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Tragic choices. Criteria for "triage" of Covid-19 patients in need for intensive care

ABSTRACT - In the present paper, the Author stresses the point that far from being a state of emergency where law and legal principles are suspended, Triage is a legal question to be faced with formal criteria. Every form of consequentialist thinking adopting different kind of material criteria, such those embraced in the guidelines drawn up by national medical societies in order to manage the pandemic, by necessarily involving a discrimination against fragile patients is incompatible with the basic principle of fundamental equality of human lives. The Author particularly focuses on the German case, where for its special constitutional tradition this basic principle is strongly avowed.

KEYWORDS - Covid-19, Triage, Utilitarian reasoning, Rule of law, Right to life, Human Dignity

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Tragic choices. Criteria for "triage" of Covid-19 patients in need for intensive care

What I'm talking about is something which is right before our eyes today. Of course, we all remember Bergamo, the first horrible situation we had in Europe during the pandemia, while we are waiting for the third wave of Covid-19 today with mutated versions of the virus. We are looking at around 80 000 deaths in Italy so far caused by Covid-19 and around half of this number, 41 000, in Germany. Just today, this morning, the SIAARTI, "Società Italiana di Anestesia, Analgesia, Rianimazione e Terapia Intensiva", and the SIMLA, "Società Italiana di Medicina Legale e delle Assicurazioni", published new Triage guidelines with a changed set of selection criteria compared with the ones they published in March. In the background, Italy has a very hard discussion these days about the new draft pandemic plan.

I've worked in the field of the ethical and legal principles for the allocation of scarce life-saving resources for 30 years now, mainly in the field of organ allocation, the allocation of livers and hearts for transplantation, and I wrote a couple of texts about Triage. My first point is to stress that Triage is a legal question in the first place. The way we have to deal with Triage in our societies, in Italy and in Germany, has to be decided by law, not by ethics and not by physicians, not by medical systems.

Under the rule of law, it cannot be for physicians to determine which citizens will survive and who will die. This is a normative question, not a medical one, and the only form of normativity which can deal with this question is law. The problem of Triage seems to hint at a situation where normal principles of normativity are suspended. Triage looks like some form of a *state of emergency*, maybe even in a *carlschmittian* sense. I have read so many discussions that seem to follow the premise that the allocation of scarce life-saving resources is a very special situation, and for this very special situation there have to be special rules about how to decide who will live or will die and about who has the competency to take this decision. I think this premise is wrong. We're not in a state of emergency. For Triage, there are no special criteria for the question of who decides and how to

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decide. There is no special legitimacy for physicians to determine which citizen may survive and which citizen must die. It is the law which has to decide, or at least the legal principles we are living by have to be applied, they are not suspended. We are not in a situation where law is not applicable.

Nonetheless, in Germany, in Austria, in Switzerland, in Italy, it is physicians' associations who are making guidelines for Triage. There's something fundamentally wrong with this premise that anything or anybody could legitimize physicians to establish such sort of structural normative rules about the right to life for certain groups of citizens.

This issue is at the heart of the Constitution, it is at the heart of the legal system. It certainly is one of the hardest questions for the rule of law to decide, but if the law doesn't decide it, what should the law be for to decide after all? If the law refuses to decide here, we would have to ask ourselves what do we have a legal system for? So, Triage is a legal question.

We had the same discussion in most Western countries regarding the allocation of scarce medical resources in organ transplantation. The traditional premise of the medical system was: it is the medical system, it is the physician or the transplant surgeon who decides who will survive and who will die. It took us about 20 years to make clear that this is a legal question, and this question already arrived at the German Supreme Court and at the German Constitutional Court. Also about Triage we are expecting a ruling by the German Constitutional Court, maybe in March (I hope it will come sooner because March will be too late), about what are the legal criteria for Triage and who is the one who has to decide. The answer will be: it is the Parliament in a formal act of legislation and certainly not any kind of medical society or single physician. So again, Triage is a legal question.

It has to be a legal question for another reason, because ethics cannot decide and does not decide anything. I do speak as an ethicist here and I do work as an ethicist too, not only as a lawyer. In the ethical debate we can find every conceivable position regarding Triage criteria from (as we call it in the philosophical terminology) strictly deontological positions assuming radical equality of patients to different sorts of consequentialist thinking, of social utility thinking, of virtue ethics. There is an extreme pluralism of ethical voices and in a pluralistic society as ours, there definitely is no ethical consensus or ethical solution for questions like that. That's one of the reasons everything which is really important, regarding legally protected basic interests of people must be determined by law and defined in a

general way, and the only way to define criteria in a general way is to define them in a legal manner, to define them by law. This is one of the main objectives of legal systems.

