



Vulnerability and Resilience in a Crisis – Ethical Criteria for Decision-Making in a Pandemic

OPINION · EXECUTIVE SUMMARY & RECOMMENDATIONS

4 April 2022

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>> EXECUTIVE SUMMARY

Introduction: Structural conflicts and necessary balancing of interests

- 1) The COVID-19 pandemic has forced and still forces societies all over the world to make trade-offs and to prioritise, with sometimes severe consequences. It is necessary to not only take responsibility for these decisions at a political level; rather, they also require ethical justification. The pandemic has shaken our confidence that life can be planned, and confronts us with the vulnerability and finiteness of our existence. The consequences – political, healthwise, social, economic, cultural – affect even our relationship to our very self, and put into question the sustainability of our way of life.
- 2) The consequences of the pandemic and of its containment affect everybody, but not to the same extent. The risks for infection, severe courses of disease and death vary depending on the physiological vulnerability (by age or pre-existing medical conditions) and the risk of exposure (particularly high for medical staff, for example). Also, the

burdens that people have to carry as a consequence of the measures of protection against infection can weigh more or less heavily, depending on one's biography, personal and professional situation, degree of vulnerability and resources of resilience. The pandemic has not only revealed significantly increased vulnerabilities of people in precarious life, living and working conditions; but has also exacerbated these vulnerabilities even more.

- 3) The German Ethics Council has already taken a stand on individual ethical questions regarding ways to manage the pandemic in a number of shorter publications. By means of the present comprehensive Opinion it intends to contribute to the development of a long-term strategy, through providing ethical orientation in the difficult processes of balancing different goods, which are unavoidable when deciding on measures to cope with pandemic crises, be it the present or possible future ones. Two important poles in the focus of such deliberations are the pole of freedom and the pole of health protection. Levels of higher or lower priority in terms of ethical risk must be formulated, which shall enable well-founded decisions on the question of when in the process of fighting a pandemic freedom should be seen as secondary to the protection of public health, and vice-versa.

Current situation: Review, experiences and challenges

- 4) The pandemic outbreak of the contagious disease COVID-19 progresses in regionally clearly discernable waves. The illness is caused by the coronavirus SARS-CoV-2, discovered in 2019; it affects multiple organs and is mainly transmitted through aerosols. In Germany, the dynamics of the pandemic is usually described in terms of the 7-day incidence rate of new infections per 100,000 inhabitants (laboratory-confirmed and registered). Compared to other epidemiological key figures like hospitalisation incidence, occupancy rate in intensive

care units, or mortality, it represents infection dynamics with less of a time lag.

- 5) Since 2008, risk analyses of competent bodies and authorities in Germany have been concerned with the possibility of a pandemic caused by a type of coronavirus. However, it may be doubted whether these analyses have been dealt with appropriately in politics.
- 6) In the initial phase of alert, a lack of knowledge about the new pathogen and about the dynamics of the corona crisis caused anxiety and concern among politicians and the population. Many people closely tracked statistics on incidences, casualties, and the occupancy rates in hospitals and ICUs every day. The measures that were taken in this phase were heatedly discussed and challenged, yet received large support and were deemed to be overall justified, also by the German Ethics Council.
- 7) Immediately after the German Bundestag had established “an epidemic situation of national scope” in its decision of 25 March 2020, comprehensive contact and entry restrictions were adopted and the closure of numerous shops, businesses and public institutions, like day-care centres, (high) schools and religious places of assembly was ordered. Concomitantly, so-called basic protective measures were introduced, combining elements like physical distancing, washing hands, coughing and sneezing hygiene, and wearing protective masks. These were supplemented later by recommendations on ventilation and, after its introduction in June 2020, on using the German mobile contact tracing app “Corona-Warn-App” (in German referred to as the AHA+L+A formula).
- 8) After a phase with low incidences in the summer of 2020, a second wave developed in October 2020, which reached its peak in December 2020. Again, contact restrictions and closures in education, culture and sports as well as in retail and catering were ordered. At the turn

of the year, the first vaccines were approved for use in the European Union, and the vaccination campaign began. During the first few months of 2021 incidences declined at first, but as soon as the beginning of March a third wave built up, caused among other factors by the rapid spread of the alpha variant B.1.1.7 of the virus.

- 9) This third wave ebbed away in April 2021, and during the summer, infection rates remained steady at a low level. After the vaccination prioritisation was lifted in June, everybody who wanted to could get vaccinated. However, since vaccination rates remained lower than expected, warnings of a “fourth wave” which might hit Germany in the winter of 2021/2022 became frequent. On 22 October 2021, the 7-day incidence rate reached the one hundred mark. It then skyrocketed within a month to exceed the four hundred mark, thereby more than doubling the maximum value recorded in December 2020.
- 10) By the end of November 2021, just when the booster vaccination campaign started, the so-called 3G regulation came into force for public transport and at the workplace, requiring every individual to provide proof of either vaccination or convalescence, or to show a valid certificate of a negative COVID-19 test (antigen test or rapid test). In many other areas of public life even stricter regulations were introduced (requiring proof of either vaccination or convalescence), which excluded non-vaccinated persons from various leisure activities and services. In spite of these and a number of further measures, the fourth wave of the pandemic was immediately followed by a fifth one. The main reason for this was the emergence of a new variant of the virus called Omicron, which became dominant in January 2022 and was considerably more contagious than previous variants. At the time this Opinion was finalised in January 2022, COVID-19 incidences achieved ever new maximum values. However, the course of disease caused by the Omicron variant is on average milder. This is why discussions as to which protective measures against the pandemic are (still) appropriate are getting more intense.

- 11) Currently, all indicators suggest that it will not be possible to eradicate the virus once and for all. The future development will depend, among other factors, on how effectively contacts can be traced and contact restrictions be controlled if new waves arise, on how fast governments react to new virus variants and how prudently they react to long-term effects. It must be expected that the virus will become endemic in Germany, thus representing just one of many pathogens in the future.

- 12) In order to move to a controllable endemic situation characterised by a recurrent, yet regionally limited emergence of the pathogen, it is necessary to achieve a thorough vaccination coverage among the population, keeping in mind that recovery from an infection also reinforces immune protection. However, it is not sufficient to monitor the containment of the pandemic only in the German context. In the long term, containment of the pandemic can only be successful if it will be possible to limit the emergence of new virus variants worldwide. The more infections occur globally, the higher is the probability that virus variants will emerge. This means that the success of measures taken in Germany may be undermined if high infection rates in other countries encourage the emergence of new, infectious virus variants and thus trigger further global waves of infection.

- 13) In order to curb the spread of the pandemic, to protect people in this country from illness and save public healthcare from the risk of excessive strain, different protective measures have been taken in the course of the COVID-19 pandemic. These were more severe in the first wave of infection than in the following waves. The political decisions for combating the pandemic – especially in the beginning of the corona crisis, but also in later phases – were taken under conditions of great scientific uncertainty. Such uncertainty prevailed both with regard to the knowledge of SARS-CoV-2 and the disease it causes, and with regard to the desirable and undesirable effects and side effects of the protective measures.

- 14) Together with the basic protective measures, restrictions of movement and contacts are crucial measures against the pandemic, which aim at containing the spread of the virus. A distinction needs to be made between direct restrictions of movement and contact on the one hand, as they are adopted during a strict lockdown, for example, in the form of curfews, and the indirect restrictions of opportunities to move around and meet people on the other hand, by closing shops, restaurants, bars, event locations, sports facilities, educational and other institutions – the so-called shutdown. In contrast to other countries, there have been almost no curfews in Germany.
- 15) The imposed protective measures had particularly severe consequences for people in community accommodation, like long-term care homes or housing facilities for integration assistance, where particularly compromised persons live together without being able to effectively keep a distance. In these facilities, general bans on visitors and curfews were imposed at an early stage in the pandemic. After public criticism about the situation of numerous people depending on professional care, the German federal states modified their infection control regulations in May 2020, in order to avoid that the protective measures in hospitals, care facilities and homes for the elderly or disabled would lead to complete social isolation of residents in these institutions.
- 16) It was not possible to wait with decisions on the various kinds of contact restriction measures until sound knowledge on their effectiveness and their indirect psychological, social and economic consequences for individual persons or groups of people was available. This was unavoidable, given the unprecedented situation of threat caused by the pandemic. It has been criticised, however, that no systematic collection of data was carried out with regard to the use of contact restrictions, so that their consequences and side effects are only insufficiently known up until today.

- 17) Test procedures are used to establish an infection with SARS-CoV-2 in case a person shows symptoms, but also to identify symptom-free carriers of the virus, and to assess whether and to what extent a person is still contagious after the disease is over. The purpose of these procedures can be identified at two levels: At an individual level, infected persons shall be identified, isolated, medically monitored and treated at an early stage. At a population level, infection chains shall be identified and interrupted in order to curb the occurrence of infection.
- 18) Especially antigen tests (“rapid tests”) have been widely used to reduce infection risks resulting from direct contact between persons. With the exception of a period of time from October until November 2021, antigen tests were free of charge for everybody as the so-called “citizen’s test”. With an amendment of the Protection against Infection Act of 24 November 2021, all non-vaccinated employees upon arrival at their workplace were obliged to show proof of a negative test issued that day (“3G at the workplace”).
- 19) In order to be able to identify and interrupt infection chains, contacts of the infected person must be effectively traced. In Germany, this is mainly the responsibility of the public health offices. Tracing contact persons is time-consuming and requires a lot of human resources, so that in some phases of the pandemic public health office staff had to be supported by employees from other areas of administration, by members of the German armed forces and by students. In spite of this support, it was not always possible to carry out contact tracing effectively when incidences were high.
- 20) Imposing home isolation or quarantine is aimed at preventing the spread of SARS-CoV-2 by interrupting contact with infected persons. Home isolation is imposed by the public health office on persons whose SARS-CoV-2 infection has been established by means of a positive PCR test. Quarantine measures concern contact persons who are merely suspected of having been infected. Upon scrutiny, so-called

collective quarantine measures seem questionable. Such measures were sometimes imposed in the context of outbreaks in hospitals, care facilities, assisted living communities or collective accommodation.

