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Compensatory allowance v. fundamental rights

In a ruling issued on November 30, 2022, the First Civil Chamber of the *Cour de Cassation* (French Supreme Court) ruled that the principle of compensatory allowance should prevail over property right, using however a careful argumentation.

Article 270 of the French Civil Code defines the principle of compensatory allowance as follows:

“Divorce puts an end to the duty of support between spouses.

One of the spouses may be compelled to pay the other an allowance intended to compensate, as far as possible, for the disparity that the breakdown of the marriage creates in the respective ways of living. This allowance is a lump-sum payment. It shall take the form of a capital, the amount of which is determined by the judge.

However, the judge may refuse to grant such an allowance where equity so demands, either taking into account the criteria set out in Article 271, or when the divorce is pronounced on the basis of faults exclusively attributable to the spouse who claims this allowance, considering the particular circumstances of the breakdown.”

Article 271 of the French Civil Code sets out the criteria for determining the amount of the compensatory allowance:

“A compensatory allowance must be determined according to the needs of the spouse to whom it is paid and to the means of the other, account being taken of the situation at the time of divorce and of its evolution in a foreseeable future.

For this purpose, the judge shall consider, in particular:

- *the duration of the marriage;*
- *the age and health condition of the spouses;*
- *their professional qualifications and occupations;*
- *the consequences of the professional choices made by one of the spouses during the marriage for the education of the children and the time that will still have to be devoted to it, or to favor the career of his/her spouse to the detriment of his/her own;*
- *the estimated or foreseeable assets of the spouses, both in capital and income, after liquidation of the matrimonial regime;*
- *their existing and foreseeable rights;*
- *their respective situations as to retirement pensions, having estimated, as much as possible, the reduction of the retirement rights that circumstances mentioned in the sixth paragraph above might cause for the spouse creditor of the compensatory allowance."*

In the case at hand, a wife was ordered to pay to her husband a compensatory allowance in the amount of 50,000 euros in capital.

The wife appealed against this decision, using an argumentation based on fundamental rights and thereby attempting to challenge the very principle of compensatory allowance, as enshrined in the French Civil Code.

Indeed, the appellant tried to escape the payment of a compensatory allowance by requesting the application of Article 1(1) of the first Additional Protocol to the European Convention on Human Rights and Fundamental Freedoms relating to the protection of property, which provides that:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

In its November 30, 2022 ruling^[1], the First Civil Chamber of the *Cour de Cassation* dismissed the wife's appeal and held that:

"As a result, these provisions strike a fair balance between the aim pursued and the protection of the debtor's assets on whom they do not, by themselves, impose an individual and excessive burden."

In drafting its decision, the *Cour de Cassation* was careful since it did not set aside the condemnation of France by the European Court of Human Rights on July 10, 2014^[2].

In that specific case, France had been condemned for violation of the aforementioned Article 1 of the Additional Protocol to the European Convention on Human Rights and Fundamental Freedoms.

The facts of that case were somewhat different since it had been ruled that the payment of the compensatory allowance that the husband had been ordered to pay would be made by the forced sale of one of his assets, whereas he had otherwise sufficient cash to pay it in capital.

The European Court of Human Rights therefore considered that *“the fair balance which had to be struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights had not been achieved. In the present case, the applicant had “borne an individual and excessive burden”, which could have been rendered legitimate only if he had had the possibility of paying his debt by another means available to him under the law, namely the payment of a sum of money or the transfer of his property rights over one or several other properties.”*

In its November 30, 2022 ruling, the *Cour de Cassation* reiterated the terms of the July 10, 2014 judgment issued by the European Court of Human Rights, but did not consider that the very principle of the compensatory allowance would infringe property right.

[1] First Civil Chamber of the *Cour de Cassation*, November 30, 2022, appeal No. 21-12.128

[2] ECHR, 5th Section, July 10, 2014, No. 4944 / 11 – Milhau v. France

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