And of course, none of the recommendations we see in Italy, Germany and Switzerland, the SIAARTI recommendations, the German ones by the "German Society for Intensive Care Medicine" (DIVI), or the guidelines by the "Swiss Academy of Medical Sciences", gives any substantial ethical reasoning. They are just an act of will, but not an act of argument. They do not even try to justify their criteria ethically, in the light of a critical pro and con. The guidelines and recommendations are not based on ethical analysis, and I assume there wasn't any real ethical discussion behind the doors. All these recommendations pay some lip service to legal and ethical principles, but these principles do not guide these guidelines, they don't really underlie them. There isn't even a plausible ethical fundament for the main normative premises of these texts. I will come back to that.

My thesis is that in finding criteria for Triage situations where we have more patients who are in dire need of lifesaving scarce medical resources (like intensive care or ventilation) than we have resources, there is a basic normative trade-off. It's the same trade-off in ethics and in law, and this trade-off is between equality on the one side and utility on the other. There are different answers to this trade-off and the behauptung question is which answers are compatible with the basic principles of our legal systems. I will give you the German example and then we will have to discuss the situation in Italy.

My main assertion is that all forms of utilitarian thinking, mild ones or radical ones, all forms of trying to maximize some sort of health utility by defining criteria for Triage situations must discriminate against the vulnerable, the comorbid, against older persons and against disabled persons. The only difference between all these different utilitarian approaches, and one of them is the Italian one, is how radical this discrimination against the vulnerable, the comorbid, the fragile, the old and the disabled is conceived.

I start with Germany as an example, because the German legal system may be a bit special in this regard, based on a learning process from the experience with National Socialism in the 30s and 40s. You all know that the Nazis killed people who they called «not worth living», disabled persons especially. The twofold basic consensuses, from right-wing to left-wing politicians when it came to the drafting of the German Constitution, was: first, no more torture, and second, that every human life, regardless of

the age of the person, her morbidity life expectancy or quality of life has the same worth, and every right to life has the same strength. An apt principle of absolute equality in the value of life.

This is, technically or legally spoken, a combination of two articles of the German Constitution. The first is Article 2 para 2, *the right to life*, and the second one is Article 1 para 1, *the principle of human dignity*. You might call it a contingent development in Germany, I'd call it quite a necessary one, that the German Constitutional Court very early started to combine these principles and to say that one feature of human dignity is a sort of basic equality. So, on the very basic level of being a person and having a right to life we are radically equal.

Ronald Dworkin made the famous distinction between treating people as equals, which he called the main normative principle of Western states, guaranteeing a fundamental right to equal concern and respect on the one hand, and being treated equally, on the other hand. Of course, you can treat people unequally and still treat them as equals, still respect them equally as persons. We are different, so we have to be treated differently in many respects, but there is a basic form of equality: we all have dignity equally, we all have basic civil rights and basic human rights equally, we have the right to equal respect. And the German tradition in constitutional law has combined these principles and has made clear that when it comes to the right to life, we are radically equal, too. So, here in order to be treated as equals we have to be treated equally, regardless of age, of morbidity, of life expectancy, of social worth, and, of course, completely regardless of religion and race and things like that. So, there's radical equality when it comes to the right to life.

I'd like give you an example. You might know the ruling, but I would like to hint at the deontological *extremism* underlying it, a sort of counter-extremism in German constitutional law, which is still mainstream, but it has its critics. The ruling provides an example when it comes to the right to life as a negative right, as a freedom right. In January 2005, four years after 9/11, the *Bundestag* passed a law (§ 14 para 3 LuftSG) which said that in a situation like 9/11, when an airplane hijacked by terrorists is directed, let's say, to Frankfurt (that's the example everybody had in mind), and it is going to crash into the towers of the European Central Bank or the Deutsche Bank, the Minister of Defence may send jets to shoot this hijacked plane down. On February 15, 2006, the German Constitutional Court (BVerfGE 115, 118) ruled that this legal provision is unconstitutional, being an infringement of human dignity (Art. 1 para 1 of the Constitution). The Senate argued, that

under the rule of the principle of proportionality, being shot down might not be considered an infringement of the constitutional right to life of the hijacked passengers on the airplane, given that otherwise they would only have another minute to live anyway. But if you take the principle of human dignity into the equation, the Court said, shooting down the plane would mean to instrumentalise, to objectify these people for reasons external to them, using them as a mere means to save others and thus infringing their dignity. It's a very precise argument. So the principle that the state must never infringe human dignity amounts to say that we cannot save, let's say, 3000 lives in the bank towers of Frankfurt am Main by shooting down the plane and killing 100. Isn't that irrational? The answer of the German Constitutional Court was: *numbers don't count*. This equal right to life means that no single life may be sacrificed, not even for a greater number of lives saved. Numbers don't count.

