

# Ethical Orientation on the Issue of General Mandatory Vaccination

AD HOC RECOMMENDATION

*Berlin, 22 December 2021*

## A situation of overall uncertainty

The debate of whether general mandatory vaccination should be introduced takes place in a sphere of uncertainty, in many ways. On the one hand, facts have changed considerably several times in the course of the pandemic, which has been lasting for almost two years now. On the other hand, considerable data and knowledge gaps still persist. According to the current state of knowledge and in the face of new variants of the virus, the vaccination rates called for in earlier stages of the pandemic are not sufficient for its containment. The rates must be a lot higher.<sup>1</sup> In spite of a vaccination rate of currently about 70 percent of the total population, the German health system has presently reached its limits in many places. Virus variants like Omicron and expectable further variants of the virus force experts to again and again revise their estimates of the future course of the pandemic. This is usual practice in science; however, it has sometimes lead to irritations and misunderstandings in politics and the media.

After intense social debate on the prioritisation of scarce vaccine supplies and the difficult organisation and implementation of the vaccination strategy, it was expected in spring 2021 that there would be a much higher willingness to get vaccinated as soon as the shortage in vaccines was removed. This forecast did not come to pass. The vaccination strategy has failed to reach many people – and partly still fails to reach them up until today. Against this background, the Federal Government and the Minister-Presidents of

the Federal States requested the German Ethics Council on 2 December 2021 to re-evaluate the question of a general statutory vaccination mandate<sup>2</sup>, which had been ruled out in various quarters up until a few months ago, and to submit an “assessment of the ethical aspects of a general mandatory vaccination”.

The continuous process of learning and adaptation during a pandemic that is rapidly changing and highly unpredictable, is not easily communicated. The factual uncertainty due to the dynamic mutation and infection developments corresponds to uncertainty in communication due to continuously changing information levels, sometimes colliding with disinformation campaigns. IT and administrative structures have not yet been adapted to the new challenges. The many burdens suffered during the crisis and the experience of uncertainty – both individually and collectively – have left their mark on society. The tone of public disputes has become more combative, and the people joining in the debate are becoming more and more impatient.

A statutory mandatory vaccination policy always represents a considerable interference with legally and morally protected goods. Self-determination of one’s own body is one of the crucial achievements in the history of democracy and liberty; personal rights always refer to the bodily integrity of the human being. This cultural dimension must be kept in focus, particularly against the background of the history of medicine in the twentieth century. It also explains why the issue sometimes triggers strong emotions. This is why in the debate on mandatory vaccination policies both legal and ethical arguments for and against a general mandatory vaccination statute must

<sup>1</sup> Various institutions have called for different vaccination targets in the course of the pandemic; among others, the European Commission pleaded for at least 70 percent of the adult population (European Commission 2021, 3) in January 2021. Presently, the assumption is that vaccination rates of over 90 percent will be necessary (Robert Koch-Institut 2021, 2).

<sup>2</sup> „General“ – in contrast to an occupation- or sector-related mandate; “statutory” – introduced as a legal obligation imposed by law, the compliance of which shall be legally monitored and sanctioned, if necessary.

be weighed up carefully. This thorough consideration must also include questions about the implementation of such a statute and its possible consequences, since these bear ethical and social implications.

The German Ethics Council has already addressed the issue of mandatory vaccination several times. In June 2019, the Council highlighted a moral duty to get vaccinated against highly contagious diseases under certain conditions in its Opinion “Vaccination as a Duty?” regarding the measles vaccination.<sup>3</sup> However, with a view to introducing a mandatory vaccination policy linked with legal sanctions, the Ethics Council has been distinctly more cautious so far. In its Opinion of 2019, it speaks out in favour of an occupation-related mandatory vaccination against measles for specific professional groups, but rejects a general mandatory vaccination policy against measles for everybody, especially children. In the context of the Covid-19 pandemic, the German Ethics Council has recommended in November 2021 to urgently look into the need for a mandatory vaccination policy for employees with a particular professional responsibility.<sup>4</sup> In a position paper of November 2020 published jointly with the Ständige Impfkommision (Standing Committee on Vaccination, STIKO) and the Nationale Akademie der Wissenschaften Leopoldina (National Academy of Sciences Leopoldina), the German Ethics Council ruled out an undifferentiated, general mandatory vaccination against SARS-CoV-2, a statement which was confirmed three months later in February 2021 in its Ad Hoc Recommendation on whether there should be special rules for vaccinated people, because such a general mandatory vaccination policy seemed neither necessary nor ethically reasonable at the time.<sup>5</sup>

With this Ad Hoc Recommendation, the German Ethics Council wants to make a contribution to forming an ethical judgment regarding a general mandatory vaccination policy. It must be emphasised that in no case should other instruments to combat the pandemic be neglected, in order to protect people from a severe course of disease or death, to clearly relieve the health system and its staff from stress, and to do everything to bring about a shift from an uncontrolled pandemic to a controlled endemic situation as soon as possible. This also applies to the time line: Even if a general mandatory vaccination statute is introduced, this will not break the current fourth wave of

infection, because it takes some time until those persons who decide to get vaccinated because of such a statute have developed complete immune protection. Such a statute rather aims at attenuating or preventing severe negative consequences of possible future waves of the pandemic, like high mortality, long-term health impairments of significant parts of the population or an impending collapse of the health system.

## Changing facts and situation

Even at the beginning of the year 2021 it was assumed that a vaccination rate of at least 70 percent of the adult population would be sufficient to contain the pandemic with its wild type or the Alpha variant of SARS-CoV-2 that were prevalent at the time.<sup>6</sup> The vaccines showed very positive safety and efficacy profiles in studies shortly before and after their introduction. There was hope that they would not only decrease the risk of severe courses of disease and casualties, but that they would also drastically reduce virus transmission, or even prevent it almost completely. When end of June 2021 the more contagious Delta variant<sup>7</sup> became dominant in Germany, much higher vaccination rates were required (at least 85 percent of the 12- to 59-year-olds and 90 percent of the over-60-year-olds) in order to avoid threatening scenarios in future waves of infection.<sup>8</sup> These vaccination rates are far from being reached.<sup>9</sup> Moreover it is not clear at this point in time whether an even higher vaccination rate might be required in view of the new Omicron variant.

In addition, protection from infection declines over the course of time. This means that in spite of being vaccinated, people can develop an infection (referred to as breakthrough infection in patients showing clinical symptoms). The protection from severe courses of disease, particularly in vaccinated people who are older and/or have pre-existing medical conditions, may decrease, so that at least a third vaccination becomes necessary (booster vaccination).<sup>10</sup> The

3 Deutscher Ethikrat 2019.

4 Deutscher Ethikrat 2021a.

5 Ständige Impfkommision/Deutscher Ethikrat/Nationale Akademie der Wissenschaften Leopoldina 2020; Deutscher Ethikrat 2021b.

6 European Commission 2021, 3.

7 Robert Koch-Institut 2021, 2.

8 Wichmann et al. 2021, 3.

9 According to Impfdashboard.de [last updated: 2021-12-20, 10:36 am], 70.3 percent of the population are fully vaccinated, 75.5 percent of the 12- to 59-year-olds and 86.9 percent of the over-60-year-olds respectively. 3.2 million people over 60 years of age are not yet fully vaccinated. Altogether, 26.7 percent of the population have not yet been vaccinated at all, among them the group of the 0- to 4-year-olds who make up for 4.8 percent of the population.

10 The booster vaccination has been recommended by the Standing Committee on Vaccination for all people of over 18 years of age in Germany (Ständige Impfkommision 2021, 7 ff.).

protection of convalescent patients from re-infection and severe course of disease also diminishes with time.<sup>11</sup> Finally there is the danger – currently relevant in the Omicron variant – that so-called immune escape variants may develop. This may lead to a further weakening of the protection from transmission and from severe courses of disease. It can therefore be expected that vaccines must be adapted and vaccination intervals must be re-evaluated.

