

Spotlights on the bioethical and biopolitical debate in Austria

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The author sheds some light on various aspects of the bioethical and biopolitical debate in Austria: basically sceptical attitude of a great part of the Austrian population towards biotechnology and genetic engineering makes up the background. The author's review of the discussions identifies primal biopolitical conflicts, *e.g.*, on the so-called "Fristenlösung" or the conflict surrounding "green" gene technology. Phases of legal regulation (with the enacting of laws governing issues such as reproductive medicine) have been followed by an "institutionalization of bioethics" and recently by some attempts of democratization of the debate. A closer look at the participants shows that the government, the parliament and the political parties act quite reticent, allowing NGOs and, for instance, the Catholic Church to influence plenty of the debate. The author presents selected subjects of the current debate, *e.g.*, the (still not decided) question of Austria's accession to the Convention on Human Rights and Biomedicine of the Council of Europe or the implementation of the European biopatent-directive. Stem-cell research and reproductive medicine are also discussed. The author concludes with a preliminary but critical comment on the debate.

Key words: Austria, Bioethics Commission, bioethics, biopolitics, biotechnology, biomedicine, debate, gene technology, regulation, reproductive medicine, stem-cell research

INTRODUCTION

The ethical and political debate surrounding biotechnology and biomedicine has started relatively late in Austria when seen in international terms, and has not – in particular in comparison to Germany – been conducted with a comparable intensity or the same quality. Discussion of reproductive medicine, embryo research and protection, stem-cell research or genetic testing has generally been rather limited. No biopolitical debate necessary to produce the comprehensive legislation required has yet taken place. Government and political parties alike have shown themselves to be somewhat reticent in this respect. The Austrian parliament has barely touched the biopolitical area, leaving topics like stem-cell investigation, embryo research and cloning firmly off the parliamentary agenda.

The purpose of the present contribution is to shed some light on various aspects of the bioethical and biopolitical debate taking place in Austria. The point of departure is the basically sceptical attitude of most Austrians towards biotechnology, biomedicine and genetic engineering. In the following chapter a historical perspective including the background, previous phases and certain legal considerations affecting these developments

are given. Afterwards some of the actors and some references to examples are presented. Controversial areas dealt with are described in Chapter 5. Finally, an initial evaluation of the biopolitical debate that has taken place will be presented.

MATERIALS AND METHODS

This paper is based on the analysis of recent public debate on key bioethical and biopolitical issues in Austria. The analysis of social and political factors influencing the process of debate as well as a review of the most important legal documents and opinions of bioethical bodies are presented.

RESULTS AND DISCUSSION

1. The sceptical attitude of a great part of the Austrian population

A Eurobarometer survey carried out in 2002 shows that Austrians, despite having a somewhat more positive outlook than in 1999, are still more concerned about biotechnology and genetic engineering than the average European. Evaluation of biotechnology and genetic-engineering items of the survey demonstrate a clear dis-

inction (as in 1999) between medical and agricultural applications. Genetically modified foods still fail to convince a majority of those polled, while medical applications, the cloning of human cells included, are more widely approved.

The latest Eurobarometer poll “Social values, science and technology” (June 2005) reveals a corresponding scepticism with regard to scientific and technical matters. While 90% of Lithuanians, for example, agreed with the statement “science and technology will improve the quality of life of future generations”, the figure for Austria was just 62%. The majority of the population in all member states of the European Union – with the exception of Austria – is of the opinion that biotechnology and genetic engineering have a positive effect on society. To give yet another example of direct comparison with Lithuania, seven out of ten Austrians polled think that the protection of the dignity of the unborn foetus is of great importance, while the figure for Lithuania is 37%. Medical applications, which are awarded more benefits too, have a higher approval rate in the public than agricultural utilization.

2. The Austrian debate seen in its historical context

2.1. Primal biopolitical conflicts

2.1.1. The debate on abortion and the so-called “Fristenlösung” (1)

Abortion has been penalized in criminal codes since the middle ages. Since 1975 abortion is exempted from punishment, if certain conditions are met: 1) within the first three months from conception after preceding consultation of a physician (the so-called “Fristenlösung”; first-trimester-abortion), 2) to avert serious danger for life or serious damage to the physical or mental health of the pregnant woman (so-called “medical indication”) and 3) if there is a serious danger of the child being severely handicapped in a mental or physical way (so-called eugenic or embryopathic indication). In both of the latter cases abortion is not subject to punishment even after the third month of pregnancy (pre-birth abortion).

This adoption of the new Austrian Penal Code (1974) was surrounded by a highly controversial public debate. It is interesting to highlight a few aspects of this conflict in the view of the current Austrian biopolitical debate.

First the actors and constellations: The liberalization of the penal provisions by enacting a (new) Criminal Code (with the provisions outlined above) has been an especially longstanding goal for the Austrian Social Democratic Party (SPÖ). Having obtained absolute majority in the National Council in 1971 the SPÖ finally was able to push this demand through. Not only the political opposition (the Christian-social Austrian People’s Party (ÖVP) and the national-liberal Austrian Freedom Party (FPÖ)) but also most notably the Catholic Church as well as the “Aktion Leben” (campaign pro life), a group closely associated with the Catholic

Church, were strongly opposing the planned revision of the Criminal Code. During the parliamentary process the “Aktion Leben” collected signatures against the proposed abortion provisions and – after the Criminal Code entered into force – initiated an (ultimately unsuccessful) collective petition aimed at the abolition of the “Fristenlösung”. Also feminist and emancipatory groups participated in the controversy. Even Cardinal Franz König, Vienna, took an active part in the public demonstrations. The parliamentary debate was surprisingly active. An objection of the – opposition dominated – second chamber of the Parliament (Federal Council) was only able to delay this subject. The Constitutional Court did not regard the “Fristenlösung” to be a breach of Austrian constitutional law.

