Fundamental Rights Concerning Biomedicine in the Constitutional Treaty and Their Effect on the Diverse Legal Systems of Member States

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A. Introduction

The Constitutional Treaty¹ was thought to address the new challenges occurring in front of the enlarged Europe in relation to the rapidly changing international political, economic, social and cultural circumstances. In this respect, the problem of the new quality of the European Union is being repeatedly disputed. If the EU is to be something more than an arrangement for inter-state cooperation, the Union has to be able to act rationally on a collective basis, in a way that different interests or preferences will give priority to seeking agreement over self-interest maximization. The question of whether the EU envisaged in the Constitutional Treaty represents a deeper form of integration can be answered by examining its ability to achieve consensus on conflicting issues and to form a common will about how to solve common problems.² The field in which the most controversies arise nowadays is that of biotechnology and biomedicine.

Through the decoding of the human genome and development of biotechnologies we gain control over processes, which until now seemed to be uncontrollable and unforeseeable. The "line between the chance and

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the choice, forming the basis of our value system is shifting.”3 This change is marked by great ambivalence. On the one hand, the advance of biological sciences carries a promise of benefit to humans, since combined efforts of reproduction medicine and genetic engineering open up the prospect of gene-modifying interventions for therapeutic goals. On the other hand, modern genetics enables the cloning of human beings and gene manipulations, which may lead us to eugenic practices – entirely discredited in the course of the 20th century. This prospect casts a peculiar light on a condition of our normative self-understanding. Concerns focus on radical changes to the terms of human existence, to the currency of human relationship, to the boundaries of inclusion and exclusion, and to our cultural understanding of birth, life and death.4

Consequently a whole range of values, such as human dignity, personal autonomy, relief of human suffering, welfare of the child and society’s well being, come into conflict. Within a state they are being transposed into the sphere of law and emerge as conflicts of fundamental rights, such as between the right to life and bodily integrity or the freedom of research and the duty of governments to best serve the health needs and other fundamental rights of their citizens. “The problem, [facing the government] (...) is precisely how conflicting claims are to be settled in the interest of the widest possible contribution to the interest of all, or at least of the great majority.”5

This paper aims to address the problem of whether the constitutional provisions constitute a coherent European approach towards the controversial issues concerning biomedicine. Consequently, the answer to the question whether we can already speak of New European Bioethics and whether an approximation of the diverse European regulations is to be expected in the future has to be sought. Therefore, first of all, the normative differences between Member States and the underlying philosophical traditions need to be shortly presented. In the second part of the paper, the analysis of the EU competences as regards the area of public health and biomedical research will proceed. This will be followed by the interpretation of the legal limitations such as human dig-