- 21) Owing to massive financial investments – both public and private –, more efficient trial protocols and accelerated approval procedures, the development period for vaccines against COVID-19 could be shortened considerably. Vaccine development was not only fast, but also extraordinarily successful. The effectiveness of the first approved vaccines exceeded the average effectiveness of flu vaccines by far. Even if available vaccines offer less effective protection against infection with the more recent virus variants, they nevertheless reliably prevent a severe course of the disease, especially if a booster dose has been administered.
- 22) During the first half of 2021, the scarce number of vaccines available were distributed on the basis of a prioritisation, giving highest precedence to the protection of persons with a high risk of suffering a severe or fatal course of COVID-19. Concerning the implementation of the campaign, it has been criticised, among other aspects, that delays – sometimes considerable – occurred in the vaccination of persons living in assisted living communities or cared for by services of integration assistance, in comparison with other groups of people belonging to the same level of prioritisation. Similar shortcomings have also been reported with regard to homeless people or refugees living in community accommodation.
- 23) The vaccination targets recommended for Germany by the Robert Koch Institute have, still up until today (i.e. end of January 2022), not been reached. The initial shortage of vaccines and also the following phase characterised by difficulties in the allocation of appointments, which for a certain time made access to COVID-19 vaccinations difficult, have meanwhile been overcome. This means that by now, the main obstacle to achieving higher vaccination rates is a lack of

willingness to get vaccinated. According to surveys, safety concerns are the main reason against getting vaccinated, both for general vaccination refusers, and for non-vaccinated persons who are willing in principle to get vaccinated. Moreover, the vaccination is not considered necessary, because the risk associated with COVID-19 is perceived as being low. In addition, in some parts of the population the high number of reported cases of infections with symptoms despite a vaccination (so-called breakthrough infections) led to discomfiture.

- 24) Due to the low willingness to get vaccinated voluntarily after the initial vaccine shortage had been overcome, a public debate ensued in the summer of 2021 on the question by what means and to what extent pressure, or even coercion, might be exerted on non-vaccinated people. Most of the time, this discussion focused on the perspective of non-vaccinated people, e.g. when discussing the legitimacy of restricting their rights. To what extent the rights of vaccinated people, who already at this point in time represented a disproportionately larger group, were restricted due to the persistence of the pandemic in Germany, was rarely the focus of public attention. Although the German Ethics Council spoke out against a statutory duty to vaccinate at the beginning of the vaccination campaign, on 11 November 2021 it recommended a fast and serious assessment of an occupation-related vaccination mandate for people providing care for particularly vulnerable persons. Only one month later, the Council – with four votes against – has argued in support of an expansion of the vaccination mandate beyond the occupation-related statute that has already been adopted by the German Bundestag. A majority of Council Members speak out in favour of a general vaccination mandate for adults, a minority comes out in favour of mandatory vaccination only for persons with an increased risk of a severe course of the disease.
- 25) The individual SARS-CoV-2 infection risk depends first of all on the number of contact persons and the frequency and intensity of these direct contacts, but also on the question of how many contacts these

other people have to third persons. In most cases a SARS-CoV-2 infection has a mild or even symptom-free progression, especially in younger people without a pre-existing medical condition. According to current knowledge, it does usually not lead to longer-term health restrictions. However, the risk for a severe course of the disease increases with age. Certain pre-existing illnesses, but also factors like obesity or smoking, might increase the risk of a severe progression of the disease, too.

- 26) Depending on the patient group, information on the frequency of the occurrence of long-term health problems after an acute SARS-CoV-2 infection differs strongly. If characteristic symptoms (like fatigue, exhaustion, shortness of breath, concentration and memory problems) occur in the period between four and twelve weeks after the infection, this is called “long COVID”. By contrast, the persistence of symptoms for more than twelve weeks after an acute infection is referred to as “post-COVID syndrome”. Many important questions regarding long or post-COVID cannot be reliably and comprehensively answered right now, given the current state of research.
- 27) Health risks in connection with a SARS-CoV-2 infection are particularly high for persons in in-patient care. One of the reasons why institutions for long-term care play a critical role in the spread of infections is the fact that they are part of a larger social network where infection chains can progress. In addition, persons in need of long-term care often present additional risk factors for a severe course of the disease, for example because of certain pre-existing medical conditions. Socio-economic features may also increase the risk for a severe progression of COVID-19. This affects people, for example, who receive unemployment benefits or who have a low-wage job with a right to social benefits, but also migrant workers (among them many caregivers) as well as refugees.

- 28) Repeatedly in the course of the pandemic, services of medical prevention, therapy and rehabilitation have been drastically reduced in order to minimise the risk of infection in medical institutions and to free capacities for the treatment of COVID-19 patients. Despite the clinical treatment needs associated with COVID-19, hospitals recorded considerably less treatments and surgeries in 2020, than in the previous year. Registered physicians were more reluctant to send patients to hospital, and persons in need of hospital treatment sometimes abstained from claiming services of basic medical or hospital care. It will take a few years until the full extent of the somatic health damages becomes apparent that might be attributable to restrictions in healthcare services during the corona crisis.
- 29) The COVID-19 pandemic and the measures taken to contain it have sometimes led to considerable psychological stress and challenges. This is the result of a complex interaction of personal, situational and environmental features, as well as the related potential for development and vulnerabilities. According to studies, feelings of insecurity and fear increased among the adult German population during the pandemic. Women were affected more strongly by such burdens than men, and the psychosocial health of older people proved to be more stable than that of younger people. However, this does not apply to lonely elderly people lacking in social support, or to residents in institutions of long-term care or in facilities for the disabled, where a deterioration of cognitive and emotional states was observed. Also children, adolescents and high school students were affected more severely by mental disorders during the pandemic, especially by anxiety and depression.
- 30) The pandemic, its consequences and side effects moreover present great challenges to our social institutions, especially in social welfare, healthcare and education. Apart from institutions of long-term care and facilities for the disabled, this also affects social services for other – particularly vulnerable – groups like child and youth services,

social-psychiatric services and assistance to the homeless. During a pandemic, it becomes apparent how crisis-proof an institution is in the way how well they manage to reconcile infection control with the fulfilment of their respective social responsibilities by means of suitable adaptations. Another relevant benchmark is the extent to which an exacerbation of social disadvantages can be avoided.

- 31) The corona crisis has shown that even the German health system, which is generally considered to be one of the best-performing and most cost-intensive in the world, was not sufficiently prepared for the challenges and stress peaks that can occur during a pandemic. This was visible, by way of example, in the public health service, represented at community level by the public health offices. During the peak periods of the COVID-19 pandemic, intensive care units in Germany were at their limits, although Germany is ranking among the top positions in Europe and the world when it comes to bed capacities in intensive care. However, owing to these well-equipped facilities, the infection control policy and the provisions made, it was possible to avoid extreme bottlenecks in healthcare, which might otherwise have resulted in triage decisions.

- 32) A considerable problem during the pandemic was the staffing situation in the healthcare system, particularly in the area of nursing care. Staff members were subject to structural, psychological and physical burdens as well as multiple stress factors. An exceptional situation of emotional stress arose from the restrictions with regard to care for the dying during the first wave of the pandemic. “Lonely dying” was emotionally extremely draining – not only for the dying persons themselves and their relatives. Also for staff in clinics and nursing care homes it was almost unbearable to enforce the contact restrictions and to experience the suffering of the people concerned. Especially with regard to the personal consequences for nursing staff in intensive care units, the term “Pflexit” has come up in the German language to describe the fact that a large number of caregivers (in

German: *Pflegende*, translator's note) quit their job or think about changing their profession.

- 33) Altogether, it has become clear that although the German health system had not been sufficiently prepared for the COVID-19 pandemic, and intensive care units, in particular, sometimes reached their stress limits, the necessary adaptations have been successful in that medical care for COVID-19 patients could be adequately guaranteed at any point in time during the pandemic. However, healthcare provision was deficient for many other groups of people. These deficiencies go beyond the pandemic and can unfortunately especially affect people who had to make major sacrifices during the pandemic, as exemplified by children and adolescents.
- 34) Educational institutions from day-care centres to high schools were not prepared for a crisis like the COVID-19 pandemic, and they were particularly affected by protective measures such as contact restrictions. The fact that German schools have considerable digitisation deficits in comparison to other countries presented a crucial problem in the transition to distance learning. Surveys among parents on the consequences of school closures due to the pandemic revealed that these brought with them considerable stress on the one hand, but also positive experiences on the other hand. Single parents with a low educational qualification and parents with children at pre-school or primary school age suffered the heaviest burdens. Those whose education came up short during the pandemic were children of socio-economically disadvantaged parents, children and adolescents with a migrant background, in refugee accommodation or with disabilities.
- 35) Most high schools and universities were also closed at the beginning of the pandemic. Starting with the summer term of 2020, studies in Germany were mainly conducted online for three terms in a row. In terms of digital teaching, high schools and universities were clearly ahead of schools. Technically and administratively, high schools

and universities also had an advantage over primary and secondary schools because of their academic autonomy and their relative budget sovereignty. All in all it has become evident that the hierarchical and the bureaucratic structure of the school system led to a reduced adaptability during the crisis, in contrast to the high school system's autonomous structure of self-governance.