If you – secondly – have a closer look at the construction of the debate, it is striking that even the SPÖ outlined abortion as socially undesired and promoted the protection of the unborn life. The failure of the existing penal provisions to solve this persistent problem was demonstrated by an estimated high number of unknown cases of abortion. A more effective support enabling women to reach independent and responsible solutions was called for (“helping instead of penalizing”). Arguments such as the right of self-determination or emancipation of women were used, but not prominently. The Catholic Church and the opposition parties stressed that the unborn child represented an autonomous human being from the moment of conception and therefore had to enjoy the protection of society. Any mitigation of that protection would question the human right to life in general by making it disposable and by initiating a dangerous development with unforeseeable consequences. Even women’s rights to self-determination cannot – certain severe conflict situations excepted – overrule the already existing life of the unborn child.

Although the current debate – and this is my third point – never again reached the same intensity and outreach as during the seventies of the last century, the abortion-issue still flares up from time to time: militant pro-life groups like “Human Life International” have besieged abortion clinics and have put women under pressure (a practice which can now be scotched in Vienna on the basis of a recently adopted legal amendment). Further examples: in the Land (which means: province) Salzburg it has been disputed whether abortions can be performed in public and not only in private hospitals. Furthermore, politicians of the ÖVP challenge the so-called eugenic or embryopathic indications, while simultaneously putting on record “not to work for the abolishment of the Fristenlösung”.

It is interesting that these activities have not been able to induce a wider political and public debate. The discourse (or maybe better: the non-discourse) then demonstrates that this controversy on abortion and its outcomes reaches into contemporary issues: on the one hand and despite obvious differences, it is difficult not

to see the connections between the debate on abortion and issues such as *in-vitro* fertilisation (IVF), pre-natal diagnosis (PND) or pre-implantation genetic diagnosis (PGD). On the other hand, one can recognize issues and positions (*e.g.*, of the Catholic Church) in the current discussions which have been presented in the context of the Fristenlösung debate for the first time.

2.1.2. The conflict surrounding “green” genetic engineering (2–5)

Austria has had three important conflicts in the area of the environment and technology: i) in 1978 the nuclear energy option has been abolished after a referendum; ii) in 1984 plans to build a power station on the banks of the Danube in Hainburg have been stopped after widespread demonstrations; iii) since the middle of the nineties of the last century questions relating to the release of genetically manipulated organisms and the Austrian controversy surrounding the prohibition of genetically modified foods (the so-called Austrian GMO conflict) have had a great impact on public discussions. This Austrian controversy surrounding “green” genetic engineering was, and doubtless continues to be, the area of biotechnology and politics with the biggest potential for conflict.

Public controversy began in 1996 with the first attempts to approve genetically modified organisms. Particular characteristics of this conflict included the formation of strong “new social movements” (above all the ecology movement, as manifested by Global 2000 and Greenpeace), along with widespread public concern, thanks mainly to support by the “Kronenzeitung” which is Austria’s daily newspaper with by far the largest circulation. This veritable groundswell of opposition to genetic engineering has culminated in various petitions for a referendum on the question of genetic technology. Indeed, with more than 1.2 million signatures collected, this call for a referendum to oppose gene technology became the second most important of its type since 1945.

An amendment to gene technology legislation in 1998 (which imposed stricter regulatory guidelines and liability rules on gene technology without tackling the prohibition of release of genetically modified organisms), along with a veto on the import of GMOs and the situation whereby no GMOs have yet been released in Austria, can be interpreted as political reactions. This conflict surrounding “green” biotechnology (*i.e.* for use in agriculture and food production) has made it very clear – in terms of modernization-related conflicts – that complex technology is both difficult to apply and at the same time rejected by large sections of the public. This area of conflict, although past the most intensive phase, continues to be a dominant theme of debate in Austria. A clear split has now emerged – in terms of both public opinion and official policy – between the agricultural (“green”) and medical (“red”) application of biotechnology. While “green” biotechnology has

been largely rejected with Austria dubbed “Europe’s biggest critic of genetic engineering” (Eurobarometer 1996), there is a significantly wider support for medical applications. What was then a highly heterogeneous set of protagonists – with campaigners against genetic engineering, as the ecology movement, the Catholic Church, chains of food shops, organic farmers and opposition political parties on one side, and biotechnology firms, business interest groups, industry, agribusiness and the majority of the then ruling government parties on the other – continues to have an impact on bio-political questions. Examples like the implementation of the European bio-patent directive in Austria make this apparent.