After the experience of the past year, it was likely that Covid-19 prevalence would rise again in autumn 2021. This development can be explained by the gradually waning immunity on the one hand, and by the comparatively low vaccination rate along with a clearly belated launch of the booster campaign on the other hand. As a consequence, numerous cases show a severe and even fatal course, and the health system is yet again threatened with collapse. Currently, it is necessary to redistribute severely ill patients across the Federal territory, and there are considerable health risks, burdens and problems. These limitations do not only concern Covid-19 patients. Possibly also the medical care for patients hospitalised due to other diseases or after accidents might not be guaranteed anymore, not even in an emergency. The fear of an actual triage scenario<sup>12</sup> is more real than ever before.

Vaccination still offers the best protection from severe Covid-19 disease courses and is therefore an indispensable means to achieve a controlled endemic situation.<sup>13</sup> The fact that the high vaccination rates required for the reasons mentioned above have clearly been missed is partly due to structural deficits (initial shortage of vaccines, halting progression of the vaccination campaign, not enough low-threshold and outreach vaccination offers, communication problems, etc.). Partly it may obviously also be attributed to pandemic fatigue and limits to voluntary vaccination willingness. In various studies, a considerable part of respondents among non-vaccinated people says that they do not voluntarily want to get vaccinated in the foreseeable future, regardless of all risks, offers and restrictions.<sup>14</sup>

<sup>11</sup> Grant et al. 2021.

<sup>12</sup> Deutscher Ethikrat 2020; documentation of the Bioethics Forum “Triage – Prioritising Intensive Care Resources under Pandemic Conditions” of 24 March 2021 at <https://www.ethikrat.org/en/bioethics-forum/triage-prioritising-intensive-care-resources-under-pandemic-conditions> [2021-12-20].

<sup>13</sup> This does not correspond to the so-called herd immunity, but “only” a sufficient basic immunity, which leads to a substantial reduction of virus circulation on the population level.

<sup>14</sup> According to surveys, more than 60 percent of non-vaccinated people are not willing to get vaccinated in the near future (forsa 2021, 20; COSMO 2021).

## Fundamental empirical prerequisites

Before proceeding to discuss constitutional and ethical aspects of a general mandatory vaccination and giving corresponding recommendations for further actions, a number of fundamental empirical prerequisites need to be pointed out. As all texts of the German Ethics Council in the course of the coronavirus crisis, this text was elaborated under the conditions of the pandemic’s dynamic development and against the background of currently available empirical insights in the pandemic and the ensuing uncertainty. In this context, the following aspects are of considerable importance:

- the degree to which immune protection decreases after a vaccination or an infection, and breakthrough infections or reinfections occur;
- the effectiveness of booster vaccinations and their required frequency;
- the actual strain on hospitals, which is subject to strong regional variations;
- the infectiousness, pathogenicity and extent of an immune escape of the Omicron variant;
- the occurrence of further variants;
- the further development of vaccination rates;
- the number of vaccinated and non-vaccinated persons;
- the distribution of these groups of persons within the population;
- the reasons for the development of the vaccination campaign, the success of which differs strongly from region to region, especially with a view to people who may still be reached.

The following deliberations are therefore based on a constantly changing knowledge level. Consequently, the following statements and recommendations may or must need to be revised. When required, they need to be reassessed and adapted and/or developed further, in order to take into account a change of facts, or an improved knowledge level.

Even now it is obvious, for example, that a general mandatory vaccination does not make sense if it is restricted to a single or double vaccination. According to current knowledge, at least one booster vaccination is required to develop a satisfactory immunity. Whether further booster vaccinations might be necessary for a certain period of time, or at regular intervals, maybe with adapted vaccines, cannot be predicted at this point in time. However, this should be kept in mind and openly communicated. In the face of the

virus variant Omicron, there is some evidence for the necessity of further booster vaccinations.

Moreover, in comparison to other countries, the German vaccination strategy was clearly less successful. This may be due partly to cultural influences, social ideals as well as varying levels of trust in political and government actions, partly to the way people experienced the first waves of infection, which was clearly more dramatic in some places than in others, or else to different concepts of dealing with public health issues. Regional differences in the vaccination rates within Germany also point to the fact, however, that the vaccination strategy in many respects did clearly fail to do everything that would have been possible – from logistics to addressing people, from outreach vaccination to faster, solution-oriented adjustments. In addition, there are still no robust data to explain why certain milieus, social groups or regions refuse vaccinations more strongly than others, especially because the reasons and life situations of non-vaccinated people vary greatly.<sup>15</sup> Among these people are persons who categorically refuse to get vaccinated; there are however also groups of the population who might be reached, some of whom are faced with obstacles in healthcare also outside a pandemic, as well as people who for the time being decide not to get vaccinated because of their personal risk assessment. At the same time, the on-going booster vaccination campaign shows that the deficits in the vaccination infrastructure continue to persist at least in part. If these various problems had been solved, a much higher vaccination rate could have been achieved by now. This would have contributed to reducing the imminent danger for the population, resulting among other factors from the excessive strain on the health system, and to avoiding repeated, drastic measures against the pandemic. It is therefore too narrowly considered, if the insufficient vaccination rates are attributed exclusively to the lack of personal responsibility in those parts of the population who have so far refused to get vaccinated. Such recriminations are one-sided, exacerbate the social dialogue and cover up structural failures.

The German Ethics Council perceives it as a basic moral duty to protect oneself and others by getting vaccinated. However, a general mandatory vaccination policy may only be introduced if it is foreseeable that the successful management of a severe crisis will not be possible without this measure. The German Ethics Council finds it crucial to emphasise

how multi-faceted the issue is, especially in the face of overly pointed debates. There is no such thing as “the” general mandatory vaccination policy; rather, different arrangements with their individual requirements and consequences must be considered. Moreover, even under conditions in which a general mandatory vaccination statute enforced by appropriate sanctions was deemed to be legally and ethically admissible, considerable efforts at convincing as many people as possible to get vaccinated on a voluntary basis would have to continue. Also, a general mandatory vaccination policy is no panacea against the pandemic. Instead, it may only be considered as one part of a comprehensive, evidence-based, differentiated and far-sighted overall strategy against a pandemic.

### Constitutional deliberations regarding proportionality

From a constitutional perspective, a mandatory vaccination statute represents a considerable interference with legal positions protected by the German Constitution, especially the right to physical integrity (Article 2 (2) sentence 1 GG). The latter includes the right of an individual for subjective reasons to reject treatments that in all objectivity are health-promoting. However, these are not absolute guarantees. Measures for the protection of other people or the general public are therefore possible in principle from a constitutional perspective. It may be true that the aspect of protecting others includes a certain reification of the human body, which in general is excluded from the grasp of the authorities. Although the state would partially avail itself of the body, this does not in itself constitute a violation of the guarantee of human dignity. Interferences with fundamental rights may therefore be justified, provided they have a parliamentary basis and fulfil certain additional requirements. In particular, the rationalising effect of the prohibition of excessiveness (principle of proportionality), which imposes restraints on the sovereign’s exercise of power, must be mentioned here. Pursuant to this principle, measures taken by the public authorities must (1) pursue a legitimate objective and (2) be suitable, (3) necessary and (4) appropriate to achieve this objective. This sequenced assessment procedure serves to answer in a structured and solution-oriented manner the question of the legitimacy of sovereign action, in particular if such action restricts fundamental rights. It must be taken into account that the Bundesverfassungsgericht (Federal Constitutional

<sup>15</sup> <https://projekte.uni-erfurt.de/cosmo2020/web/topic/impfung/10-impfungen/#gründe-des-nicht-impfens> [2021-12-20]; forsa 2021, 5 ff.



Court) has conferred onto the democratically legitimised legislator great scope for the evaluation and assessment of measures to combat the Covid-19 pandemic, because of the dynamics and complexity of the situation and the high importance of the legally protected interests at stake.<sup>16</sup>

(1) The question of whether an objective is legitimate reveals that the assessment of mandatory vaccination policies cannot be made in an abstract manner, but requires a precise object of investigation in the form of a specific legal concept, and a corresponding agenda set by the public authorities.