- 36) During the pandemic, free space, development opportunities and social relationships of children, adolescents and young adults were massively restricted. They were impeded during important phases of their personal development and education; phases which are usually characterised by steps towards independence and self-reliance, as well as by numerous social contacts and experiences, which require great efforts to catch up on.
- 37) In comparison to other countries, the German economy has proved to be relatively stable so far, as is evidenced by the positive economic and labour market data. Nevertheless, and in spite of substantive political countermeasures, the corona crisis has caused considerable economic damage in certain sectors (e.g. event industry, catering and tourism) or for specific types of employment (e.g. solo self-employed persons). Countermeasures ranged from public stakes in companies via loan guarantees, tax relief, and sector-related corona benefits to prolonged payment of short-time compensation. By these means, some hardship has been eased, yet they are a considerable burden on public households for years to come, and they have massively increased public debt.
- 38) With regard to the presumed conflict of goals between a flourishing economy and effective health protection, as it has sometimes been invoked, especially at the beginning of the pandemic, it must be stated that there can be no question of a simple either-or. It would be an over-simplification to pretend that there is a strict opposition between economic interests and health concerns. Measures to rapidly

manage and contain the pandemic do not necessarily come at the expense of economic development, but can on the contrary contribute to its speedy recovery.

- 39) Crises are often called the “hour of executive power”. Apparently, a strong executive authority enjoys popularity among large parts of the population in times of crisis. This also holds true for the COVID-19 pandemic. Support for the executive power unavoidably has a downside, though, because it means that the position of parliaments is weakened, unless the executive makes a conscious effort to reintegrate them. If in addition judicial control is reduced, jurisdiction will also be under pressure. The discussion regarding a weakening of parliaments during the COVID-19 pandemic does in fact have a certain justification, but is mainly restricted to its functional processes. In spite of these difficulties, the essential decisions to contain the pandemic were made in the parliaments, i.e. by the legislative power. Jurisdiction has controlled the adherence to legal provisions and regulatory frameworks also during the pandemic. However, due to infection control measures, also the courts were limited in their ability to work during the peak periods of the pandemic. Moreover, they were initially very cautious in their judgments on severe infection control measures.
- 40) During the COVID-19 pandemic, the German federalist system has come under public criticism. Since health protection is essentially the responsibility of the federal states, infection control measures were not uniform in all states, but sometimes differed widely. The people or companies concerned quite often perceived them as confusing or, especially near the state borders or in interstate activities, as barely understandable. However, not taking decisions centrally, and not having uniform regulations all over Germany, also carries advantages with it. Federalism makes it possible to take into account regional particularities, and thus counteracts any undifferentiated and schematic approach of the central state. With a view to the infection control

measures, a balance has been achieved between decisions taken at a federal and at a state level, at least to a certain extent.

- 41) Another democratic challenge for policy-making during a pandemic lies in the danger of practising a kind of “technocratic governance” based on expert advice. German politicians took expert advice seriously and often followed it. Apart from the Robert Koch Institute and organisations like the major research institutions as well as the German Ethics Council, political leaders have also been counselled by individual scientists, especially in the fields of virology and epidemiology. Sometimes the impression arose that political decisions were derived directly and without further need for justification from figures like the R number or the 7-day incidence rate. Opposed to this “evidence-based governance” (as it was referred to from a critical point of view), which was often presented in the media as having no alternative, was a flood of misinformation on the virus and the measures to contain it, as well as on the political motivation suspected behind them. Such misinformation has often been spread via social media. Politics had little power to oppose this so-called “infodemic”, since the communication channels used by politics are mainly the press and public service broadcasting. This is why parts of the population, who do no longer retrieve information from these media, could not be reached.
- 42) The people’s confidence into Germany as a democracy, state under the rule of law and federal state has suffered during the pandemic. The population’s consent to infection control measures like the closure of day-care centres, schools and high schools, closing of borders and ban of large events was at clearly over 80 percent in the beginning of the pandemic, but decreased significantly in its further course. Among other factors, this loss of confidence is probably due to the fact that the insufficient preparedness for the pandemic in many social areas, and especially the lack of adaptiveness of public infrastructure to the crisis, became more and more obvious.

Basic lessons learned from the pandemic: (social) anthropological reassurances

- 43) The pandemic has revealed very clearly how vulnerable the human being is, and that this vulnerability is an inevitable part of the human condition. *Vulnerability* is a basic anthropological given. It denies every form of idealisation which defines the human being first and foremost as a self-sustaining being that is only impaired in its self-sufficiency and strength if adverse events occur, and that needs solidary support only in these cases. As humans are physical beings, the body is vulnerable especially due to the bodily sensations of suffering and pain. Human beings are also socially and mentally vulnerable, especially because they depend on reliable relationships and commitments, on co-operative assistance and support, including recognition and appreciation.
- 44) Vulnerability is not simply an occasional susceptibility, or a weak spot, that should be avoided as much as possible in leading an otherwise successful life. It is therefore misleading or at least ambiguous to generally speak of “vulnerable (groups of) persons” requiring special protection, e.g. during the COVID-19 pandemic. Especially in the context of protective measures, such a generalising talk of vulnerability is linked to a considerable danger of stigmatisation, even more so if persons who belong to a particularly vulnerable group are held responsible for the protective measures because of their association with this group. Moreover, reducing people to their disease-related vulnerability may lead to justifying that protective measures are especially targeted at individual persons because of this vulnerability, or that social groups are being isolated because of this vulnerability, no matter what other measures of (self-)protection might be available.
- 45) In a person’s specific life history, the basic anthropological given of vulnerability is expressed as *situational* and *structural* vulnerability: Situational vulnerability happens in social, political, economic or

environmental constellations or interactions. In times of a pandemic, it may manifest as the exposedness of a person's bodily or psychosocial integrity to a high risk of infection, possibly linked to and augmented by a markedly increased risk of severe or even fatal disease. Situational vulnerability also occurs in the context of (psycho) social, economic or cultural consequences of the measures that are intended to stop the spread of the pathogen, or at least curb it. The phenomenon of *structural* vulnerability is revealed by the pandemic in two ways: Firstly, the people concerned experience limitations and restrictions – sometimes substantial – in their conduct of life, caused by the social institutions or organisations in which they live, and the latter's regulations and provisions, to which they are subject more or less inevitably. Structural vulnerability is also revealed by the fact that institutions and organisations themselves are vulnerable, for example, if – under the exceptional conditions of a pandemic – they cannot maintain their usual functional processes to the required extent.

- 46) While acknowledging the vulnerability of the human being in all its dimensions, it should not be overlooked that the human condition also includes elements such as creativity and the power of resistance. In scientific debate, the term “resilience” has become a household name for these features. However, it would be misleading to perceive human resilience simply as the counterpart to human vulnerability, that might compensate for or even allow such vulnerability to be ignored. Rather, resilience is the power to deal with the challenges resulting from a situation of vulnerability or of actual harm, in a way that the option to successfully lead one's life remains valid or may even be increased by an enhanced sensitivity for the vulnerabilities and strengths of life.
- 47) The experience of recognition in interpersonal relationships, and of belonging to communities, also counts among the basic requirements of a good way of living – especially under extraordinary circumstances,

as they occur during a pandemic. The experience of recognition refers to the current situational vulnerability of the respective person or group of people. The experience of belonging happens in the form of practically experienced solidarity. Recognition and belonging can sensitise for the respective situational and structural vulnerabilities, and at the same time reinforce that resilience which helps affected people to productively cope with these vulnerabilities by means of adaptation and transformational creativity.

- 48) The connection of vulnerability and resilience also has consequences for the relationship between justice and solidarity. One's own potential vulnerability has an equalising effect in the sense that everybody depends on solidarity and strives for equitable participation. By acknowledging and respecting vulnerability as an essential feature of being human, solidarity – in being equiprimordial to liberty and equality – is recognised as an aspect of justice. Understanding the inherent vulnerability of every human being challenges a concept of solidarity according to which healthy and productive population groups should selflessly set aside their own interests for the sake of so-called vulnerable groups. The changing attribution of vulnerability to various groups in the course of the pandemic has revealed: Not only elderly or disabled persons, but also young people, families and children have been vulnerable or susceptible to harm during different phases and in different ways.
- 49) In clinical-psychological research, the term “resilience” refers to differences in the effect of and the capacity to deal with risks or factors of vulnerability. It describes successful strategies to cope with stress, whereby a strategy's success is interpreted as being the result of an interaction between the person on the one hand and the close social and institutional environment on the other hand. Vulnerability, by contrast, means a lack of mental capacities to cope, as well as restrictive conditions of life (low educational level, little financial resources, low level of integration and participation), which can in return have

a negative influence on an individual's health, especially in situations of personal and social crisis.

- 50) Speaking of the resilience of institutions means that the latter have resources which enable them to behave adaptively and transformatively towards their users' requirements and needs also in times of social crisis. In this context, institutions of various educational and care sectors must be mentioned, that manage to bring into perfect agreement the principles of health protection with those of their users' autonomy and social participation.
- 51) With regard to an individual person's dimension, studies suggest that an emotionally negatively shaded outlook and low social support have contributed to losses in self-ascribed individual psychological resilience over the course of the crisis. Especially for the analysis of resilience-vulnerability constellations in children and adolescents, a systemic perspective is recommended, which observes possible effects of risk factors and stabilising factors within the family or the family subsystems on mental health. The resilience of organisations can be seen in their capacity to adapt. In this context, *situational* resilience means dealing with unexpected events at the micro level (e.g. patient flows, bottlenecks in supply), *structural* resilience the optimisation of resources and practices at the meso level (e.g. adjustment of workflows, staffing, hygiene concepts or communication processes) and *systemic* resilience the long-term changes of resources and practices at the macro level (e.g. through administrative or political decisions).
- 52) In the interest of the required promotion of resilience of institutions in the health sector (not only) during the COVID-19 pandemic, it must be the aim to strengthen staff in both quantitative as well as qualitative respects. Institutions that ignore or do not respond to the physical and psychological stress caused to their staff due to the pandemic, or that pretend that avoiding or coping with such stress is the

exclusive regulatory duty of the authorities, do not only jeopardise the safety of the patients entrusted to them, but also the loyalty of their employees during and after the pandemic, and therefore their own long-term opportunities for development.