My argument here is that these age-old biopolitical conflicts still influence the current debate, not only as regards content. My interpretation is that potential groups of activists (political parties, feminist groups, disability rights groups) would rather not touch a (biopolitical) issue. This approach seems to have its roots in a fear that a broad political debate about biomedicine and biotechnology might bring back disputes which no one wants again (*e.g.*, “Fristenlösung”) or might launch public discussions of a kind (such as the GMO conflict) no one wants to face again. Potential participants must also have in mind that a debate could – with regard to their particular goals – change the legal framework in a non-desirable manner. And most of the contributors realise that their previous handling (or better: non handling) of these issues was quite a good way (in German “man fährt gut damit”): so why should one change the approach?

I am going to prove my interpretation especially in Chapters 4 and 5 of my contribution.

2.2. The regulatory phase

With the exception of the above-mentioned examples of areas of conflict, the bioethical and biopolitical debate started late in Austria in comparison to other countries. The debate was not getting under way until the mid-1980s and was initially characterized by a close thematic connection between reproductive medicine and genetic technology and a marked concentration on questions relating to legal regulation.

In fact, the Reproductive Medicine Law (FMedG), designed to regulate medically-assisted reproduction, was not debated and placed on the statute book until 1992, a full ten years after Austria’s first test-tube baby was born. The Austrian legislation does not refer to the embryo as such, but has coined the artificial legal term “cells capable of development”. This did not prevent the discussions concerning the embryo to be linked with the regulation of abortion (and the “Fristenlösung”). For the first time a lively discussion took also place in feminist circles in the context of genetic and reproductive technology, which was again internationally inspired but which had no major influence on the formation of policy. The Austrian debate was in any case stron-

gly influenced by Catholic-inspired arguments. “Despite rejection of any form of artificial fertilisation in principle, certain applications of it were considered acceptable among Catholic dignitaries (such as homologous IVF treatment under certain circumstances” (3).

Gene technology was regulated after and largely independent from the Reproductive Medicine Law: the Austrian Gene Technology Act (GTG) came into force on January 1st 1995. Terms of reference were the relevant European directives and the German gene technology law. The heated controversies going on at that time in Germany played a role, but discussions in Austria were limited to certain groups. There was also less resonance in the media, which can perhaps be explained by a smaller economic significance of this sector in Austria than in Germany. Arguments and models of discussion followed the German example, as was the initial setting-up of a parliamentary commission of enquiry. “This temporary opening up of the subject in the form of a discourse – albeit one limited to parliamentary representatives and experts – was in any case shown to be at odds with the traditional patterns of consensus-based democracy of that time. The relatively limited recommendations of the commission were largely of no consequence, and were in any case undermined by a ministerial legislative proposal” (3).

Grabner (3) sums up that with the Gene Technology Act “the legal situation was now clear, although biotechnology policy was still not attracting much special attention. This period can now be seen in retrospect as the quiet before the storm of the Austrian genetic technology controversy of 1996/97, which led to a massive increase in interest of both the public and the media”.

2.3. *Bioethics becomes institutionalized (3, 6)*

The first research ethics committees were established in 1980 at three medical faculties (Vienna, Graz, Innsbruck) on the basis of the Helsinki Declaration.

The setting-up of the parliamentary commission of enquiry in 1992 to deal with legislation on genetic technology was already mentioned. The possibility of using commissions of enquiry to prepare the way for parliamentary decisions on “wide-reaching and significant matters” never got beyond the initial attempt in 1992. No other biomedical and bioethical subject was ever again treated in this way in Austria. This is in stark contrast to the specialist commissions of enquiry set up by the German Bundestag (federal parliament).

Research ethics committees were introduced in 1994 by the Hospitals Act and the Drug Law. Today up to 40 such entities responsible for ethical review and oversight of research involving human beings exist in Austria.

An Advisory Board on Gene Technology was set up according to the Gene Technology Act in 1995.

The Bioethics Commission at the Federal Chancellery was established in the summer of 2001. This was largely in line with parallel events in Germany (Natio-

nal Ethics Council) and Switzerland, but relatively late when seen in the European context: The French National Consultative Ethics Committee for Health and Life Sciences – now regarded as a model to follow – was set up in 1983. The Danish Council of Ethics began its work in 1987. The main task of the Bioethics Commission is to advise the Federal Chancellor on the ethical aspects of all social, scientific and legal matters that arise in connection with the development of science in the field of human medicine and biology. In the words of the Federal Chancellor, the commission should serve as “an early warning system”. The Bioethics Commission is a forum of experts only, composed of 19 members (15 men and 4 women) from a wide range of disciplines including medicine, molecular biology and genetics, jurisprudence, sociology, philosophy and theology.

This composition of the committee provoked much criticism, above all from interest groups representing the disabled and patient advocacy groups. These groups saw the founding of a committee on ethics for the federal government merely as the creation of a mouthpiece for the administration. They decided therefore to create a committee on their own, in order to develop alternative positions in parallel to the topics being dealt with by the Bioethics Commission and to influence the debate.

In the autumn of 2002, the Government of the Land Vienna set up a committee on biological and medical ethics “to complement the work of the Bioethics Commission at the regional level”.

Summing up, one could say that there is no lack of committees on (bio)ethics in Austria.

2.4. *Dialogue and participation (5, 7)*

Demands for a wider public discussion of biopolitical matters grew louder especially through the activities of the above-mentioned commissions (3). Indeed, the work of bioethical committees – even in Austria – is not going on behind closed doors. The challenges created by biotechnology and biomedicine have also provoked strong scientific interest in recent years, both for its own sake and in the regulatory field. The number of scientific publications has risen, and these subjects have had an important impact on the institutions that train scientists in certain disciplines. A series of major bioethical events and international symposia – organized by such bodies as universities, political parties and NGOs – have recently taken place in Austria.