We have a huge philosophical discussion starting with a famous article by John Taurek in 1977 about the deontological and consequentialist discussion about «should the numbers count?». You all know the *trolley examples* – it is allowed to *sacrifice* (to *kill*) one person or two persons in order to save five –, but Taureks more radical question is: is it always better to *save* the greater number? The answer of the German Constitution seems to be that numbers also don't count when it comes to saving lives. We cannot let someone die in order to save other people. So, when it comes to the right of life every life has the same value, and when it comes to saving lives, we must not discriminate on the basis of any reason. Not only we must not discriminate following criteria like race, or religion, or ideology, or gender, we must not discriminate *at all*. We must not discriminate regarding health status, we must not discriminate regarding age, we must not discriminate regarding life expectancy or morbidity.

So, to put it quite clearly, when it comes to the German constitution, the value of the life of a multimorbid 89-year-old, is exactly the same as the life of the healthy 18-year-old.

We all have different normative intuitions. And I guess every one of us has a bit of utilitarian thinking in himself, so there seems to be something wrong with this kind of deontological extremism. I assume that no constitutional court in the Western world would have made the same ruling as the German one when it comes to the 9/11 situation. This is a special tradition in the German constitutional system, but it's a tradition which, I would say, is thinking a certain premise which is part of the principle of human dignity to its end.

Amartya Sen once wrote that normative approaches or ethical theories can be differentiated by the kind of information they accept into ethical thinking. In this regard, the principle that every life has radically equal worth, that every right to life is equally strong is a normative principle which is very meagre, very scarce of information. We don't accept *any* material differentiation. There is no conceivable normative reason to differentiate between people when it comes to life and death questions.

So, if you take that seriously (and I don't claim that all nations should follow the German example, I just tried to explain this line of thinking as an *ideal type* example) there is only one criterium left to decide Triage questions. It is *urgency*. Urgent patients are patients who need intensive care of ventilation right now, because otherwise they will die soon. Every urgent patient has a legal right to be treated in the hospital as long as there are resources. I stress this point because in Switzerland, the guidelines say that even if there are still enough free places in the intensive care unit, physicians should not accept old and fragile person at the outset. In Switzerland we had already a couple of cases where older patients suffering from Covid-19 died because the hospitals refused to treat them although they still had more than 400 free beds in the intensive care units, which would clearly be illegal in the German legal system and, as most of my colleagues think, it is illegal in the Swiss legal system, too. I don't know about Italy, but I think that everybody was treated in Italy as long as the resources held.

So, what about Triage? Imagine the intensive care units are full, we don't have enough intensive care places for the people who urgently need ventilation and most of these people who need ventilation and don't get it will die. What can you do? The German answer would be a very simple one: you treat those people in the order they arrive at the hospital and when all the beds are full, all the beds are full. There is no possible criterium for discriminating against certain patients. If everyone has the same right to live, then you cannot take an 80-year-old person from the ventilator and let him die in order to save a 20-year-old person, because both have exactly the same right to life. So, in the end, the only criteria left are completely formal ones, without any material dignity. You could toss a coin, if you want. Or you can just keep those urgent patients on the ventilator who happened to come first to the hospital. That's the German solution, and I'm quite sure that this will be the answer of the German Constitutional Court.

There’s a problem with this, and the problem is that the little utilitarian in your heart will protest. And this little utilitarian in your heart

will tell you: «isn't this a waste of resources to care for all the elderly and let the young die? Shouldn't we try to make the best use of our resources? Shouldn't we try to maximize utility?». If you start with this line of thought, then you have to differentiate between persons. In the line of consequentialist thinking you have a lot of options here. A classic utilitarian (let us call that level one of utilitarian thinking) would say: «Well, we will allocate scarce lifesaving resources as we treat everything else: along the lines of social utility. We try to maximize social utility *per se*». That might mean assessing how important is this person for our society. Then we could define what is the worth of, let's say, a physician compared to a philosopher, what's the worth of Elon Musk compared to somebody collecting garbage. This would be a classical consequentialist solution.