- 53) Vulnerability as well as resilience are criterially relevant for ethical decision conflicts. This fact is underlined by the efforts taken to operationalise both of them for evaluation and assessment processes by means of specific or even quantitative indicators (vulnerability indices). Vulnerability refers to different kinds of concernedness, needs for assistance and safety interests. It takes on a concrete form for specific groups or regions, depending on social, health and care-related disparities, which can and must be balanced in the context of an integrative consideration. Unequal treatment of persons, groups, or regions based on empirically verifiable coherencies is – if it is correctly understood – clearly not an additional discrimination against persons who are disadvantaged anyway. For the balancing of specific aspects of vulnerability also opens up new insights into causal relationships, which in turn reinforce (or reduce) existing social inequalities. These insights help to develop measures to remove these inequalities (and possibly to promote resilience).

Decisions requiring the balancing of interests and their normative-criterial foundations

- 54) The pandemic continuously necessitated and still necessitates complex decisions requiring the balancing of interests. Such decisions requiring the balancing of interests are essentially political. However, they cannot be exclusively based on well-founded empirical insights offered by experts from the natural or social sciences. Since they substantially affect also morally and legally relevant goods and options, such decisions requiring the balancing of interests must also rely on juridical or ethical criteria.

- 55) Second to none, there is the criterion of human *freedom*. Just like the human being, it is both vulnerable and resilient, and must always be understood in its social interrelatedness to other freedoms – not least under consideration of the conditions governing the possibilities of its existence. This is the reason why opposing freedom on the one hand and health protection on the other hand is an invalid simplification. In policies for the containment of a pandemic, it is a complex process to strike a balance between aspects limiting freedom and aspects enabling freedom.
- 56) Maintaining or re-establishing a maximum degree of freedom is a fundamental aim both from an ethical perspective and from the perspective of (constitutional) law. Strategies to control infection by physical distancing in all its variations have led to the – often considerable – restriction of rights and freedoms, sometimes with severe consequences. The strictest variant of physical distancing in the form of a comprehensive lockdown of private and public life can only be justified if high mortality, long-term health impairments of significant parts of the population, or the imminent collapse of the health system cannot be averted by other, less intrusive means. As soon as these targets are met, such restrictions of rights and freedoms must be revoked on ethical as well as on constitutional and legal grounds.
- 57) The so-called negative freedom does not only manifest itself in the absence of *external* determinations, like in the form of infection control measures that drastically restrict liberties. Negative freedom also manifests itself in the freedom from *internal* restrictions and limitations of individual life options. Such restrictions and limitations may result from the experience of external deprivation and need, and can turn into paralysis and hopelessness. Positive freedom has an internal side, too: the orientation of one's personal way of life towards reference points, of whose meaningfulness the person concerned is convinced, and by which this person therefore abides when performing their self-determined actions and their way of life. The external

sides of positive freedom are revealed where people claim public benefits or engage in human communities in all their varied forms.

- 58) Against the background of such an understanding of human freedom, the importance of private, public, and especially national institutions for enjoying freedom becomes apparent. Institutions are responsible for guaranteeing personal freedom – for both negative and positive freedom: Institutions should keep restrictions of external freedom to a minimum and enable internal freedom (e.g. in the sense of subjective security) to the maximum degree possible. At the same time, they should protect and promote the internal and external forms of social bonding and community building required for positive freedom – in the knowledge that all institutions can have enabling as well as restricting effects on freedom.
- 59) Negative and positive freedom have both been restricted during the pandemic for infection control reasons, sometimes drastically. In order to determine the intensity of an impairment of freedom and its consequences in the medium- and long-term, it is essential to consider its duration. After all, long lasting loss of freedom may potentially lead to habituation effects, which is problematic. This means that freedom must – at least partly – be learned and lived anew in post-pandemic times. It also must be taken into consideration to what extent various elements restricting freedom have a cumulative effect and therefore cause disadvantageous consequences that go beyond a mere addition of such elements. Conflicting interests regarding freedom must be decided in a structured communicative process, i.e. essentially in democratic interaction. Ultimately, the key question with relevance for the theory of freedom and democracy is concerned with the threshold that the state must not cross when restricting the individual's scope of freedom, even if it fulfils its duty to protect public health under the exceptional conditions of a pandemic crisis.

- 60) For the development of an ethical criteriology when handling conflicts this means that regaining one's freedom does not merely imply that external restrictions of negative freedom are revoked, i.e. that freedom of movement and travel is re-established. Rather, it also includes the safeguarding and support of internal freedom by protecting from health threats, social distress and not least of all economic hardship. To make freedom with strong bonding in the most various forms of human community building possible (again), it is moreover necessary to safeguard and expand robust private and public institutions.
- 61) *Democracy* and *political participation* are indispensable to guarantee and express vulnerable as well as resilient freedom. Especially under the conditions of a pandemic, the co-operation of national institutions based on the rule of law, the embeddedness of governmental decision-making procedures into the entirety of social processes and processes related to forming public opinions and a shared concept of community, the opinion-forming function of media communication and last but not least the most extensive political participation possible of the persons concerned in decisions which affect them directly in their way of living are highly important.
- 62) "Exigent circumstances" that may arise in the course of a pandemic no doubt require the government and public administration (public health and security service, disaster management, etc.) to act both rapidly and flexibly. In such cases, the executive power should have recourse to previously elaborated and tested emergency plans, and implement them consistently in case of need. It also has to observe the precedence of the legislative power – especially if in times of crisis, the authorities interfere strongly with the rights and/or way of life of people over a prolonged period of time. Policies legitimised by parliament may use scientific expertise to reach fact-based decisions. However, such expertise may and must never replace the political decisions of parliaments or executive organs.

- 63) Particularly in crises like pandemics, jurisdiction, especially of the Bundesverfassungsgericht (Federal Constitutional Court), plays a democratically stabilising role. The fact that, in view of considerable factual uncertainties and great urgency to adopt measures, the courts have not taken on the role of a pseudo legislator, but have made reference to the broad margin of discretion and scope for action of the legislative power, materially corresponds to the democratic principle of rule of law. Nevertheless, there have also been clearly problematic regulations in the course of the COVID-19 pandemic – e.g. contact restrictions outdoors with questionable benefit in terms of infection control, or isolation measures affecting the dying – which the courts did not oppose, at least not early enough and decidedly enough.
- 64) Especially in the case of drastic measures in times of pandemics, a high degree of unambiguousness, clarity and comprehensibility is indispensable. If incomplete, unclear or simply incomprehensible regulations are repeatedly adopted, this might shake people's confidence into the rationality of the measures for infection control or for managing the pandemic. This not only jeopardises the necessary acceptance of normative standards, but also the indispensable co-operation of the wider public in combating the pandemic. Managing a pandemic requires efforts from the entire society, which cannot be enforced to the required extent. The necessary voluntary co-operation of the population presupposes people's understanding for the reasonableness of the imposed measures.
- 65) Particularly in times of crisis, the mass media and especially public service radio and TV have a task that is indispensable for a democratic constitutional republic, and that is to make the controversial pros and cons of measures audible and visible for the deliberative public. The task of taking a critical stance has not always been fulfilled to a desirable extent at the beginning of the corona crisis. Given the proportions, the newness and the suddenness of the pandemic problems, a certain reluctance to focus on every detail with harsh criticism may

have been understandable and justifiable. However, in the further course of the pandemic even apparent maldevelopments have not been addressed with the necessary explicitness by a journalism that regards itself as “constructive” or “sensitive to the common good”.

- 66) As a form of government, the idea of a liberal and democratic republic is closely connected to the normative goal of political participation. The people concerned should be involved in decisions related to the design of the space directly surrounding them, and of the places of their immediate cohabitation on the basis of equality and shared responsibility. It is a requirement of political justice to enable effective participation in designing the jointly shared public sphere. During the pandemic, legal regulations, e.g. regarding hygiene concepts, were often implemented by management teams at short notice and without the involvement of the people concerned, for example in institutions of long-term care or integration assistance. In fact, there would have been room for manoeuvre, which could have been exploited creatively in the interest of the people concerned. In view of the substantial interference with the immediate conduct of life in most social and also facility-related areas, the following rule should apply: Pandemics are the hour of effective political participation.
- 67) *Human rights discourses* that expose the ethical significance of human rights help to prevent that in the democratic process of developing or restricting the basic rights, which are codified human rights in the shape of legal norms, their critical potential is being compromised. In spite of all the legal discourse about basic rights, management of the pandemic was quite often lacking in a sufficiently developed sense of how problematic many measures were from a human rights perspective. Neither such discourses, nor the omnipresent talk about vulnerability have prevented that the basic and human rights of children, the elderly, persons in need of care, or disadvantaged and marginalised groups like homeless people, refugees or migrant workers have been insufficiently observed or even violated.

