Deutscher Ethikrat

Solidarity and Responsibility during the Coronavirus Crisis

AD HOC RECOMMENDATION

Berlin, 27 March 2020

1 Introduction

The current pandemic is challenging our society in unprecedented ways. At least in recent history, there is no experience with similar health hazards. Nor is there a precedent for the current rigorous, sweeping and nationwide government measures that restrict civil liberties. They aim to prevent an exponential increase in the number of infected and sick people. Without them, the healthcare system could soon reach saturation point. A rapid increase in the number of seriously ill patients might lead to an undersupply of medical care for people in need of treatment – regardless of whether they suffer from the lung disease, Covid-19, caused by the novel coronavirus or from any other disease. Nonetheless, even the measures adopted so far have inevitable economic and psychosocial side effects, including negative repercussions for the health situation of particularly vulnerable groups.

There is an ethical core conflict: taking the right measures to sustainably safeguard a high-quality and effective healthcare system whilst, at the same time, averting or mitigating the serious adverse consequences of these measures for people and society. Furthermore, the stability of the social system must be guaranteed. In addition, it is still uncertain when vaccines, drugs, therapies and test procedures will be available to provide a sustainable solution.

All this necessitates a fair balancing of competing moral goods, including basic principles of solidarity and responsibility. Against this backdrop, the unequal distribution of primary risk leads to friction. On the one hand, according to current knowledge, it is likely that many people (especially younger people) will only suffer a relatively mild course of disease; in fact, children seem to bear very little risk. On the other hand, for certain risk groups (for instance, the elderly, the chronically ill or people with comorbidities) there is a significantly elevated risk of mortality.

Given the characteristics of this novel pathogen, the distribution of risks, and the expected burden on the healthcare system, in particular the hospital system, a "laissez-faire strategy" seems to be irresponsible. This strategy relies solely on the rapid spread of the virus in the hope that the epidemic will come to a halt as soon as enough people have survived infection (community protection, also known as "herd immunity"). An approach combining the laissez-faire strategy with the systematic cocooning of vulnerable groups may be viewed differently. However, even this approach runs the risk of overburdening the healthcare system and thereby threatening the life and limb of all citizens.

Aside from the question which is indeed controversial but need not be discussed here, whether there are sufficient foundations for restrictions of freedom under constitutional and ordinary law, these restrictions are justifiable from an ethical point of view – at least for the time being. Even highly burdensome adverse consequences are acceptable. However, the longer the pandemic lasts, the more attention must focus not only on the immediate but also on the manifold social and economic consequences that transcend the national context.

2 Purpose of this Ad hoc Recommendation

Against this backdrop, the epidemiological imperative has to be upheld whereby the spread of the virus must be considerably slowed, i.e. the disease curve must be flattened. However, it is by no means clear whether this aim can be achieved on the desired scale and whether the intended effects will ensue. Therefore, consideration must also be given to the extent to which and for how long a society can cope with severe restrictions on everyday life. There has to be examination, from a social (legal, economic, political) and medical perspective, of the scope and duration of interventions that are appropriate and acceptable in the long term. This has to do with the question about how to resolve the almost inevitable collisions of norms and conflicts or at least about how to mitigate their consequences. This Ad hoc Recommendation is the German Ethics Council's contribution to this discourse. It focuses on two main aspects.

Firstly, it provides ethical guidance for dramatic situations requiring actions and decisions, especially what is known as triage. To this end, basic prescriptions and prohibitions are presented. In addition, the relationship between these normative precepts and more pragmatic guidelines developed in the medical context is examined.

Secondly, criteria and procedural provisions are outlined as to when and in what way the dominant escalation strategy currently in effect can be replaced by a "renormalisation" strategy with a gradual relaxation of restrictions. Renormalisation does not simply mean a return to normality, i.e. it is by no means equivalent to restoring the *status quo ante* or completely remedying the hazardous situation. Rather, it is about the conditions under which an acceptable level of risk can once again be assumed. This level represents the "general risk of life" which though perforce indeterminate seems socially commensurate. Such an approach ought to proceed on the basis of clearly defined temporal and factual milestones in order to open up perspectives for moving beyond the current restriction strategy.

