The Triage-Gesetz, a *Selektionsgesetz* for Germany. Some brief reflections on who governs the choices and the limits of law

di Michaela Giorgianni

Abstract: *La Triage-Gesetz, una Selektionsgesetz per la Germania. Alcune brevi riflessioni su chi governa le scelte e sui limiti del diritto* – In Germany, the Bundestag passed the Triage-Gesetz, thus meeting the demands of the Bundesverfassungsgericht on the distribution of scarce health care resources in times of pandemic and the risks of discrimination against persons with disabilities. However, it has not been able to find solutions that could be considered conform with constitutional values. All this leads to reflections on the role of the state and its relationship to the market, as well as on the limits of law and on (un)avoidable choices.

Keywords: Resource allocation; Discrimination; Triage; German Federal Constitutional Court.

1. Distribution of scarce resources and the practice of triage in times of pandemic

In November 2022, the *Bundestag* approved the *Triage-Gesetz*[1], responding to the request of the *Bundesverfassungsgericht*[2] and attempting to resolve the problem of the distribution of scarce health care resources and furthermore to reduce the risks of discrimination against persons with disabilities in emergency situations.

A reflection on the distribution of scarce resources is based on complex bioethical dilemmas and it concerns the limits of the realization of the principle of justice. In safeguarding the fundamental right of life and health care, the debate about the effects of the free market and state intervention, and whether resources should necessarily depend on the economy and its strategies, is ongoing. To discuss the distribution of health resources, moreover, usually implies a shortage of the same, when the demand for medical care exceeds the available resources and a decision must be made how to distribute them. But often the scarcity is not the result of an absolute

[1] Deutscher Bundestag, *Beschlussempfehlung und Bericht des Ausschusses für Gesundheit (14. Ausschuss)*, zu dem Gesetzentwurf der Bundesregierung – Drucksachen 20/3877, 20/3953 - *Entwurf eines Zweiten Gesetzes zur Änderung des Infektionsschutzgesetzes* vom 9. November 2022, Drucksache 20/4359.

[2] BVerfG, 16. Dezember 2021 - 1 BvR 1541/20, in *NJW*, 2022, 380; in *NVwZ*, 2022, 139.

lack of the resource, but rather it is the society which decides and is unwilling to give up other goods and benefits in such amounts as to eliminate shortages[3]. Faced with a deficiency of resources in comparison with needs, decisions arise, in fact, at different levels, in the context of national health policies and within health structures.

Bioethics then attempted to indicate in the abstract the values and criteria governing the various ways of manifesting *triage*. *Triage*, which derives from the French *trier* (to select, sort, order), while originally used to describe the selection of agricultural products, has since been employed in specific health care contexts to denote the dramatic decisions regarding the distribution of a scarce medical resource and the selection of patients by treatment priority in war and disaster medicine scenarios[4]. Exactly such scenarios played out again in many countries around the world during the Covid-19 pandemic, with the increased number of admissions to intensive care and insufficient health care resources available. This emergency has led to difficult political decisions, to heavy personal restrictions and strong limitations of freedom and the violation of fundamental rights. It has been perceived as a «tyrannical health», which «has become the enemy of all our rights; and paradoxically, it has become also the enemy of health itself»[5].

In searching for the ethical foundations of the practice of triage, those theories of justice with mainly egalitarian or utilitarian traits have thus been discussed, in order to be able to answer negatively the question "Should the numbers count?" or rather explain "Why the numbers should (sometimes) count"[6]. In times of pandemic, instead, the debate on the distribution of scarce health resources from a liberal-libertarian perspective, which limits state intervention to leave room for the free market and personal autonomy, was marginal[7]. Consider the political proposal based on *herd immunity*, which is inspired by *laissez-faire* and social Darwinism and achieves the goal of immunizing the "stronger" community at the expense of the "more vulnerable", particularly the elderly, the sick and the poor, necessarily leading to an increase in social and economic inequalities. Not far behind, moreover, it is the utilitarian or consequentialist approach, which, with a view to achieving the greatest benefit for the greatest number of persons, itself leads to serious discrimination, especially against the most fragile[8].Whereas the egalitarian theory, applied to the question of the distribution of scarce resources, recognizes everyone's equal and fair opportunity to access medical care and is based on medical urgency, on the "*first come, first served"* principle and the selection, i.e. "fairer" randomness