I have a colleague, a professor for Jewish ethics in Jerusalem and some time ago I had a discussion with him in Davos about Triage. He said: «I have an answer: rabbis first. Because rabbis, if they survive, they can do so much for other people». Of course, he wasn't completely serious, but that is the line of thinking. So, who is really important of you and who is not? Let's make a list. Of course, most of our constitutions, especially also the Italian one, would forbid looking at social utility.

So we go down to the second level: what about health utility? Shouldn't we at least try to use scarce medical resources like ventilation places in emergency care units, to create the biggest aggregate sum of health utility? How to measure health utility? Well, health economists quantify health utility by *quality adjusted life years* (QALYs) *or disability adjusted life years*. They say: «What we want to maximize is the number of life years saved of patients and we have a second criteria, which is the quality of life of these patients». So, if you are in total health your life years count multiplied with 1; if you're in a very bad state, if e.g. you are a quadriplegic and have a severe depression, you have a life quality of 0.1, so every year you live has the worth of 1/10 of a completely healthy person. That's what mainstream health economics suggest. So, if you want to maximize health utility, you have to try to maximize the quality adjusted life years of the patient collective. To do that, you have to select patients to be saved who are basically healthy (besides needing ventilation because of Covid), who have quite some life expectancy, who have no comorbidity. So you have to choose the healthy ones, the young ones. And of course this means that you have to discriminate against older persons, you have to discriminate against fragile persons, you have to discriminate against multimorbid persons, because they won't live long enough and they won't have enough quality

of life in order to be chosen. Or, to put it in another way, if you start talking about health utility, you have to treat people as *vessels of utility* (and not much else). And if you are not a good vessel for utility because you're too old, or too sick, or too fragile, or too disabled, then it's just not worth to invest any resources into you. There are better people to be invested in. This is level two.

In level three you would only claim: «let's maximise life years saved, but let's not count the quality of life of the persons saved». So, in this third step, still utilitarian but not hardcore utilitarian, we could say: «let's save the greatest number of life years and let's say every life, every year which is being lived, has the same worth». But then again you would have to discriminate against older people who will not live as long as younger people, you will have to discriminate against vulnerable people, against people with dementia who will not live that long, against disabled people who will die younger and so on. Maximising life years was the official Italian guideline by SIAARTI published in March 2020, ten months ago. And thus it was one of the most consequentialist guideline within Europe.

(The only ones who, of course, traditionally are extremely utilitarian are the British. The UK guidelines said: «we have to maximize utility». They didn't say anything about what they thought about utility. At least, they thought about maximizing quality adjusted life years). The Italian guidelines of March 2020 claimed: «We have to save our resources for patients who: first, have the best chances of short-term survival, and second, patients with whom we can save the most life years». This goal of maximizing life-years was quite an extreme position. Now, with the amended guidelines issued today, the Italian approach changed the utilitarian *ratio* and made a further step down to level four, as I call it. Instead of traying to maximize total social utility (level one), quality adjusted life years (level two), or just life years (level three), the new Italina guidelines do the same as the German recommendations and the Swiss guidelines. They say: «We want to maximize short-term survival; thus we want to maximize the number of lives saved». And to operationalize this, the criterion is to look at the chances a patient has to come out of the intensive care unit alive. So, it is about short-term survival. A couple of weeks, maybe months.

This is what I would call a reduced form of utilitarianism. The new guidelines in Italy are less extreme than the former rules. But does this approach make sense at all? I do not think so, because if you're a utilitarian, if you want to maximize lives, you have to acknowledge that "having a life"

has a timestamp, that you cannot have a life without having a time to live. You can live minutes, days, weeks, months, years, decades. So, the only way to measure life, if you want to maximize it, if you want to aggregate it in the patient collective, you have to measure its duration. It doesn't make sense to say we want to save the number of lives who at least live, let's say, three weeks. Why three weeks? Why not three months, why not three years, or three decades? I think this is an incoherent criterium.

