

# Conference on Reproductive Medicine

Saanenmöser, January 22, 2011

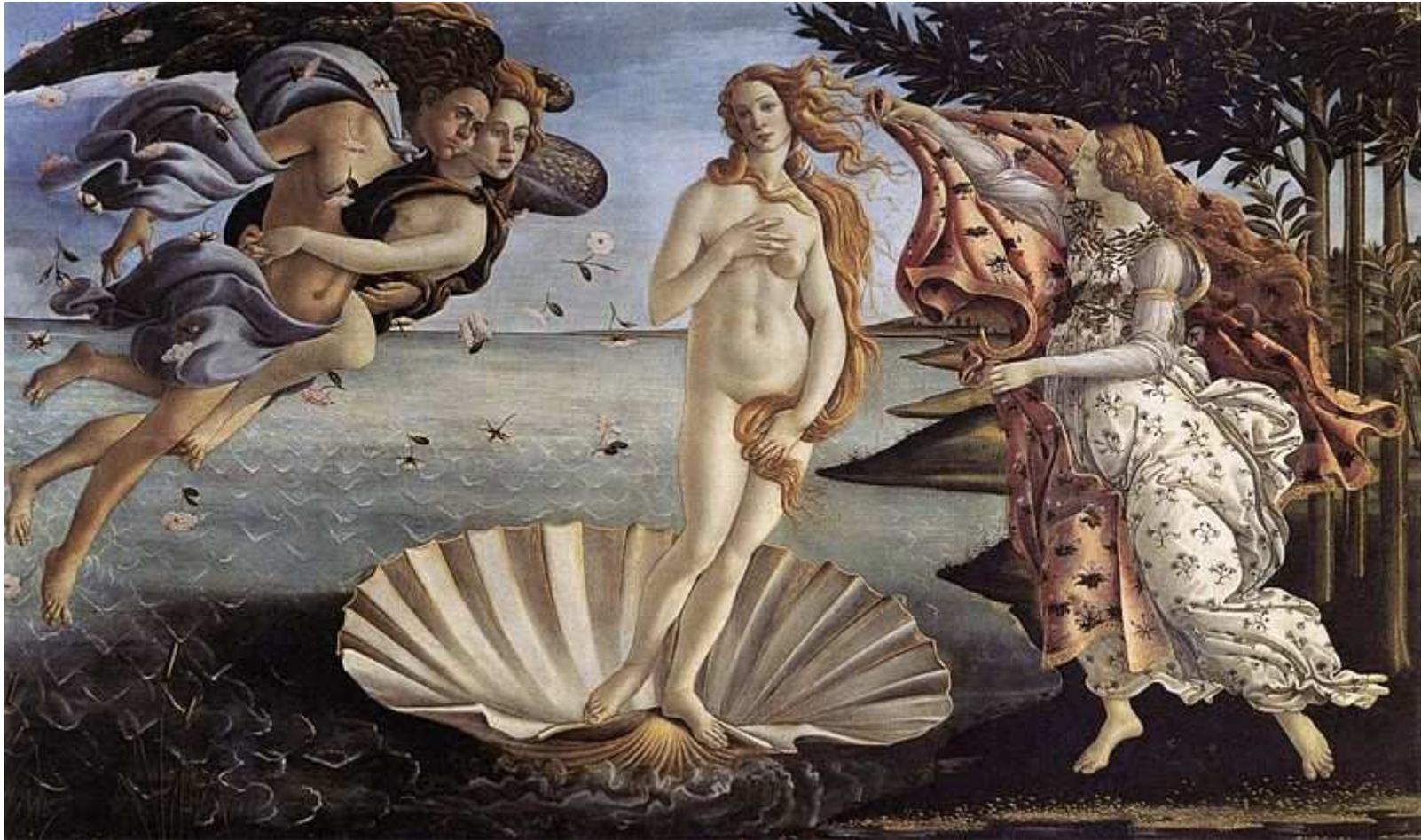
## PID – a legal perspective

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# I. Introduction



Birth of Venus, Sandro Botticelli (1485)



# I. Introduction

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## **I. Introduction**

## **II. Legal Sources**

- 1. Swiss Constitution (Art. 119)**
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## II. Legal Sources

### Art. 119 Swiss Constitution: Reproductive medicine and gene technology involving human beings

<sup>1</sup> Human beings shall be protected against the misuse of reproductive medicine and gene technology.