It should, however, be noted that even these events only reach limited sectors of the public. The latest initiatives invest more effort in trying to start a public discourse marked by such characteristics as transparency and greater participation. The first public “day of discussion” was organized in Vienna in October 2002, with the title “Genetic diagnosis: what’s it got to do with me?”. The 2004 “day of discussion” followed up on this subject with “Genome research and medicine –

how does it affect me?" The event, which was held in Graz (Austria) in June 2004, included discussions of scientific, sociological and ethical questions by experts and interested parties. June 2004 saw also the first "public citizens' conference" entitled "Genetic data: where from, where to, what for?" This event, which took place in Vienna, was modeled on similar conferences held previously in Denmark.

Although attempts are being made to widen the public debate, certain deficits are clearly apparent. Doubts regarding the seriousness and success of these activities have been expressed (3) and also confirmed (3).

3. Participants in the debate

Distinctive features of the Austrian biopolitical debate come into focus when examining more closely the parties involved (5, 8).

The political parties with representation in the Austrian parliament are remarkably restrained about expressing themselves in public on bioethical and biomedical subjects. The Austrian People's Party (ÖVP) and Austrian Freedom Party (FPÖ) are the only parties to mention biopolitical questions in their policy programmes. Some parties have also issued a series of subject-specific statements. The SPÖ and the Greens reject the domestic implementation of the European bio-patent directive in Austria, while the ÖVP promotes the "no" to the promotion of research with human embryonic stem cells and demands a veto on cloning. It seems that controversies either follow traditional patterns (*e.g.*, termination of pregnancy) or deal with specific points (*e.g.*, the bio-patent directive). On the other hand, one can find areas of agreement among the political parties (at least on basic principles) such as the issue of the Convention on Human Rights and Biomedicine of the Council of Europe. All political parties have signalled their approval for an accession. However, dissent might exist but not be apparent, as long as problematic issues are not touched upon. To sum it up, areas of conflicts are quite diffuse and no clear political profiles can be detected.

The Austrian parliament has basically made no contribution to the debate on biopolitical questions, and the field as a whole has barely been examined. Subject-specific proposals and basic debate have not taken place in the parliament, save for a few exceptions and decisions, some of which will be explained below. The Austrian federal government has mentioned the subject of bioethics for the first time in its programme for the current (XXII) legislature. The emphasis was placed on research into safety and risk factors, along with priority for the ethical questions involved and a strict veto on reproductive cloning. The European bio-patent directive is now to be implemented after the completion of a parliamentary enquiry. A further measure to be implemented by the federal government is the ratification of the Convention on Human Rights and Biomedicine of the Council of Europe and its additional protocols sub-

ject to previous clarification of the interests of handicapped persons.

The legal framework and the (ministerial) competences within the Austrian Federal Government are fragmented; for example, there are different competences for Science and Research, for Health and Women, for Innovation or for Justice. So far, attempts of restructuring this whole policy-field have not gone beyond so-called "agreement clauses", which means, *e.g.*, that the competent federal ministries have to act consensually when executing the Austrian Reproductive Medicine Law. The pragmatic way is a more or less formal "case by case" coordination. The establishment of the Bioethics Commission at the Federal Chancellery (acting as an advisory body on the basis of a general legal responsibility for "coordinating the general government policy") provides a further platform for coordination.

Thanks to the Bioethics Commission constituted at the Federal Chancellery (9), however, the debate has become clearly more intensive and sharply-focused. From the beginning, the Bioethics Commission has issued opinions and recommendations on various subjects by which it has defined the key topics of past and future debates, while clearly taking on an agenda-setting role. In its first recommendation (of February 2002), the Bioethics Commission unanimously urged Austria's accession to the Convention on Human Rights and Biomedicine of the Council of Europe. In March 2002 the commission came to the unanimous conclusion that "the domestic implementation of the European bio-patent directive is important also from the ethical point of view". The Bioethics Commission issued its findings regarding the question of stem-cell research in the context of the sixth EU research framework programme (2002–2006) in May 2002. There was a consensus among the members of the commission on that no financial support should be made available for research using embryos or therapeutic cloning. Eight of the nineteen members of the commission rejected all research on stem cells derived from human embryos on the grounds that their extraction was ethically unacceptable. The majority group of eleven members were in favour of research work on existing groups of embryonic stem cells, provided the final decision in individual cases was depending on whether strictly defined conditions have been met. There was a consensus that priority should be placed on supporting research on adult stem cells. In an interim report of February 2003, the commission unanimously rejected the so-called "reproductive" cloning (*i.e.* cloning designed to produce children), and asked for corresponding national and international prohibitions to be enacted. In March 2004, the commission issued its opinion regarding a draft amendment to the Austrian Reproductive Medicine Law (FMedG). On that occasion a group of seven members welcomed the suggestion of a comprehensive ban on cloning (*i.e.* one covering both reproductive and therapeutic cloning). Nine members were of the opinion that there were not sufficiently weighty reasons to justify the

imposition of a statutory ban on so-called therapeutic cloning. In July 2004, the Bioethics Commission issued a report on preimplantation (genetic) diagnosis (PGD), giving not only a comprehensive overview on the scientific, legal, ethical and social aspects of PGD, but also containing two different recommendations: one opinion in favour of a restricted approval of PGD and the other one in favour of maintaining the present legislation unchanged (6). During the first half of the year 2005 the Bioethics Commission has been invited to discuss the aspects of advance directives (living wills) (10).