First of all, it is decisive to clarify whether a mandatory vaccination policy is intended to protect the persons obliged to vaccination themselves from contracting the disease, or whether its goal is to protect other people and the general public. Merely offering protection to the hitherto non-vaccinated persons themselves would not qualify as the legitimate objective of a mandatory vaccination policy. The Bundesverfassungsgericht (in the context of forced treatment or assisted suicide) correctly points out that the will of the holder of fundamental rights is decisive, “which eludes any appraisal on the basis of general values, religious precepts, societal norms for dealing with life and death, or considerations of objective rationality”.<sup>17</sup>

However, simply “increasing the vaccination rate” in itself would probably also be insufficient as an objective of a mandatory vaccination policy; the legislator would rather have to justify to what extent such an increase serves to protect other people, and especially vulnerable persons.<sup>18</sup> It obviously makes a considerable difference whether it is intended to reduce the number of new infections as much as possible, or simply to achieve a level of (new) infections that the health system can cope with without major upheavals. The same applies to the decision whether short-term, medium-term and/or long-term effects shall be achieved by means of a mandatory vaccination policy.

(2) A mandatory vaccination policy is suitable, if it is a means to at least promote the intended purpose, i.e., if it is not unsuitable from the outset. The latter

case is clearly an exception. Given the indispensable time lag until a person who has so far not been vaccinated develops sufficient immune protection after the vaccination, such an exceptional case could for example be assumed if the mandatory vaccination policy was intended to directly oppose imminent threats – be they of an individual or of a systemic nature.

(3) A mandatory vaccination policy is necessary to achieve the intended objective, if no other means exists that is at least as effective and less intrusive. In this case, alternative options for regulations must be evaluated. What is decisive is the requirement of equal effectiveness, because obviously less intrusive measures are always conceivable. At the same time, also the temporal order of possible alternatives for action and the urgency of a reaction by the public authorities must be considered. It has been correctly pointed out that the necessity of a mandatory vaccination policy cannot be excluded only because it requires a certain lead time and other mechanisms with a faster effect exist. Nor will it be possible to completely ignore previous action by the public authorities; but in an acute emergency it is probably not sufficient to refer to deficient preliminary work by the government in order to rule out specific measures.<sup>19</sup> This is why the vaccination campaign’s deficits mentioned above do not justify the wholesale claim that a general mandatory vaccination is not necessary.

However, against the background of these deficits and temporal order it is necessary to explain why no sufficient vaccination rates could be expected in the future without a mandatory vaccination policy even if the relevant efforts were intensified and voluntary vaccinations were increased. In this context, it would also have to be discussed what effect the expected approval of protein-based vaccines might have on the willingness to get vaccinated. In addition, it should be considered that the state has already introduced a kind of vaccination mandate in the form of the so-called “2G” regulations (access only for vaccinated or convalescent persons, translator’s note) that are increasingly used, even if only indirectly sanctioned. Inversely, these regulations, just like stricter contact restrictions (lockdown), constitute equally intrusive interferences with fundamental law, and cannot simply be considered as “more lenient” in comparison with mandatory vaccination. For reasons of effectiveness and of control efforts, however, it would probably not be sufficient to point out a comprehensive

<sup>16</sup> BVerfG, decision of 19 November 2021 – Bundesnotbremse I (Ausgangs- und Kontaktbeschränkungen), ref.: 1 BvR 781/21 etc., para. 171, 185, 202, 204 f., 216 f. ([http://www.bverfg.de/e/rs20211119\\_1bvr078121.html](http://www.bverfg.de/e/rs20211119_1bvr078121.html)); BVerfG, decision of 19 November 2021 – Bundesnotbremse II (Schulschließungen), ref.: 1 BvR 971/21, 1 BvR 1069/21, para. 114, 122, 134 f. ([http://www.bverfg.de/e/rs20211119\\_1bvr097121.html](http://www.bverfg.de/e/rs20211119_1bvr097121.html)).

<sup>17</sup> BVerfG, Judgment of the Second Senate of 26 February 2020, ref.: 2 BvR 2347/15 etc., para. 210 ([http://www.bverfg.de/e/rs20200226\\_2bvr234715.html](http://www.bverfg.de/e/rs20200226_2bvr234715.html)); cf. BVerfGE 128, 282 (308); 142, 313 (339).

<sup>18</sup> As does Bundestag printed paper 20/188 (institution-related mandatory vaccination policy).

<sup>19</sup> BVerfG, decision of 19 November 2021 – Bundesnotbremse II (Schulschließungen), ref.: 1 BvR 971/21, 1 BvR 1069/21, para. 175 ff. ([http://www.bverfg.de/e/rs20211119\\_1bvr097121.html](http://www.bverfg.de/e/rs20211119_1bvr097121.html)).

and consistent testing regime as an alternative means. Nevertheless, this important means to contain the pandemic, which has intermittently been neglected, would remain relevant in parallel with a possible mandatory vaccination policy.

With regard to aspects of necessity, the following should be clarified: Firstly, how a possible general mandatory vaccination policy would relate to the institution-related mandatory vaccination policy, which has recently been adopted. Even if, for constitutional reasons, the legislator is not obliged to a strict regulatory consistency, it would nevertheless be questionable if it had not been checked beforehand whether this instrument might be sufficient to achieve the stated objectives. Secondly – and this is even more fundamental – the question arises whether overall, it would not be an equally suitable but more lenient means to have a stratified regulation based on risk-profiles, instead of a mandatory vaccination policy that covers the entire (vaccinable) population.

(4) Appropriateness presupposes that the benefit of the measure must not be out of proportion to the impairments caused by it. Therefore, the specific relation between purpose and means must once more be taken into account.

The German Ethics Council has highlighted in earlier publications that the crucial aspect cannot be to completely avoid any infections (not even of severe or fatal cases), but that the overall aim must be to avoid high mortality, long-term health impairments of significant parts of the population or an impending collapse of the health system.<sup>20</sup> This will indirectly contribute to protecting potentially vulnerable people from the threat that non-vaccinated persons could pose to their life and health. Moreover, a mandatory vaccination policy might contribute in the medium to long term to avoiding more intrusive interferences with fundamental rights through protective measures that would not be necessary if vaccination rates were high (e.g.: curfews, travel bans, quarantine; stage bans, threats to professional existence or to the right to education; negative impacts on private life: marriage and family, freedom of religion; impairment to societal-democratic decision-making processes, particularly freedom of assembly). It might thus prevent further exacerbations of the damages that have already occurred due to the pandemic and the attempts to control it (e.g., in the field of education, from day-care centres up to universities, in business and culture).

Opposed to this is the burden on non-vaccinated persons. It would certainly be inappropriate to oblige people to get vaccinated, if in their individual case they should not be vaccinated for medical reasons, because they would then face highly increased health risks. Even if these may be rare cases, it is necessary from a constitutional perspective to regulate such exceptions.

However, even for vaccinable persons, mandatory vaccination may not generally be considered as appropriate merely because the risks linked to vaccination are low by objective standards. As has been mentioned above, the protection of physical integrity also includes the protection of one's own risk assessment. This illustrates the importance of thorough information. In addition, deliberations must take into account the intended extent of the mandatory vaccination policy, with regard to the time frame, the number of vaccinations, the intended types of vaccine and their benefit-risk-profile, the question whether there are different vaccines to choose from, and how practical access barriers are countered.

Frequently, a difference is made in the political debate between mandatory vaccination policy (considered as admissible) and compulsory vaccination (allegedly unacceptable). Regardless of the legal provisions that need to be observed in this respect (see p. 15 ff.), it must be emphasised in view of the prohibition of excessiveness, that the legislator may exclude certain coercive measures. Nevertheless, a sanctionable legal obligation is linked by definition to state enforcement measures, and therefore also to the use of force by public authorities. In any case, enforcement measures must comply with constitutional standards, and most of all be proportionate. This requires an escalating sequence of steps. If and to the extent that the measure that needs to be enforced – in this case the vaccination – complies with constitutional requirements, it is barely obvious why certain forms of enforcement should be excluded, apart from political expediency or legally relevant practicability considerations. Other legal consequences that the legislator attaches to the vaccination mandate or to its non-adherence (indirect enforcement) must meet these constitutional standards, too.

### **Ethically relevant principles**

From an ethical point of view, a general mandatory vaccination must not only be constitutionally, but also morally acceptable. Hereby the following ethical principles are especially relevant.

<sup>20</sup> Deutscher Ethikrat 2020.