In a nutshell, this Ad hoc Recommendation wishes to help both policymakers and the general public to grasp the various conflict scenarios as normative problems, too. For this reason,

the forthcoming decisions cannot and must not be based solely on (medical) science. It would not only constitute an excessive demand on science to expect it to come up with clear instructions for policies. Fully delegating policy decisions to science would also run counter to the basic idea of democratic legitimation. It is important to base policies on advice from science, but the latter cannot and must not replace the former. After all, scientific findings do not come with adequate instructions for their proper application. This is a task for society as a whole, to be executed within the legal framework by policymakers who bear democratic responsibility.

3 Coping with dilemmatic decision-making situations

The measures already decided upon (hygiene, physical distancing, etc.) may reduce the number of new infections to such an extent that the health care system will still be able to manage especially severe cases requiring intensive medical treatment. This would make it possible, in the not too distant future, to scale back the physical distancing strategy in a controlled manner, on a step-by-step basis, whilst accepting a rise in infections but also increasing community protection. The considerations set out below (in section 4) are intended to provide guidance on this.

Given the rapid pace of development, however, an alternative scenario does not seem far-fetched, whereby the existing and even potentially more intrusive measures prove to be inadequate even if the capacities of intensive care medicine are expanded in parallel. In Germany, major efforts are currently being made to increase these capacities. Nevertheless, a situation also seems possible here in Germany in which there are no longer sufficient intensive care resources for the patients in acute need of them. In this case, the medical staff could be forced to carry out ad hoc triage – i.e. to decide which of the patients requiring intensive care would receive priority and thus, for example, ventilation or extracorporeal membrane oxygenation (ECMO), and which ones would be treated as lower priority.

This forces us to examine the fundamental normative requirements that apply to such situations resulting from a genuine shortage of (intensive) medical care. In a second step, these requirements are to be aligned with guidelines that are currently being developed in the field of medicine.

a) Basic requirements

In situations where the urgent need for life-sustaining medical resources cannot be met for all those in acute need of them, tragic life and death decisions must be taken. For some of these constellations there is no solution that is satisfactory for everyone both from the legal and ethical angle. The question as to who benefits from a scarce resource, on what grounds and to whom it is denied, touches on central basic rights of those affected, and raises fundamental issues of distributive justice. As far as the current crisis is concerned, there are just a few concrete guidelines for an emergency situation. The documents recently prepared in various countries, including a statement by seven German medical bodies (see link at the end of the text), go beyond theoretical analysis and propose practical corridors for action, prioritisation algorithms and decision-making aids. They reflect the implied ethical and theoretical justice problems.

In situations of catastrophic shortages, which cannot be ruled out for the current situation in Germany either, the basic orientation of medical care undergoes a necessary extension: from a sole focus on each individual patient's well-being to the consideration of certain public health necessities under conditions of acute danger to the lives of an incalculable number of further, seriously and similarly ill patients. This widening of the scope of medical duties can lead to conflicts between fundamental ethical and legal requirements. In the most serious cases, they may prove to be almost unsolvable dilemmas.

The Basic Law (*Grundgesetz*) sets out a binding framework for medical ethics, too. The guaranteeing of human dignity necessitates egalitarian equality and thus provides for corresponding basic protection for all against discrimination. For the state – the direct addressee of fundamental rights – the principle of indifference to the value of life likewise applies: it is prohibited to evaluate human life, never mind devalue it. Any direct or indirect differentiation of the state with regard to the value or duration of life and any associated regulation by the state resulting in the unequal allocation of chances of survival and risks of death in acute crisis situations is inadmissible. Every human life enjoys the same protection. This means that not only differentiations based on gender or ethnic origin are prohibited. The state must also refrain from classifying lives on the basis of age, social role and its assumed "value" or a predicted lifespan.

