

The Impact of the Holocaust on the Bioethical Controversy in Germany and the European Community

A. Precondition

- I. Significance of Human Genetics
- II. "Holocaust" - "Holokaust"
 1. The word
 2. The term
 3. The argument
- III. Eugenics
 1. The meaning
 2. The history
 3. The racial hygienics ("Rassenhygiene")
- IV. NS racial legislation ("Rassengesetzgebung")
 1. „Gesetz zur Verhütung erbkranken Nachwuchses“
 2. „Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre“
 3. "Aktion Gnadentod"
 4. "Endlösung der Judenfrage"
- V. Interim Result

B. Bioethical Controversy

- I. Framework
 1. Atmosphere
 2. Risk-Society ("Risikogesellschaft")
 3. Legal Basis
- II. Biomedicine
 1. Fields (Overview)
 2. PID
 3. Clone technology
 4. Stem Cell Research
- III. Politics
- IV. Arguments "Religious War"
 1. Religious / Ethical fundamentalism
 2. Holocaust-argument
- V. Result

A. Precondition

I. Significance of Human Genetics

In enlightened societies there is a basic desire to know who humans are and why they are as they are.

At least, an understanding of human heredity is of importance in the prediction, diagnosis and treatment of diseases that have a genetic component. That understanding was given a fresh impetus with the studies of chromosomes in the middle of the past century which ran into the nowadays Genome-Project.

To illuminate the roles of the genes means to change human life. It means not only a scientific, but also a social and ethical **Revolution**.

So not only research utilizing human embryos to provide insight into cell development was certain to cause much bioethical controversy, especially in Germany.

As a response to the disaster of the Third Reich the German Constitution, the "Grundgesetz" (basic law), puts into top position the unalterable command to protect the human dignity. Prevailing opinion is, that the protection has to begin at the time of the formation of a zygote. Many believe that humans should not at all be allowed to control their own evolution. On the other hand, their opponents emphasize the freedom of research.

Other member-states of the European Community are not so fixed, when the developing fertilized egg is to be called a human or a "human being".

But they don't have to deal with a past like the Germans. They don't have to deal with the holocaust in the perpetrating role.

II. Holocaust - Holokaust

1. As I address myself to you as somebody who is teaching and practicing public law, I should use plain legal terms. However "holocaust" is the **opposite of a legal term**.

“Holocaust” denotes the maximum credible injustice to be done to a people and for which there never was and never can be a legal justification.

Put together from the Greek words "holos" = completely and, "kaustos" = burnt, we come across "Holokaustos" "in the writings of *Xenophon* meaning "burnt offering". About 1250 we find the **word** "holocaust" in an English translation of the Bible¹. In World War II contemporaries made use of the word to describe the persecution and killing of Jews. Since then "holocaust" internationally is associated with Nazi-genocide of the Jewish people².

In Germany the expression became popular due to the title of a TV-Movie in 1979³. That title was not translated. To emphasize the singularity of the so to say industrial extermination of the Jews as distinguished from other phenomena of genocide⁴, in Germany "holokaust" was written with a "k" and spelled "au" sometimes. The term “Holokaust” was restricted to the murdering of the Jews⁵, but the word “Holocaust” was also used to describe the big-scale murdering of any people on racial reasons. The Holocaust-memorial to the murdered Jews in Europe in Berlin, after a long discussion, being built since 30 October 2001, although is written with a “c”⁶.

¹ Cp. The Merriam-Webster Dictionary, New York 1974, p.338 “a thorough destruction esp. by fire.”

² *Bauer, Yehuda / Keren, Nili*, History of the Holocaust, New York 1982; *Benz, Wolfgang*, Der Holocaust, 5 ed., Munich 1999; *Berenbau, Michael*, The World Must Know. The Story of the Holocaust as Told in the United States Holocaust Memorial Museum, Washington, D.C. 1993; *Gutmann, Israel*, et al. (ed.) Enzyklopädie des Holocaust. Die Verfolgung und Ermordung der europäischen Juden, 2nd ed., München 1998; *Guido Knopp*, Holokaust, 2000; *Koch, Gertrud* (ed.), Bruchlinien. Tendenzen der Holocaustforschung, Böhlau, Cologne 1999. See also *Hilbig, Raul*, Die Vernichtung der europäischen Juden, Frankfurt / M. 1999; *Yahel, Leni*, Die Shoah. Überlebenskampf und Vernichtung der europäischen Juden, Munich 1998.