The widespread absence of government and party-political positions in this field offers an opportunity for NGOs to step in and to dominate the Austrian biopolitical debate. This is why the proceedings regarding the Convention on Human Rights and Biomedicine of the Council of Europe have been accompanied by intensive lobbying on the part of interest and pressure groups: the core issue of the organization *Lebenshilfe Österreich* is the question of the “significance” of people with disabilities in a society, where life with disabilities and handicaps is increasingly seen as avoidable. Pro-life organizations like *Aktion Leben* see themselves “as the Austrian organization for the advancement and protection of life standing for an all-embracing protection of human life from conception to natural death” and therefore take a position against PGD or embryo research. As already mentioned, new social movements such as *Global 2000* or *Greenpeace* have a considerable influence over the domestic discussion in Austria, such as that concerning genetic engineering and the bio-patent directive.

Church-based and theological opinions are also widely represented in the debate. In 2001, both of Austria’s evangelical churches published a joint memorandum entitled “Responsibility for Life”, which dealt with questions raised by biomedicine. The eleven chapters of this paper tackle such relevant questions as reproductive medicine, reproductive and therapeutic cloning, pre-implantation diagnosis and research into human-embryo stem cells. The Catholic Conference of Austrian Bishops continues to contribute opinions to the debate. In a communiqué of November 9th 2001, this organization urgently sought to introduce certain taxative measures, including the imposition of a general prohibition on cloning and all “exploitation” of embryos or foetuses, regardless of Austria’s future adoption of the Convention on Bioethics. With regard to existing decisions on the question of stem-cell research at a European level, this communiqué intends to show “the extent to which the Austrian Federal government is willing to follow its own ethically responsible path where important basic questions are concerned, regardless of majority opinions within the EU, and independently of certain economic interests”. Commenting directly on the report of the Bioethics Commission already mentioned, preimplantation diagnosis is defined as “a direct instrument of selecting and an indirect means of terminating human life” in an opinion published in July 2004 (11).

The day-to-day ups and downs surrounding the publication of reports on biomedicine-related subjects could well be observed in the Austrian media throughout the last years. The corresponding waves of controversy were accompanied both by wild allegations (“cloned babies”) and actual cases of medical and technical developments, including details of current scientific and research breakthroughs in such fields as stem-cell research or the Human Genome Project. Regardless of the opinions and recommendations of the Bioethics Commission, which are taken up by the media regularly, such increases in the intensity of media reporting reflect mainly international news. One element that results in Austria lacking the continuous bioethical debate that is being conducted in, say, Germany or Switzerland, is the fact that Austria has no “quality” daily press comparable to the “*Frankfurter Allgemeine Zeitung*”, “*Die Zeit*” or the “*Neue Zürcher Zeitung*”, all of which are likely to report extensively and continuously on bioethical topics. Apart from the weekly newspaper “*Die Furche*”, only the website *science.orf.at* (Austrian Radio and Television Corporation) offers a reliable forum for contributions and discussions of any consistency.

The question if and to what extent a gender-sensitive perspective has been part of the discussions with ethical, legal and social implications (that means if an engendering of the debate has taken place) can only be answered preliminarily. In the 1980s reproductive medicine and biotechnology were linked primarily by feminist groups, while experts in medicine tended to keep these issues apart. In the past few years these issues have again been debated in a closer relationship and slowly, and sometimes alone feminist voices can be heard again. Women have – especially in the conflict surrounding “green” genetic engineering – played an important role (from protagonists within prominent NGOs up to female ministers). However, their arguments have been marginalized and blurred in the debates and the processes formulating politics. An extensive political discourse is (still) missing, although some significant contributions such as the criticism on the small number of women in the Bioethics Commission, the beginning scientific discussion or the so-called “Salzburg Declaration” issued in the context of a conference on feminist ethics in 2003 can be noticed (3, 12).

4. Selected topics

4.1. Convention on Human Rights and Biomedicine of the Council of Europe (7, 13)

A fairly intensive debate is going on about whether to sign the Convention on Human Rights and Biomedicine of the Council of Europe (the so-called Oviedo Convention, along with its Additional Protocols). Austria has neither signed nor ratified this convention to date.

In Austria, discussion of the subject has been dominated by pro-life pressure organizations such as *Aktion Leben* or *Lebenshilfe Österreich* for several years. They have adopted an overwhelmingly negative posture with

respect to the Convention. Several Austrian Länder (provinces) have also reacted negatively to the adoption of this Convention by Austria. Petitions for a “No” to the Convention of Human Rights and Biomedicine have been organized on several occasions. Their criticism is mainly targeted at the Convention’s regulations concerning research on embryos (Article 18 of the Convention) and research on persons not able to consent (Articles 6, 17 and 20).