These stipulations run counter to a purely utilitarian assessment that aims to merely maximise human lives or years of life. Instead, they are about the state guaranteeing fundamental principles of law. In this respect and in view of the impending dilemmas in possible triage situations, the basic normative principle behind all measures that provide orientation in this area must first be established. Of course, every admissible effort must be made to save as many lives as possible. But the measures required for this must not extend beyond the framework of constitutionally

binding precepts. Personal ethical convictions may demand a focus purely on results and, with this, the absolute maximisation of the number of human lives saved. But even they cannot justify actions that go beyond the outlined limits of constitutional law.

The state must not rate human life, and consequently must not prescribe which lives are to be saved first in situations of conflict. Even in exceptional times of a widespread and catastrophic emergency, the state is duty bound not only to save as many human lives as possible but also, and above all, to safeguard the foundations of the legal system.

The options available to the state when it comes to enacting binding abstract guidelines for the allocation of scarce resources are, therefore, limited. The fundamental rights directives describe what is no longer permissible in a predominantly negative manner. In contrast, they scarcely offer any positive guidance for the concrete triage decisions in hospitals. This does not mean that it is impossible to draw up guidelines for such decisions. It does not follow from the prohibition of an evaluation by the state that such decisions cannot be accepted. Therefore, it makes sense to combine different levels of normative concretisation. This has to do with the function of, for example, professional bodies that can and should provide important guidance beyond what the state is permitted to do, but remain within the framework of the aforementioned basic requirements.

The resulting primary responsibility of the medical profession for individual decisions and their implementation follows on from the aforementioned limits of what can be regulated by the state, which have their roots in constitutional law. However, this responsibility should not, under any circumstances, be exercised only "at the bedside", i.e. within the framework of the individual doctor-patient relationship. For reasons of equal treatment alone, but also for the sake of general acceptance, there is a need for uniform rules for clinical emergencies. As indicated, initial recommendations by medical bodies have been published in response to the current crisis.

b) Ethical conflicts in individual cases

In emergency situations, in which fewer ventilators are available than are acutely needed, a distinction must be made between two basic scenarios:

- *Triage in ex ante situations:* This refers to cases where the number of unoccupied ventilators is smaller than the number of patients who have an acute need for them. The decisions that are unavoidable here are less problematic in normative terms, although they, too, are associated with severe mental stress for the people who have to take them. Patients who are subsequently denied treatment are not "killed" by a failure to act by the medical decision-makers. They are simply not saved from disease-related death for reasons of tragic impossibility. Here, the principle applies that nobody can be obliged to do the impossible. The law does not furnish any positive selection criteria for this decision. It must be ensured, however, that any unfair influences on the decision taken are excluded as far as possible, such as those relating to social status, origin, age, disability, etc. From an ethical point of view, the decision should be based on well-considered, justified, transparent and, as far as possible, uniformly applied criteria.
- *Triage in ex post situations:* In this scenario, in which all available ventilators are occupied, the life-sustaining treatment of one patient would have to be discontinued in order to save the life of another patient by reassigning the medical device. Here, the assumption – which has to be confirmed by medical judgment – is that the indication for ventilation is still valid for all the patients concerned. Such decisions are far more problematic. Borderline situations can arise here which are almost unbearable for the staff treating the patients. Anyone who takes a moral decision in such a situation, that is ethically justifiable and in line with transparent criteria – such as those established by medical bodies – can expect exculpatory leniency from the legal system in the event of a possible (criminal) legal investigation of the incident. However, it is not objectively legal to actively terminate an ongoing, still indicated treatment for the purpose of saving a third party. Here, the fundamental imperative formulated above must be remembered: Even in times of disaster the state must safeguard the foundations of the legal system. State and society could bear an erosion of these foundations even less than numerous tragic decisions in life and death emergencies.