³ The US-Titus/NBC „Docu-Drama” from 1978 (directed by *Marvin Chomsky*) was broadcasted in Germany 22, 23, 25, 26/11/1979. Complete title: “Holocaust – Die Geschichte der Familie Weiss”. See *Lux, Stefan* (ed.), Lexikon des internationalen Films, Vol. G - H., Hamburg 1995, p. 2514.

⁴ Genocide is stated in Art. 2 Genocide Convention of 9 December 1948 UN Treaty Series, Vol. 78, 277. See also *Safferling, Christoph J.M.*, Wider die Feinde der Humanität – Der Tatbestand des Völkermordes nach der Römischen Konferenz, JuS 2001 p. 735 –739.

⁵ *Gutman*, l.c. (N. 1), XI.

⁶ On 25 June 1999 the German “Bundestag” passed a resolution to build the Memorial to the Murdered Jews of Europe, designed by architect *Peter Eisenman*. The Memorial will be erected in the center of Berlin, in the vicinity of the Brandenburg

2. The “Holocaust” of the Jews is one and at the same time the most important part of the Nazi-evil. But to gain a general view of the Nazi atrocity you also have to include the killing of all the helpless people and people without any rights under Nazi rule. In this case the **term** “Holocaust” is used in a wider understanding.

In don't talk about the war crimes and the unjust judgments against the resistance movement, but about the extermination of innocent people aimed "to keep race and blood clean"⁷.

The singularity of the holocaust is not diluted, if you see it in compliance with the context of the eugenic motivated killing of humans and human beings.

3. Before I will enter into eugenics I would like to emphasize that the Germans born after World War II are not responsible for any kind of Nazi atrocities. But our past is on our conscience.

In this regard "Holocaust" is a symbol for the **maxim "Never again"**.

In political controversies, the holocaust is an **argument**, no one can overcome. It is also an argument easily to be misused⁸.

gate and the Reichstag building. See also *Jeismann, Michael*, Mahnmal Mitte. Eine Kontroverse, 1999; *Heimrod, Ute* (ed.), Der Denkmalstreit – das Denkmal? Die Debatte um das „Denkmal für die ermordeten Juden Europas“: eine Dokumentation, Berlin 1999.

⁷ Cp. also *Friedländer, Henry*, Der Weg zum NS-Genozid. Von der Euthanasie zur Endlösung, Berlin 1997

⁸ Representative: *Dörner, Klaus*, Wiedervereinigung mit den Schwachen, Frankfurter Allgemeine Zeitung No 160/ 14 July 1999, p. 10: „Aber auch hinsichtlich der möglichen Gefahren, die sich mit dem neuen Technologieschub der Medizin verbinden, ist in Deutschland eine Wachsamkeit zu registrieren, die zumindest von einigen Ländern als übertrieben, als fundamentalistisch und als zu lerneifrig, was die NS-Medizin angeht, belächelt wird. So gilt das Embryonenschutzgesetz als zu fortschrittsfeindlich; die Bioethik-Konvention des Europarates erfährt ihren nachhaltigsten Widerstand aus Deutschland; und die Bundesärztekammer hat in ihren Sterbebegleitgrundsätzen das Hungersterben für Menschen im chronischen Wachkoma ausgeschlossen, sie hält an der Menschenwürde der Lebensweise auch dieser Bevölkerungsgruppe fest. Darin kommt eine große Lernbereitschaft aus unserer Vergangenheit der NS-Medizin zum Ausdruck.“

III. Eugenics

1. The term “eugenics”⁹ is applied to theories and practices designed to improve the human condition from the genetic point of view.

The eugenics attempts to improve the human species – the negative eugenics by identifying persons at risk of perpetuating inferior genes and by preventing their reproduction, the positive eugenics by identifying persons who carry good genes and by encouraging their reproduction.

