**Decision n° 2010-2 QPC of June 11th 2010**
**(Mrs Viviane L.)**

On April 14th 2010 the Constitutional Council, in the conditions provided for by Article 61-1 of the Constitution, received an application for a priority preliminary ruling on the issue of constitutionality transmitted by the Conseil d'Etat (decision n° 329290 of April 14th 2010), an application lodged by Mrs Viviane L. raising the issue of the conformity with constitutionally guaranteed rights and freedoms of :

- paragraphs 1 and 3 of Article L.114-5 of the Family and Social Welfare Code

- 2 of paragraph II of section 2 of Act n° 2005-102 of February 11 2005 for Equality of rights and opportunities, participation and citizenship of disabled persons.

THE CONSTITUTIONAL COUNCIL

Having regard to the Constitution;

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

Having regard to the Family and Social Welfare Code;

Having regard to Act n° 2002-303 of March 4th 2002 pertaining to the rights of ill persons and the quality of healthcare;

Having regard to Act n° 2005-102 of February 11th 2005 for Equality of rights and opportunities, participation and citizenship of disabled persons;

Having regard to decision n° 133238 of the Conseil d'Etat of February 14th 1997;

Having regard to decision n° 99-13701 of the Cour de cassation of November 17th 2000;

Having regard to the Regulation of February 4th 2010 as to the procedure applicable before the Constitutional Council with respect to applications for priority preliminary rulings;

Having regard to the observations on behalf of Mrs L. made by the SCP Lyon-Caen, Fabiani, Thiriez, Attorneys at the Conseil d'Etat and the Cour de cassation, registered on May 4th 2010

Having regard to the observations on behalf of the Paris Public Hospital service made by the SCP Didier, Pinet, Attorneys at the Conseil d'Etat and the Cour de cassation, and those on behalf of the Provident Fund and Retirement Fund of personnel of the French National Railways (SNCF) made by Me Odent, Attorney at the Conseil d'Etat and the Cour de cassation, registered on May 4th 2010;

Having regard to the observations of the Prime Minister, registered in May 4th 2010;

Having regard to the further observations on behalf of Mrs L. made by the SCP Lyon-Caen, Fabiani, Thiriez, Attorneys at the Conseil d'Etat and the Cour de cassation, registered on May 12th 2010.

Having regard to the documents produced and appended to the case file;

Attorney Arnaud Lyon-Caen for the applicant, and Mr Charles Touboul, representing the Prime Minister, were heard by the Council in open court on June 2nd 2010

Having heard the Rapporteur;

ON THE FOLLOWING GROUNDS

1. Paragraph I of section 1 of the Act of March 4th 2002 referred to above provides:

" No-one shall claim he has sustained injury due solely to the fact of being born.

A person born with a disability caused by medical negligence may obtain relief for the injury sustained when the negligent act has directly caused the disability or has worsened the same or has not made it possible to take steps likely to attenuate said disability.

When the liability of a healthcare professional or a healthcare establishment is incurred towards the parents of a child born with a disability which was not detected during pregnancy due to manifest negligence, the parents may claim compensation solely for the injury they have sustained. This injury shall not include the particular expenditure incurred throughout the child's lifetime due to such a disability. Compensation for the latter is a matter for national solidarity.

The provisions of this paragraph I shall be applicable to proceedings currently underway except for those where there has been an irrevocable ruling on the principle of compensation".

2. The first three sub-paragraphs of paragraph I of section 1 of the Act of March 4th 2002 referred to above were codified into Article L.114-5 of the Family and Social Welfare Code by 1 of paragraph II of section 2 of the Act of February 11th 2005 referred to above. 2 of this same paragraph II has taken the final sub-paragraph of paragraph I and adapted the wording thereof.

WITH RESPECT TO PARAGRAPH 1 OF ARTICLE 114-5 OF THE FAMILY AND SOCIAL WELFARE CODE

3. The party making the application argues that forbidding a child from claiming relief for the injury sustained due to his being born would infringe the principle that since no-one has the right to cause injury to another, a person causing injury is under a duty to compensate for the same. This prohibition, which deprives a child born with a disability due to an error committed when carrying out a prenatal diagnosis of the right to claim compensation, whereas this same right may be exercised by a child whose disability was directly caused by medical negligence, leads to a difference in treatment which runs counter to the Constitution.

4. Article 34 of the Constitution proclaims : " Statutes shall determine the basic principles .. of systems of ownership, property rights and civil and commercial obligations". Parliament is at all times at liberty, when acting within the limits of the powers vested in it, to pass new provisions as and when it sees fit and to modify or repeal previous statutes by replacing them, if need be, by other provisions, so long as when exercising this power it does not deprive of statutory guarantees requirements of a constitutional nature. Article 61-1 of the Constitution, like Article 61, does not vest the Constitutional Council with any general power of appraisal and decision-making similar to that vested in Parliament. This Article merely vests the Council with jurisdiction to rule on the conformity of a statutory provision with rights and freedoms guaranteed by the Constitution.

