



Research of the FADA at a glance: “Protection against Discrimination on Grounds of Chronic Diseases”

Overview of the expert opinion

This study takes up the discussion in the fields of law and legal policy about the significance of the non-discrimination law for the protection against discrimination on grounds of chronic diseases in Germany, in the European Union and at international level. On the basis of an overview of existing discriminations in Germany it was clarified whether (and/or to what extent) the non-discrimination law and social law currently valid in Germany offer protection against discrimination on grounds of chronic diseases. Furthermore, it was examined whether the existing legal standard meets the requirements of a protection against discrimination, which is based on fundamental and human rights. Finally, the expert opinion investigates the situation in other countries and provides an overview, as for example of France, Great Britain and Canada, the Netherlands and Switzerland. The results lead to recommendations. The analysis is focused on specific cases in the private insurance service sector as well as on the access to and termination of employment relationships.

Authors, title and publication year of the expert opinion

Professor Dr Kurt Pärli and lic. iur. Takek Naguib: ‘Protection against Discrimination on Grounds of Chronic Diseases’ (2013).

The outcomes

Significant discriminations against persons suffering from chronic diseases

There are large gaps in the available data on the occurrence of discriminations on grounds of chronic diseases. This is why the authors recommend to gather more data in order to get a more or less representative impression of discriminations on grounds of chronic diseases. As can be derived from the existing studies and reports, it is particularly the group of persons suffering from a visible chronic disease and/or a disease with a stigma attached which is affected by discriminations, especially in working life and in relation to insurance services. ‘The most frequent cases of deprivation and discrimination are reported by persons suffering from HIV/AIDS or obesity, one of the reasons for this being that relevant data about these disorders are available.

Discrimination against persons suffering from chronic diseases in working life

In working life, discrimination on grounds of chronic diseases can be discerned at all stages of an employment relationship – during the application procedure, when concluding the employment contract, during employment and when terminating the employment relationship. Reported cases include discriminations against persons suffering from diabetes mellitus and HIV/AIDS, but also obesity, severe forms of neurodermatitis and mental disorders. Frequently, chronic diseases are

concealed in applications and in employment relationships for fear of negative consequences, such as being dismissed or not being employed.

Discrimination of persons suffering from chronic diseases in the private insurance service sector

The private insurance system is a large sector where people are rather often affected by discrimination on grounds of chronic diseases. Discriminations have been reported, both by refusal of an insurance police but also by differences in determining the premium - in cases of diabetes mellitus, HIV/AIDS, multiple sclerosis, chronic enteritis and mental diseases such as depressions.

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In international law (in particular in the United Nations human rights covenants, the European Convention on Human Rights [ECHR] and the relevant ILO Conventions), in Community law and in the General Equal Treatment Act, the term 'chronic disease' is not listed as a separate characteristic. Since the catalogues of dimensions of discrimination are not conclusive, chronic diseases fall into the category "other status", as they have not been explicitly mentioned as characteristics in the United Nations human rights covenants and in the European Convention on Human Rights.

The characteristic 'chronic disease' is closely linked to the term of disability included in the Basic Law and in the General Equal Treatment Act (AGG).

The question as to whether 'chronic disease' is implied in the term 'disability' has not been finally settled. Starting out from the social model of disability, the experts conclude that 'chronic disease' belongs to the term 'disability', as specified in Article 3, para 3, second sentence of the Basic Law (GG) and Section 1 of the General Equal Treatment Act (AGG). However, it is required that the chronic disease entails a permanent medical functional impairment, which in connection with social barriers leads to an impairment of participation in society or could rather certainly lead to this impairment or results in the threat of it. It is not decisive whether the restricted participation in social life is a result of the functional impairment or whether it was caused by the fact that the person suffering from a chronic disease is alleged to have a reduced ability of participation. A disability also exists in those cases where social prejudice and/or stigma on grounds of a chronic disease lead to an impairment of participation in social life.