- 68) In keeping with the principles of inclusiveness of the scope of protection of human rights and of the universality of human rights, both the general vulnerabilities of specific groups resulting from their particularities as well as their special needs and circumstances of life, and the situational vulnerabilities of individual persons must be respected. The fact that the entitlement of all human beings to equal respect of their rights also includes those affected or threatened by marginalisation, is reflected in the right to free and equal social participation, as it is highlighted in the human rights catalogue.
- 69) Measures to combat pandemic events do not only have to be effective and proportionate; they should also be scrutinised, each individually and all of them collectively, with regard to standards of *justice*. In the context of pandemic management, two aspects appear to be particularly important, apart from the requirement that decisions should do justice to the facts: firstly, the social, intergenerational and international implications of *distributive justice*, and secondly, the concept of *capability justice*.
- 70) In order to do better justice to the facts, i.e. enhance the appropriateness of measures to contain the pandemic, the scientific bases and therefore the epistemic conditions of decision-making must be gradually improved. This applies not only to research on the respective pathogen, the disease, the course of a pandemic and the development of suitable vaccines and medication, but also to the comprehensive analysis of the consequences of various political measures.
- 71) When fighting a pandemic, numerous questions arise regarding the fair distribution of damages, risks and benefits. They pertain to the health, social, economic and cultural consequences of the measures taken and thus affect very different goods and areas of life. Moreover, these questions present themselves in very different ways at the national, European and global level, in spite of their strong interconnectedness. Regardless of the self-responsibility of the individual,

which is ethically required also in times of a pandemic, the postulate that primary concern is directed to those groups of people who are most compromised and therefore strongly rely on assistance and support – like the chronically ill, persons with disabilities, persons in precarious employment, self-employed people with insufficient social security, refugees or homeless people – forms an integral part of and serves as a point of reference for distributive justice. Since a pandemic crisis can dramatically exacerbate pre-existing precarious life situations and vulnerabilities, sometimes rendering them visible for third persons for the first time, the fundamental needs of the most vulnerable people concerned must be given priority in political decision-making.

- 72) In the family, too, completely new routines of everyday life had to be practised because of home-office, home-work and home-schooling. This highlighted the issue of a gender equitable distribution of care work and had an especially strong effect on social injustice. Even if the burdens arising in this context were not primarily financial, nor led to acute economic deprivation for the persons concerned, they nevertheless illustrated the multitude of social challenges resulting from measures taken to combat the pandemic, which hit some groups of the population much harder than others.
- 73) Another aspect of distributive justice that is particularly important in the context of the pandemic is the so-called intergenerational justice. The generation issue is important from an ethical justice perspective in at least two ways in the containment of a pandemic: firstly, in a *present-times related way* (synchronic), i.e. with a view to a current unfair distribution of the burdens caused by the pandemic and the measures taken to contain it between different age groups; and secondly, in a *future-times related way* (diachronic) with regard to a fair distribution of burdens between currently living generations and future generations.

- 74) The first aspect is relevant because children, adolescents, apprentices and tertiary students had to suffer substantial restrictions of their conduct of life for infection control reasons, out of consideration for the high risk for the older generation to have a severe course of disease with COVID-19. Justice commands that in a fair overall assessment not only the particular need for protection of very old people should be considered, but also the sacrifices and burdens that go along with the protective measures taken, under which the younger generation and their support system suffered most.
- 75) The second aspect of generational justice concerns the long-term consequences of current measures for future generations. In this context it is important to note that public households are financing the consequential costs of the pandemic mainly by means of new debt. In view of the drastic increase in national debt, future generations will have to bear the main burden in financing the costs of the pandemic.
- 76) A particularly thorny issue in the course of the COVID-19 pandemic have hitherto been various questions of distributive justice in the health sector. For example, precautions should be made in the interest of justice, to ensure that all patients who urgently require clinical treatment have equal access to such treatment in the future – also in situations of extraordinary strain – without being discriminated against on grounds of their type of disease.
- 77) In phases of exponentially rising infection rates, the prioritisation of scarce resources in intensive medical care during a pandemic was also discussed in Germany, especially the criteriological bases for decisions in triage scenarios. This discussion focused on two possible situations of conflict, of which the first might arise upon admission of a patient to the intensive care unit, e.g. if the number of available ventilation devices is smaller than the number of patients acutely requiring them (so-called *ex ante* triage). The second relates to the possibility of ending an on-going life-sustaining intensive care treatment

in order to free resources if a patient with a better prognosis arrives (so-called *ex post* triage).

- 78) As there are no generally acknowledged rules for handling triage decisions so far, neither at the national nor at an international level, it is desirable to elaborate widely consistent international recommendations for dealing with these decisions in the future, e.g. under the auspices of the World Medical Association or the World Health Organisation, because they are extremely distressing for every person concerned (also relatives).
- 79) Questions of distributive justice also arise when details of a vaccination strategy must be adequately managed. Even at the national level, vaccination strategies bring up questions of justice, given the initially scarce supply of vaccines, because well-founded criteria for establishing an order of priority for vaccinations are required and it must be decided whether and to what extent existing restrictions should be revoked for vaccinated persons. The vaccination issue epitomises that questions of distributive justice cannot be answered on the basis of a national perspective alone, but have a *European* and a *global* dimension that require corresponding efforts. There is no moral justification for denying medical care to particularly vulnerable groups simply because they live far away from us in countries of the global South, while at the same time administering scarce supplies of vaccines to others who have a significantly lower risk of suffering or dying from the disease. From an ethical perspective, assisting poorer countries in containing the pandemic and its consequences is therefore an imperative of international solidarity. From a *legal* perspective, however, it must be considered that the constitution obliges the German state and its organs to first and foremost serve the well-being and protection of the German population.
- 80) The issue of justice may not simply be reduced to the distribution of certain goods. Since people are using goods in different ways,

depending on a number of diverse factors (from health conditions via social life situations to geographical and climatic conditions), it is essential to optimally promote and develop the individual capabilities of a person, in order to achieve equality (equal opportunities) in this respect. Especially in the light of the considerations made in this Opinion on vulnerability and resilience, it is probably helpful – also for evaluating the various measures to contain the pandemic in retrospect – to refer to certain basic capabilities, most of all on the fundamental capacity of persons, institutions and systems to act.

- 81) The COVID-19 pandemic has revealed that there is a surprisingly high *willingness to show solidarity* among the vast majority of the population. The fact that there have been repeated protests of various groups against individual infection control measures, which in the opinion of these people caused an unacceptable burden for them, does not contradict this appraisal if seen holistically. On the contrary, such protests rightly point out that solidarity may not be exacted indefinitely. Solidarity is the willingness to set aside – at least temporarily – legitimate claims that a person or group of people principally is entitled to on grounds of justice, in favour of others.

- 82) Solidarity is apparent in the context of vaccination prioritisation, if less vulnerable sections of the population (must) stand back to allow more vulnerable sections of the population to be the first to enjoy the benefits of vaccine protection. Such an unequal treatment is not only reconcilable with the principles of justice, it can even be imperative: An unequal risk situation in principle justifies an unequal treatment. With regard to the ethical balancing of goods required in times of a pandemic, a distinction must be made between the solidarity that persons show voluntarily upon their own free will, which means that they can determine the extent and a possible time-limit themselves, and the solidarity to which people or entire populations are obliged by way of government decisions.

- 83) In a pandemic, solidarity in the form of state-imposed obligations of solidarity plays a crucial role. People who are subject to these obligations may rightfully expect that their willingness to solidarity will not be unduly stretched. The burdens that are imposed on specific (groups of) persons in favour of others must be reasonable and distributed as justly and fairly as possible on the “shoulders” of eligible (groups of) persons. This is another difference between imposed solidarity and voluntary solidarity. Altruistically motivated persons may choose not to or barely to make their voluntary willingness to show solidarity depend on the question whether others could also help – they are guided by the acute need of support of the other person. Acceptance of imposed solidarity, by contrast, will decrease in proportion to the degree that burdens are unilaterally distributed, especially if this is not compensated at least partly by means of adequate measures.
- 84) Whether the (groups of) persons who are obliged to solidarity through various protective measures against the pandemic accept their burdens as reasonable and justified, essentially depends on the question whether they have *trust* in the institutions that decide about such obligations (parliament, administration), or on the basis of whose knowledge such decisions are made (science). For it is virtually impossible for them to assess themselves the complex matters to which infection control measures relate, or their consequences and side effects, which – both for their causes and their extent – can only be estimated with difficulty.
- 85) *Trust* enables people to rely on the appraisals, decisions and actions of others in situations of uncertainty, without compromising one’s own sense of security. Trust helps to deal productively with ambiguities and crises. If persons who make decisions and assume responsibility for them are not trusted, or if institutions on which people rely in a pandemic are not trusted, or if the trust placed in them is disappointed and violated, insecurities will increase exponentially. Just

like a distribution of burdens that is perceived as unjust, disappointed trust can also cause the gradual loss of acceptance of infection control measures in the fight against a pandemic.

- 86) Trust is indispensable for living a good life. However, trust can be disappointed, deceived and violated. This is an aspect of every person's vulnerability. Once trust has been shaken or violated, it is very difficult to rebuild, win it back or stabilise it again. This holds true for the trust placed in people, but also in systems, institutions or organisations. Anyone who wants to win trust, or not squander it, must create a basis of trust by means of exhaustive and reliable information on critical decisions.
- 87) In a pandemic, for example, acknowledgement of a person of trust can erode if the respective (groups of) persons concerned are not involved in decision-making on protective measures. Relationships of trust can also be jeopardised if, for example, contact restrictions prevent qualified social workers over a prolonged period of time from seeing the children and adolescents they assist. Self-trust is a distinct category of personal trust. During the coronavirus crisis, for example, many employees in long-term care lost confidence in their own professional skills due to the numerous restrictions and legal regulations in the context of hygiene management and management of daily routine work. It is of utmost importance that after the pandemic, the people concerned regain confidence in their own ability to make professional decisions.
- 88) Trust in institutions relies on the impression of people having to deal with them that they can rely on the competence and the goodwill of these institutions' employees. In order to (re)gain trust in an institution, it is necessary that people work in this institution who instil (new) trust. This goes to show that institutional trust is often based on personal trust. In spite of its eminent importance for creating trust in an institution, it would nevertheless be insufficient to exclusively rely

on personal trust. Rather, political and funding bodies are challenged to strengthen the crisis resilience of institutions and thus provide the necessary framework for building and securing trust.