<sup>2</sup> The Confederation shall legislate on the use of human reproductive and genetic material. In doing so, it shall ensure the protection of human dignity, privacy and the family and shall adhere in particular to the following principles:

- a. forms of cloning and interference with the genetic material of human reproductive cells and embryos are unlawful.
- b. non-human reproductive and genetic material may neither be introduced into nor combined with human reproductive material.
- c. the procedure for medically-assisted reproduction may be used only if infertility or the risk of transmitting a serious illness cannot otherwise be overcome, but not in order to conceive a child with specific characteristics or to further research; the fertilisation of human egg cells outside a woman's body is permitted only under the conditions laid down by the law; no more human egg cells may be developed into embryos outside a woman's body than are capable of being immediately implanted into her.
- d. the donation of embryos and all forms of surrogate motherhood are unlawful.
- e. the trade in human reproductive material and in products obtained from embryos is prohibited.
- f. the genetic material of a person may be analysed, registered or made public only with the consent of the person concerned or if the law so provides.
- g. everyone shall have access to data relating to their ancestry.



## II. Legal Sources

### Federal Act of 18 December 1998 on Medically Assisted Reproduction (Reproductive Medicine Act, RMA)

#### Art. 5 RMA: Indications

<sup>1</sup> Assisted reproductive techniques may be used only if:

- a. the aim is to enable a couple to overcome infertility and other treatment methods have failed or offer no prospect of success; or
- b. there is no other way of avoiding the risk of transmitting a serious, incurable disease to the offspring.

<sup>2</sup> Without prejudice to Article 22 paragraph 4, reproductive cells may be selected so as to influence the sex or other characteristics of the future child only if there is no other way of avoiding the risk of transmitting a serious, incurable disease to the offspring.

<sup>3</sup> The removal and analysis of one or more cells from an embryo in vitro are prohibited.



## II. Legal Sources

### Federal Act of 18 December 1998 on Medically Assisted Reproduction (Reproductive Medicine Act, RMA)

#### Art. 17 RMA: Development of embryos

<sup>1</sup> The number of impregnated ova developed into embryos outside the woman's body must not be greater than is required to establish a pregnancy within one cycle; the maximum number shall be three.

<sup>2</sup> The embryo may only be developed outside the woman's body to the extent that is essential in order to permit implantation in the uterus.

<sup>3</sup> The preservation of embryos is prohibited.



## II. Legal Sources: Hurdles to PID

	<b>Removal and analysis of cells from an embryo</b>	<b>Conservation of "good" embryos for the next cycle</b>	<b>Creation of 8-12 embryos</b>
<b>Constitution*</b> (according to the FOJ)	Yes (although contrary to the goals of the law, VPB 2008.14)	No (only under "unexpected" circumstances)	No
<b>Law (RMA)</b>	No (art. 5 para. 3 RMA)	No (art. 17 para. 3 RMA)	No (Art. 17 para 1 RMA)

- Polar Body Biopsy is permissible – it is not an embryo (art. 2 para. lit. i RMA). See, however, art. 5 para. 2 and art. 22 para. 4 RMA.
- Is Morphological Selection permissible? It is not a "removal and analysis of one or more cells from an embryo in vitro" (Art. 5 para. 3 RMA).

**\* Art. 119 para. 2 lit. c Const.:** "... no more human egg cells may be developed into embryos outside a woman's body than are capable of being immediately implanted into her"



## III. Legal and Ethical Dilemmas (1)

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### Constitutional Right to Medically Assisted Procreation

Art. 10 para. 2 Const.; Art. 8 ECHR – Restrictions are possible

### Constitutional "Promise" of Medically Assisted Procreation? – Protection against Misuse only?

Ambiguity of Art. 119 Const.?