5. Article 6 of the Declaration of the Rights of Man and the Citizen of 1789 proclaims that the law "shall be the same for all, whether it protects or punishes". The principle of equality does not preclude Parliament from treating different situations in different ways, nor from departing from the principle of equality for reasons of general interest provided that, in each case, the resulting different treatment is directly connected with the purpose sought to be achieved by the statute which introduces said different treatment.

6. Firstly, under the terms of the first two paragraphs of Article L.114-5 of the Family and Social Welfare Code, nothing precludes a child from claiming compensation from healthcare

professionals and healthcare establishments when the negligence claimed has solely prevented the mother, with full knowledge of the facts, from exercising her right to terminate the pregnancy. Healthcare professionals and healthcare establishments remain liable for the consequences of their negligence in all other cases. Thus paragraph 1 of Article L.114-5 does not exonerate healthcare professionals and healthcare establishments from all liability.

7. Secondly, after the decision of the Cour de cassation on November 17th 2000 referred to above, Parliament felt that, when the negligence of a healthcare professional or a healthcare establishment has solely prevented the mother, with full knowledge of the facts, from exercising her right to terminate the pregnancy, the child has no rightful interest to claim compensation for the consequences of such negligence. When laying down such a principle, Parliament merely exercised the powers which the Constitution recognizes as being vested in it without adversely affecting the principle of liability or the right of redress before a court of law.

8. Thirdly, the challenged provisions impede the right of a child born with a disability to claim compensation solely in the case when the alleged negligence is not at the origin of the disability. The difference in treatment thus introduced does not fail to comply with the principle of equality.

9. The arguments raised as regards paragraph 1 of Article L.114-5 of the Family and Social Welfare Code should thus be dismissed.

WITH RESPECT TO PARAGRAPH 3 OF ARTICLE l14-5 OF THE FAMILY AND SOCIAL WELFARE CODE

10. The party making the application argues that the requirement of manifest negligence on the part of healthcare professionals and healthcare establishments for the latter to incur liability towards the parties of a child born with a disability undetected during pregnancy, and the impossibility for the parents of such a child to claim compensation for the injury corresponding to the specific expenditure incurred by said disability throughout the lifetime of the child, infringes the principle of liability and that of " full relief for injury" and as such infringes the principle of equality.

11. Article 4 of the Declaration of 1789 proclaims : "Liberty consists in the freedom to do everything which does not injure others". From these provisions derives the principle that any person who causes injury to another is under a duty to compensate for such injury. The possibility of bringing proceedings based on such liability implements this constitutional requirement. However, this does not preclude Parliament, in the general interest, from deciding the circumstances in which such liability may be incurred. It may therefore, on such grounds, accompany this principle by exceptions or limitations on condition that this does not have any disproportionate adverse effect on the rights of injured parties or on the right to effective redress before a court of law which derives from Article 16 of the Declaration.

- As regards the requirement of manifest negligence

12. When requiring that there be manifest negligence in order for the liability of a healthcare professional or a healthcare establishment to be incurred towards the parents of a child born with a disability which was not detected during pregnancy, Parliament intended to take into consideration the difficulties inherent in making prenatal diagnoses in view of the state of medical knowledge and techniques available at the time of such diagnoses. To this end, it has excluded recourse to mere presumptions or deductions as a basis for a claim. The concept of 'manifest negligence' is not the same thing as "recklessness". Thus, in view of the purpose it is sought to achieve, the narrowing of the requirements which must be met for the incurring of liability by healthcare professionals and healthcare establishments is not disproportionate.

- As regards the exclusion of certain types of injury

13. Firstly, healthcare professionals and healthcare establishments are still required to compensate for injury other than that including the specific expenditure incurred throughout the lifetime of a child as a result of the disability from which he suffers. Paragraph 3 of Article L.114-5 of the Family and Social Welfare Code does not exonerate healthcare professionals and healthcare establishments from all liability .

14. Secondly, Parliamentary debate on the Act of March 4th 2002 referred to above shows that the challenged provisions are designed to ensure the assuming of expenditure for all persons suffering from a disability by a system which does not introduce any distinction based on the technical conditions in which the disability may be detected before birth, nor on the choice which the mother might have made subsequent to such a diagnosis. By thus deciding that the specific expenditure incurred throughout the lifetime of child due to his disability cannot constitute injury giving rise to compensation when the negligence claimed is not at the origin of the disability, Parliament took into account ethnic and social considerations which are the preserve of its power of appraisal.