The Bioethics Commission (in its opinion published in 2002) has concluded that basic conflicts in terms of content that go beyond detailed aspects between the Biomedicine Convention and the Austrian legal system or its fundamental principles are not apparent. The Commission has recommended explicitly that “especially in the light of the decisive improvements to be expected in the field of legal protection” Austria should ratify the Convention “as soon as possible”, accompanied by supportive domestic legal and political measures.

Explicitly referring to this positive position of the Bioethics Commission, a few corresponding parliamentary initiatives were started (*e.g.*, that of the SPÖ of July 2002). However, the dissolution of the National Council in autumn 2002 put an end to further negotiations. It is now specific government policy to ratify the Convention and its Additional Protocols, and all parties with representation in the parliament are in favour of such ratification. But the required political and legal measures remain still pending.

The causes for this strained situation are diverse. One possible factor lies in the misunderstanding of the specific normative aspects of the Convention. The Convention on Human Rights and Biomedicine is not (at least in the main part) self-executing. Before it can be adopted by Austria, it requires the unequivocal approval by the National Council (with the possibility of conditions being imposed), and furthermore needs to be implemented specifically by incorporation into national law. Ratification involves initially the creation and further development of a supranational legal framework and a set of limitations on biomedicine, which is a field that increasingly ignores national borders. The participation of the widest-possible cross-section of society is a prerequisite for the effective acceptance of such international minimum standards.

Not to join the Convention has certain disadvantages. Any country that refuses to ratify foregoes the opportunities to influence actively the further development that are offered by the Additional Protocols. Moreover, it denies itself also the right to appeal to and have recourse to inspection by the European Court of Human Rights. A decisive factor in favour of joining is that entry into the Convention could give a strong impulse to develop Austrian law further. Indeed, it can be assumed that the regulations of the Convention on Human Rights and Biomedicine correspond to those of Austrian law in many respects. Adoption of the convention and its additional protocols would also provide

an opportunity to examine the current legal situation in Austria. While a higher level of domestic legal protection could be achieved, without necessarily adopting the lowest common denominator that some critics fear, there might also be further benefits where the rule of law is concerned. These would become most apparent in terms of secondary legal and political measures and outcomes. Currently controversial subjects, such as cloning or embryo research can and should be precisely defined, accompanied by regulation of such “grey areas” as transplantation of organs from living donors.

4.2. The European bio-patent directive (7)

The question of the Austrian implementation of the EC directive on the protection of biotechnological inventions (98/44/EC) has become somewhat of a never-ending story. This directive was supposed to be implemented throughout the European Union by July 30th 2000, but has still not been adopted by all member states. The directive has been legally challenged, but the European Court of Justice has rejected appeals with remarks that the directive takes such a strict approach to patent law that the human body remains totally inviolable and inalienable, and that human dignity is guaranteed. In 2004 the European Commission has taken action against the countries concerned, including Austria, on grounds of breach of agreement.

The resistance to this directive has already manifested itself in the above-mentioned 1997 petition for an (anti-) gene technology referendum. The campaign was conducted under the slogan “No patents on life” and the declaration: “We demand a legal prohibition on the patenting of living organisms. Farm animals, research animals and plants are not things that can be created in a genetic research lab and then “marketed” by the patent holder. The patenting of living organisms should be rejected in principle on ethical grounds. Life should be created by nature, and not in a genetic research lab!” The organizations, such as Greenpeace, which proposed this referendum, along with the SPÖ and the green parties, managed to stir up massive popular and media opposition against the incorporation of this directive into Austrian law. Those in favour of implementing the directive came largely from the ranks of business and industry.

The ethical debate became more heated after the Austrian Bioethics Commission concluded in favour of an implementation of the directive in March 2002. This was in contrast to other national committees on ethics (*e.g.*, in Luxembourg, Sweden and Denmark), which proposed renegotiating the directive. The Bioethics Commission argued that the implementation of the directive is also important from the ethical point of view, because it would serve to define, extend and – for the first time – place ethically-based limits on what can be patented. Establishing defined ethical limits – so the Commission – is an advantage, even if not all the questions concerned can be clarified. This decision of the Bioet-

hics Commission subsequently came in for heavy criticism. This situation (even after a parliamentary enquiry had taken place in October 2003) continued for the next three years, resulting in the corresponding amendment to patent law with the votes of the ruling parties in May 2005. A monitoring committee was set up in the meantime, on the basis of a parliamentary decision of 1998, to evaluate the effects of the directive.

4.3. Stem-cell research in the contest of EU research funding (3, 14, 15)

National debates should be seen in their international context. Research involving stem cells derived from human embryos and its funding by EU sources (particularly under the auspices of the sixth EU research framework programme) has attracted a great deal of attention in Austria. The then Austrian minister responsible for this area adopted a strong position regarding the observance of protection for human dignity and human life with respect to genome research and biotechnology at a very early stage (in December 2001). Furthermore, specific prohibition of funding for certain types of research was demanded. In June 2002, Austria was the only EU member state to vote against the adoption of the framework research programme: a programme establishing the basis of funding for research into human embryonic stem cells, was not acceptable for Austria. As a further consequence, decisions were made regarding initiatives of some member states to implement comprehensive guidelines and bioethical principles: a ban on funding for certain areas of research (such as the cloning of humans for reproduction or the production of human embryos exclusively for research purposes) and a moratorium until December 31st 2003 on EU funding for research activities involving the use of human embryos and human-embryonic stem cells were resolved. After the termination of this moratorium, EU-funding for activities in the latter field is now permitted under certain conditions subject to exhaustive studies and ethical reviews, on a case-by-case basis.