# III. Legal and Ethical Dilemmas (1)

## Art. 119 Swiss Constitution: Reproductive medicine and gene technology involving human beings

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## III. Legal and Ethical Dilemmas (2)

### Federal Act of 8 October 2004 on Human Genetic Testing

#### Article 11 Prenatal tests

It is forbidden to perform prenatal tests whose purpose is:

- a. to determine characteristics of the embryo or fetus which do not directly impair its health; or
- b. to determine the sex of the embryo or fetus for a purpose other than diagnostic.

### Swiss Criminal Code

#### Article 119 Legal abortion

[...]

<sup>2</sup> The termination of a pregnancy is likewise exempt from penalty if, at the written request of a pregnant woman, who claims that she is in a state of distress, it is performed within twelve weeks of the start of the pregnant woman's last period by a physician who is licensed to practise his profession. The physician must have a detailed consultation with the woman prior to the termination and provide her with appropriate counselling. [...]



### III. Legal and Ethical Dilemmas (3)



#### **PID "Tourism": No extraterritorial effect of the RMA**

(For a comparison of different European states see Erläuterungen zur Änderung des Fortpflanzungsmedizingesetzes, February 18, 2009, pp. 38-46)



## IV. Solutions

### The mills of legislation grind slowly ...

- |        |  |   |
|--------|--|---|
| 2003   | Expert opinion (Huntington Gesellschaft / Verein Kinderwunsch) on PID – PND  |  |
| 2004   | Motion WBK, Sept. 2, 2004 (04.3439)  |   |
| 2005   | Swiss National Advisory Commission on Biomedical Ethics gives a favorable opinion on PID   |   |
| 2007/8 | Expert opinion of the FOJ on constitutional issues (VPB 2008.14)   |   |
| 2009   | Preliminary draft for a revision of the RMA (PID permissible only in the case of the risk of transmitting a serious illness), consultation procedure |   |
| 2010   | Federal Council intends to revise the constitution   |   |
| 2011   | Consultation procedure on a new art. 119 Const.  |   |



## IV. Solution

### Preliminary draft for a revision of the RMA

#### Article 5a (new) [Analysis of cells from an embryo *in vitro*]

<sup>1</sup> [...]

<sup>2</sup> The analysis of genetic material from an embryo *in vitro* and the selection of embryos so as to influence the sex or other characteristics of the future child is permissible only if:

- a. the risk of the nidation of an embryo with the disposition for a serious illness cannot be avoided otherwise;
- b. it is probable that the serious illness will appear before the age of 50;
- c. there is no effective therapy against the serious illness; and
- d. the couple claims in writing towards the physician that the risk according lit. a is not bearable.



## IV. Solution: Challenge in Court?

### Federal Court of Justice, Decision of July 6, 2010

Finding: PID is permissible for couples with high risks of trisomy 13 or 14. The aim was to implant, not to select embryos, which is not punishable under the German Embryo Protection Act.

(Germany will discuss a new – restrictive – law in 2011.)

### Legal Situation in Switzerland

#### Art. 37 RMA Contraventions

Anyone who wilfully:

[...]

e. removes and analyses cells in contravention of Article 5 paragraph 3;

[...]

shall be liable to a term of imprisonment or to a fine of up to 100,000 francs.



## IV. Solution: Challenge in Court?

### European Court of Human Rights, Decision of April 1, 2010

Finding: The general prohibition of ova donation in the Austrian Artificial Procreation Acts violates art. 8 (right to private life) in conjunction with art. 14 ECHR (equal treatment). Compared to other couples seeking medically assisted procreation it violates equal treatment if the applicants may be prevented from such treatment because of their need for ova donation. The member states have no obligation to allow medically assisted procreation. However, if they do so, they must regulate it in a coherent manner, respecting equal treatment. The margin of appreciation afforded to the member states must be wide one.

### Switzerland

**Will the Swiss Constitution and the RMA survive this test?**