- 89) In the course of the pandemic, scientists and especially virologists received special attention by politicians and the public because of their expert knowledge. In a hitherto unknown way, many people in politics referred to *the* findings of science, sometimes presenting their political decisions as a mere translation of scientifically proven facts into measures or regulations. On the other hand, it must be stated that the scientific community cannot come up with ultimately binding and irrefutable truths on the various aspects of the pandemic and put them at the disposal of politicians and the public, because empirical knowledge is by definition preliminary and fallible.
- 90) It is part of the credibility and trustworthiness of scientific experts that on the one hand, they represent the current state of research, and on the other hand make its preliminary nature and its limitations unmistakably clear to those responsible in politics and administration, and to the public. This is an essential aspect of scientific honesty and integrity. Science must be free and independent. Any usurpation or influence by (party) politics must be rejected. The public pressure on scientific advisory bodies that can sometimes be observed damages the trust that is put in the efforts of science to provide fact-based objectivity. Conversely, scientists must respect the proper logic and individual responsibility of political decision-makers. In a democratic constitutional society governed by the rule of law, the ultimate responsibility for political decisions rests with the democratically elected sovereign: the parliaments.
- 91) In the situation of a pandemic, the attribution, acceptance and assumption of *responsibility* is multifaceted and complex. Responsibilities emerge at different levels and are attributed to actors with different structures and specific roles: At the micro-level, this might

be the direct interaction between individuals within a facility; at the meso-level, this might be the actions of facility management boards who provide the framework and structure for the assumption of responsibility at the micro-level; at the macro-level, this might be political actors, who by adopting legal regulations exert a substantial influence on the actors at the micro- and meso-levels. This hierarchy has a strong effect on the ability to actually meet one's responsibility at the lower level. This interconnectedness of different levels and role-specific responsibilities takes up the concept of "multi-actor responsibility".

- 92) Every member of a society is personally responsible to contribute towards fending off immediate health risks for themselves and especially for others by complying with state-imposed or voluntarily assumed protective measures. Each individual must assume responsibility before the national bodies if they do not adhere to statutory regulations. In view of deliberate or unavoidable control deficits, however, it is not sufficient for the purposes of protection against infection if legal standards are complied with only out of fear of sanctions. Rather, as many people as possible should understand the necessities resulting from the responsibility for well-being and woe of one's own life and the life of others.
- 93) Apart from the level of personal responsibility, the level of national or corporate responsibility is especially important in the context of a pandemic. Only if the different relevant levels of responsibility with their mutual interconnections are understood, will it be possible to adequately deal with one of the fundamental problems of attributing responsibility, which is intensified during a pandemic: the diffusion of responsibility. By means of the concept of multi-actor responsibility it is possible to find out in a differentiated manner who must assume responsibility for what at which level. When analysing such attributions of responsibility, the principle of subsidiarity has considerable ethical relevance. It stipulates that higher levels of decision-making

should only lay down binding rules for matters that cannot be satisfactorily regulated at a subordinate level.

Balancing of goods in a pandemic

- 94) Altogether, government action in managing a pandemic must be as coherent as possible. Even if the conditions of combating a pandemic are constantly changing, new virus variants with modified properties emerge, vaccines and medications are developed and measures have a different effect than expected, it must be ensured that the normative criteria guiding the state's balancing of goods remain diachronically and synchronically coherent.
- 95) The principle of proportionality must be applied to measures for managing a pandemic in the same way as to all other public measures. Accordingly, they must pursue a constitutionally legitimate aim and be suitable, necessary and appropriate (reasonable) to achieve this aim. "Suitable" means that the chosen regulation instrument must be able to promote the achievement of the regulatory aim. The term "be able to" is important because it leaves the authorities a certain leeway to determine how a regulatory aim defined by them may be achieved. "Necessary" means there is no equally effective yet milder means by which the regulatory aim might be achieved. Last but not least, the criterion of "appropriateness" is meant to prevent that the respective public measure disproportionately restricts basic rights.
- 96) In the legal sense, basic rights are no absolute values, with the important exception of human dignity (Article 1 (1) GG). Their high level of protection can therefore be restricted, provided justification is given, especially through considerations regarding proportionality. Understood in this way, basic rights are scalable, deontologically weak provisions offering a higher or lower degree of protection. Balancing conflicting interests in order to select specific regulatory instruments

is not a mathematically precise task, but requires political scope for action. From a constitutional perspective, several equally “correct” solutions are feasible, which may not all seem to be equally politically wise, but which are all equally constitutionally justifiable.

- 97) Moral decision-making conflicts usually arise in situations where different moral goods cannot be safeguarded or realised at the same time or to the same degree. Given the multitude and heterogeneity of the relevant goods, it is not only necessary to have clear criteria and rules for the balancing of goods required in such situations of conflict, but also effective protection of the deontological core area of morality that cannot be weighed. Such decision-making conflicts are solved in an ethically justified manner if in the process of weighing moral goods a reasonably substantiated preferential choice is made.
- 98) The present Opinion is mainly concerned with the macro-level of state and society, where the balancing of goods is done by political institutions that are empowered to do so by law or according to the constitution. During a pandemic crisis the fundamental problem arises that, at least in the beginning, the process of balancing different goods is subject to great uncertainty with regard to the consequences and side effects of measures, which might not only harm other goods unintentionally, but even damage the very good which was meant to be protected by means of the respective measures. The ethical criterion in health policy matters therefore is not how effectively a measure can oppose the stress caused by a specific contagious disease, but what the overall health effects are.
- 99) In decisions taken in a situation of uncertainty, the maximin criterion is usually brought to bear, which aims at minimising the damage occurring in a worst-case scenario. Although minimising damage is an obvious criterion for political decision-making in pandemic emergency situations, it should not be overlooked that focussing exclusively on the damage without considering potential positive

consequences, i.e. the benefit, might lead to wrong conclusions. In order to make well-founded ethical decisions it is necessary to weigh the overall opportunities *and* risks against each other.

- 100) Decisions about risks that must either be reduced in any case by the state, or that possibly must be accepted at the individual and at a societal level, or that can be countered by means of individual risk precautions, always depend on risk assessments, both subjective and intersubjectively shared with others, as well as on the level of risk considered to be acceptable as a result of social negotiation and agreement. A distinction must be made between the individual and the state level of decision-making. Whereas individual people may follow more venturesome decision-making rules and can offset their personal risks and opportunities over time, this does not apply at the state level, because the state must strike a fair balance between the burdens for numerous people. Governments that interfere with individual rights of freedom not to protect other people, but exclusively to maximise the population's average life expectancy, would jeopardise the liberal order of democracy.
- 101) Materially, the purpose of measures to fight a pandemic arises from the state's general duty to protect life and limb of its citizens. However, there are limits to the state's obligation to protect. This means that from an ethical and legal perspective, public interference with self-imposed risks should be restricted to a minimum. Although our legal system tolerates various forms of self-harming behaviour on grounds of individual freedom, nobody has the right to subject *others* to unacceptable risks against their will. Apart from barely measurable consequential costs for society at large, it is therefore mainly the risks imposed on other people that are ethically and legally inadmissible as soon as they exceed a certain level of acceptability.
- 102) If through vaccinations, medication, immunisation due to previous infection, or if as a consequence of the spread of new virus variants

with a higher infectivity but lower pathogenicity, the health risks arising from a pandemic infectious disease are below the level that society is prepared to accept – up until now and in the future – with regard to other viral diseases (e.g. the four previous coronavirus diseases, influenza), then severe interferences with basic freedoms are no longer justified.

- 103) Balancing different goods does not exhaust itself in the assessment of opportunities and risks or of possible damage and potential benefit. The term “goods” must be understood in a broad sense: It includes basic goods such as life, the experience of self-efficacy, freedom, physical and mental integrity, as well as commodities like food, clothing, accommodation and a minimum provision of material goods. Last but not least also (basic) rights, competencies, social relationships and participatory rights are considered to be goods of high moral significance. In order to weigh up between this multitude of goods, different preferential rules are suggested in the ethical debate. Apart from so-called rules of thumb like “reversible takes precedence over irreversible damage”, “short-term damage takes precedence over long-term damage” or “the common good takes precedence over individual interests”, especially the preferential rule of fundamentality (of goods) (“the more fundamental, or higher-ranking good must be preferred”) and the preferential rule of dignity (of goods) (“the more important good must be preferred”) are being used.
- 104) Balancing goods is often difficult even in decision-making conflicts where the consequences and side effects only concern the very person who makes the considerations and decisions. If large groups or entire societies are affected by the consequences and side effects, the balancing of goods is substantially more complex and normatively more demanding. Yet this is regularly the case in a pandemic crisis. Since the opinions as to which goods should be regarded as more fundamental or more important differ widely, it is decisive especially in political decision-making processes not to narrow down the sphere of

public deliberation through unrealistic requirements for a consensus, or through undue prerequisites (of a material or epistemic nature).

