



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF H.W. v. FRANCE

(Application nr. 13805/21)

DECISION

Art 8 - Private life - Divorce for fault to the exclusive detriment of the applicant for not having fulfilled her conjugal duty by refusing to have intimate relations with her husband - Predictability of the law - Narrow margin of appreciation - Conjugal duty not taking into consideration consent to sexual relations - Prescriptive dimension of the rule of law with regard to the spouses in the conduct of their sexual life - Refusal to comply with it having legal consequences - Matrimonial obligation contrary to sexual freedom and the right to dispose of one's own body as well as to the positive obligation of prevention incumbent on the contracting states with regard to combating sexual violence. legal consequences - Matrimonial obligation contrary to sexual freedom and the right to control one's own body, as well as to the positive obligation of prevention incumbent on the contracting states in the fight against domestic and sexual violence - Other possible means of ensuring the rights of the applicant's husband - Absence of relevant and sufficient grounds - Fair balance not struck between competing interests.

Prepared by the Registry. Not binding for the Court.

STRASBOURG

January 23, 2025

This judgment becomes final under the conditions set out in Article 44 § 2 of the Convention. It may be subject to formal amendments.

In the case of H.W. v. France,

The European Court of Human Rights (Fifth Section), sitting in a Chamber composed of :

María Elósegui, *President*,
Mattias Guyomar,
Armen Harutyunyan,
Stéphanie Mourou-Vikström,
Gilberto Felici,
Kateřina Šimáčková,
Mykola Gnatovskyy, *judges*,

and Victor Soloveytschik, *Section Registrar*,

Viewed :

the application (n° 13805/21) against the French Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 5 March 2021 by a national of that State, M^{me} H.W. ("the applicant"),

the decision to inform the French Government ("the Government") of the complaints under Article 8 of the Convention and to declare the remainder of the application inadmissible,

the decision not to disclose the applicant's identity,
comments from the parties,

After deliberation in chambers on December 17, 2024,
Delivers the following judgment, adopted on this date:

INTRODUCTION

1. The case concerned a divorce on grounds of misconduct, in which the claimant was solely at fault on the grounds that she had ceased to have sexual relations with her spouse. She invoked Article 8 of the Convention.

IN FACT

2. The applicant was born in 1955 and lives in Le Chesnay. She was represented before the Court by M^e L. Mhissen, lawyer.

3. The Government was represented by its agent, Mr. D. Colas, Director of Legal Affairs at the Ministry of Europe and Foreign Affairs.

4. The facts of the case, as presented by the parties, are as follows.

5. The claimant and Mr. J.C. married in 1984 and had four children.

6. On April 17, 2012, the petitioner filed a petition for divorce.

7. In a non-conciliation order dated January 29, 2013, the family court judge of the Versailles district court authorized the spouses to initiate divorce proceedings and ordered provisional measures. As such, he awarded the use of the marital home to the claimant, ordered J.C. to vacate the premises and set the terms of his contribution to the maintenance and education of the couple's last child still in his care.

8. On July 9, 2015, the plaintiff sued her husband for divorce on grounds of fault. She claimed that her husband had prioritized his professional career to the detriment of their family life, and that he had been irascible, violent and hurtful. Finally, she presented various claims relating to the consequences of the divorce and the terms of J.C.'s obligation to maintain their last dependent child. She also sought compensation of 8,000 euros (EUR) for the faults allegedly committed by her husband during their marriage.

9. J.C. counter-claimed that the divorce should be granted to the sole detriment of the plaintiff, arguing that she had shirked her marital duties for several years and that she had breached the duty of mutual respect between spouses by making slanderous accusations against him. In the alternative, he requested a divorce on the grounds of permanent impairment of the marital bond. He also dismissed the plaintiff's claims for the property consequences of the divorce and for an increase in her maintenance obligation. He opposed his wife's claim for compensation, arguing that the breakdown of the marriage had not created any disparity in the spouses' respective living conditions. Lastly, he sought compensation of EUR 1,000 for the alleged breach of the duty of mutual respect, but refrained from making any claim for compensation for the breach of marital duty.

10. In a judgment dated July 13, 2018, the family court of the Versailles district court ruled that none of the grievances alleged by the spouses were substantiated and that the divorce could not be granted on grounds of fault. With particular regard to the alleged breach of marital duty, he considered that the claimant's health problems were such as to justify the couple's lasting lack of sexuality. After noting that the couple had not lived together for more than two years at the date of the divorce petition, the court granted the divorce on the grounds of permanent impairment of the marital bond. It then ruled on the consequences of the divorce. In particular, it rejected the claimant's request for compensation on the grounds that the breakdown of the marriage had not created any disparity in the spouses' living conditions. Lastly, it rejected both spouses' claims for compensation, as well as the request for a reassessment of J.C.'s maintenance obligation.

11. The applicant appealed against this judgment.

12. The parties maintained all their claims.

13. Following the oral hearing, the parties were invited to comment on the admissibility of J.C.'s application for divorce on the grounds of permanent alteration of the marriage bond. In a note en délibéré dated October 4, 2019, the petitioner requested that this application be declared inadmissible, insofar as it had been filed in the alternative, in disregard of the provisions of article 1077 of the French Code of Civil Procedure.