Either you are a radical egalitarian, and you say, as the German Constitution seems to demand: «we aren't interested in how long a person will live, if we can save him here and now. An 89-year-old maybe has another six months to live, but he has the same right to be saved, besides Covid, as the perfectly healthy 20-year-old. And we do not care whether the person in the ICU has a 30% or a 80% chance of surviving ventilation. This does not constitute a normative difference. We treat everyone the same». Or you say this principle of radical equality in the right of life is normative «nonsense upon stilts», as Bentham would have claimed, or John Stuart Mill, or Boris Johnson (if he were capable of ethical reasoning). Instead, you claim: «let's make the best utility function out of what we have to do. We can't save everyone. This is horrible, but in this situation at least let us save as much life as possible, and this can only mean as many life years, or quality adjusted life years as possible». There's nothing in the middle: saving short-term lives doesn't make any sense. However, this is the Swiss approach, the German approach, and starting with today, it's also the new Italian approach.

If you look at the criteria given by the Swiss Academy of Medicine and now by SIAARTI in Italy and, very similarly, by the "German Society for Intensive Care Medicine", they have to provide an answer for the question: «how do you evaluate a patient's chance of short-term survival? What are the criteria?». These are those I just quoted. First it's age: the older you are, statistically, the worse are your chances of short-term survival. Second is comorbidity: if you're healthy, your chances are better. Third is the so-called *fragility state*, *la scala di fragilità (cfs)* of the patient, playing an important role in the new Italian recommendations, too. To quote: «Il triage deve basarsi su parametri clinico-prognostici definiti e il più possibile oggettivi e condivisi. La valutazione, mirata a stratificare le probabilità di superare l'attuale condizione critica con il supporto delle cure intensive, dovrà procedere basandosi sulla valutazione globale di ogni singola persona malata attraverso i seguenti parametri:

- numero e tipo di comorbilità;
- stato funzionale pregresso e fragilità rilevanti rispetto alla risposta alle cure;
- gravità del quadro clinico attuale;
- presumibile impatto dei trattamenti intensivi, anche in considerazione dell'età del/la paziente».

So the questions is: do you need help by other people in order to live? So, if you suffer from dementia, your fragility state is high. If you are debilitated, if you are disabled, if you're a quadriplegic, if you're sitting in a wheelchair, you need help. The more help you need, the less are your chances to get the ventilation if you get Covid. So, what the Italian guidelines, the German guidelines, the Swiss guidelines say is: «if you're fragile, if you are old, if you're suffering from dementia, if you are comorbid, if you are vulnerable in any way, you will not get treatment». And in the end, it doesn't make a difference whether you look at long-term survival or short-term survival because the criteria are the same. That's what I wanted to show you with my thesis, that although a part of our hearts is utilitarian (it is not ethically wrong to make as many people happy as possible or to make the world a better place by maximizing utility), if you start this logic in the allocation of scarce life-saving medical resources, you will have to discriminate against the vulnerable. Because they are no good vessels for utility.

That's what John Harris 20 years ago called the *principle of double jeopardy*. Who is already bad off, will not get the resources he is in dire need of, just because he is already bad off. We take from the weakest. That's the price you pay when you start utilitarian thinking in the allocation of scarce life-saving medical resources. On the other hand, of course, there's also a heavy price to pay if you do it the extremely non-utilitarian way: you waste life years that could be saved. You underachieve. That's the basic trade-off. We have to take that seriously, and this trade-off must be a question of constitutional law, or at least it must be formally decided by the people in a democratic way, in the form of law. It is certainly one of the hardest decisions we have to make besides starting a war or something like that. But what is law if it hasn't an answer to this question?

In Germany it's a constitutional principle that every question of *iustitia distributiva*, of distributive justice, which effects basic rights of citizens has to be decided by the parliament at least in its basic evaluations and principles. This is derived from the constitutional principle of democracy

and the rule of law. In the case of Triage, the situation of Germany seems to be special, because the only institution who could really define criteria for Triage is the German Parliament, but at the same time, the Constitution itself seems to already provide the only possible material answer to this question. I didn't try to tell you how wonderful it is to be a German and that everybody in the whole world should follow the German example. I just tried to explain that, for reasons which may seem historically contingent, but are necessary from the viewpoint of legal philosophy, the German Constitution is very strict when it comes to the equal value of all individual lives, stricter than other constitutional systems in the Western world. But whatever answer you'd like to give you will not be able to escape this basic normative trade-off between an idea of radical equality (that every life has equal worth, and that "equal" means "equal" and not "almost equal" or "sometimes equal"), on the one hand, and on the other hand the utilitarian principle of saving the greatest number of *x* (*x* being lives, or people, or life years, or quality adjusted life years). You cannot escape the logic of this problem.