Національний університет «Одеська юридична академія»

Робоча група з питань розвитку кримінального права
Комісії по правовій реформі при Президентові України

Робоча група з питань кримінального та кримінального процесуального права
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У збірнику представлені тези доповідей та повідомлень, які були оприлюднені на міжнародній науково-практичній конференції «Завдання кримінального права в умовах надзвичайного стану», присвяченій 25-річчю утворення Національного університету «Одеська юридична академія», яка відбулась 9 грудня 2022 року на базі Південного регіонального центру Національної академії правових наук України та кафедри кримінального права Національного університету «Одеська юридична академія». Збірник розрахований на науково-педагогічних працівників, докторантів та аспірантів, магістрантів та студентів, практичних працівників, всіх, кого цікавлять сучасні проблеми кримінального права.

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THE ISSUE OF "TRIAGE" IN GERMAN CRIMINAL LAW

Today, I have chosen a topic that has been the subject of considerable debate in Germany over the past two years. Namely: The "Triage" as a possible application of the figure of "justifying conflict of duties".

The Covid-19 pandemic, which reached Germany in March 2020 at the latest, has added a new aspect to the legal concept of the "justifying conflict of duties".

The question is whether physicians can be prosecuted for manslaughter or bodily injury (by omission) if the ventilators available in a hospital are not sufficient to ensure adequate medical care for the patients admitted.

The term "triage" actually originates from the field of military medicine and is currently also gaining relevance in Ukraine. Due to the Russian war of aggression, Ukraine is now in a terrible war.

This war and in this context specifically the missile attacks have the consequence that many people in Ukraine are killed or injured. The injured people are admitted to clinics, where medical treatment is required and, in many cases, – especially in times of war – treatment options will be limited.

In typically discussed cases of Triage, only one ventilator in a hospital is available and two people are admitted at the same time, who can only be saved by being connected to that ventilator.

However, the doctor on duty is technically obliged to provide both patients with sufficient care.

If he fails to do so and a patient dies as a result of the lack of medical treatment, then – with the appropriate intent – criminal liability on the part of the physician for death by omission stands to reason.

In our case, however, the physician cannot save both patients, since he has only one ventilator at his disposal. He can therefore only save one of the patients and must allow the other patient to die.

This inevitably raises the question of whether he can be held criminally responsible for the death of the other patient. However, since no one is obliged to perform the impossible, criminal liability must be ruled out in this case. The principle of "impossibilium nulla obligatio est" applies.

The situation of "triage", which has not yet become reality in Germany, at least officially, unfortunately already gained tragic significance in other European countries at the beginning of the year 2020. In Ukraine, this question is also likely to arise today – both with regard to the Covid pandemic, but also with regard to the ongoing armed conflict.

In German criminal legal literature, it triggered a discussion about how to decide in such cases – and whether there are or should be binding criteria in such an emergency on the basis of which a physician has to decide.

In this context, the question is at what level of criminal liability (constituent element, unlawfulness, culpability) criminal liability no longer applies.

It furthermore needs to be asked whether certain criteria should be created by the lawmakers according to which physicians have to decide which people they must save, or whether these criteria should be developed by jurisprudence or the literature.

On the other hand, it is also asked whether the physician in triage cases should be free in his decision and subject only to his conscience.

In principle, three forms of triage can be distinguished:

The "classic" form of triage is the situation of so-called "ex-ante" triage mentioned above. Here, two emergency patients are admitted to the hospital at the same time, but the physician has only one ventilator available and can therefore save only one of them.

Next there is the situation of the so-called "ex-post" triage. In this case, a patient is already connected to a ventilator but has only a slight chance of survival. Now another patient with a higher chance of survival is admitted. The question now arises whether the physician may withdraw the ventilator from one patient in order to make it available to the other patient with a higher chance of survival.

In addition, a third form of triage is being discussed, the so-called "preventive triage".

Here, a patient admitted to the hospital with a low chance of survival is denied connection to a ventilator because patients with a higher probability of survival are likely to be admitted soon who need the ventilator just as urgently and who, if they were admitted at the same time, could be given priority.

While "ex-ante" triage is generally regarded as a problem of justifiable conflict of duties, "ex-post" triage and "preventive" triage are said to be legally impermissible according to the prevailing view.

First, I will address "ex ante" triage in more detail.

In German academic literature, this is generally regarded as permissible.

This is predominantly seen as a case of a "collision of duties" which, according to the prevailing view, leads to a justification of the physician. The opposing view, however, regards cases of a conflict of duties as merely grounds for exculpation.

However, the detailed questions according to which the physician has to make his decision in cases of a conflict of duties are controversial.

There is a broad spectrum of opinions here.

This spectrum ranges from a fundamental freedom of the physician to decide which of several equally endangered patients should benefit from the saving treatment, to binding guidelines which the physician must follow and which limit his decision-making competence.

The following applies - under German law - to the "classic" cases of conflicting duties:

A justification due to a justifying collision of duties shall only apply if it is a collision of duties of equal rank. If, for example, a father with two of his own children and two children of others capsizes with a ship and only one of the children can be rescued, he has the duty to save one of his own two children as a result of the family bond.