4 Legitimacy requirements and negative effects of the extensive social lockdown

At the present time, no decision has been or can be taken about how long the measures to contain the pandemic, some of which have only just come into force, are to remain in place. According to recent public statements by virologists and epidemiologists, the pandemic could last another one to two years, depending on the availability of the necessary drugs and vaccines. Against this backdrop, the question arises as to how long the measures to slow the course of the pandemic and, more particularly, the ones designed to reduce physical contact, are justified. The justification of these lockdown measures necessitates an extremely complex

balancing of goods under conditions of uncertainty from their introduction and throughout their entire duration.

a) Starting point: Strategic decisions in the ethical corridor of solidarity and responsibility

The core ethical conflict necessitates the weighing up of the hoped-for benefits of a physical distancing strategy to sustainably maintain an effective healthcare system against feared or direct damage to the political, social, economic, and cultural situation of the persons or groups of persons directly or indirectly impacted by this strategy. On the one hand, such deliberations, which always include analyses of usefulness, are ethically indispensable. On the other hand, they are only legitimate insofar as they do not permanently undermine or even destroy basic and human rights or other fundamental values. Even the required protection of human life is not absolute. The rights of freedom and participation as well as economic, social, and cultural rights should not be *unconditionally* subordinated to it. A general life risk must be accepted by everyone.

aa) Solidarity conflicts

Particularly in these times of crisis, it becomes evident how great the solidarity resources in our country actually are. Solidarity means the willingness to take pro-social action on the basis of relevant common ground that demands something from the person who is prepared to show solidarity. Solidarity neither exists automatically nor is it unlimited. The impulse to help others may initially emanate from the elementary human compassion that almost everyone feels in the face of serious threats to others. That being said, such compassion must still be translated into concrete action. Solidarity depends on various factors. There must be a basic feeling of togetherness or at least of common concern in a dangerous situation. Those willing to show solidarity must have sufficient material or immaterial means at their disposal to translate their desire to help into practice. Under certain circumstances persons showing solidarity must even be prepared to endanger themselves within reasonable limits. However, this happens regularly in the expectation that any benefits and burdens will be fairly and equitably distributed *in the long term*. All persons involved in solidarity-based forms of practice should ask themselves what losses and costs they can – with justification – expect from whom – in the current case, for example, what losses in our political, social, economic or cultural way of life can be asked of whom.

bb) Assignment of responsibility and risk acceptance

Initially, each individual is asked to take the corresponding decisions. This highly personal responsibility also includes awareness that one's own decisions and lifestyle always have consequences for the decisions and lifestyles of others. This applies, for example, to the situation where members of high-risk groups are inclined to decide for themselves to refrain from special protection strategies in favour of other options. Personal responsibility is always relational. Within this relational framework, the growing group of persons who have survived the infection and disease and who, according to the latest scientific knowledge, are at least for the time being neither infectious for others nor at risk of re-infection, must also weigh up their decisions. Regardless of whether this can be prescribed by the state, it is an expression of the personal responsibility of those who are immune after an infection when they use their regained freedom and freedom to act in the spirit of solidarity to overcome this serious crisis. At the same time, this is also an opportunity to strengthen social cooperation, with long-term effects too.

Beyond solidarity-based individual responsibility, the state may also define risks and assign responsibilities in order to safeguard the fundamental conditions of a functioning social life. This includes the involvement of different actors (individuals, groups, public associations, state institutions) within the framework of multi-actor responsibility. Within the confines of the Basic Law, the state may also determine the acceptable level of risk for the individual and society. A broad public debate is needed to learn from the current crisis and to draw appropriate conclusions.

b) Prerequisites and consequences of a structured renormalisation process

At the moment, many statements on the subject focus on the question of the legality and moral legitimacy of the current measures. The justified question of "how far?" must, however, be supplemented by the more pressing question in the medium and long term as to the conditions under which the socially debated and widely agreed shift from lockdown to resumption of "normal operations" can take place. Beyond the fundamental goal of reducing the infection rate, thought must already be given now to how an orderly return can be achieved to a reasonably "normal" social and private life and regular economic activities in order to keep economic, cultural, political and psychosocial damage to a minimum.