2. The idea to apply knowledge of heredity to improve the human race goes back to the earliest times.

Plato idealized a society in which there is a constant selection for the improvement of the human stock. Later on the British took over. After *Maltusius* and *Darwin*¹⁰, it remained to *Darwin’s* cousin *Francis Galton*¹¹, to see that the theory of evolution implied that humans might direct their own evolutionary future. *Galton* coined the term “eugenics”, declaring that “it would be quite practical to produce a high gifted race of man by judicious marriages during several consecutive generations”. At first *Galton* did not gain wide acceptance for eugenics because the scientific foundation was lacking. So he endowed a research fellowship in eugenics and provided funds for a chair of eugenics at London University. It was *Karl Pearson*, who obtained fellowship and chair and who felt that high birth rates of the poor was a threat to civilization and that the higher races must supplant the lower. His views gave countenance of those who believed in racial superiorities.

⁹ From Greek „born-well“.

¹⁰ The book “On the origin of species by means of natural selection or the preservation of favoured races in the struggle for life” came out 24 November 1859 and was sold out the same day. In Germany the “Volks-ausgabe” of “Die Entstehung der Arten durch natürliche Zuchtwahl oder Die Erhaltung der begünstigten Rassen im Kampf ums Dasein”, ed. by *Schmid, Heinrich*, Stuttgart (without year) popularised *Darwin*.

¹¹ Restrictions in Marriage. Studies in National Eugenics. Eugenics as a Factor in Religion. Followed by an Abstract of an earlier Memoir 'Eugenics: Its Definition, Scope and Aims', Sociological Papers Vol. II (1904), p. 195-250. For Germany see

In 1926 the American Eugenics Society was founded in the United States which supported the belief that the white race was superior to other races. Besides, the science of that day supported single-minded views on feeble-mindedness and criminal types. Eugenists laid great stress on the importance of sterilizing defective persons. By 1931 sterilization laws had been enacted in 27 states of the United States. Sterilization laws were also passed in Switzerland¹², Denmark, Norway and Sweden¹³.

3. The greatest abuse of the concept of eugenics took place in Nazi Germany¹⁴, when as a rationale for producing a master race people considered to have inferior genes were murdered. After January 1933 key ideology in Public Health was the "Rassenhygiene" (racial hygienics), replacing social hygienics¹⁵. The doctrine had been outlined in 1895 by *Alfred Ploetz*¹⁶. 1905 a society for racial hygienics (Gesellschaft für Rassenhygiene) had been founded. After the catastrophe of 1919 racial hygienics developed momentum with the falling birth-rate, the threatening of the German population to die out, the pauperization combined with diseases like alco-

also *Tonnies, Ferdinand*, Eugenik, 1905 = Soziologische Studien und Kritiken, Jena 1925, p. 334-349

¹² Cp *Müller, Bertold*, Rechtliche und gesellschaftliche Stellung von Menschen mit einer „geistigen Behinderung“: eine rechtshistorische Studie der Schweizer Verhältnisse im 19. und 20. Jahrhundert, Zürich 2001.

¹³ Already 1757 Sweden banned marriages of epileptics..

¹⁴ See also *Bastian, Till*, Von der Eugenik zur Euthanasie. Ein verdrängtes Kapitel aus der Geschichte der Deutschen Psychiatrie, Bad Wörishofen 1981; *Eckart, Wolfgang, U.*, Geschichte der Medizin, 2nd. ed., Berlin 1994, p.286; *Kaul, Friedrich Karl*, Die Psychiatrie im Strudel der "Euthanasie". Ein Bericht über die erste industriemäßig durchgeführte Mordaktion des Naziregimes, Frankfurt /M 1979; *Klee, Ernst*, „Euthanasie“ im NS-Staat, 9th ed. Frankfurt / M., 1985; *Müller-Hill, B.*, Tödliche Wissenschaft. Die Aussonderung von Juden, Zigeunern und Geisteskranken 1933-1945, 2nd. ed., Hamburg 1985; *Schmuhl, H. W.*, Rassenhygiene, Nationalsozialismus, Euthanasie, Göttingen, 1987; *Weingart P. / Jroll, J / Bayertz*, Rasse, Blut und Gene. Geschichte der Eugenik und Rassenhygiene in Deutschland, Frankfurt/M., 1992; *Wuttke-Groneberg, Walter*, Medizin im Nationalsozialismus, Tübingen 1980.