## Liberty

In our society, the principle of human liberty is fundamental, and in many respects, it is constitutionally protected. Every human being is inherently endowed with freedom. Not liberty requires justification, but any intended restriction of such liberties. To begin with, freedom consists of fending off inner and outer influences, limitations or constraints. In this sense, imposing legal obligations constitutes a restriction of liberty – provided that such obligations have not yet been recognised as moral duties anyway, and have therefore been assumed voluntarily. For this reason, such obligations must be carefully justified and weighed against the precious good of personal liberty. This may happen in the awareness that individual freedom of one person does not only end at the limits of the individual freedom of all others (collective dimension of individual liberties). Rather, each person's individual freedom is only possible in the first place because of a co-existence with all others that enables and promotes freedom. The pandemic illustrates this fundamental fact: An intact healthcare system, safeguarded by a society in solidarity, is an essential requirement to maintain or regain one's individual freedom in the case of a severe disease. The pandemic shows that different liberties are interconnected; the freedom to receive education as a major asset, the freedom to comprehensively enjoy culture and leisure etc. can only be granted as long as the pandemic is under control. The same holds true for the freedom of millions of people's professional life, e.g., in trade, culture, or catering, whose material existence depends on the accessibility of their services.

## Self-determination of one's own body

Self-determination is the direct consequence of freedom. It specifically holds true for one's own body. Body-related, or physical, self-determination demands that as a rule, all physical interventions (including medical interventions) require an informed, voluntary consent. Especially in Germany with its history of medical coercive measures, the principle of physical self-determination and the right to physical integrity enjoy an extremely high protection that is the object of comprehensive legal codification, and for good reasons. One of these reasons is that interference with physical self-determination and integrity may affect human dignity. As a consequence, one's own body is mostly excluded from the grip of state authority and society in Germany. Under the concept of self-determination, it is even permitted to expose one's body to massive risks, up to gross irrationality,

without being impeded from doing so by the state. Paternalistic restrictions only apply in a few rare cases. Any conscious interference with a person's physical integrity by the state therefore always needs very good reasons; as a consequence, any mandatory vaccination is subject to a high burden of justification.

However, the right to self-determination of one's own body is not absolute. One's personal negligence, unreasonableness or also highly risky behaviour may not lead to a situation where others might be substantially harmed. Since just like the freedom of one person must be in tune with the liberties of others, the physical self-determination and integrity of others must equally be considered. This holds all the more true in a pandemic. A highly contagious virus not only affects those who do not want to get vaccinated, but also those who – without having a choice or being able to defend themselves – might suffer health impairments or physical damage by getting (re)infected. This is also the case if people cannot be medically treated due to the high incidence of Covid-19, or only at a later point in time, because surgeries have been cancelled and therapies postponed. During a pandemic, the physical integrity of one person is directly connected to the physical integrity of other persons, if it is a matter of getting infected and suffering potentially substantial health hazards. As vaccines are currently available, it is in particular the indirect effects that are relevant now. These effects are the result if the exercise of one's right to physical integrity takes the form of deciding against vaccination, and thus leads to an excessive strain on hospitals and intensive care units as collective effects. This affects everybody who needs (intensive care) treatment, no matter whether they suffer from Covid-19 or something else.

## No-harm and integrity protection

This touches on the ethical principle of no-harm or integrity protection. This principle demands that any possible harm that might result from a measure or intervention under discussion must be carefully anticipated and, as far as possible, be minimised. Included is also potential harm that is caused by the omission of specific measures or interventions, which would have been available and necessary. Potential harm does not only include physical impairments, but any factors that significantly worsen the life situation of a person or a group of persons. For example, effects on psychosocial conditions, on the material situation, on the access to education and sports, leisure or cultural activities, on the inclusion into the community need to be mentioned here. Insofar it must be clarified and



ultimately assessed to what extent a mandatory vaccination policy is suitable to avert such negative consequences on health or on society. At the same time it must be verified whether by a compulsory interference with the physical integrity of people who do not want to get vaccinated – i.e., against these people's reservations or convictions – harm is caused that cannot be justified. The principle of no-harm and integrity protection requires a positive benefit-risk-ratio when evaluating potential harm, with potential benefits clearly outweighing potential harm.

### Justice and equality before the law

In such deliberations, the ethical principle of justice and the fundamental equality before the law play a crucial role. Every debate on justice in ethics indisputably has an international dimension to it, which results from this debate's genuinely universalistic claim. In the pandemic, this dimension is particularly visible in the problem of the global distribution of the vaccines. However, in the national context that is primarily being discussed here, the following controversy is of vital interest: While some people consider the introduction of a general mandatory vaccination policy as urgently required for reasons of justice, others clearly exclude such a general vaccination mandate – also for reasons of justice. The latter hold the opinion, that not everybody concerned can reasonably be expected to bear the consequences linked to such a step, or that new injustices could arise.

Those who consider it fair to introduce a mandatory vaccination policy primarily point out the problem of access to adequate health care in cases of acute medical treatment needs. In the course of the current pandemic, important clinical treatment capacities are used to care for non-vaccinated Covid-19 patients. Apart from these actual cases, additional resources are reserved for further patients with Covid-19 infections. Consequently, persons who for other reasons are in need of treatment have to accept considerable deficits in medical treatment and care. This is a manifestation of a serious problem of distributive justice, which is even more severe since the excessive strain on hospitals could have been avoided, at least in part, by means of a timely vaccination of the Covid-19 patients. It is a fundamental requirement of justice that all people with an equal need for treatment have the same prospect of adequate medical care, independent of the nature of their health problem.<sup>21</sup> Given the

large number of Covid-19 cases, that could partly have been avoided, this could not or cannot be fully guaranteed in all phases of the pandemic. In the end, a lot of people in need of medical treatment have to bear the burden, sometimes heavy, which is the result of other people's decision not to get vaccinated.

For these reasons, appropriate measures must be taken in order to avoid situations of excessive strain where the treatment of certain patient groups is postponed because their need for treatment seems less urgent. Otherwise, the impression might arise that in the emergency situation of a pandemic, persons who have rejected their opportunity to benefit from the effective means of preventative health protection that has been offered to them would be given preference over persons who due to their particular kind of disease did not have this opportunity.

Another problem is the assessment of the consequences of a mandatory vaccination policy under aspects of legal justice. Justice and equality before the law require equal liberties for everybody, but also equal rights with regard to an unimpaired – as far as possible – life (and health) situation. However, an undifferentiated equal treatment is not imperative, neither for constitutional standards nor for moral reasons. This is why specific risk profiles of different population groups must be considered, especially if these groups cause different burdens for the health system. This would have consequences for the design of a possible mandatory vaccination policy, too. Even if some people subjectively feel that they bear a particularly high burden due to a mandatory vaccination policy, or that they are even subject to a certain social stigmatisation, the extent of the objective physical burden of a vaccination is the same for everybody. Moreover, this burden weighs less heavily than the massive health risks that a lot of people are facing due to a temporary overload of the health system resulting from a high number of non-vaccinated Covid-19 patients in need of treatment that could have been avoided. Against this background it would be reasonable, also with a view to the demands of equality before the law, to require all persons subject to mandatory vaccination to comply with the legal standard, and to legally sanction behaviour that is in breach of one's duties. Nevertheless, it must be considered that the vaccination may have quite differing consequences with regard to the degree of protecting oneself and others, depending on the risk profile.

In addition, it has been demanded again and again during the pandemic that the burdens must be quite evenly or fairly distributed, at least on a medium- and

<sup>21</sup> Against this background, the general prioritisation of Covid-19 patients against other persons, which could occasionally be observed at the beginning of the crisis, was problematic.

long-term basis. When setting aside one's own interests for reasons of solidarity, sometimes even over an extended period of time, it seems quite natural to assume that those who have initially and justly been preferred will later show their good will in other situations. For example, for a long time young people have shown consideration for especially vulnerable persons and have accepted restrictions. In return, they should at least be allowed to hope that those people will protect themselves as soon as appropriate means are available, in order to relieve stress from the health system and thus make measures that limit everybody's freedom dispensable.

