

DECISION 94-343/344 DC OF 27 JULY 1994

Respect for Human Body Act and Donation and Use of Parts and Products of the Human Body, Medically Assisted Reproduction and Prenatal Diagnosis Act

On 29 June 1994 the Constitutional Council received a referral from Mr Philippe SEGUIN, Speaker of the National Assembly, and on the same day, followed by an amended referral on 11 July 1994, from Mr Jean-Louis BEAUMONT, Mr Léon AIME, Mr Jean-Paul ANCIAUX, Mr François d'AUBERT, Mr Hubert BASSOT, Mr Yves BONNET, Mr Franck BOROTRA, Mr Alphonse BOURGASSER, Ms Christine BOUTIN, Mr Lucien BRENOT, Mr Jean BRIANE, Mr Louis de BROISSIA, Mr Bernard CARAYON, Mr Pierre CARDO, Mr Michel CARTAUD, Mr René CHABOT, Mr Serge CHARLES, Mr Jean-Marc CHARTOIRE, Mr Ernest CHENIERE, Mr Charles de COURSON, Mr Marc-Philippe DAUBRESSE, Mr Jean-Claude DECAGNY, Mr Francis DELATTRE, Mr Jean-Jacques DELVAUX, Mr Xavier DENIAU, Mr Jean-Paul FUCHS, Mr Hervé GAYMARD, Mr Germain GENGENWIN, Mr Michel GHYSEL, Ms Marie-Fanny GOURNAY, Mr Alain GRIOTTERAY, Mr Pierre HERIAUD, Mr Pierre HERISSON, Mr Michel INCHAUSPE, Ms Bernadette ISAAC-SIBILLE, Mr Yvon JACOB, Mr Marc LAFFINEUR, Mr Thierry LAZARO, Mr Marc LE FUR, Mr Bernard LEROY, Mr Alain LEVOYER, Mr Jean de LIPKOWSKI, Mr Arsène LUX, Mr Thierry MARIANI, Mr Jacques MASDEUARUS, Mr Georges MESMIN, Mr Pierre MICAUX, Mr Jacques MYARD, Mr Jean-Marc NESME, Mr Henri NOVELLI, Mr Francisque PERRUT, Mr Etienne PINTE, Mr Marc REYMANN, Mr Georges RICHARD, Mr Yves RISPAT, Mr Jean ROYER, Mr Frédéric de SAINT-SERNIN, Mr Paul-Louis TENAILLON, Mr Jean UEBERSCHLAG, Mr Christian VANNESTE, Mr Jacques VERNIER, Mr Philippe de VILLIERS, Mr Jean-Paul VIRAPOULLE and Mr Jean-Jacques WEBER and, on 22 July 1994, from Mr Bernard de FROMENT, Mr Robert GALLEY, Mr Philippe LANGENIEUXVILLARD and Mr Daniel PENNEC, Deputies, pursuant to the second paragraph of Article 61 of the Constitution, for review of the constitutionality of the Respect for the Human Body Act and the Donation and Use of Parts and Products of the Human Body, Medically Assisted Reproduction and Prenatal Diagnosis Act.

THE CONSTITUTIONAL COUNCIL,

Having regard to the Declaration of Human and Civic Rights of 26 August 1789;

Having regard to the Preamble to the Constitution of 27 October 1946;

Having regard to the Constitution of 4 October 1958;

Having regard to Ordinance 58-1067 of 7 November 1958 (Institutional Act on the Constitutional Council), as amended;

Having regard to the Civil Code;

Having regard to the Public Health Code;

Having regard to the Act of 16 November 1912;

Having heard the rapporteur,

On the following grounds:

1. The referrals made to the Constitutional Council by, first, the Speaker of the National Assembly and, second, sixty-eight deputies relate to the same statutes; they should therefore be joined and a single decision given;

ON THE PARAMETERS FOR REVIEW OF THE STATUTES REFERRED:

2. The preamble to the 1946 Constitution reaffirmed and proclaimed rights, freedoms and constitutional principles, declaring in its opening paragraph: “In the morrow of the victory achieved by the free peoples over the regimes that had sought to enslave and degrade humanity, the people of France proclaim anew that each human being, without distinction of race, religion or creed, possesses sacred and inalienable rights”; it follows that the protection of human dignity against all forms of enslavement or degradation is a principle of constitutional status;
3. Individual freedom is guaranteed by Articles 1, 2 and 4 of the Declaration of Human and Civic Rights; but it has to be reconciled with the other principles of constitutional status;
4. By the tenth paragraph of the preamble to the 1946 Constitution, “The Nation shall provide the individual and the family with the conditions necessary to their development”, and by the eleventh paragraph, “The Nation shall guarantee to all, notably children [and] mothers ... protection of their health ...”;

ON THE PROVISIONS CHALLENGED BY THE DEPUTIES MAKING THE SECOND REFERRAL:

Regarding sections 8 and 9 of the Donation and Use of Parts and Products of the Human Body, Medically Assisted Reproduction and Prenatal Diagnosis Act:

5. Section 8 inserts, after chapter II of title I of book II of the Public Health Code, a new chapter II bis, entitled “Medically Assisted Reproduction”, comprising ten sections L152-1 to L152-10;
6. Section L152-1 defines medically assisted reproduction by reference to clinical and biological practices enabling in vitro conception, transfer of embryos and artificial insemination and to any technique of equivalent effect enabling procreation outside the natural process; section L152-2 provides that the purpose of such medical assistance, to satisfy a couple’s wish to have a child, is either to treat an infertility whose pathological nature has been medically diagnosed or to prevent the transmission of a particularly serious illness to the child; that section also requires that the man and woman forming the couple must be alive, of an age to procreate, married or able to furnish proof that they have lived together for at least two years, and have given prior consent to the transfer of embryos or to insemination; section L152-3 provides that, given the state of medical techniques, the two members of the couple may determine in writing that the attempt will be made to fertilise a number of ovocytes, which may make it necessary to conserve embryos, with the intention of satisfying their wish to have a child over a period of five years, and that they will be consulted each year for five years to establish whether they still wish to proceed; it states the general rule that an embryo may not be conceived using gametes that do not originate in one or the other member of the couple; section L152-4 provides, however, that by way of exception the two members of a couple may agree in writing that the embryos conserved may be received by another couple; section L152-5 lays down the conditions on which this may be done, i.e. the latter couple must satisfy the requirements of section L152-2 and may not receive medical assistance without resorting to a donor; it sets up a procedure subjecting reception of the embryo to a decision by the court; it states the principle that the couple receiving the embryo and the couple that have given it up are not to know each other’s identity; section L152-6 stresses that medically assisted reproduction by donor may be practised only as a last resort where medically assisted reproduction within the couple cannot be achieved; by section

L152-7, “A human embryo shall not be conceived or used for commercial or industrial purposes”; section L152-8 states that in vitro conception of human embryos for purposes of study, research or experiment is prohibited, as is any experimentation on embryos; it does provide, however, that by way of exception a man and a woman forming a couple may agree in writing that studies may be carried out on their embryos; such studies must be for a medical purpose and must not harm the embryo; they may not be carried out without the assent of a national board set up to adjudicate on matter of the medicine and biology of reproduction and prenatal diagnosis by section 11 of the Act to insert a new section L184-3 in the Public Health Code; section L152-9 deals with the approval of practitioners qualified to carry out these biological and clinical procedures, and section L152-10 puts in place a procedure which applicants must first complete;

7. Section 9 of the Act provides that embryos existing on the date of its promulgation in respect of which it has been determined that they are not the object of a couple’s wish to have a child nor that there is any objection to their reception by another couple and that they comply with the health safety rules in force on the day of their transfer can be entrusted to a couple satisfying the tests of section L152-5, and it adds that “if they cannot be received and they have been conserved for five years at least, conservation shall be ended”;

8. The deputies making the second referral argue that the latter provision undermines the right to life of embryos, which, they assert, have all the attributes of human beings from conception; the provision is discriminatory in that it breaches the principle of equality between embryos, depending on whether they were conceived before or after the date of promulgation of the statute; likewise, the statute could not, without infringing the principle of equality between a couple’s human embryos, authorise the parents and the medical profession “to select those embryos which are to be implanted from those which are not” or “to select those embryos which are to be given to other couples from those which are not”; the provision in the statute whereby studies may be carried out on embryos fails to respect the integrity of the person and the human body; the selection of embryos violates the constitutional principle of the protection of the genotype of humanity; the possibility of having children whose natural parent is a donor calls in question the family rights expressed and guaranteed by the preamble to the 1946 Constitution; the prohibition on children born of in vitro fertilisation by donor of knowing their genetic identity and their natural parents infringes the child’s right to health and to the development of his or her personality; the legislature could not give the national board set up to adjudicate on matters of the medicine and biology of reproduction and prenatal diagnosis the authority to give assent without violating the constitutional principle of the separation of powers, all the more so since it referred the determination of the composition of the board to the authority empowered to make regulations;