¹⁵ Cp *Schmidt, Ludwig*, Hygiene, Sozialhygiene, Rassenhygiene, Ziel und Weg 4 (1934) p. 251-252

¹⁶ Die Tüchtigen unserer Rasse und der Schutz der Schwachen, 1895.

holism, tuberculosis and syphilis¹⁷. When race hygienics met race hatred and anti-Semitism¹⁸, the outcome was a racial legislation.

IV. NS Racial legislation (“Rassengesetzgebung“)

The doctrine of racial hygienics paved the way for the NS racial legislation, the “Rassengesetzgebung”.

1. First step was a law to prevent children with hereditary diseases, in German „Gesetz zur Verhütung erbkranken Nachwuchses“ (14/7/1933)¹⁹ with the supplementary marriage-health law “Gesetz zum Schutze der Erbgesundheit des Deutschen Volkes”²⁰ (18/10/1935). Laws like these could have been enacted in any other country at that time.

2. Second step were typical Nazi-laws, the so called “Nürnberger Rassengesetze” enacted on 15 September 1935 aimed at the Jews²¹, including the most prominent

¹⁷ Cp *Binding, Karl / Hoche, Alfred*, Die Freigabe der Vernichtung lebensunwerten Lebens. Ihr Maß und ihre Form, Leipzig 1920.

¹⁸ Roots: *Scheil, Stefan*, Die Entwicklung des politischen Antisemitismus in Deutschland zwischen 1881 und 1912: eine wahlgeschichtliche Untersuchung, Berlin 1999.

¹⁹ RGBl. I p. 529. See also *Schneider, Christoph*, Die Verstaatlichung des Leibes: das „Gesetz zur Verhütung erbkranken Nachwuchses“ und die Kirche: eine Dokumentationsanalyse, Konstanz 2000; *Kramer, Sabine*, „Ein ehrenhafter Verzicht auf Nachkommenschaft“: theoretische Grundlagen und Praxis der Zwangssterilisation im Dritten Reich am Beispiel der Rechtsprechung des Ergogesundheitsobergerichts Celle, Baden-Baden 1999.

²⁰ Ehegesundheitsgesetz, RGBl. I p. 1246.

²¹ See also the citizen law (“Reichsbürgergesetz”) 15 September 1935 (RGBl. I p. 1146); First ordinance regarding citizen law (“Erste Verordnung zum Reichsbürgergesetz”) 14 November 1935 (RGBl. I p. 1333); Second ordinance regarding citizen law (“Zweite Verordnung zum Reichsbürgergesetz”) 21 December 1935 (RGBl. I p. 1524) –re: civil servants –; Third ordinance regarding citizen law („Dritte Verordnung zum Reichsbürgergesetz“) 14 June 1938 (RGBl. I p. 627) – re: Jewish trade – with the ordinance to eliminate Jews from German business life (“Verordnung zur Ausschaltung der Juden aus dem deutschen Wirtschaftsleben“) 12 November 1938 (RGBl. I S. 1580); Fourth ordinance regarding citizen law („Vierte Verordnung zum Reichsbürgergesetz“) 25 July 1938 (RGBl. I p. 969) – re: withdrawal of license to practice as a Jewish doctor); Fifth ordinance regarding citizen law (“Fünfte Verordnung zum Reichsbürgergesetz“) 27 September 1938 (RGBl. I p. 1403) – re: withdrawal of Jewish attorneys –; Sixth ordinance regarding citizen law (“Sechste Verordnung zum Reichsbürgergesetz“) 31 October 1938 (RGBl. I p.

“law to protect the German Blood and the German Honor (“Gesetz zur Schutze des deutschen Blutes und der deutschen Ehre”)²², which prohibited marriages between and extramarital sexual intercourse of Jews and Germans.

3. The concept to prevent children with hereditary diseases led to the euthanasia of mentally disabled persons, ordered by Hitler in September 1939 und executed since January 1940 as “Aktion Gnadentod.” The “Euthanasia program” was kept secret, but was noticed and rejected by the public during 1940. Hitler decided, to stop officially the program until September 1941. By that time from 70.000 to 90.000 people hade been killed.

4. The persecution of the Jews did not stop. The “Euthanasia program served as example The German offensive against the USSR meant the signal for further escalation. On 20 January 1942 the Wannsee-Konferenz took place, where the “Endlösung der Judenfrage” was decided secretly. Even by Nazi-legal standards, that program was illegal²³. That takes us back to the “Holokaust” in its strict sense.