### **Solidarity**

The principle of justice moreover legitimises an unequal treatment of persons whose situations are essentially different. This applies first and foremost to (groups of) persons who either directly bear the risk of a severe or fatal Covid-19 disease course or who indirectly face considerable impairments due to the pandemic. From an ethical perspective, the needs and interests of the weakest and most vulnerable groups need special attention. In this context, the ethical principle of solidarity becomes increasingly important. Solidarity is the willingness to set aside one's own legitimate claims in favour of those of other people or of the common good, at least temporarily. During the pandemic, such solidarity could be seen in the high willingness to accept restrictions of one's freedom without an immediate personal benefit. With regard to the vaccination, solidarity becomes visible if people get vaccinated in spite of their own reservations and/or without the expectation of a major personal benefit, in order to promote a high level of immunity among the population and therefore the protection of many other people. This solidarity may possibly be exercised in the awareness that a high vaccination coverage is an indispensable/crucial contribution for moving to a controlled endemic situation. In that sense, the willingness to show solidarity by those people who are affected particularly hard by the restrictions imposed because of the pandemic might be stretched too far through the unwillingness of a few to get vaccinated.

### **Sustainability and responsibility for consequences**

Another decisive point is the confidence that the tools used to fight the pandemic, among them the general mandatory vaccination, can viably guarantee that the pandemic can be contained, or at least make such a containment reasonably feasible. The principle

of sustainability is therefore important for an ethical assessment. In a situation of dynamic uncertainty, it is necessary that even now, in parallel with the urgency measures of the current crisis, sufficient precautions are being taken against possible or foreseeable further waves of infection. So far, response to the development of the pandemic was mainly reactive. Many measures were taken too late to prevent or at least attenuate further waves of infection. A general mandatory vaccination would not be intended to break the current fourth wave. However, it may be an effective tool in the medium-term to contain subsequent waves, and suitable to sustainably establish a controllable endemic situation.

Closely connected is the principle of responsibility for the consequences, which requires an assessment and evaluation of the intended consequences and the undesired collateral effects of any measure. In view of the introduction and enforcement of a general mandatory vaccination policy, effects like a possible (further) radicalisation of some of those people who are unwilling or sceptical to get vaccinated must also be considered. These effects must be weighed against the effects that the omission of decisive action could have on large parts of the population. Such deliberations go beyond a purely ethical assessment, since they depend to a great extent from an appraisal of the actual political situation. They are therefore genuine tasks of political actors in legislation and executive. They must be ethically responsible, but will be decided at a political level.

### **Specific arguments**

From the application of these principles and various practical considerations, a number of specific arguments can be derived in favour of and against a general mandatory vaccination policy. In the following section, argumentation patterns are taken up that are present in the current discussion and that are particularly relevant from an ethical perspective. In this way, the transparency that is necessary for a normative discussion shall be established, and the complexity of the problems adequately acknowledged.

### **Arguments against general mandatory vaccination**

*Disproportionate interference with personal liberty and physical integrity?*

The most important argument that is brought to bear against a general mandatory vaccination policy concerns the question of proportionality. A general

mandatory vaccination policy is considered as a strong interference with one's personal freedom, the right to self-determination and one's physical integrity, and as such might affect human dignity. Opponents of a mandatory vaccination policy hold the opinion that such an interference cannot be justified when assessing empirical as well as constitutional and ethical aspects.

*Not a suitable or a necessary instrument?*

From that point of view, a general mandatory vaccination policy does seem to be neither a suitable nor a necessary instrument for bringing about a controlled endemic situation. In order to avoid an excessive strain on the health system and to achieve overall control of the pandemic, alternative instruments like tests or controlling people's vaccination status, convalescence or test results would be available as suitable means. Opponents claim that up until now, not all of the more lenient tools available to contain the pandemic have been exploited. Notably, it would be worth considering means for increasing the level of voluntary vaccination that have been particularly successfully employed in other European countries (especially personal dialogue, making individual appointments for vaccinations, etc.). It has also been argued that new antiviral medication against Covid-19, if it is administered in the first few days of the infection, could protect patients from a severe course and therefore help to prevent an excessive strain on the health system.

The idea that a mandatory vaccination policy is suited to relieve strain from the health system is also challenged because under the conditions of the Delta variant, the effect of protecting others through the prevention of an infectiousness of vaccinated persons was less marked than had been hoped. What is more, in the face of new variants like Omicron, the effectiveness of the vaccines with regard to their protection from severe courses of infection should be monitored further. Up until a possibly necessary adaptation, only the vaccination with the available vaccines could be considered, which might be less effective against Omicron.

Moreover, it is claimed that the risks caused by the SARS-CoV-2 pathogen are clearly stratified for various vulnerability limits. For example, the risks for a severe or fatal course of the disease were particularly high for the very elderly and for people with certain pre-existing medical conditions, at least for the virus variants identified so far. In addition, these persons also required intensive medical care a lot more

frequently than younger, healthy people. According to the Intensive Care Availability Register of the Deutsche Interdisziplinäre Vereinigung für Intensiv- und Notfallmedizin (German Interdisciplinary Association for Intensive and Emergency Medicine), people of over sixty years of age (61.1 percent) or over fifty years of age (83.1 percent) account by far for the largest part of Covid-19 patients requiring intensive care. In Germany, currently more than three million people over the age of sixty have not been vaccinated.<sup>22</sup> It would be obvious that this fact has considerable potential to be a burden for the health system. At the same time, it would become clear how important it is for all citizens to protect these people from infection – only if a protection of the elderly population was achieved, a stable health care situation for all people in Germany would be guaranteed. And specific measures targeting those groups of society who represent a particularly severe threat to the health system because of their high health risks would be more lenient than undifferentiated measures targeting everybody.

*Inappropriate and not reasonable?*

It has further been argued that a mandatory vaccination policy would lead to inadequate or unreasonable constraints. At an individual level, this applies mainly to the fear of complications that might go beyond expectable vaccination reactions and only appear at a later point in time, as well as the unreasonable demand to have to undergo vaccination in spite of such fears and reservations. What would be preponderate in this context was that it might only be possible to successfully fight the pandemic by means of a mandatory vaccination policy if several booster vaccinations were also given, whose number could not be specified at the time of introducing a mandatory vaccination policy. This holds true given the decrease in immune protection over time for both vaccinated and convalescent persons. It means that possibly several involuntary interferences with one's physical integrity might be necessary. Also at the social or political level problematic consequences might arise, if statistically improbable undesired side effects of the vaccination (like for example a myocarditis) occur. In this case, the group of vaccination opponents might increase further, or they might become more radical.

The appropriateness of a general mandatory vaccination policy is also being challenged because the vaccines that are currently available offer less effective protection from a severe course of the disease

<sup>22</sup> <https://www.intensivregister.de/#/aktuelle-lage/altersstruktur> [last updated: 2021-12-20, 2 pm].

than has been originally expected, given the Delta variant that is (yet) dominant in Germany. Future variants might further reinforce this effect. This gives rise to the fear that even with the help of a general mandatory vaccination policy no significant relief for the intensive care units could be achieved, at least until the vaccines have been adapted, and that therefore further protective measures going beyond mandatory vaccination and restricting personal liberties may have to remain in force for everybody. Taken together, these would be factors of uncertainty of high importance. Compared to the severity of the intervention that goes along with a general mandatory vaccination, these factors would disprove that the measure is appropriate, at least if it is not restricted to persons who derive a high personal benefit from the vaccinations because they belong to one of the acknowledged risk groups.

*Stigmatisation of involuntarily non-vaccinated persons?*

There are people who cannot or should not get vaccinated, for example if they have allergies against ingredients of vaccines, or if they have a medical history of strong reactions to vaccinations themselves or in their parentage. People with mental problems must be considered, too. It would be possible to exclude them from a mandatory vaccination policy. Nevertheless, the introduction of such a statutory duty could carry the danger of compromising and discriminating these people, because they would be in an exceptional position which they would need to prove. In the context of a general mandatory vaccination policy, a clear limit would have to be set to define who should or could not be vaccinated. Drawing such lines would be a challenge, especially with a view to clarifying whether apart from physical reasons, psychological reasons or reasons of personal conviction might also justify exceptions.