The willingness to accept lockdown measures on behalf of community-building solidarity is of particular importance and depends on two specific factors:

- Permanent monitoring of the necessity and appropriateness of the measures taken. In this respect, the principle of proportionality also necessitates, particularly in the current situation, the inclusion of the time dimension.

- The postulate of explaining to the public how and under what conditions moves can be made to restore "normality" is closely associated with this.

Both aspects can be factored into the concept of opening up perspectives. From a normative point of view, this expresses the fact that every restriction of fundamental rights must be justified at all times. In socio-psychological terms, the opening up of perspectives means that the projected time limit increases the acceptance of restrictions on freedom in the current status quo. Conversely, uncertainty about the end of such measures leads to a loss of solidarity and demotivation the longer they last. It should be emphasised that the socio-psychological aspects mentioned above most certainly have an impact on the normative evaluation of the appropriateness or reasonableness of restrictions on freedom.

Systemic threats from restrictions can be predicted in almost all social subsystems. In science, for example, if research infrastructures and professional exchange cannot be maintained on the necessary scale. The education system, too, is no longer able to fulfil its function which is important to society as a whole. Sport and culture are badly affected. In addition, the following aspects are of particular importance:

- Socio-psychological consequences: The lockdown aims to slow down the increase in infections so as to prevent an overburdening of healthcare. This is necessary to save the lives of seriously ill patients. However, the expected side effects also pose a threat to health, possibly even to people's lives, especially to members of vulnerable groups. These include:
  - Patients whose medical treatment is suspended as it is not deemed to be absolutely essential at that particular point in time;
  - Persons in institutions providing child and youth welfare, assistance for the disabled, in social psychiatry and nursing homes, who are largely denied visits and for whom almost all leisure, work, educational and therapeutic services are discontinued;
  - Women and children at risk of domestic violence induced by social stress;
  - People at risk of social isolation.
- Economic consequences: As rightly pointed out from various quarters, the crisis highlights the need not just for a state that is capable of action but also for a functioning market economy to handle the situation, at least in the medium and long term. In certain sectors – such as the hotel and catering trade or the cultural sector – the economic survival, particularly of small businesses and the self-employed who depend on regular income for their daily livelihood, is currently under threat. At the same time, many people are losing their jobs, especially those in precarious employment. In addition to foreseeable losses of prosperity for everyone as a result of an impending global recession, there are also problems of supplying goods to cover daily needs and safeguarding production capacities and know-how. Last but not least, the direct supply of medical facilities with the equipment necessary for clinical treatment and the upholding of the required hygiene standards depend on functioning supply chains. Above all, however, there is a fear that the overall market economy could collapse if too many small and medium-sized companies in Germany are forced to file for bankruptcy due to their often low capital reserves. For structural reasons, it is not enough to merely prevent such insolvencies; the aim should rather be to enable them to resume their operative business. This can only be achieved if the complex network of interactions between producers, and between producers and consumers can be sufficiently revived under the legal system and if consumer behaviour can be restored to normal, at least in part.
- Elementary conditions of democratic culture: In the long term, it is problematic even for a consolidated democracy to remain in a state in which the guarantees of fundamental rights, which are intended to be a corrective and stimulus for democratic processes, are largely suspended, or when elections are postponed or there is a switch to postal voting. Furthermore, for a constitutional state it is also of elementary importance that it does not lapse into thinking in state of emergency categories.

These reflections on the side effects of the lockdown must be supplemented by criteria that can guide policy decisions on whether to continue, relax or end the social distancing strategy. Three constellations can be distinguished for this purpose:

I The strategy is successful in so far as an overburdening of the healthcare system can be avoided and other health, economic and political damage does not outweigh the benefits. This is the case when statistically the number of individuals infected by an infectious person is permanently below one. If and when that state is reached, the gradual and epidemiologically based dismantling of the restrictions is not only possible but imperative.

