if the contact has a cold.
2. keeping an all-round distance or even just a vis-à-vis distance of about 1.5 m (1 – 2 m) if none of the people present has signs of a cold is not supported by scientific data. However, this greatly impairs people living together and especially carefree contact among children, without any recognisable benefit in terms of protection against infection.
3. close contacts, i.e. under 1.5 m (1 – 2 m), among pupils or between teachers and pupils or among colleagues at work etc., however, do not pose a risk even if one of the two contacts has signs of a cold, because the duration of such contacts at school or even among adults somewhere in public is far too short for droplet transmission to occur. This is also shown by studies from households where, despite living in close quarters with numerous skin and mucous membrane contacts, few members of the household become ill when one has a respiratory infection."

The court also followed Prof Kappstein's assessment regarding the transmission rates of

symptomatic, pre-symptomatic and asymptomatic people.

> Pre-symptomatic transmissions are possible, but not inevitable. In any case they are significantly lower when real contact scenarios are evaluated than when mathematical modelling is used.
>
> From a systematic review with meta-analysis on Corona transmission in households published in December 2020, she contrasts a higher, but still not excessive, transmission rate of 18% for symptomatic index cases with an extremely low transmission of only 0.7% for asymptomatic cases. The possibility that asymptomatic people, formerly known as healthy people, transmit the virus is therefore meaningless.

In summary, the court stated:

> There is no evidence that face masks of various types can reduce the risk of infection by SARS-CoV-2 at all, or even appreciably. This statement applies to people of all ages, including children and adolescents, as well as asymptomatic, pre-symptomatic and symptomatic individuals.
>
> On the contrary, there is the possibility that the even more frequent hand-face contact when wearing masks increases the risk of coming into contact with the pathogen oneself or bringing fellow humans into contact with it. For the normal population, there is no risk of infection in either the public or private sphere that could be reduced by wearing face masks (or other measures). There is no evidence that compliance with distance requirements can reduce the risk of infection. This applies to people of all ages, including children and adolescents."

The court relied on the extensive findings of another expert, Prof. Dr. Kuhbandner, in its conclusions that there was "no high-quality scientific evidence to date that the risk of infection can be significantly reduced by wearing face masks."

The judge continued

> In addition, the achievable extent of the reduction in the risk of infection through mask-wearing at schools is in itself very low, because infections occur very rarely at schools even without masks. Accordingly, the absolute risk reduction is so small that a pandemic cannot be combated in a relevant way... According to the expert's explanations, the currently allegedly rising infection figures among children are very likely to be due to the fact that the number of tests among children has increased significantly in the preceding weeks. Since the risk of infection at schools is very low, even a possible increase in the infection rate of the new virus variant B.1.1.7 in the order of magnitude assumed in studies is not expected to significantly increase the spread of the virus at schools. This small benefit is countered by numerous possible side effects with regard to the physical, psychological and social well-being of children, from which numerous children would have to suffer in order to prevent a single infection. The expert presents these in detail, among other things, on the basis of the side-effect register published in the scientific journal *Monatsschrift Kinderheilkunde*.

The Court also relied on the expert opinion of Prof. Dr. med. Kappstein on the unsuitability of PCR tests and rapid tests for measuring the incidence of infection

Regarding the PCR test, the Court quoted Dr Kappstein to the effect that the PCR test used

can only detect genetic material, but not whether the RNA originates from viruses that are capable of infection and thus capable of replication.

The expert Prof. Dr. Kämmerer also confirmed in her expert opinion on molecular biology that a PCR test – even if it is carried out correctly – cannot provide any information on whether a person is infected with an active pathogen or not. This is because the test cannot distinguish between "dead" matter, e.g. a completely harmless genome fragment as a remnant of the body's own immune system's fight against a cold or flu (such genome fragments can still be found many months after the immune system has "dealt with" the problem) and "living" matter, i.e. a "fresh" virus capable of reproducing.

There is a great deal more of interest on the PCR test from page 120 of the 176 page judgment. According to Prof. Dr. Kämmerer, in order to determine an active infection with SARS-CoV-2, further, and specifically diagnostic methods such as the isolation of replicable viruses must be used.

According to the expert report, the rapid antigen tests used for mass testing cannot provide any information on infectivity, as they can only detect protein components without any connection to an intact, reproducible virus.