Domestic debate in Austria is, *e.g.*, characterized by the fact that no research into human embryonic stem cells has yet been carried out in Austria, and there are thus no research-funding applications pending. Significant research is, however, being carried out on stem cells from human adults. This suggests a substantial difference to the state of discussion in other countries. It is interesting to note that Austria has had no parliamentary discussion concerning the framework conditions or funding even of potential research into human embryonic stem cells until now. The difference with respect to the stem-cell debate going on in Germany is striking. Steps taken there include the setting up of a parliamentary commission of enquiry to examine the legal aspects and ethics of modern medicine. In addition, major and extraordinary debates on stem-cell legislation and funding have taken place in plenary sessions of the Bundestag. In other words, while the debate on

stem cell research in Europe and in Austrian media has been quite heated, it has not really touched Austrian political bodies such as the federal government or the parliament. Again it was the Bioethics Commission and its opinion, dated May 2002 (see Chapter 4), who was standing in the crossfire of criticism (3).

It is in a way astonishing that this Austrian position (as shown) lacks – at least compared with the situation, *e.g.*, in Germany (with an Embryo Protection Act and a Stem Cell Act) – a clear and distinctive national legal framework: Section 9 of the above-mentioned Reproductive Medicine Law (FMedG) is the main point of reference. Accordingly, “cells capable of development” can only be used for medically-supervised fertility treatment. This stipulation is understood in such a way that it prohibits both the extraction of stem cells from embryos and research using human-embryonic stem cells or lines of stem cells. This interpretation however, is facing increased criticism, Section 9 of the Reproductive Medicine Law (FMedG) does not regulate the use of embryonic stem cells obtained by permitted means – such as being extracted outside the jurisdiction of FMedG (*i.e.* outside Austria) – and the term “cells capable of development” refers only to totipotent cells, and not to pluripotent embryonic stem cells. Austrian legislation imposes neither a prohibition on imports nor import limitations of any kind of (pluripotent) embryonic stem cells. Obviously, there exists a need for legal and political clarification of questions regarding both the protection of embryos and research using embryos and stem cells (*cf.* the observations concerning the Convention on Human Rights and Biomedicine).

This discussion is now set to be revived in the context of the current negotiations concerning the seventh EU framework research programme. Austria has already published a position paper in November 2004, in which it asks for the setting of high ethical standards and maintains the opinion that adult stem cell research should take priority over research with embryonic stem cells.

4.4. Reproductive Medicine Law (16, 17, 13, 14)

The Austrian Reproductive Medicine Law (FMedG), which establishes the legal framework for medically-supervised fertility treatment, is relatively restrictive. The many limits it imposes mean that not all available medical treatments can be offered in Austria. The law also restricts access to people who meet certain requirements. IVF treatment is only permitted for married couples or couples in a stable marriage-like relationship. Only homologous procedures are normally permitted, which means that all germ cells must be obtained from the spouse or the partner. Egg-cell donation, surrogate motherhood and embryo donation (referred to as “prenatal” or “pre-implant” adoption) are all prohibited. The periods for which semen / egg cells and embryos can be stored are also limited, despite the 2004 amendment to the Austrian Reproductive Medicine Law

(FMedG). To be fair, it has to be mentioned that – dependent on whether defined conditions are met – medically assisted reproduction treatments can be financed to a certain extent from public funds.

It is a widespread opinion that Section 9 of this law implies a ban of preimplantation genetic diagnosis (PGD), although the legislation does not refer to PGD explicitly. This is currently giving rise to lively debate on account of the right to equality enshrined in the Austrian constitution, as prenatal diagnosis (PND), or diagnosis *in utero*, are both legally permitted and financed from public funds. This brings us on to the question of legally non-penalized abortion (11). We have already referred to the need for a legal and political debate of the questions surrounding embryo and stem-cell research. The official position (as expressed, *e.g.*, by the Austrian Federal Ministry of Justice) is that the existing legislation can already be used to impose a general prohibition on cloning. This legalistic attitude attracts criticism because it fails to provide specific guidance on, above all, the use of nuclear cell transfer for the purpose of therapeutic cloning.

Efforts to amend the law have not gone beyond a small change carried out in 2004, which consisted of a largely uncontroversial extension to the permitted storage period for gametes and cells capable of development. The 2004 report explaining this amendment also refers to the fact that the debate gives rise to a series of questions, such as those concerning PGD, and recommends an explicit regulation of the prohibition of cloning, along with a close observation of developments in other countries. Any further demands or requests regarding amendment to the Reproductive Medicine Law (FMedG) would require more comprehensive discussion.

The fact that the law has not been amended substantially since the legislation came into force more than a decade ago means that many newly-developed procedures in the field of reproductive medicine are not specifically regulated by current law. This leaves a number of legal issues pending.