*Difficulties in the implementation and enforcement?*

A further objection against a general mandatory vaccination policy is based on the argument that it might be very hard to implement in liberal-democratic constitutional states, or could only be enforced by means that are difficult to justify. This refers to various forms of coercion when enforcing the measure (see p. 15 ff.). In addition, given the high number of convinced vaccination refusers, a large number of legal proceedings would have to be expected that would engage the authorities for many years. The ensuing risk of long-lasting court proceedings might give rise to the impression among the public

that the state was unable to cope with the pandemic. Deficits in the implementation might also increasingly give rise to reproaches of inconsistency and incompetence, as well as to populism, and reinforce the disenchantment with politics, at least in parts of the population.

*Possible negative consequences for society?*

A number of further reservations refer to possible adverse consequences of a general mandatory vaccination policy on society. There is concern that it might signify the beginning of a growing (health) political paternalism. Some people fear that there might be a tendency to expand such policies, e.g., by applying the arguments for a mandatory vaccination policy to other types of vaccines, or to situations other than a pandemic crisis. This also includes the risk of a normalising effect, which might give rise to expectations on the part of citizens that the state should protect them from evermore health risks which used to be assumed to be part of everybody's personal responsibility. With a view to the general way of dealing with the pandemic, and particularly with regard to the introduction of a mandatory vaccination policy, fears exist that risk aversion might rise to higher levels than seem desirable in a liberal society. Also highlighted are possible negative effects on the citizens' responsible participation, which might be undermined by a mandatory vaccination policy. For example, such a policy would make it impossible to voluntarily decide to get vaccinated for reasons of solidarity. Negative consequences on grasping the necessity of one's responsible engagement with prevention and health might also be feasible, especially in so-called risk groups, for whom such an insight would be particularly important. A mandatory vaccination policy could even contravene efforts to contain the pandemic by fostering a false sense of safety and favouring risky behaviour on the part of vaccinated persons. Such effects would diminish the effectiveness of the measure as an instrument to fight the pandemic. Moreover, the introduction of a mandatory vaccination policy after having previously excluded it categorically is said to have caused a loss of trust among the population. However, it is the trust in the agents and institutions in politics, medicine and health that is fundamental for people to consent to getting vaccinated.

What is more, there is fear of an increasing political escalation. A mandatory vaccination policy might further polarise people, especially in regions with low vaccination coverage. The infringement of



a high legally protected right might further radicalise some of the convinced vaccination opponents, who already at this stage are prepared to use violence, and induce them to perilous actions. Social-psychological research yields evidence that a mandatory vaccination policy might face opposition by certain groups.<sup>23</sup> It might therefore further reinforce the defence reactions, sometimes violent, against various measures to combat Covid-19 that are noticeable even today in some regions.

#### *Promotion of criminal behaviour?*

Currently, about two thirds of the population are in favour of a general mandatory vaccination policy.<sup>24</sup> At the same time, there is a considerable number of people who do not want to get vaccinated on any terms. Also, the falsification, the trade and the use of false vaccination certificates have increased drastically after the introduction of the regulation requiring proof of vaccination or convalescence to access certain services. Due to a recent amendment of the law, substantial penalties will apply for such behaviour in the future. There is reason to fear that the number of criminal acts to avoid being vaccinated would again rise considerably if a mandatory vaccination policy was introduced. In that case, hitherto blameless people would be driven to commit crimes. Especially the long-term consequences of such a development might be grave: A considerable number of people might turn their back on the state, and this would have erosive effects on a democratic society.

#### *Global perspective?*

Finally, it is being argued with regard to a mandatory vaccination policy that the assumption to be able to drastically change the development of the pandemic by means of a national solo effort in a globalised world is rather naive. Also, it would use up a large number of doses of vaccine, not least because of necessary booster vaccinations. These vaccines would therefore be denied to the many societies and countries in need of them, especially in the global south, at least for the time being. This would exacerbate global injustice. It would be more expedient to focus on the provision of vaccines to people who are willing to get vaccinated in regions of the world that are short of supplies, instead of people who are unwilling to get vaccinated in regions where the needs of those who want to get vaccinated have already been met.

#### **Arguments in favour of general mandatory vaccination**

##### *Proportionate interference with physical self-determination and integrity?*

From a supportive perspective, it has been constitutionally and ethically acknowledged that a general mandatory vaccination statute is doubtless a grave interference with one's personal freedom, the fundamental right to physical integrity and the right to physical self-determination, which also affects aspects of human dignity. Nevertheless, such a statute is considered as suitable in the current situation, and regarded as necessary, given the lack of more lenient but equally effective alternatives. It is also rated as appropriate and reasonable for everybody, and therefore appraised as being proportionate overall. There would be no primacy of physical integrity over other rights and liberties, and physical integrity may therefore be restricted, albeit only for very good reasons. The aspect of dignity in relation with an interference with one's physical integrity would not be affected, at least not if the purpose is not exclusively to protect others, and if only persons with the capacity to consent are affected. At the same time, it would have been proved by now, due to the huge number of vaccinations without complications and the very rare severe side effects (especially compared to an infection with the virus), that it is not a grave interference, not even with the new vaccines. Major undesirable side effects could be expected to be extremely rare, especially in the case of mRNA vaccines. In particular the cases of myocarditis mentioned above would be easy to treat and would occur a lot more frequently in the case of an infection with the SARS-CoV-2 virus, than in the case of a vaccination. Correspondingly, the overall low personal risk would be substantiated by the fact that the vaccines were very well-tested, monitored and well-tolerated. According to scientific consensus, future risks, which may occur as late as several years after the vaccination and might therefore not be known today (so-called long-term effects), are not to be expected. The ingredients of the vaccines in use remain in the human body for a short time only. While this is sufficient to trigger a sustainable immune response, there are no known physiological mechanisms that might cause undesirable effects with a delay of several years. With regard to short- and medium-term effects, reference is being made to the positive experience with over 8.7 billion doses of vaccine<sup>25</sup> that have so far been administered all over the world.

<sup>23</sup> Betsch/Böhm 2016.

<sup>24</sup> infratest dimap 2021; YouGov Deutschland 2021.

<sup>25</sup> <https://ourworldindata.org/covid-vaccinations> [last updated: 2021-12-20, 6:50 pm].



*Suitability for reducing risks and threat level?*

Those in favour of mandatory vaccination highlight that with the Delta variant and possible further, even more contagious variants, a clearly higher vaccination coverage will be required in order to control the pandemic and avoid excessive strain on the health system. This would be the reason why a general mandatory vaccination statute is necessary today. With regard to the requirement of being necessary, but also suitable and effective, the known individual data on the effectiveness of the vaccines and the obvious relationship between regional vaccination coverage and regional overburdening of the health system is pointed out, as well as the considerable, way above average portion of non-vaccinated Covid-19 patients in intensive care units. The excessive strain on intensive care units would not only cause a precarious shortage of medical services for non-vaccinated persons, but also for vaccinated persons, and potentially for everybody in need of (intensive) medical care. Vaccinated persons would be subject to a largely avoidable risk; not only due to the indirect effects of an overburdened health system, but also due to the large number of infections leading to health impairments and to social and other restrictions. Again, the long-term consequences of a Covid-19 infection, such as long Covid<sup>26</sup>, would need to be considered here, which may constitute a burden for the health system even beyond the current situation of urgency.

Even if the crisis in which Germany currently finds itself could not be directly averted by means of a mandatory vaccination policy, it is stressed that such a policy is suited to prevent future emergency situations, for example with a view to further waves of infection due to the seasonal decrease in immunity, or variants like Omicron. Especially if the quality of immune protection was to decrease, it would be important to fully exploit immune protection quantitatively by achieving as high vaccination rates as possible. This is all the more true since some of the currently available antiviral medications (e.g., monoclonal antibodies) seem to be less or not at all effective against the Omicron variant. This would also be the only way to protect those people who have an immune deficiency or who should not get vaccinated for medical reasons.

Very high vaccination coverage rates would also be required to reduce the risk of the development of new dangerous virus variants. The overall number of infected people, and the amount of time during which

the virus can mutate in their bodies and be passed on to others, are decisive for the level of this risk. Firstly, the number of infected persons is reduced through vaccination. Secondly, the time during which the virus is active in the body of those who get infected in spite of being vaccinated is shorter, because they react with a stronger immune response to the infection. This is why the vaccination of the largest possible number of people would be the only way to sustainably prevent the development and propagation of virus variants.