[3] G. Calabresi, P. Bobbitt, *Tragic Choices*, New York,1978.
[4] K.V. Iserson, J.C. Moskop, *Triage in Medicine, Part I: Concept, History, and Types*, in *Annals of Emergency Medicine*, 2007, 275 ss.
[5] C. Casonato, *Health at the time of CoViD-19: tyrannical, denied, unequal health*, in *BioLaw Journal*, 2020, 315 ss.
[6] J. M. Taurek, *Should the numbers count*, in *Philos Publ Aff.*, 1977, 293 ss.; G.S. Kavka, *The Numbers Should Count*, in *Philos. Studies*,1979, 285 ss.; J.F. Woodward, *Why the Numbers Count*, in *Southern Journal of Philosophy*,1981, 531 ss.; J.T. Sanders, *Why the Numbers Should Sometimes Count*, in *Philos Publ Aff.*, 1988, 3 ss.
[7] M. Charlesworth, *L'etica della vita. I dilemmi della bioetica in una società liberale*, Roma, 1996.
[8] P. Singer, *Etica pratica*, Napoli,1988.

over any discriminatory choice. The asset "life" must always be protected and there is no life that is more valuable than other lives or more convenient to save[9].

In fact, as Carlo Casonato has well pointed out, «the principle of equality would require to give more time, more attention, more resources, etc. exactly to the most vulnerable patients», whereas according to *triage* "the greater vulnerability, the greater loss". He is pointing out the difference between formal and substantial equality: one «leads to treating everyone equally, without considering the different conditions and states of need»; the other «requires treating different categories in a different and reasonable way, giving more to those who need more»[10].

2. The recommendations of medical associations: the Italian and German experiences compared

More specifically, there has been considerable discussion in Italy on so-called "*ageism*"[11], as discrimination based on age, especially in response to the SIAARTI (Italian Society of Anaesthesia, Analgesia, Resuscitation, and Intensive Care) recommendations of the 6 March 2020. In the guidelines, when faced with an emergency, a derogation from *the first come, first served* chronological criterion or the draw was justified when it was necessary to set an age limit for entry to the ICU. The selection criterion based on age is subsequently contextualized and combined with other elements to refer clearly, though not explicitly, to the utilitarian vision. Access is thus favored to «those who are primarily more likely to survive and secondarily to those who may have the most years of life saved, with a view to maximizing the benefits for the greatest number of persons», emphasizing that «the presence of comorbidities and functional status must be carefully assessed, in addition to age»[12].

Not far from the Italian experience was the situation in Germany. In the absence of regulation, doctors could only find guidance in the recommendations and guidelines of professional associations and the German Ethics Committee. The judges in *Karlsruhe* went through the different opinions expressed by the various professional and trade associations, focusing above all on the recommendations of the DIVI association (*Deutsche Interdisziplinäre Vereinigung für Intensiv- und Notfallmedizin*), which deal with general principles, procedures, and criteria for priority decisions. Priorities are set «not with the intention of valuing persons or lives», but with the aim of ensuring care for the greatest number of patients. The criterion of the «prospect of clinical success» (*klinische Erfolgsaussicht*) is decisive and is defined as «the probability of surviving the

[9] *Un diritto per la pandemia*, a cura di L. Busatta e M. Tomasi, in *BioLaw Journal*, 2020.
[10] C. Casonato, *Health at the time of CoViD-19: tyrannical, denied, unequal health*, cit., 319.
[11] R.N. Butler, *Age-Ism: Another Form of Bigotry*, in *The Gerontologist*, 1969, 243 ss.
[12] SIAARTI, *Raccomandazioni di etica clinica per l'ammissione a trattamenti intensivi e per la loro sospensione, in condizioni eccezionali di squilibrio tra necessità e risorse disponibili*, 6 marzo 2020, in https://www.sicp.it/documenti/altri/2020/03/siaarti-raccomandazioni-di-etica-clinica-per-lammissione-a-trattamenti-intensivi-e-per-la-loro-sospensione/.

current illness through intensive care». Accordingly, those with «a higher probability of survival» will be treated with priority. The list of criteria includes «comorbidities» (*Komorbiditäten*) and «general health condition including frailty» (*Allgemeinzustand einschl. Gebrechlichkeit*)[13]. These criteria are used to evaluate the individual's prospect of success in treatment and constitute negative indicators for low probability of success in intensive care measures.

Well, these recommendations, according to the BVerfG, do not eliminate the "risk of discrimination" and may even become the "gateway" to forms of discrimination of persons with disabilities. They are, by the way, recommendations of a «group of experts» and are «not legally binding». Neither are «synonymous with the medical standard, but they can help to clarify it».

