

German court ruling on triage for elderly patients in pandemic: A double-edged sword

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The German parliament is obliged to ensure that, in the case of triage, no one is disadvantaged due to a disability. This decision was reached on Wednesday by the country's highest court, the Federal Constitutional Court in Karlsruhe. The court upheld the complaint of nine people with disabilities who fear discrimination in the event of insufficient intensive care capacity to treat acute COVID-19 cases.

Until now, there has been no legal basis regulating who should receive priority in such a case. The German Interdisciplinary Association for Intensive Care and Emergency Medicine (DIVI) issued a "Guideline for Prioritisation and Triage in Acute Resource Shortages" in the spring of 2020 and recently updated its guideline. The DIVI, however, is a private association and its guideline has no legal binding force.

For their part, the plaintiffs feared that the DIVI guideline, which is primarily oriented towards the likelihood of the success of treatment, would create the basis for their discrimination. This is because a disabled person's likelihood of recovery is often—and on occasion, incorrectly—assessed as being less than that of a non-disabled person.

Nancy Poser, a judge from Trier who is in a wheelchair due to a congenital muscle disease and is one of the nine plaintiffs, told the *taz* newspaper a year ago she had "two problems with the triage guidelines: Firstly, I don't think they are necessarily suitable for assessing the chances of success of treatment. But above all, I think this path—based on the survival of the fittest, i.e., the fittest shall live—is wrong."

The example contrasting a 90-year-old pensioner with pre-existing health problems with a 25-year-old mother is "often brought up," Poser said. "But it's hardly that clear-cut in practice: what about the 30-year-old gymnast and a 40-year-old wheelchair user, where there is a difference of a 60 and 40 percent probability of survival. Where does it start, where does it end?"

The Federal Constitutional Court has largely endorsed this view. The risk of discriminating against disabled people in medical decisions is not ruled out by the DIVI's professional recommendations, the court explained. "The recommendations are not legally binding." The court continued, that "it cannot be ruled out that the recommendations in their current version could permit discrimination against persons with disabilities."

The Federal Constitutional Court left it largely open how the Bundestag should legally prevent discrimination against persons with disabilities in the case of triage: "In principle, the legislature has wide scope for assessment, evaluation and organisation here."

The court ruling has met with approval from social associations, doctors' representatives, political parties and churches.

The head of the federal Anti-Discrimination Agency, Bernhard Franke, called it a "very important signal" for people with disabilities and the leader of the World Medical Association, Frank Montgomery, welcomed the fact that legal authorities had to define "guard rails" for the orientation of doctors.

The president of the social association VdK, Verena Bentele, commented: "It cannot and must not be allowed that medical professionals are left to their own devices regarding such an important question, a legal basis is needed for this." Eugen Brysch, chairman of the German Foundation for Patient Protection, said: "Now the Bundestag can no longer avoid the issue." So far, it has always delegated decisions on prioritisation in the health system to professional associations.

Dirk Wiese, vice-chairman of the Social Democratic Party (SPD) parliamentary group, called the decision a "clear mandate to us as legislators," which "we should now fulfil quickly, but with due diligence." The Green Party fraction leader Britta Haßelmann tweeted: "It is up to us as legislators to take precautions. Now careful consideration and discussion will be needed in the Bundestag on how this can be organised."

German Justice Minister Marco Buschmann, Free Democratic Party (FDP), announced that the government would quickly present a draft on the protection of persons with disabilities in the event of a triage situation. There is a need for "clear rules that offer people with disabilities protection against discrimination," he said. German Health Minister Karl Lauterbach (SPD) also welcomed the ruling, saying, "People with disabilities need protection by the state more than anyone else. All the more so in the case of triage."

In fact, the ruling is a double-edged sword.

The principle that no one should be disadvantaged because of their disability, as stated in the German constitution (Basic

Law) and now confirmed by the Federal Constitutional Court, is correct and should be defended. However, the very idea that triage can be reconciled with this prohibition of discrimination, as well as the protection of human dignity and the right to life and health (which are also enshrined in the Basic Law), is absurd.

Triage in itself means discrimination. Decisions are made about who receives medical treatment and who is consigned to die without treatment.

The term originates from the field of military medicine. On the battlefields of the 19th and 20th centuries, where soldiers in their tens of thousands were forced to charge into enemy lines, medical orderlies had to decide between those to be recovered for treatment and those left to die. Doctors may also be forced to make triage decisions in unforeseen natural disasters and major accidents where the number of injured exceeds available medical resources.

The COVID-19 pandemic, however, is not such an unforeseen natural disaster. Scientists have warned of such a pandemic for years. Following the discovery of SARS-CoV-2, leading scientists repeatedly described the measures needed to contain and eliminate the virus. With few exceptions, however, governments all over the world have ignored these findings and pursued policies that prioritise profits over human lives. In particular, factories and schools have been forced to remain open to ensure that parents are available to the labour market and corporations can rake in record profits.

The rapid spread of the Omicron variant now means that triage decisions loom en masse. The head of the Association of Statutory Health Insurance Physicians in Berlin, Burkhard Ruppert, warned a month ago: “With the high infection figures, the situation in intensive care units will blow up in our faces. We will end up in a triage situation the likes of which we have never experienced in Germany since the Second World War. We will reach the point where we will have to consider whether to give the last available bed to a 75-year-old who has been vaccinated three or two times and has still been infected. Or do I give the bed to a 25-year-old who has not bothered to take any precautions?”

The explosion in the number of infections in the US, Britain, France and numerous other countries confirms this warning—yet governments are doing nothing in response. In Germany, too, the country’s new traffic light coalition (SPD-FDP and Greens) is allowing the pandemic to rip through society. It has allowed health offices to take Christmas holidays so that the rising number of infections cannot be correctly registered, with experts warning that the new Omicron variant does not constitute a wave, but rather a wall of infections that will rapidly overwhelm intensive care units.

If the Federal Constitutional Court had been serious about protecting the disabled, human dignity and life, it should have called on the government to take immediate and urgent measures to contain the pandemic. Instead, it only confirms, in

its own words, that reconciling triage with protecting the disabled and human dignity is tantamount to squaring the circle.

In the final paragraphs of its decision, the court outlines several ways in which the legislature can “effectively address the risk of discrimination on the grounds of disability in the allocation of pandemic-related scarce intensive care resources.” In doing so, “the limited human and material capacities of the health care system available for treatment should not be additionally burdened in such a way that the ultimate goal of effectively protecting the lives and health of patients with disabilities would be adversely affected.” The same applies “with regard to the duties of the legislature to protect the lives and health of other patients.”

And finally, the court solemnly declares: “The principle of the inviolability of human dignity, i.e., that one life may not be weighed against another, does not preclude, a priori, regulating criteria for decisions relating to the distribution of scarce resources in order to save lives.” The court palpably fails, however, to explain how one can distribute “scarce resources in order to save lives”—in other words, decide who gets intensive care treatment or not—without weighing “one life against another.”

The politicians now praising the decision made by the Federal Constitutional Court will use the debate on the triage law to accustom the public to an inhumane practice, which should in fact never take place. It is significant that FDP Bundestag Vice-President Wolfgang Kubicki (FDP), one of the loudest opponents of lockdown measures and mandatory vaccination, has joined in the chorus of praise for the ruling.

Only an independent working class movement can put a stop to the profits-before-lives policy that poses a deadly threat to both the healthy and disabled.



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