*Positive record regarding freedom?*

It is also argued that the issue is essentially a matter of weighing up the protection of individual people from interferences with their physical integrity against the common good (in the form of safeguarding the rights and interests of all people). The latter would not only include health protection and the protection against infection, but also preserving the integrity of different areas of society, such as education, economy, catering, culture, etc. The freedom of the individual to decide for or against vaccination would have to be contrasted with public welfare as an indispensable basis for the freedom of all individuals. If the pandemic could not be brought under control, individual as well as collective liberties would have to remain subject to restrictions. When weighing up the respect for the individual freedom of those who do not want to get vaccinated and the respect for the individual and collective liberties of vaccinated people, the scales would increasingly tip towards the latter. From this point of view, a general mandatory vaccination policy on balance would lead to a positive result for freedom, both individually and collectively.

*Fair distribution of burdens?*

Another argument in favour of a general mandatory vaccination statute refers to the importance to prevent excessive strain on the health system. Vaccinated persons, who are treated later or not at all, because the high number of Covid-19 patients overburdens institutions of the health system, would face negative health effects and damages, some of them life-threatening. Moreover, it would be important in a pandemic crisis to limit future burdens on society in the form of repeated restrictions due to protective measures. The negative sequelae of such measures, some of them severe, would not only affect the economic, psychological and social situation of many people, but also the social areas mentioned above. In this context, the immense burden on children and adolescents would

need to be highlighted, whose right to education is massively impaired if the respective institutions are closed or restricted. In addition, their personal development would be compromised because of contact restrictions and closure of sports and leisure facilities. Although a general mandatory vaccination could not immediately put an end to the pandemic, the aim of a far-reaching restoration of social, cultural and economic normality and the prevention of recurring restrictions on social life would have a high ethical relevance.

Compared to these burdens, the individual risks associated with the already well-examined available vaccines seem low overall. The aspect of dignity would not only have to be taken into account with regard to the interference with the physical integrity of those obliged to get vaccinated, but also with regard to those who are subject to avoidable health hazards or even damages against their will. On the one hand, alternative means to fight the pandemic which might be further exploited – such as ever stricter regulations requiring proof of vaccination or convalescence and additional testing to access certain services – would be less effective, because they do not offer direct protection or can be bypassed relatively easily. On the other hand, they would again represent a burden for both non-vaccinated and vaccinated people, and would have an increasingly negative, polarising effect on the social situation. Even more far-reaching instruments like contact restrictions, lockdowns, etc. are known to have sequelae some of which may be dramatic. It is also pointed out that by now every adult in Germany has had the opportunity to voluntarily get vaccinated free of charge for several months. Even if there have been numerous avoidable obstacles in the German vaccination campaign (see above), it was nevertheless possible during the past months to get vaccinated at many locations. When assessing the appropriateness of a mandatory vaccination policy, it is further underlined that the protective measures and restrictions on fundamental rights would be less and less appropriate for vaccinated people. The lower the risk of a vaccination was proven to be, the more appropriate would be the introduction of a mandatory vaccination policy.

#### *Potential positive consequences?*

A number of further arguments in favour of a general mandatory vaccination policy refers to the positive consequences if it were to be introduced. For example, it is assumed that the willingness among the population to adhere to the law would induce a considerable share of the vaccination sceptics to get vaccinated

without major conflicts. There are also hints from social-psychological research that such an obligation by law might offer to some self-declared vaccination refusers an inner reason, a signal or a kind of permission to get vaccinated after all. A general mandatory vaccination policy might also be a welcome way out of the dilemma for people who are personally willing to get vaccinated, but live in an environment of vaccine hesitancy.

From the point of view of democratic theory, it can be argued, also on the basis of historical examples, that legal obligations can have a pacifying effect and would rather calm current social conflicts than escalate them – also because no further moral and/or social pressure would have to be exerted in the future, since the legal obligation would suffice. By focusing on the willingness to adhere to the law rather than on individual morals, citizens could have good reasons to hold different opinions, while the same legal regulations apply to all. In this way, a mandatory vaccination policy might have positive effects against the growing polarisation and the atmosphere of threat and distrust that is sometimes felt. A well-balanced introduction of a general mandatory vaccination policy might also be perceived as the authorities' assumption of political responsibility and as a proof of the state's capacity to act. The decision to objectively re-evaluate the exclusion of certain measures in the face of significantly changed circumstances may enhance the trust in politicians and their decisions, which is indispensable for living together in a democracy. Last but not least, a mandatory vaccination policy would be endorsed by a majority of the population by now. A year ago, only one third of the population were in favour of a general mandatory vaccination policy. Now the scales have tipped, and a significant majority supports it.<sup>27</sup>

### **Practical issues regarding implementation**

Independent of the question whether or with what design a mandatory vaccination policy is regarded as legitimate or even necessary, the consequences of such a decision must be deliberated and openly communicated. There needs to be clarity about the requirements and limits of its implementation.

#### **Acceptance of legal standards**

Experience since March 2020 has shown that there is a generally high willingness among the population to

<sup>27</sup> infratest dimap 2021; YouGov Deutschland 2021.

support or to go along with the measures to contain/ combat the pandemic. This is based on the insight, shared by most people, in spite of some understandable criticism regarding details, that the measures are reasonable and necessary, if and insofar as their design and application are proportionate. Also, and especially during the pandemic, the substantial willingness to comply with legal standards (law abidance) is a crucial resource to effectively guarantee the binding character of the law. Since the measures to combat the pandemic affect a large majority of the population, a high willingness to co-operate is indispensable. A nationwide forced implementation of orders and bans is therefore out of the question, also for practical reasons, and given the strong compliance with legal standards, it is not necessary in the first place. Nevertheless, it cannot be ruled out that not all addressees will comply with a general mandatory vaccination statute. In this case, measures must be available that promote abidance by the statute.

#### **Safeguarding effective application of a mandatory vaccination policy**

The mandatory vaccination policy represents a legally prescribed obligation to get vaccinated. Its enforcement includes measures that should guarantee the effective application of a mandatory vaccination statute, and that react to non-compliance with various intensity. The practical implementation brings up numerous legal and administrative questions that may not be trivialised. A mandatory vaccination policy is only worthwhile if it can be implemented effectively. This means that a mandatory vaccination policy is subject to the proviso of its practical implementability. This includes the lasting and sufficient availability of vaccines as a factual precondition. If there is a lack of vaccines, not only the legitimacy of the mandatory vaccination policy itself would be questioned, but especially the legitimacy of using sovereign power for its enforcement. The legislator must bear the political responsibility for a differentiated assessment of the possibilities and limitations regarding the enforceability of a mandatory vaccination policy if it is not complied with. The legislator ought not content itself with the claim that the enforcement by the use of sovereign power would “actually” be unproblematic, or would have only marginal importance, because this is not the case.

Compliance with mandatory vaccination statutes that have been introduced so far (mandatory vaccination against measles, institution-related mandatory vaccination) can be guaranteed by means of fines, for

example. In some cases, other means of coercion in the context of administrative enforcement are feasible, especially penalty payments. The question as to which instruments are reasonable essentially depends on the specific design of the mandatory vaccination policy. In the face of the legally protected interests at stake, the legislator strictly must observe the principle of proportionality at all times, which also strictly applies to every individual imposition of sanctions. Particularly the enforcement of a mandatory vaccination policy by means of physical force (“forced vaccination”) is problematic and should therefore be excluded.

The effective application of a mandatory vaccination policy also requires that there is clarity with regard to other legal consequences of non-compliance with the mandatory vaccination policy, especially in labour law. This is required by the freedom of occupation that is protected by basic law, which demands that both employers and employees must not be subject to legal uncertainty. This would also lead to a loss of effectiveness in the application of a mandatory vaccination policy.