3. The *Bundesverfassungsgericht* rules on the risk of discrimination of persons with disabilities in case of *triage*

This is the background to the *Bundesverfassungsgericht's* ruling of 16 December 2021, which entered the debate on the possible regulation of *triage*, the criteria for the distribution of scarce resources and the risk of discrimination against persons with disabilities. More specifically, it upheld the position of the claimants and ruled that the legislature had violated the duty of protection (*Schutzpflicht*) (Art. 3, para. 3, second sentence, *Grundgesetz*), because it had not taken the necessary measures so that in the distribution of vital, but not for all available, resources during a medical emergency «no one, on reason of a disability, is discriminated at all». The legislature is therefore obliged to take «the appropriate measures without delay» to ensure protection for persons with disabilities when they are assigned to an intensive care unit. The German Federal Constitutional Court also listed a few steps that the legislature could take to effectively prevent any discrimination due to a disability in a *triage* situation, such as instructions on procedure or documentation otherwise training of medical and nursing staff.

The case had already arisen in June 2020 when nine persons with different physical and mental deficiencies had complained to the judges in *Karlsruhe* about the inertia of the legislator regarding the increased risk of infection of the disabled. In addition, previous health conditions could lead compared to other patients to discrimination in medical treatment and for the admission to intensive or emergency care, leading to *"triage before triage"*. In an initial decision of 16 July 2020, the *BVerfG* had, however, rejected the emergency appeal, not considering it unfounded in itself, but at that time the

[13] Deutsche Interdisziplinäre Vereinigung für Intensiv- und Notfallmedizin (DIVI), *Entscheidungen über die Zuteilung von Ressourcen in der Notfall- und Intensivmedizin im Kontext der COVID-19 Pandemie*, 2020-2021, in https://www.divi.de/joomlatools-files/docman-files/publikationen/covid-19-dokumente/211214-divi-covid-19-ethik-empfehlung-version-3-entscheidungen-ueber-die-zuteilung-intensivmedizinischer-ressourcen.pdf.

course of the infection in Germany was such, that a *triage* situation in intensive care units seemed improbable[14].

The subsequent decision of the Constitutional Court was hailed by many as protective of persons with disabilities, but it also generated strong criticism around the topic of direct and indirect discrimination. Some spoke, in fact, of a "disappointment" because the judges allegedly neglected to deal with the main constitutional question, starting with the criterion of the *klinische Erfolgsaussicht*, ruling out the possible existence of a problem of indirect discrimination of persons with disabilities a priori[15]. Indeed, if «probability of survival» as a selection standard would be chosen, different forms of disability, chronic disease and age precisely reduce the possibility of survival at COVID-19. According to the *BVerfG*, instead, to protect persons with disabilities, it must be ensured that doctors, in a *triage* situation, decide only because of the «current and short-term probability of survival» (*allein nach der aktuellen und kurzfristigen Überlebenswahrscheinlichkeit*). This assumption, again according to the judges, «does not rest on an evaluation of human life, but only on the chances of successful intensive care according to the current disease». If, on the other hand, the selection criterion was to be based on «expected long-term survival time» (*längerfristig erwartbare Überlebensdauer*), and thus on a maximization of life expectancy, it could lead to discrimination against persons with disabilities.

At this stage, it needs to be clarified whether the German position succeeds in providing protection for persons with disabilities against discrimination or whether a lack of protection can be found. Also, whether a general regulation which decides between life or death of persons is constitutionally necessary or appropriate, who, if any, should be called upon to formulate it and what content it should have.

This leads to a return to pondering the role of the state and of medical professional associations in determining the criteria for distributing scarce resources, the need to guarantee legal certainty and the effectiveness of recommendations and guidelines published by professional associations, trade associations and ethics committees.