II The strategy does not lead to the desired success in avoiding the overburdening of the healthcare system within a set period of time – the length of which would have to be measured according to the uncertain epidemiological prognosis of when the measures taken should have an effect – or other health, economic and psychosocial damage prevails. This is when the legitimacy of the strategy ends.

III There is reasonable hope that continuing the strategy over a defined period of time will lead to a reversal of the current

overburdening of the healthcare system. Even in such a situation, at least some relaxation of the restriction regime is advisable. Conflicting interests are becoming increasingly important.

To the extent that one is willing to classify these interests as subordinate for a certain period of time (constellation I), they now probably constitute strong reasons for abandoning this strategy. Corresponding deliberations apply to the consideration of economic consequences. The foreseeable global recession, the massive decline in the gross domestic product and the associated burdens on public budgets cannot be adequately expressed using quantitative indicators. As illustrated by this broad outline, these factors have an impact on the prerequisites of a functioning community whose welfare state-based solidarity is dependent on economic performance.

Such and similar considerations require serious social debate even in times of crisis. There will likewise have to be discussion of which life risks a society is willing to classify as acceptable and which it is not. The review and evaluation required over the forthcoming months will also have to take a detailed look at the legal regulatory framework – not least with a critical eye on the newly established powers of intervention.

c) Possible elements of future procedures

An essential point of reference for future procedures is the avoidance as far as possible of the aforementioned triage situations. At the same time, any measures taken should be regularly re-evaluated in a dynamic process in order to keep burdens and consequential damages as low as possible. Finally, parallel efforts should focus on making long-term solutions available as soon as possible. In the following, without suggesting any prioritisation, we recommend a number of procedures and measures that should be given priority in the near future:

- Strengthening and stabilising the capacities of the healthcare system, especially of nursing, establishment of a nationwide system for recording and optimising the use of intensive care capacities.
- Better networking between actors in the healthcare system and with other relevant sectors of society.
- Further expansion of test capacities for the diagnosis and detection of (preliminary) immunity (serological tests, currently under development).
- Further ongoing data collection on individual and group immunity, (community protection), Covid-19 courses, etc., further model development to assess the effectiveness of interventions.
- Broad promotion and support of research on vaccines and therapeutics, and preparation of support structures for their mass production and roll-out.
- Support for interdisciplinary research on the social and psychological effects of the Covid-19 pandemic, including future risk perceptions.
- Continuous re-evaluation of measures restricting freedom; where justifiable, their gradual withdrawal and a resumption of social and economic activity.
- Development of effective and tolerable protection and isolation strategies for risk groups (pre-sick people, elderly people) and in specific institutions (for instance facilities for the elderly and long-term care).
- For younger high-risk groups in particular, it is important to note that effective self-isolation is dependent on the option of (preventive) sick leave or other forms of leave for those affected and the other members of their household.
- Sound information strategy: Transparent and regular communication on actions taken and policy-making decisions in relation to highly infectious diseases.
- Concrete calculations of the expected costs of measures taken and alternative scenarios.

Crises, it is often said, are the "moment of the executive". But that does not go far enough. Particularly in times of crisis, society must rely on the interaction between a federal state and its branches of government with the plurality of societal and – most notably – scientific voices. The issues that currently need to be resolved affect society as a whole; they must not be delegated to individuals or institutions. Especially painful decisions have to be taken by bodies mandated by the people that can thus act and be held to account politically. The Coronavirus crisis is the moment of democratically legitimised politics.

The German Academy of Ethics in Medicine (AEM) provides a continuously updated collection of links to "Recommendations and resources on ethical questions of patient care related to the COVID-19 pandemic": https://www.aem-online.de/index.php?id=163" [26.03.2020].

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