9. The legislature secured various forms of protection in the event of the conception, implantation and conservation of embryos fertilised in vitro; but it did not see the need to provide for the conservation of all embryos once formed for all time and in all circumstances; it considers that the principle of respect for human life from its inception is not applicable to them; and that the principle of equality is accordingly likewise inapplicable to such embryos;

10. It is not for the Constitutional Council, which does not have the same decision-making powers as Parliament, to question provisions enacted by Parliament in the light of developments in knowledge and techniques;

11. Contrary to what is asserted by the applicants, there are no provisions or principles of constitutional status applicable to embryo selection that are directed to the protection of the human genetic inheritance; there is nothing in the preamble to the 1946 Constitution that

precludes the development of the human family via gamete or embryo donations on the terms provided by the Act; the ban imposed by the Act on any means whereby a child might ascertain the donor's identity cannot be regarded as an attack on health protection as secured by the preamble; as regards individual decisions concerning studies for medical purposes, it was not *ultra vires* for the legislature to impose the requirement for assent by an administrative board constituted in accordance with rules determined by the new section L184-3 of the Public Health Code to ensure that the embryo's interests are not jeopardised;

Regarding sections 12 and 14 of the Act:

12. Section 12 of the Act inserts at the beginning of chapter IV of title I of book II of the Public Health Code a section L162-16, organising prenatal diagnosis for the purpose of detecting a particularly serious ailment in the embryo or foetus in utero; section 14 inserts a section L162-17, which lays down the circumstances in which a biological diagnosis may be made from cells removed from the embryo in vitro;

13. The deputies making the second reference claim that these provisions, which would facilitate termination of pregnancy, violate the right to life;

14. Section L162-16, concerning prenatal diagnosis in utero, does not authorise any new case of termination; section L162-17 relates only to diagnoses made from cells removed from the embryo in vitro; the claim therefore fails as a matter of fact;

Regarding section 10 of the Respect for the Human Body Act:

15. Section 10 of the Act inserts in chapter I of title VII of book I of the Civil Code a part 4 entitled "Medically Assisted Reproduction", comprising two new sections 311-19 and 311-20; section 311-19 provides that, in the case of medically assisted reproduction by donor, no relationship may be established between the donor and the child, and no action for remedies may be brought against the donor; section 311-20 sets out the circumstances in which the applicant spouses or partners must first give their consent before a judge or a notary, who will inform them of the commitments they enter into thereby in respect of relationship;

16. The deputies making the referral challenge the anonymity of gamete donors vis-à-vis the unborn child in the light of the principle of personal liability contained in section 1382 of the Civil Code; they also submit that there is a fundamental principle recognised by the laws of the Republic arising from the provisions of the Act of 16 November 1912 which permit a child to seek to establish paternity outside marriage in certain circumstances;

17. The Act has neither the object nor the effect of regulating issues of paternity in cases of medically assisted reproduction; no provision or principle of constitutional status forbids the prohibitions laid down by Parliament on establishing a relationship between child and donor and on bringing actions for remedies against donors; the applicants' claims must therefore be dismissed;

ON ALL THE PROVISIONS OF THE STATUTES REFERRED:

18. The legislation referred sets out a number of principles including the primacy of the human being, respect for the human being from the inception of life, the inviolability, integrity and non-marketability of the human body and the integrity of the human race; these principles help to secure the constitutional principle of the protection of human dignity;

19. All the provisions referred reconcile and implement constitutional rules without distorting their scope;

Has decided as follows:

Article 1

The Respect for the Human Body Act and the Donation and Use of Parts and Products of the Human Body, Medically Assisted Reproduction and Prenatal Diagnosis Act are declared constitutional.

Article 2

This decision shall be published in the *Journal officiel de la République française*.

Deliberated by the Constitutional Council at its sittings of 26 and 27 July 1994.