A regulation that provides for clinical success as a criterion for prioritizing patients in intensive care can be considered constitutional, setting limitations on the basis of negative criteria founded on the principle of equality (Art. 3 III GG) and supplementing it with the criteria of randomness and chronology[16]. Otherwise, it can be assumed that even in times of emergency the state has a duty to «guarantee the fundamentals of the legal system» and so the principles contained in the *Grundgesetz* cannot be violated. One can then doubt the need for a *Triage-Gesetz* and regard the establishment of selection criteria, based on a utilitarian view, as an

[14] BVerfG, 16. Juli 2020 - 1 BvR 1541/20, in *NVwZ*, 2020, 1353.
[15] S. Huster, *Much Ado about Nothing*, in https://verfassungsblog.de/much-ado-about-nothing/, 29. Dezember 2021.
[16] H.-G. Dederer, *Keine Triage ohne gesetzliche Grundlage*, in https://verfassungsblog.de/keine-triage-ohne-gesetzliche-grundlage/, 28. Dezember 2021; A. Brade, M. Müller, *Corona-Triage: Untätigkeit des Gesetzgebers als Schutzpflichtverletzung*, in *NVwZ*, 2020, 1792 ss., 1796.

expression of an evaluation of the value of life and therefore contrary to human dignity[17].

On the other hand, the possibility of regulating "negative criteria" of selection, such as prohibitions of discrimination, is not ruled out, and non-state actors, doctors and professional associations should also be allowed to be involved in regulation. Thus, the problem of the relationship between state and non-state regulations within a broader legal framework comes into play.

So, the decision of the *Bundesverfassungsgericht* traversed complex issues of bioethics, biolaw and biopolitics, without being able to give a clear answer to the dilemma of the distribution of scarce healthcare resources and the protection of differently abled persons. It has cautiously embraced and at the same time criticized the utilitarian view, but without having the audacity to concede the appropriate clarifications and referring the decision to the legislature. On the other hand, the German legislature, as will be seen, followed the indications of the Constitutional Court and, whether through attempts at balancing or searching for compromises, was unable to come up with solutions that could be considered conform with constitutional values.

4. The choice for a *Triage-Gesetz* and the "*survival of the fittest*" principle

The German legislator decided early to regulate *triage* by law. After a several widely criticized drafts, the bill of the Federal Ministry of Health of 14 June 2022 responded to the instructions of the *Bundesverfassungsgericht* to realize the duty of protection and to prevent discrimination against persons with disabilities regarding the distribution of scarce resources in times of pandemic. In particular, the Infection Protection Act (*Infektionsschutzgesetz* of 20 July 2000) was amended, inserting special provisions and adding § 5c on the «procedure in the event of insufficient treatment capacity in intensive care due to the pandemic». According to the bill, in times of pandemic no-one may be discriminated against by a medical allocation decision in case of *triage*, in particular because of «disability, degree of frailty, age, ethnic origin, religion or belief, gender or sexual orientation» (§ 5c (1)). Analogous to the DIVI recommendations, the decisive criterion is the «probability of current and short-term survival» of the patients under investigation (*aktuelle und kurzfristige Überlebenswahrscheinlichkeit*), and «comorbidities» may be considered, but only to the extent that they, by reason of their «severity» or «combination», «significantly reduce the probability of short-term survival» related to the current illness. Not suitable criteria for assessing the probability of current, short-term survival are «disability, age, medium- or long-term life expectancy, degree of frailty and quality of life» (§ 5c (2))[18].

[17] R. Merkel, S. Augsberg, *Die Tragik der Triage - straf-und verfassungsrechtliche Grundlagen und Grenzen*, in *JZ*, 2020, 704 ss., 712.

[18] Referentenentwurf des Bundesministeriums für Gesundheit, *Entwurf eines Gesetzes zur Änderung des Infektionsschutzgesetzes* vom 14. Juni 2022. On this, see T. Gutmann, B. Fateh-Moghadam, *Geplante Regelung der Triage – Grundrechtsschutz als Farce*, in *ZRP*, 2022, 130 ss.

There had been many criticisms to the *triage* bill, starting with the criterion of «current and short-term survival probability», which would not protect persons with disabilities from discriminatory situations. Furthermore, the retention of «comorbidity» as a factor indicating the prospect of success and the best chance of survival could lead to an increase in discriminatory decisions against the frailest. In this context, judge and activist Nancy Poser, one of the *Verfassungsbeschwerde* plaintiffs before the German Federal Constitutional Court, was clear in stating that the *triage* bill «legitimizes society to decide solely on the basis of the *survival of the fittest* principle»[19]. Again, the bill lacks rules that would counteract the practice of *"triage before triage"* and thus prevent the occurrence of forms of discrimination through non-hospitalization. While, compared to previous versions of the bill, the controversial practice of "ex post triage", i.e., the discontinuation of intensive care in favor of a person with a better probability of survival, was deleted, as it was considered ethically unjustifiable.