If he saves one of his children, then he is justified with regard to the failure to save the other child because of a justifying conflict of duties, since he can only save one child. With regard to the failure to save the other children, he is justified because there are already no equivalent duties to act here.

If he were to save someone else's child and let his own children drown, on the other hand, he would be liable to prosecution, because there are unequal duties of conduct between the other children and his own child.

With regard to the situation of "triage", the question now arises as to whether the physician has equal or unequal duties of conduct with regard to the sick or injured persons admitted to a clinic.

This now leads to the question of whether the law mandates that the physician should give priority to saving certain patients. In Germany, for example, with regard to the Covid pandemic, it is being discussed whether the legislator should establish such a "ranking" of criteria to which the physician must adhere or whether the physician should be left free to decide whom to save.

If the legislator were to establish such a ranking, the consequence would be that the physician would only be justified if he fulfilled the higher-ranking duty, that means: if he adhered to the ranking.

Controversially discussed – with regard to the Covid pandemic – as possible criteria are:

- the urgency of the treatment
- the priority principle with regard to hospitalization

- the chances of success of a cure
- the probability of survival of the persons concerned
- the age (or potential further lifetime) of the patient
- any contributory negligence on the part of the patient with regard to the situation triggering the emergency situation (for example the patient's contributory negligence for his severe illness if, for example, he or she refused to receive a vaccination), or
- the patient's employment in an occupation of systemic importance.

With regard to the war, it could be further discussed whether the physician must primarily save soldiers or persons working in an occupation of systemic importance.

In any case, there is agreement that social background or status, ethnicity, religion, gender or political or sexual orientation must not play a role in the decision.

On the other hand, it has also been suggested that in such cases no specific criteria should be used, but that – at least in ambiguous cases – the decision should simply be determined by lottery.

As a result, however, the prevailing view in Germany rejects such a binding ranking. And the do right – in my opinion.

Linking the decision to such binding criteria would ultimately lead to a rather undesirable juridification (oder „formalization“) of the crisis situation, which would only superficially lead to legal certainty for the physician.

Considering the fact that in such dilemma situations, action must generally be taken quickly and the physician should therefore not be obliged to conduct an extensive examination of the criteria, I am skeptical about such a binding ranking of criteria.

This is because an obligation to carry out an extensive examination of such criteria may ultimately be to the detriment of all patients who are in need of rapid assistance.

For this reason, while it may be useful to draw up such a ranking of criteria in order to give physicians certain guidelines for their ethical decisions in dilemma situations, it does not seem advisable to attach penal consequences to non-observance of these criteria by defining "higher-value" and "lower-value" guarantor obligations.

In this respect, it should be noted that in the case of "ex-ante" triage, the physician must in principle be free to decide which patients he treats with priority, even if other patients will die as a result of the lack of treatment.

In the case of "ex-post" triage, on the other hand, it is unanimously held in Germany that this is inadmissible.

In this case, a patient who has already been connected to the ventilator is disconnected from the ventilator by the attending physician in order to make the ventilator available to another patient who may have a better chance of survival.

This regularly results in the death of the patient who was treated first.

Here, the general consideration is that this is not a case of a justifying collision of duties.

That is because there is no collision of two duties to act, but rather a collision between a duty to act (duty to rescue a patient) and a duty to refrain (duty to refrain from actively killing a patient by withdrawing the ventilator),

It is therefore to be regarded as unlawful to actively withdraw the ventilator from an already ventilated patient.

I consider this to be correct.

The prohibition on actively killing a person by withdrawing the ventilator takes precedence over the requirement to help dying people in this specific case.

This is because the patient has already acquired a „secure status“ on the basis of trusting the already ongoing treatment strategy of the physician.

Because the physician has already given the patient cause to trust him, he may not retroactively undermine that trust by unilaterally stopping the treatment without warning.

Finally, a few words about "preventive" triage.

Here, a patient admitted to the hospital with a low chance of survival is refused connection to a ventilator because patients with a higher probability of survival are likely to be admitted soon who need the ventilator just as urgently and could be given priority if they were admitted at the same time.

In this case, the physician is regularly considered to have an obligation – at least in principle – to provide assistance to a patient who was admitted earlier.

This applies even if it is to be expected that patients with a higher probability of survival will be admitted a short time later who need the ventilator just as urgently.

Even if this patient, who is expected to arrive later, would have been given priority if he had been admitted at the same time (or if it would have been possible for the physician to save the other patient in any case by way of his free decision), the principle of priority applies here.

The person who is admitted first and needs help is entitled to receive this help.

This is because at the moment when connection to the ventilator is necessary, the justification by way of conflicting duties does not yet apply, so that a physician has no affirmative defense.

This is a brief overview of the legal assessment of the three forms of triage in Germany. In my written contribution, which I will provide for the conference, I will also address the question of the legal consequences for the physician if he makes a decision – assuming he is free to decide – for improper motives. Unfortunately, I cannot elaborate on this in our conference today.