V. Interim Result

I told you, the “Holokaust” in Germany makes for an increased awareness of every succeeding generation after the Nazi-generation and the "Holokaust" is a symbol for the maxim "Never again". I approve of that attitude. I even approve of putting the eugenic crimes under the same symbol.

1545) – re: withdrawal of Jewish patent attorneys –; Seventh ordinance regarding citizen law (“Siebte Verordnung zum Reichsbürgergesetz”) 5. Dezember 1938 – re: retirement pension of Jewish civil servants –; Eight ordinance regarding citizen law (“Achte Verordnung zum Reichsbürgergesetz”) 17.1.1939 (RGBl. I p. 47) – re: withdrawal of license to practice as Jewish dentist, veterinary surgeon and pharmacist –. See also *Blau, B.*, *Das Ausnahmerecht für Juden in Deutschland*, Düsseldorf, 1954; *Ladwig-Winters, Simone*, *Anwalt ohne Recht: das Schicksal jüdischer Rechtsanwälte in Berlin nach 1933*, Berlin 1998.

²² RGBl. I p. 1146.

²³ Other opinion *Benz, I.c.* In this respect the controversy about legality and legitimacy is obsolete. Nevertheless see *Dyzenhaus, David*, *Legality and legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, Oxford 1999; *Gross, Raphael*, *Carl Schmitt und die Juden: eine deutsche Rechtslehre*, Frankfurt/M, 2000.

But I definitely disapprove of using Holocaust as a knock out argument in all kind of contemporary controversies. I doubt if the bioethical controversy has anything to do with the holocaust at all.

Nevertheless most questions about biotechnology are not of a scientific, but of a political, religious and legal character.

The most controversial question is, how to treat identified birth defects and genetic diseases? Are we reviving overcome eugenic concepts? Are we violating the “Never again”-principle of the Holocaust?

For many Germans the answers ist Yes”.

As a result of the misuses, there exists a taboo concerning any kind of eugenic concepts in Germany. The practice of modern genetic counseling is reconsidered as a eugenic activity and denounced as modern form of Holocaust.

In Israel, you may believe this attitude to be quite absurd. The goal is not a priori immoral to prevent the conception or birth of individuals with most serious forms of maldevelopment, who would be tragic burdens for themselves and to their families. There has to be a permission for individuals and couples to be identified at risk of perpetuating genes that lead to hereditary diseases. In consequence, they should be able to make informed and personal decisions about reproduction. However, the physicians and scientists who make that possible have to deal with the holocaust argument.

B. Bioethical Controversy

I. Framework

1. In 1997 the „biomedical Thriller“ by *John Case*, *The Genesis Code*²⁴ was a New York Times Bestseller. The plot in short: By using DNA of Holy relics an Italian scientist succeeds in cloning a couple of young boys, one of which is supposed to possess the genes of Jesus. This causes a conservative Organization inside the catholic

²⁴ Ballantine Books, New York

church to look for all cloned boys on purpose to let them die. The story is an extreme example for the fears inherited biotechnology.

2. The bioethical controversy is part of the old argument about chances and risks of modern technology. Optimism associated with progressing sciences and technology has gone. Things which were considered as benefit for mankind, as victory of men over nature – freedom of famine, raising life expectancy and standard of living, humane working conditions, leisure time, mobility, opportunity of communication – were taken for granted in Western industrial nations and were scarcely thought of. Even though a reasonably civilized life is unthinkable without the achievements of modern sciences, technology and medicine.

Achievements like these inevitably involve risks. In Germany there are many movements refusing to accept those risks. They think that we are not able to master modern technology. Risk-society (“Risikogesellschaft”) is not only a catchphrase. After a couple of large scale accidents – from Tschernobyl to New York WTC – many people deem the failure of man made installation to be more dangerous than natural disasters.

Of course they are wrong. There is no abandoning of the civilization. Our Chancellor denoted the destruction of WTC as an attack on civilization all over the world, and he was right. To counter-attack, we have to use our technology, we have to make our installations safer, we have to find sufficient vaccine against anthrax.