15. The challenged provisions are designed to respond to the difficulties encountered by healthcare professionals and healthcare establishments when taking out insurance in economically acceptable conditions in view of the amount of damages which may be awarded to compensate fully for any disability which might arise. Parliament also took into account the consequences for the cost of health insurance of the changing nature of medical liability. These provisions are thus intended to guarantee the financial equilibrium and the good organization of the healthcare system.

16. Thirdly, parents may obtain compensation, throughout the lifetime of the child involved, for specific expenditure incurred by a disability when this disability has been directly caused or aggravated by negligence or when such negligence has prevented the taking of measures likely to alleviate this disability. They cannot however obtain such compensation when the disability has not been detected before birth due to an error in diagnosis. The difference between the systems of compensation thus corresponds to a difference arising from the origin of the disability.

17. Fourthly, paragraph 3 of Article L.114-5 of the Family and Social Welfare Code provides that compensation for expenditure occurred throughout a child's lifetime due to his disability is a matter for national solidarity. To this end, when passing the Act of February 11th 2005 referred to above, Parliament intended to ensure the effectiveness of the right to compensation for the consequences of a disability irrespective of the origin thereof. It therefore introduced the additional disability allowance which completes the normal social welfare system, composed of flat rate benefits, by a system of compensation tailored to the needs of the disabled person.

18. In these conditions, the limitation of injury giving rise to compensation decided by Parliament is not of a disproportionate nature in view of the purpose it is sought to achieve. It does not run counter to the principle of liability, nor that of equality, nor any other right or freedom which the Constitution guarantees.

<u>WITH RESPECT TO 2 OF PARAGRAPH II OF SECTION 2 OF THE ACT OF FEBRUARY 11TH 2005 REFERRED TO ABOVE</u>

19. Under 2 of paragraph II of section 2 of the Act of February 11th 2005 referred to above " The provisions of Article L.114-5 of the Family and Social Welfare code as worded pursuant to 1 of this paragraph II shall be applicable to proceedings underway on the date of the coming into effect of Act n° 2002-303 of March 4th 2002 referred to above, except for those where there has been an irrevocable ruling on the principle of compensation".

20. The party making the application contends that the immediate application of these provisions "to proceedings currently underway and consequently to the accrual of causes of action prior to its coming into effect" adversely affects legal certainty and the separation of powers.

21. Article 16 of the Declaration of 1789 proclaims : "A society in which no provision is made for guaranteeing rights or the separation of powers, has no Constitution".

22. Consequently, if Parliament may modify retrospectively a legal rule or validate an administrative decision or an instrument of private law, this may only be done if it seeks to achieve a purpose in the general interest and complies with decisions which have become res judicata and the principle that punishments and penalties shall not be retrospective. In addition the decision or instrument modified or validated should not disregard any rule, nor any principle of constitutional status, unless the purpose of general interest itself is of constitutional status. Lastly, the scope of the modification or the validation must be strictly defined.

23. Paragraph I of Article 1 of the Act of March 4th 2002 referred to above came into effect on Match 7th 2002. Parliament made this applicable to proceedings underway at said date when no final judgment had been handed down therein. These provisions concern the right of a child born with a disability to bring proceedings, to the conditions governing the incurring of liability by healthcare professionals and healthcare establishment towards the parents of such a child, together with forms of injury giving rise to compensation when such liability is incurred. If the grounds of general interest referred to above may justify applying fresh rules to future proceedings concerning legal situations which arose prior to the coming into effect of said rules, they cannot justify such major modifications to the rights of persons who have, prior to said date, commenced legal proceedings to obtain compensation for injury sustained by them. 2 of paragraph II of Article 2 of the Act of February 11th 2005 referred to above must thus be held to be unconstitutional.

**HELD**

Article 1 : Paragraphs 1 and 3 of Article L 114-5 of the Family and Social Welfare Code are in conformity with the Constitution.

Article 2 : 2 of paragraph II of section 2 of Act n° 2005-102 of February 11th 2005 for Equality of rights and opportunities, participation and citizenship of disabled persons is unconstitutional.

Article 3: This decision shall be published in the Journal officiel of the French Republic and notified in the conditions provided for in Section 23-11 of the Ordinance of November 7th 1958 referred to hereinabove.

Deliberated by the Constitutional Council sitting on June 10th 2010 and composed of Messrs Jean-Louis DEBRE, President, Messrs Jacques BARROT, Michel CHARASSE, Jacques CHIRAC, Renaud DENOIX de SAINT MARC, Mrs Jacqueline de GUILLENCHMIDT, Messrs Hubert HAENEL and Pierre STEINMETZ.

Decision announced on June 11th 2010.