#### **Exceptions from mandatory vaccination**

With regard to the effective application of a mandatory vaccination policy the question needs to be answered whether and to what extent individuals can be exempted from such a statute. Cases of medical contraindications, especially those of vaccine intolerance, are provided for other mandatory vaccination policies, too, for example the institution-related mandatory vaccination against Covid-19 and the mandatory vaccination against measles. The legislator should make sure that there is a consensus on cases of medical contraindications. The Robert Koch Institute, the Paul Ehrlich Institute and the STIKO can contribute to reaching such a consensus. In this context it should also be clarified whether there might be psychological contraindications, or whether cases may be acknowledged where a vaccination is subjectively unacceptable (for example, if the partner or a family member is a recognised case of severe vaccine damage, even if that damage is not due to the vaccination against Covid-19, but another vaccination; or if an anxiety disorder exists with regard to vaccinations). It is self-evident that such exceptions from a general mandatory vaccination statute can only be restrictively recognised. Otherwise, the aim of the mandatory vaccination policy would be undermined. Moreover, the legislator should define criteria for medical certificates in line with the established standards of

jurisprudence that must be met if a medical contraindication is to be recognised (e.g., notification to the competent health authorities with a proviso to verify the certificate, maybe also an authorisation for specific registered physicians to issue such certificates, like in the procedure for the recognition of occupational accidents).

## Recommendations

The German Ethics Council emphasises that high vaccination rates are decisive in order to achieve a controlled endemic situation. On the basis of the ethical and legal arguments and conditions presented above, the Council recommends, with four dissenting votes, to expand the mandatory vaccination policy beyond the currently existing institution-related statute.<sup>28</sup>

An expansion of the mandatory vaccination policy must go along with a number of measures. Care must be taken to ensure a nationwide infrastructure (vaccination centres, medical practices, pharmacies, company doctors, mobile vaccination teams, etc.) with a large number of low-threshold vaccination offers, and to sustainably provide sufficient doses of vaccine. As far as possible, there should be the opportunity to choose the type of vaccine. It is recommended to directly invite persons obliged to get vaccinated and offer them personal vaccination appointments. The German Ethics Council further recommends to set up a secure national vaccination register, which would make it overall easier to implement mandatory vaccination statutes, and also to keep vaccination appointments.

The call to get vaccinated should be linked to a comprehensive, low-threshold counselling offer. In doing so, it is indispensable to maintain an appreciative and caring communication. A mandatory vaccination policy must be accompanied by target group-oriented, culturally sensitive, multilingual and easily understandable information, also via social media. Local communities, religious communities, charities and other non-profit organisations should be involved in an appropriate manner. The political actors and public authorities should deliberately counter existing social discord, in order to dissolve confrontations between vaccinated and non-vaccinated people. Preparatory and accompanying studies on the causes of low vaccination coverage should foster the improvement of the vaccination and communication

strategies. Continuous evaluation and accompanying research are recommended.

Even if a majority of the German Ethics Council endorses an expansion of the mandatory vaccination policy to large parts of the population, opinions differ with regard to the scope.

### Position 1

Seven of 20 members of the German Ethics Council hold the opinion that it is reasonable to extend the existing institution-related mandatory vaccination statute to a vaccine mandate that is stratified according to the respective risks and is restricted to adults who are particularly vulnerable with regard to Covid-19 (like the elderly or persons with pre-existing medical conditions). The definition of the groups of persons that should be included is based on the aim to avoid excessive strain on the health system, and especially on intensive care units.

#### *Reasons:*

It is a fundamental ethical principle that in order to achieve an aim, the most lenient effective means must be employed. Especially an expansion of the institution-related mandatory vaccination statute is connected with a number of uncertainties and implementation challenges (see above), which need to be clarified in advance. This is an argument in favour of a restriction of a mandatory vaccination policy to certain age and risk groups, instead of introducing it indiscriminately for all adults.

The consistent implementation of such a restricted mandatory vaccination policy seems to be sufficient to reach the target of avoiding a collapse of the health system. Infected people of an advanced age and/or suffering from certain pre-existing medical conditions are affected by a severe course of disease a lot more often than others, and their hospitalisation rates are distinctly higher. To prevent a collapse of the health system, their protection is therefore more crucial, since they require inpatient treatment and intensive medical therapies most frequently. For example, there is in fact still a vaccination gap of over three million people aged sixty and over. Only if particularly vulnerable groups are sufficiently protected, burdens for other people resulting from cancelled treatments for other diseases etc. can be avoided.

It also seems proportionate to oblige particularly vulnerable people to get vaccinated. Since the elderly and persons belonging to risk groups have an individually increased risk to require intensive care, a vaccination brings them a very high personal benefit.

<sup>28</sup> Of the currently 24 Council members, 20 have consented to the Ad Hoc Recommendation, four have rejected it. There were no abstentions.



For this reason, it seems more acceptable to oblige them to get vaccinated. Given this increased benefit of a vaccination against Covid-19 for these persons themselves, possible adverse effects carry less weight.

Restricting a mandatory vaccination policy on parts of the population whose health hazards are particularly severe may also be seen as a contribution to justice and solidarity. For as long as there were no vaccines available, less jeopardised parts of the population showed a high degree of solidarity towards more vulnerable groups of society by accepting restrictions of their liberties that were sometimes drastic and long-lasting. Since effective possibilities for self-protection are available now, they may expect that vulnerable persons get vaccinated in order to prevent further lasting restrictions of freedom, and that they, as less vulnerable persons, are not themselves subjected to a vaccine mandate all the same.

Before extending a mandatory vaccination policy to large parts of the population, the public authorities must first do everything to implement the more limited, institution-related mandatory vaccination statute that will be in force by then. If the state fails to fulfil its duties in this respect, this by itself offers no reason to extend the mandatory vaccination policy to further groups of persons. Fully exploiting more lenient available means at first does not only correspond to the principle of proportionality, but may also counteract social tensions.

Although the specific implementation of a risk-stratified mandatory vaccination policy is known to be challenging with regard to an adequate differentiation of the corresponding risk groups, and although this policy may have to be adjusted as the pandemic progresses, such a stratified approach is being supported by the arguments mentioned above.

#### **Position 2**

Thirteen of 20 members of the German Ethics Council support the expansion of the mandatory vaccination statute that has already been incorporated into law to a general vaccine mandate that covers all adults over the age of 18 living in Germany who are eligible for a vaccination.

#### *Reasons:*

This proposal of a general mandatory vaccination policy including everybody over 18 years of age is geared towards the aim of containing the pandemic in a sustainable, lasting and just manner, i.e., reaching a controlled endemic situation. To achieve this aim it is not sufficient to pursue the step-by-step

approach of a risk-stratified mandatory vaccination policy. Such a strategy would always lag behind the waves of the pandemic and add to the threat of a constant recurrence of contact restrictions of all kinds, which would make especially children, adolescents and young adults suffer. A general mandatory vaccination policy is therefore not only in the interest of vulnerable groups, but also in the interest of the young generation.

A stratification of the mandatory vaccination policy according to risk groups would cause further practical, as well as ethical secondary problems. First of all, it is difficult to reasonably differentiate the risk groups, since apart from age, various further risk factors need to be considered. Moreover, it has become evident that a prioritisation can lead to time delays. And last but not least, a risk stratification can also be unjust, because legal delimitations always show elements of arbitrariness, and may lead to stigmatisations and other social conflicts.

Moreover, independent of excessive strains on the health system and the people employed in this field, a sustainable and just containment of the pandemic also requires that those persons are protected, who either cannot get vaccinated or to whom the vaccination does not offer reliable protection against severe or fatal courses of disease. A containment of the overall occurrence of infections also contributes to reducing the high number of long-term health impairments like long and post Covid. In view of the high contagiousness of the Delta variant, and even more of the Omicron variant, a very high vaccination coverage within the total population is therefore required. This cannot be achieved without the inclusion of younger adults into a general mandatory vaccination policy. Moreover, very high vaccination coverage rates are also required to reduce the risk of the development of new, dangerous virus variants.

The concerns regarding a division of society must be taken seriously. This is exactly why it must also be taken into account that the repeated re-introduction of restrictions and the continuing discussions about them exacerbate the polarisation within society. Even more important is it to engage in dialogue with vaccination-sceptics, in order to promote the willingness to get vaccinated voluntarily. And it is just as vital to frame the general mandatory vaccination statute such that it reduces polarisations as far as possible.



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## CONTACT

German Ethics Council

Jägerstraße 22/23

D-10117 Berlin

Phone: +49 30 20370-242

Fax: +49 30 20370-252

Email: [kontakt@ethikrat.org](mailto:kontakt@ethikrat.org)

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