Nonetheless the resistance against the “Risikogesellschaft” looked for targets and allies. Targets were nuclear energy and at first genetic engineering. Allies were, like always, the lawyers and law professors. Germany is not only dedicated to the rule of law (“Rechtsstaat”), but also to the legal process. Access to the courts is one of the most important constitutional principles in Germany causing delays for scientific, technological or medical projects. For most projects such a delay is fatal. In 1989 my academic childhood friend and colleague *Bernhard Schlink* propagated the so called

“katechontische Funktion des Rechts”²⁵, meaning the purpose of law to slow down technological progress.

3. Right at that time the revolution of genetic engineering took place. In 1973 *Stanley Cohnen* made well-aimed gene transfer possible. But in Germany the industrial use of genetics did not advance. There was no specific legal basis. In spite of the principle: “no prohibition so permission”, the administrative court of Hesse unexpectedly stopped the installation of a genetic plant demanding a parliamentary law on genetic engineering²⁶. The legislator was forced to shoot from the hip and to pass a law, leaving aside all controversial items like the human genetics. Human genetic is partly regulated by the law to protect the embryo (“Embryonenschutzgesetz”) from 1990. The “Embryonenschutzgesetz” is a penal law. It permits in-vitro-fertilization only to initiate pregnancy and criminalizes sex determination, germ line gene therapy and cloning of human embryos. There is no comparable law in the other member states of the European Community. The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine from 1995 is more liberal, and therefore was not signed by Germany. I take part of the “Embryonenschutzgesetz” for unconstitutional considering that progress in medical and biological sciences, in particular advances obtained through biomedical research, contributes to save lives and improve their quality. But that’s an outsider opinion within the jurisprudence. Fortunately the scientists think differently. In the political and bioethical controversy the hardliners are losing ground. Even in Germany biomedicine is making progress.

II. Biomedicine

1. I do not intend to steal your precious time by giving a lecture in a subject other than my own and, on top of that, in a strange language, so I only tell you in short that the biomedicine deals with the diagnosis of the genome, the genetic analysis, the genetic diagnosis, the genetic therapy and the genetic research. All subjects meet

²⁵ Die Bewältigung der wissenschaftlichen und technischen Entwicklungen durch das Verwaltungsrecht, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtler (VVDSStRL) 48, Berlin 1990, p 238 - 261 (259).

²⁶ Decision 6 November 1989 – 8 Th 685/89 –, NVwZ 1990, 276.

themselves somehow. But their legal and ethical problems are different. Regarding the legal aspects the genome-project is only interesting for patent attorneys. Ethically the genome project serves as a slippery slope argument. In Germany people are afraid of becoming transparent ("gläserne Mensch"). Therefore the genetic analysis is also permitted as judicial evidence only in very rare cases for example in criminal proceedings to persecute sexual offences or in civil proceedings to define the parentage. Nevertheless the DNA-Analysis is increasing. The genetic diagnosis is indicating or predicating genetic irregularities. In Germany you need a consent before starting such a diagnosis or you may violate the "right not to know". Ethically the predicative diagnosis is undesired, if it only aims to exposure a genetic disease for which there is no therapy. However this is a general problem of diagnosis. So the bioethical controversy concentrates on the genetic diagnosis of human being before birth. The genetic therapy is permitted, if it deals with nothing but soma cells. The somatic gene therapy is a normal way of repairing cells. Most controversial is the germ line gene therapy; even research is forbidden in Germany. At the moment the focus of the bioethical controversy is cloning and stem cell research.

2. In Germany the diagnosis of in-vitro-fertilized embryos before implanting them into the uterus of their natural mother is illegal. It is all the more a criminal offence to use the uterus of a woman who did not give the fertilized egg (so called uterus-leasing). The ban of PID is a direct result of the Holocaust-argument. The doors opened for selection shall be locked no matter how.

3. Therapeutic cloning to replace human tissues is legally the same as the usual tissue graft. The problem is that you need a medium to transplant healthy genetic material of the patient. Such mediums are embryonic stem cells. Therapeutic cloning only can be done, if the use of embryonic stem cells is permitted.

Reproducing a whole living thing like the famous sheep Dolly is permitted. Reproducing a human being is banned in most countries of the world, especially in Germany.