- 105) Public discourse in a democratic system should be oriented towards a broad, inclusive concept of the public use of reason, in order to quell ideologically motivated bans on thinking or exclusions of inconvenient points of view. What matters here is the ability to endure views that differ from one's own opinion, and to jointly explore the range of rational choices by means of sober and respectful communication based on mutual recognition. Respectful and inclusive public discourse is irreconcilable with hate messages and calls for violence, nor may the foundations of the democratic constitutional order be called into question in a general manner. Particularly harmful for democratic opinion-forming is the deliberate propagation of gross untruths and conspiracy fables.
- 106) A comprehensive analysis of policies during the pandemic has only just begun, but if it is meant to be fruitful, it should already take future scenarios into account. The crisis has changed this society. The post-pandemic situation will therefore not merely be a return to pre-pandemic times. Instead, it must be pointed out under which conditions it is possible to leave behind the permanent crisis mode by managing persistent risks in a way that their consequential damages for society are minimised. The idea that the crisis is only terminated once a pre-COVID risk or security situation has been re-established, must be countered by a risk-adapted and risk-conscious way of handling a reality where the virus has not disappeared, but no longer dominates people's lives.
- 107) However, the corona crisis has drastically revealed how little prepared we have been – and still are – for a situation of uncertainty that not only affected a specific sector, but the entire society, in spite of all preliminary considerations. Dealing with such epistemic vulnerability involves the acknowledgement that unalterable “master plans” are

not realistic, but that it is not a solution either to take a short-term perspective without any clear strategic orientation, and only react to acute threats. It is an enormous communication challenge to implement this.

- 108) During periods of great uncertainty, public discourse must be conducted with utmost sensitivity for the potential consequences of measures. In public communication, any panic-mongering to crave attention must be avoided in the same way as any downplaying or giving an “all-clear signal” without sound reasons. The way we handle risks directly affects the structuring of the tension-filled relationship between freedom and security in our community. Beyond the core areas of freedom that should not be subjected to trade-offs, a process of continuous reflexion and consideration is required that also takes into account what has usually been or usually is accepted by society in comparable contexts.
- 109) As the COVID-19 pandemic impressively illustrates, increased efforts to enhance security can massively impair both individual and group-related freedoms. Especially measures that are particularly severe and long-lasting must meet strict justification requirements. Freedom is not a privilege granted by the state, but a foundation of any constitutional democracy that, as a matter of principle, is non-negotiable.
- 110) The historical reconstruction of the course of the pandemic must not be followed by an unhistorical evaluation. Hindsight is always easier than foresight, and in a crisis of global and historic proportions, errors and wrong decisions are unavoidable. This applies to individual decisions at all levels of responsibility as well as to institutional processes. However, this does not give carte blanche. Rather, a critical assessment of crisis management is required in order to reveal personal misconduct, systemic flaws, dysfunctional forms of organisation and/or unsuitable procedures, and to enable corrections. A highly

developed error culture is also an expression of resilience. In this process, it is important to perceive the democratic value pluralism and even disagreements as a virtue, not a blemish, instead of avoiding political dispute by referring to a supposedly exclusively correct point of view.

- 111) In the course of the past two years it has become apparent that different and sometimes opposing risk assessments have been made among the population; sometimes due to the degree of concernedness, sometimes due to a divergent weighing of goods. It is the state actors who carry the main responsibility for maintaining a feeling of togetherness among the population in times of crisis. It is their task to inform and to be a counterpoise, to keep as open as possible the elementary civil society spaces where democratic dispute can take place, and to confront scapegoat narratives. Also, and precisely because there will be a time after the pandemic when we need a sense of “us” to analyse and possibly repair the damage that has been done as much as possible, it is crucial to maintain the guiding principle of togetherness in difference.

>> RECOMMENDATIONS

1. Democratic legitimisation of protective measures

In a pandemic, it must be politically decided whether the possibilities of protection are sufficient and effective at the level of the individual and of (civil) society, and which measures the state should, or even must, take. These political decisions must be as far-sighted as possible, they must be quick and consistent if the situation aggravates, they must be scientifically informed, subject to ethical considerations and democratic – adopted by the federal and state parliaments in important issues –, and they must take into account the perspective of the people concerned. Most of all, social groups that are strongly affected by the pandemic or the measures to contain it and that are underrepresented in public discussions should be actively involved. This should be applied as comprehensively as possible to all of the democratic challenges that arise under pandemic conditions (see section 2.5).

2. Duty to generate knowledge

The balancing of goods that is necessary to justify protective measures requires substantial qualitative and quantitative empirical data from various

academic disciplines which needs to be collected and analysed. The scientific knowledge gained should provide deeper insights into the paths of infection and the question in which social areas and under what conditions which risks for infection or disease exist and by what measures these might best be minimised. In addition, scholarly insights should be gained on the implications of protective measures for various groups of the population. Since these academic findings are a prerequisite for a reasonable restriction of basic rights and for the solution or mitigation of dilemmas, the state is obliged to ensure the accessibility, collection, pooling and analysis of the required knowledge and data base, and to promote corresponding research projects. At the same time, data on secondary health outcomes (e.g. mortality increase due to cardiovascular diseases or oncologic diseases that have not been treated or have been treated too late, higher incidences of mental illnesses up to an increase in commitments to a psychiatric hospital pursuant to German state legislation on mental illness) must be collected, so they can be included in the harm-benefit assessment. Concomitantly, research and data collection on the consequences of the pandemic and of the measures taken to contain it for groups that are disproportionately affected by social injustice, precarious life situations or discrimination must be carried out systematically, in order to enable a better protection of (inherently and situationally) particularly vulnerable groups from health risks and from harmful consequences of protective measures in the future, and to strengthen their resilience in a targeted manner.

3. Integration of protective measures into an overall long-term strategy

Restrictions of rights and liberties should be kept to a minimum at all times. It is therefore advisable to develop an overall strategy as soon as possible, as to how the pandemic can be managed over its total duration in a way that is adequate for the respective point in time. In doing so, both the long-term consequences of the pandemic and those of the protective measures should be taken into account. As soon as there are signs that the pandemic situation aggravates, or that protective measures have harmful consequences, or that there are scientific findings requiring a modification or adaptation, the overall strategy should be adjusted accordingly. In any

case, undifferentiated restrictions of liberties (especially in the form of a lockdown) should be kept as short-term as possible, however, and as strict as necessary. This is why undifferentiated and general measures must be replaced by differentiated protective measures, or deleted completely, as soon as a reasonably low level of infection, disease or hospitalisation incidences has been reached, or the possibility of effective and acceptable options for self-protection are ensured. People in this country may reasonably expect that the preconditions for more effective and differentiated protective measures respectively for the termination of restrictions of freedom are being proactively created.

4. Respect for human dignity and protection of the core of human rights

In all measures for the containment of the pandemic, human dignity must be respected and the core of basic and human rights must be protected. First and foremost, effective measures must be taken in good time in order to prevent infection events from getting out of control and thereby human dignity being disregarded. This is the case, for example, if people are left to die alone, without the assistance of close persons or spiritual care. Respect of human dignity moreover demands that protective measures are taken to prevent situations where triage decisions become necessary in health-care. Should such situations of tragic choices arise, persons with disabilities run the risk of being put at a disadvantage. Legislation must prevent this by means of suitable regulations. Pandemic protective measures affect the core of basic and human rights. This is also the case if, for example, a minimum of social contacts is denied in care facilities and other community accommodation, or if people who cannot help themselves are in a situation of existential distress and potential assistance is denied to them. This is why with all measures to combat the pandemic, social services, contact points and shelters for people in emergency situations (e.g. women or children who are victims of domestic violence, people in acute mental crises or homeless people) must remain operational enough for these people to get help. It can also be a violation of basic and human rights if in the case of infection outbreaks in community facilities, group quarantine or collective quarantine is imposed and implemented, and thus healthy persons are

exposed to high risks of infection in the interest of pandemic containment. Therefore, precautions should be made for the case of an infection outbreak in a community facility to provide separate accommodation for individuals or small groups. The core of economic, social and cultural human rights is under threat if feasible and effective measures of assistance and compensation are not taken. This is the case, for example, if the economic livelihood in the event of de facto occupational bans is not guaranteed through benefits, or if children and adolescents are completely excluded from education (e.g. if participation in digital classes is not possible due to barriers or lacking technical infrastructure, and no alternatives are offered).

5. Protection of particularly vulnerable persons

Persons with high risks of infection and/or a severe course of disease must be particularly protected. This is imperative both with regard to the protection of their own health and with regard to the common good. In decisions on protective measures it is necessary to weigh up direct pandemic-related health hazards against potential harm resulting from protective measures, whereby also social burdens and mental stress must be taken into consideration. Restrictions of the rights of the persons concerned must be kept at a minimum, and these persons must be included in the decision-making processes. The decision on protective measures must go along with a systematic monitoring of their consequences and side effects for groups that are disproportionately affected by social injustice, precarious life situations or discriminations.

6. Strengthening the crisis resilience of institutions

A lesson to be learned from the poor resilience of institutions in the current crisis is that short-term protective measures must go along with middle- and long-term protective measures in order to proactively minimise the damage to goods that are protected by basic law and in order to strengthen the individual resilience of particularly vulnerable persons. Effective health protection can only be reconciled with obligations to a comprehensive protection of basic and human rights if essential social institutions are made crisis-proof. Where this is currently not the case, it is necessary to remedy

the situation by means of cross-sectoral cooperation of all levels of responsibility. The demand to turn hitherto vulnerable into resilient institutions above all refers to the healthcare, education and social systems with their essential services and essential relationships. It includes an infrastructure and in particular organisations with sufficient equipment and staffing which allows to tap free resources in case of a crisis, or resources that can be generated in the short-term. Only in this way will it be possible to fulfil the allocated tasks and react quickly and appropriately to crisis-related challenges.