> Finally, the expert points out that the low specificity of the tests causes a high rate of false positive results, which leads to unnecessary personnel (quarantine) and social consequences (e.g. schools closed, "outbreak reports")until they turn out to be false alarms. The error effect, i.e. a high number of false positives, is particularly strong in tests on symptomless people.

The judge then turned to the right to informational self-determination, which forms part of the general right of personality in Article 2(1) of the Basic Law. This is the right of individuals to determine for themselves in principle the disclosure and use of their personal data. Such personal data also includes a test result. Furthermore, such a result is a personal health "data" in the sense of the Data Protection Regulation (DSGVO), which in principle is nobody's business.

This encroachment on fundamental rights is also unconstitutional. This is because, given the concrete procedures of the testing process in schools, it seems unavoidable that numerous other people (fellow pupils, teachers, other parents) would become aware of a "positive" test result, for example.

The judge observed that any compulsory testing of schoolchildren under Land law was not covered by Germany's Infection Protection Act – irrespective of the fact that this itself is subject to considerable constitutional concerns.

According to § 28 of the Act, the competent authorities can take the necessary protective measures in the manner specified therein if "sick persons, persons suspected of being sick, persons suspected of being infected or excretors" are detected. According to § 29 IfSG, these persons can be subjected to observation and must then also tolerate the necessary examinations.

In its decision of 02.03.2021, ref.: 20 NE 21.353, the Bavarian Administrative Court of Appeal refused to consider employees in nursing homes as sick, suspected of being sick or excretors from the outset. This should also apply to pupils. However, a classification as

suspected of being infected is also out of the question.

According to the case law of the Federal Administrative Court, anyone who has had contact with an infected person with sufficient probability is considered to be suspected of being infected within the meaning of § 2 No. 7 IfSG; mere remote probability is not sufficient. It is necessary that the assumption that the person concerned has ingested pathogens is more probable than the opposite. The decisive factor for a suspicion of infection is exclusively the probability of a past infection process, cf. judgement of 22.03.2012 – 3 C 16/11 – juris marginal no. 31 et seq. The Bavarian Constitutional Court has rejected this for employees in nursing professions. The Weimar judge observed that "Nothing else applies to schoolchildren."

Regarding the children's right to education, the judge stated:

> Schoolchildren are not only subject to compulsory schooling under Land law, but also have a legal right to education and schooling. This also follows from Articles 28 and 29 of the UN Convention on the Rights of the Child, which is applicable law in Germany.
>
> According to this, all contracting states must not only make attendance at primary school compulsory and free of charge for all, but must also promote the development of various forms of secondary education of a general and vocational nature, make them available and accessible to all children and take appropriate measures such as the introduction of free education and the provision of financial support in cases of need. The educational goals from Article 29 of the UN Convention on the Rights of the Child are to be adhered to.

The judge summarised his decision as follows:

The compulsion imposed on school children to wear masks and to keep their distance from each other and from third persons harms the children physically, psychologically, educationally and in their psychosocial development, without being counterbalanced by more than at best marginal benefit to the children themselves or to third persons. Schools do not play a significant role in the "pandemic".

The PCR tests and rapid tests used are in principle not suitable on their own to detect an "infection" with the SARS-CoV-2 virus. This is already clear from the Robert Koch Institute's own calculations, as explained in the expert reports. According to RKI calculations, as expert Prof. Dr. Kuhbandner explains, the probability of actually being infected when receiving a positive result in mass testing with rapid tests, regardless of symptoms, is only two per cent at an incidence of 50 (test specificity 80%, test sensitivity 98%). This would mean that for every two true-positive rapid test results, there would be 98 false-positive rapid test results, all of which would then have to be retested with a PCR test.

A (regular) compulsion to mass-test asymptomatic people, i.e. healthy people, for which there is no medical indication, cannot be imposed because it is disproportionate to the effect that can be achieved. At the same time, the regular compulsion to take the test puts the children under psychological pressure, because in this way their ability to attend school is constantly put to the test.

Finally, the judge notes:

> Based on surveys in Austria, where no masks are worn in primary schools, but rapid

tests are carried out three times a week throughout the country, the following results according to the explanations of the expert Prof. Dr. Kuhbandner:

100,000 primary school pupils would have to put up with all the side effects of wearing masks for a week in order to prevent just one infection per week.

To call this result merely disproportionate would be a completely inadequate description. Rather, it shows that the state legislature regulating this area has become distant from the facts to an extent that seems historic.

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