4. Stem cells of humans become multipotent; regularly they are only able to repair the organ they belong to. There is much research on so called adult stem cells. But at the moment the embryonic stem cells (ESC) are more interesting, because they are

totipotent, meaning that they are able to replace any cells of the human body. There is hope, that one day ESC will make possible to defeat diseases like multiple sclerosis²⁷, Alzheimer and diabetes. However the problem is to gain embryonic stem cells. In Germany in vitro fertilization is only allowed to induce pregnancy. Any kind of selection is forbidden. If there are surplus embryos (super ovulation) you have to make a random access. The embryos, which are not selected, have to be destroyed. That is bad luck for them; but that is not a violation of their dignity. They at least had their chance. Most of the ethical classes in Germany think producing ESC to use them as therapeutic medium for others violates their dignity. But if the ESC are surplus from other countries, Germans are not able to make the selection. Than the ESC-Research is permitted. Which means: in Germany you only have to import ESC to catch the research train.

III. Politics

There is a political controversy on biomedicine in most civilized countries of the world. In July President *Bush* supported the prohibition of any kind of human cloning including therapeutic cloning. The House of Representatives decided the same way in August. The situation in the US Senate is not yet clear. In Great Britain any medical use of embryos, which are not older than 14 day is permitted. That influenced the discussion in the US. On 9 August President *Bush* declared, that ESC with already present cell-lines should be possible and may be financed by public funds. In Canada und France one is inclined to follow that middle-way. Present ESC that can be used are existing in Australia, Sweden, India and Israel. As I am told the Rambam Medical Center in Haifa ist willing to export ESC to Germany exactly to Bonn University in Nordrhein Westfalen.

In Germany the controversy is boiling. The Federal Parliament (Bundestag) established a Bioethical Committee hoping to delay the development. The Chancellor reacted by establishing August a National Ethic Council in August 2001, hoping to liberalize the Embryonenschutzgesetz step by step. His front man, the president of Nordrhein-Westfalen *Wolfgang Clement*, intended to travel to Israel to support the import of ESC. The opposition, the Christian Union was protesting heavily. Then

²⁷ Medical alternative as long-term option is the xenotransplantation uderstood to mean the transplantation of living cells, tissues and organs across species border.

there was a stand still. Now things are rolling again. We are expecting a decision until the end of the year.

V. Arguments “Religious War”

1. The controversy resembles a religious war. Religious and ethical fundamentalists think that they are defending the Creation, technocrats want to force the progress of mankind. As a legal adviser I am inclined to reject any kind of fundamentalism. Not only as a professor of public law I think that a legislation is unconstitutional which forces women to bear children with diseases, that could have been avoided²⁸. In Germany abortion is permitted, if the born child would suffer a genetic disease. The PID is not permitted. So women first have to get pregnant and then are permitted to abort. That' is cruel, inhumane and unconstitutional.

2. In this context the holocaust-argument is the most perfidious argument. Its only purpose is to blame women in a situation that is difficult enough for them.

V. Result

In the bioethical controversy there are fanatics of progress thinking, what can be done should be done to better the human race. They may be regarded as mentally insane as the Nazis.

But generally the biomedical achievements have nothing to do with racial selection. Here the holocaust-argument, the never again argument, is completely displaced. Even if you include the euthanasia program, you are not allowed to compare the use of embryonic stem cells which are bound to perish with that program.

There is an impact of the Holocaust on the bioethical controversy in Germany that could influence other member states of the European Community. And it is good that the Germans are more sensitive in ethical manners than other nations. But it is

Cp. *Hüsing, Bärbel et.al.* , Zelluläre Xenotransplantation, Bern 2001.
²⁸ Cp. for example *Ronellenfitsch, Michael*, Forschungsfreiheit und biomedizinische Forschung, in: Wagner, Hellmut (ed.), Rechtliche Regulierung - Hemmnis oder Antrieb für Wissenschaft, Forschung und Innovation, Karlsruhe 2001, p. 83-104.

strictly unbearable to use the holocaust-argument in a context that has nothing to do with the Holocaust at all. Never forget the Holocaust also means never to misuse the Holocaust as an argument. In the bioethical controversy there are many arguments worth to be discussed. Let's leave the knock out arguments to the fundamentalists. Israelis know better than to use the holocaust-argument in the bioethical controversy. In Germany and Europe we should learn from them.