Statistical discrimination against persons suffering from chronic diseases in the private insurance service sector as a particular challenge

Persons suffering from chronic diseases are considerably affected by discrimination in the private insurance sector. This particularly applies to the insurances (life insurance, occupational disability insurance, accident insurance, health insurance) which are subject to the Insurance Contract Act (German abbreviation: VVG). Due to the freedom of contract existing in the private Insurance Contract Act, the insurance enterprises are generally free to decide whether they will refuse to conclude an insurance contract or conclude it on comparatively worse conditions (e.g. higher

premiums), depending on the result of their risk analysis. The risk assessment falls within the competence of the insurance enterprises. It is true that, according to the General Equal Treatment Act (Section 20, para 2, second sentence), differences of treatment on the ground of a disability shall be permissible only where these are based on recognized principles of risk-adequate calculation, in particular on an assessment of risk based on actuarial calculations which are in turn based on statistical surveys. However, it has been legally contested whether insurance enterprises may exclusively rely on statistical data or, in case of a lack of these statistics, whether other kinds of information - such as empirical knowledge of medicine – are sufficient as a basis for calculating the risks as well.

Moreover, in general, neither the data serving as a basis of risk analysis for insurance providers nor the method of risk calculation are transparent in practice. Furthermore, it has not been settled from which definition or interpretation of the term ‘chronic disease’ the insurance enterprises start out. It is not known either how they collect and analyse individualized data and how they weight them in relation to the statistical data and/or empirical knowledge. Moreover, there is only superficial knowledge about the practice of stating the reasons for discriminations in concrete and individual cases.

From the point of view of international and constitutional law, these legal and virtual uncertainties are extremely problematic – particularly in view of the considerable violations of the right to self-fulfilment (Article 2 of the Basic Law), the significant infringements of central spheres of life and also because of the probably continuing stigmatization of and discrimination against persons suffering from chronic diseases.

Protection of persons suffering from chronic diseases in international law

In some countries, such as Switzerland, France and Great Britain, chronic diseases are also implicitly included in the characteristic ‘disability’ in various Acts and prohibitions of discrimination, similar to the situation in Germany. Moreover, in certain decrees in Belgium, Great Britain, the Netherlands, and Portugal the dimension of discrimination on grounds of chronic disease is either specifically stated or specific chronic diseases are explicitly mentioned. Another solution approach is the introduction of the dimension ‘state of health’ and/or ‘health’ in decrees in France, Hungary and Slovakia.

Which measures need to be implemented according to the authors?

- Recognition of ‘chronic disease’ as an implicit element of the term ‘disability’ according to Article 3, para 3, second sentence of the Basic Law and Section 1 of the General Equal Treatment Act.
- Ensuring an effective protection against discrimination on grounds of chronic diseases by amending Section 1 of the General Equal Treatment Act.
- In particular: Introduction of a new dimension of discrimination, e.g. ‘disease’ or ‘chronic disease’ or an explicit and non-exhaustive list of individual (chronic) diseases. It is recommended to carefully weigh the pros and cons of the different legislative options and in this context also to thoroughly examine the approaches to a comparison of law described in the legal expert opinion.

- Restrictive interpretation of Section 20, para 2, second sentence of the General Equal Treatment Act. Thus, a discrimination on grounds of chronic disease which is a disability within the meaning of Section 1 of the General Equal Treatment Act, is subject to standards of justification permitting only faultless actuarial and statistical data.
- The legal uncertainty with regard to the interpretation of Section 20, para 2, second sentence of the General Equal Treatment Act has to be eliminated by legislation.
- It has to be ensured by legislative measures that persons suffering from chronic diseases cannot be excluded from the private insurance policy coverage. Thus, with reference to Section 20, para 2, second sentence of the General Equal Treatment Act and the Insurance Industry Supervision Act (German abbreviation: VAG) it has to be put on the record that differences of treatment on grounds of a chronic disease shall only be permitted on the basis of statistics based on actuarial calculations.
- An unambiguous definition and use of the term 'chronic disease' and the diseases included in this category is required.
- Insurance enterprises have to ensure that their differentiations of risks as well as the statistical data and individual details on which they are based will be transparent.
- To achieve this transparency, an unambiguous definition and use of the term 'chronic disease' and the diseases included in this category is required.
- Furthermore, in line with Article 10a, para 2a of the Insurance Industry Supervision Act, the legislator has to clarify that an insurance company providing different premiums or benefits and services on grounds of a chronic disease shall publish the actuarial and statistical data from which the consideration of the respective chronic disease as a factor of risk assessment has been derived. In addition, these data have to be updated at regular intervals.

More information

The expert opinion entitled 'Protection against Discrimination on Grounds of Chronic Diseases' is accessible => [here](#), available only in German language.

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