7. Promoting self-responsibility and solidarity and maintenance of social cohesion

In order to contain a pandemic, a liberal and constitutional democracy depends on the voluntary co-operation of the people living in this state, on these people's solidarity and their willingness to independently assume responsibility. Self-responsibility and solidarity must be encouraged and supported; if there is no scope for them, such scope must be created. The often creative and resourceful contributions of civil society to crisis management should be promoted, not obstructed.

Wherever public service duties are delegated to subsidiary organisations, e.g. to voluntary welfare, these assistance systems should be supported by the state so they can fulfil their duties in spite of the special challenges of infection control (e.g. in long-term care or aid for the homeless). Pressure or coercion against people may only be justified if voluntariness does not bring about the required results, or if the prohibition of an usurpation of competencies as part of subsidiarity can no longer be observed because the political and social system is in danger of becoming dysfunctional due to the pandemic. Intrusion into private lives should be avoided as much as possible. Where such an intrusion is nevertheless deemed to be necessary, it requires a special empirical and normative justification. Hereby, the protection of the privacy and family of people in precarious life situations (especially in community accommodation) must be equally respected. The potential of infection control measures to accentuate social divisions should be systematically considered in decision-making processes.

8. Decentralised protection concepts adapted to specific sectors and local circumstances

Decentralised protection concepts geared to specific sectors and local circumstances are more effective than undifferentiated general measures, and usually interfere less strongly with the basic rights and liberties of people. Confusion and uncertainty resulting from a multitude of regionally differing measures must be remedied by means of transparent communication. The most promising strategies of infection control include uniform and generally binding framework conditions, which the state needs to explain, justify and sanction towards the persons concerned. Within such framework conditions, targeted concepts for protection should be independently implemented by the competent decision-makers in a sector-specific, decentralised manner. It is crucial to strengthen self-responsibility in all social fields and at all hierarchical levels, and to use specific knowledge about the local situation. In this way, the people's willingness to show solidarity and their creative potential can be put to use.

9. Fair distribution, minimisation of and compensation for burdens

Any protection strategy should counteract discrimination, distribute burdens as fairly as possible and compensate for unavoidable unequal burdening. In the considerations required to do so, both the immediate and the indirect consequences of the protection strategy for all groups of society concerned should be taken into account. In this context, special attention must be given to the inherent and situational vulnerability of persons, and to the systemic vulnerability of institutions, as well as to strengthening all factors of resilience at the various personal and institutional levels. Equally, the rights of persons in precarious life situations must be protected, and it is necessary to work against the exacerbation of social injustice. Aspects of social as well as intergenerational justice must be adequately considered. This means, for example, that for children, adolescents and young adults in an educational context, the priority cannot be to catch up on contents missed during the pandemic as quickly as possible. Instead, the main challenge is to prevent that some pupils or students are being persistently hindered in their cognitive and social development as a consequence of the corona crisis.

10. Enabling and strengthening participation

The general rights to self-determination and participation are based on political justice and apply during a pandemic in the same way as at any other point in time. Moreover, participation helps to adequately design protective measures and promotes their acceptance. Therefore, the representatives of the interests of the groups of persons concerned must be included as “experts on their own account” in the prospective and retrospective evaluation of the consequences of infection control measures. This applies to all levels of decision-making from parliaments via communities down to the individual educational or social institutions (e.g. pupil, parent and student representations in the educational area, advisory boards in workshops or homes of integration assistance, refugee councils, self-representation boards of homeless people). In spite of the efforts for more participation and its recognition, the necessity of a co-ordinated approach should not be neglected, given the unpredictability of a pandemic.

11. Communication and information

Acceptance and legitimisation of protective measures against the pandemic are closely connected. Their acceptance and the population’s willingness to co-operate will be considerably fostered by means of good crisis communication and appropriate, appealing and understandable information. This requires the attempt to talk to all kinds of people, and to take them with their respective concerns and viewpoints seriously. The national government and the federal states should inform systematically, continuously, in many languages and in a culture-sensitive manner about the pandemic, pandemic policies and the individual measures of protection, especially the vaccination strategy. However, information should not be given in a patronising manner, or condescendingly. Instead, space must be devoted to discussions on an equal footing. In doing so, it should be taken into account that many people no longer draw information from the traditional media, like press, radio and TV, but via social media. On the one hand, a lot of misinformation can be found on these, on the other hand, they offer opportunities for dialogue and exchange. Communication and information strategies should offensively use these and other opportunities for

interaction in order to be successful. At the same time, the development and effective implementation of strategies against (especially intentional) disinformation is necessary.

12. International justice

Combating the pandemic will only succeed by means of a co-ordinated, international approach. It is therefore necessary to strengthen the United Nations and the World Health Organisation with the aim of supporting the healthcare systems of poorer states and of ensuring the provision of healthcare in a pandemic situation. This relates to the availability of protective measures, but also to the access to vaccines, treatment options and test procedures. Most of all, it must be made sure that also in poorer countries a high level of vaccination coverage of the population is achieved. All means to this end should be taken into consideration without reserve. It is a question of international justice, yet properly understood it is also in the interest of rich countries to support less wealthy countries - especially in the global South - in their efforts to contain the pandemic and its consequences.

Course of the COVID-19 pandemic in Germany

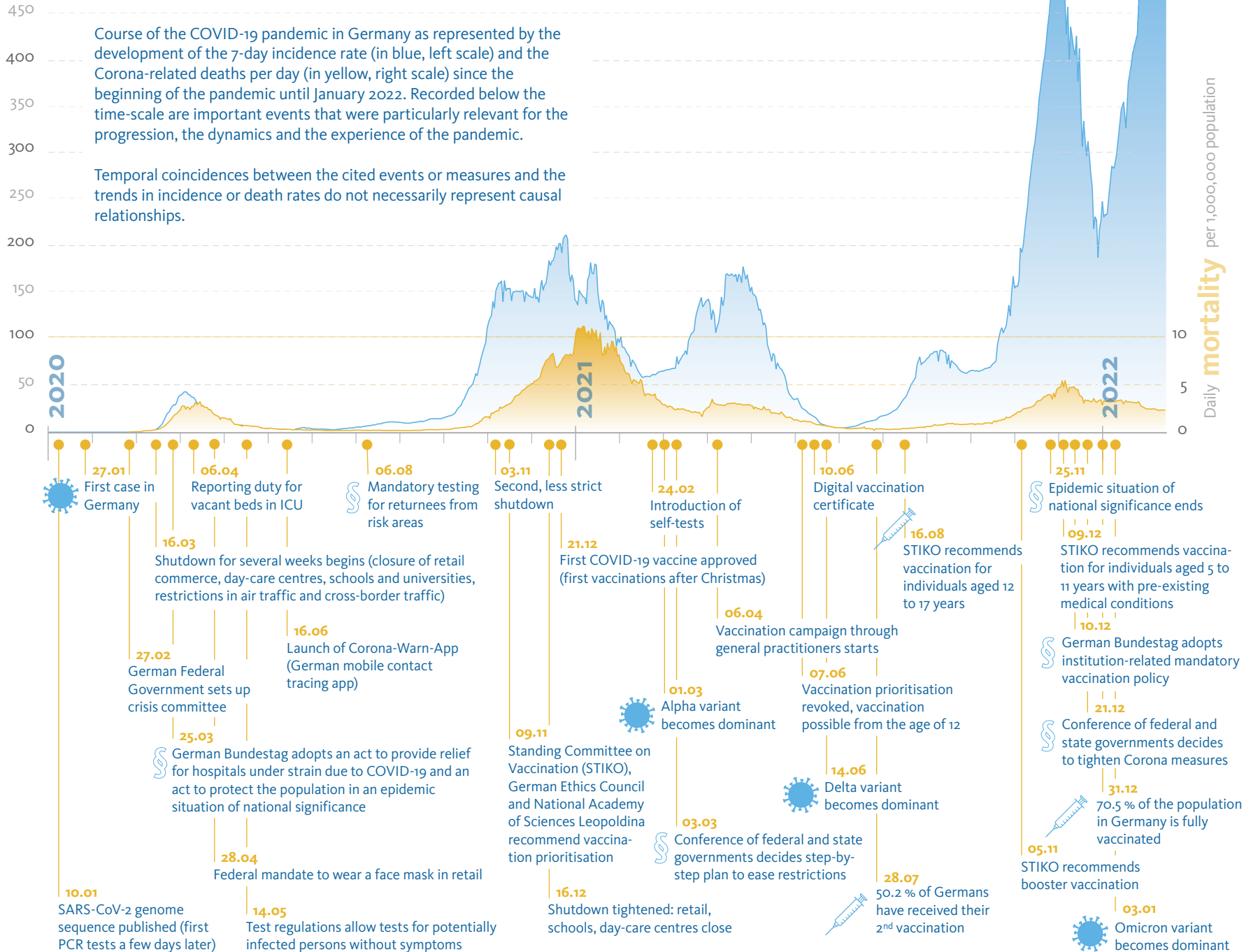
Course of the COVID-19 pandemic in Germany as represented by the development of the 7-day incidence rate (in blue, left scale) and the Corona-related deaths per day (in yellow, right scale) since the beginning of the pandemic until January 2022. Recorded below the time-scale are important events that were particularly relevant for the progression, the dynamics and the experience of the pandemic.

Temporal coincidences between the cited events or measures and the trends in incidence or death rates do not necessarily represent causal relationships.

7-day incidence rate per 100,000 population

Daily mortality per 1,000,000 population

data source: Johns Hopkins University / graphics: angenehme-gestaltung



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