4.5. (Assisted) Euthanasia (7)

The ethical and legal issues relating to the ending of life are now also on the agenda. Discussions of assisted euthanasia in the Netherlands and Belgium or assisted suicide (in Switzerland), along with proceedings in the European Court (the Pretty case), have not gone unnoticed in Austria. The Austrian position to date, which amounts to a total veto on any form of “active” assisted euthanasia, while encouraging the expansion of the hospice movement and the provision of palliative care, remains in force. This is confirmed, along with other factors, by the parliamentary enquiry entitled “Solidarity with the dying – aspects of humane care of the terminally ill in Austria” of May 2001 as well as a unanimous decision of the National Council on the issue in December 2001 and the statutory introduction of periods of leave for family carers of terminally-ill patients.

The current situation is characterized by a relatively intense debate of possible scenarios, which is in turn strongly influenced by events outside Austria, such as in Germany or the United States (the Theresa Schiavo case). These include an anticipated provision for patients to make “living wills” (advance directives) concerning their treatment in the event of a future lack of ability to take decisions. The patients’ will in this respect is in principle recognized under Austrian law, and is normally regarded as a patient’s inalienable right. There is still, however, a core issue regarding the legal scope of such advance directives, which is not covered by current law. After many years of failed attempts to develop a “widely accepted opinion” at a scientific level and interdisciplinary workgroups, the last few years have been marked by political efforts to use federal legislation to regulate the issues still outstanding. The draft law that has now been presented has basically been welcomed by all those concerned, but certain details of it have come in for criticism (10). The fate of this legislative project must therefore still be classified as uncertain.

4.6. Gene Technology Act

The Austrian Gene Technology Act, which is (as mentioned) more than 10 years old, regulates also genetic analysis and somatic gene therapy for humans. The fact that this Act is confronted with a rapid pace of developments in all sectors of genetic engineering, implicates the necessity of current normative adaptations to this technical progress. In the past years some amendments to this Act have primarily aimed towards the field of “green” gene technology. This has left – as far as the requirements of this “red” genetic technology are concerned – an urgent need to adapt the 1995 law to current levels of scientific and technical understanding (alongside the accompanying ethical, legal and social debate).

In July 2005 the responsible ministry has invited to comment on a draft amendment whose content is above all to adjust regulations concerning medical applications of genetic engineering according to the “state of the art”. One of the key issues of this planned amendment is a new legal definition and differentiation of genetic analysis besides some new quality and data protection regulations. A major issue is the (proposed) extension of prenatal diagnostics at the preimplantation (genetic) diagnosis. However, diagnosis should be largely restricted to the testing of embryos in order to exclude chromosomal or genetic dysfunctions incompatible with life. The draft refers to the current legal situation and states that Austria is so far one of the few remaining European countries where an explicit legislation concerning PGD is missing and where the widespread opinion argues for a ban of PGD. The introduction of a wider range of PGD applications or even of a general genetic screening is rejected. The explanatory report to this draft refers directly to the report of

the Bioethics Commission (July 2004). Not surprisingly this draft has faced massive criticism ranging from the questioning of the right *sedes materie* (whether this technique should be regulated in the Gene Technology Act or in the Reproductive Medicine Law) to arguments such as “PGD means selection”. Other voices stipulate that PGD discriminates people affected by disabilities or pronounce the “door opener function” of the proposal.

CONCLUSIONS

The gene technology question has defined, and continues to define, the course of domestic and party-political debate in Austria and is attracting a corresponding level of media attention. Relatively scant attention is given to other ecological, technological and biopolitical issues. Politicization of these issues is – by and large – relatively low. Interest of the public is still fairly weak and bioethical and biopolitical issues have attracted only comparatively restricted publicity. The debate is limited in some respects: the range of issues discussed is rather narrow and has tended to remain unchanged (apparently, *e.g.*, the “Fristenlösung”-controversy has left its marks). The agenda-setting is largely influenced from outside Austria, although domestic inputs and shadings have increased in the past years. It is also not rare to see both the subject of discussion and its debating model imported from abroad, with the course of debate and the profile of the participants closely resembling their counterparts elsewhere, with the result that some domestic factors do not find proper attention. The number of contributors to the debate is comparatively low but has increased, especially with the Bioethics Commission joining. Neither the federal government nor parliament nor the political parties do play a prominent role. Positions or even conflict situations are quite diffuse in this “inner circle of the political arena”. Participation of diverse parts of civil society has its tradition in some specific contexts, but does seldom go beyond these. Approaches following this “mood of dialogue” (Irwin) can be recognized, but need to be developed further. These beginnings to “democratize” the debate are clearly facing the obstacle of the traditional patterns of policy-shaping in Austria (3).

Seen from a higher perspective, some central frames of reference in the Austrian biopolitical debate can apparently be recognized. Bioethical and biopolitical discussions are mostly limited and inert. Or to be more precise: there seems to be a situation where the potential participants and activists of a debate see that the regulatory framework, as outdated and as flawed as it might be, “works (quite) well” on a practical level and that most of them fear that a broader political debate could change the legal framework in an undesirable manner. This kind of a “loose-loose-situation” leads in fact to a great hesitance to touch the critical issues.

The absence of a holistic or comprehensive political or legal strategy has resulted in a situation where legislation, and thus political debate, is delivered only piecemeal. Since nearly a decade Austria has not really changed in any way the legal framework covering biomedicine, biotechnology and genetic technology. This is in stark contrast to the public debate and legal and political developments that have taken place in other industrialized countries in Europe and elsewhere.

DISCLAIMER

The views presented in this paper are those of the author and not those of the Austrian Bioethics Commission.

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