The CDU and CSU opposed the selection criterion based on «probability of survival» and pointed out a further weakness of the bill in the failure to provide for other *triage* scenarios, such as those resulting from natural disasters, wars, or terrorist acts, because even in these cases there is a danger of discrimination of people with disabilities. Only the latter shortcoming was subsequently remedied by the *Bundesregierung's* bill of 24 August 2022, which extended the scope of § 5c more generically to a «communicable disease». But it otherwise left unresolved the doubts especially concerning the criterion of «current and short-term probability of survival» and the incidence of comorbidities[20].

Finally, on 10 November 2022, the *Bundestag* passed the *Triage-Gesetz*, which supplemented the *Infektionsschutzgesetz* and regulates priorities in the event of limited treatment capacity in the ICU. The decisive criterion for the allocation decision, the «probability of current and short-term survival» remains unchanged (*aktuelle und kurzfristige Überlebenswarscheinlichkeit*) (§ 5c (2)); factors such as «disability, degree of frailty, age, ethnic origin, religion or belief, gender or sexual orientation» must not be a cause for discrimination (§ 5c (1)); «comorbidities» may be taken into account if they «significantly reduce the probability of short-term survival» related to the «current illness».

Opposition parties regard the new regulation as a violation of human dignity and the constitutional principle of *Lebenswertindifferenz*. Thus, Sören Pellmann (Die Linke) called it a *Selektionsgesetz*, which leads to serious risks of discrimination[21].

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[19] H. Haarhoff, "*Könnte behinderte Menschen das Leben kosten". Grüne lehnen Triage-Gesetzentwurf von Lauterbach ab*, Mai 2022, in https://www.tagesspiegel.de/wissen/grune-lehnen-triage-gesetzentwurf-von-lauterbach-ab-4328806.html.

[20] Gesetzentwurf der Bundesregierung, *Entwurf eines Zweiten Gesetzes zur Änderung des Infektionsschutzgesetzes* vom 24. August 2022, in www.bundesgesundheitsministerium.de.

[21] www.bundestag.de/dokumente/textarchiv/2022/kw42-pa-gesundheit-triage-914490.

5. Conclusion

All this leads to the conclusion to reconsider who should have the power to decide on people's life and death, and if the legislature has the power to compress or even exclude one person's right to life in defence of another person's right to live. It leads to doubts on the nature of actual scarcity of resources, if these are in effect political choices, and to distrust the *triage* system and the ethical nature of the distribution criteria themselves, even if they are drawn up by professional associations. It leads to pointing out the limits of law and the constant need for judicial control of the Constitutional Courts to review the activities of the legislature and ensure respect for the fundamental rights.

The debate on the role of the state and its relationship with the market is thus rekindled to reflect on «How much policy choices on the allocation of healthcare resources should be left to the market and how much should be reserved for the public sphere». This is to doubt that choices affecting goods of primary importance can be left to the rules of the market and the neo-liberal approach[22] of the dominant capitalist system.

There has been discussion of "tragic" choices, which are considered presupposed by the practice of *triage* and would be "inevitable" in "exceptional" situations. But the scarcity of goods is not necessarily inevitable and rather depends on a choice made in the political arena. We are therefore in the realm of political choices and administrative discretion, which «are not, however, removed from a control of conformity with principles and rules» to guarantee respect for the principle of equality and the person's right to health in its existential dimension. Equality gives ethical value to the inquiry of the resources distribution and «the concrete inequality in access to care for reasons of place, age, pathology» can deny the possibility of survival. With the consequence of directing tragic choices to protect "public health" and to the detriment of certain more vulnerable categories. But the state should remember that one of its primary tasks is to guarantee health as an egalitarian right and to prepare health systems also for emergency situations, to prevent "avoidable" shortages and "unnecessary" recourse to "tragic" choices in the future. And the limits of law were discussed. Law «supports and legitimizes the exception», but it is also the «rule and limit of power». Sometimes the obstacle may not be the «presence of law», but «that specific legal discipline», and «reliance on non-law does not always bring with it a greater fullness of life»[23].

Michaela Giorgianni
Dipartimento di Giurisprudenza
Sapienza, Università di Roma
michaela.giorgianni@uniroma1.it

[22] *Tragic choices, 42 anni dopo. Philip Bobbitt riflette sulla pandemia.* Intervista di Roberto Conti, in *Giustizia Insieme*, 17 maggio 2020.
[23] S. Rodotà, *La vita e le regole. Tra diritto e non diritto* (2006), Milano, 2018, 23, 30, 232, 235.