14. In a decision dated November 7, 2019, the Versailles Court of Appeal granted the petitioner a divorce on the following grounds :

"Considering that [H.W.] herself acknowledged in the handrail she made on May 9, 2014 at the Versailles police station that she had ceased all intimate relations with her husband since 2004 ;

Considering that [H.W.] justifies this situation by her state of health, invoking in particular a serious accident in the metro recognized as a service accident on December 29, 2005 leaving her with numerous after-effects and having immobilized her for almost a year, then an operation in 2009 for a paralyzing herniated disc; (...) she also establishes having presented a persistent polymorphic tick syndrome (chronic Lyme disease - exhibit 251) treated by a long-term antibiotic therapy since October 2016;

Considering, however, that such medical evidence cannot excuse the wife's continued refusal, from 2004 onwards, to have intimate relations with her husband, for such a long time, even though, in the aforementioned "main courante", [H.W.] recounts her husband's repeated solicitations on this subject and the arguments generated by this situation ;

Considering that these facts, established by the wife's admission, constitute a serious and repeated violation of the duties and obligations of marriage, making it intolerable to continue living together;

Considering that only [J.C.'s] request for divorce being justified by sufficient evidence, the divorce will be granted to the wife's exclusive detriment and the judgment reversed on this count;"

15. The Court of Appeal also upheld all the other provisions of the lower court's ruling.

16. The applicant appealed against this judgment. In her supporting memorandum, she put forward a series of pleas, including one alleging violation of "Articles 4 et seq:

"In granting the divorce to the plaintiff, the Court of Appeal wrongly qualified as a "serious and renewed violation of the duties and obligations of marriage, making it intolerable to continue living together" "the wife's continual refusal, from 2004 onwards, to have intimate relations with her husband".

Under article 242 of the French Civil Code, "divorce may be requested by one of the spouses when facts constituting a serious or repeated breach of the duties and obligations of marriage are imputable to his or her spouse and render the maintenance of the cohabitation intolerable", but the refusal of intimate relations cannot be set up as a fact constituting such a breach.

To admit the contrary would be tantamount to enshrining the existence of a genuine obligation for each spouse to meet and yield to his or her spouse's demands on this point - regardless of whether such demands correspond to his or her own wishes.

It is in fact the right to physical integrity and personal freedom, fundamental rights enshrined in the [Convention], that are at stake here.

It is therefore not surprising to note that, while such an obligation may have been present in certain decisions in the past, fortunately there has been no ruling to this effect for 23 years (cf. Civ. 2^{ème}, December 17 1997, n° 96-15.704).

In the present case, therefore, the judgment cannot be upheld insofar as it held that "the wife's continued refusal from 2004 onwards to have intimate relations with her husband" constituted a "serious and repeated breach of the duties and obligations of marriage, making it intolerable to continue living together" (judgment, p. 6, § 9).

In so ruling, the Court of Appeal established the wife's obligation to respond to her husband's requests, even if she did not wish to do so.

Such a consecration is inadmissible, and will be censured."

17. In a reply, J.C. presented detailed observations on this point:

"(...) the violation of marital duty has been and remains a fault within the meaning of article 242 of the Civil Code, such as to justify a divorce being granted to the exclusive detriment of the person who refuses to respect it.

This duty is one of the forms taken by the spouses' duty of cohabitation set out in article 215 of the French Civil Code.

Since the law has not changed, its violation remains grounds for divorce on grounds of fault.

If the Cour de cassation has not had occasion to rule on such facts in a reasoned decision for several years (Civ. December 17, 1997, pourvoi n° 96-15.704), it is because it leaves it to the trial judges to assess whether the spouse's behavior constitutes a serious and repeated breach of the duties and obligations resulting from the marriage, which made it intolerable to continue living together (1^{ère} Civ. June 24, 2015, pourvoi n° 13-20.291).

Few recent decisions by the French Supreme Court can therefore demonstrate the permanence of this grievance as a basis for divorce based on fault.

However, the Cour de cassation recently reiterated that refusal to have sexual relations is a ground for nullity of marriage (2th Civ. December 19, 2012, pourvoi n° 09-15.606).

And the courts regularly grant divorces on the grounds of such fault.

Moreover, articles "4 et seq." of the [Convention] invoked by [H.W.] are powerless to call into question this definition of the duties between spouses. (...) the appellant merely invokes the [Convention] in a general manner (...)

It should be remembered that the duty to maintain intimate relations with one's spouse is justified both by the fact that the purpose of marriage is to found a family and by the fact that they demonstrate the permanence of affection between the members of the couple.

Moreover, a breach of this duty does not, of course, automatically justify divorce on principle. Only if the court deems that the breach is of a serious or repeated nature, making it intolerable for the couple to continue living together, will it justify a divorce on grounds of fault.

Moreover, this grievance may be dismissed if it appears that it is excused by the circumstances invoked by its author, in application of article 245 of the French Civil Code.

It is therefore in consideration of the circumstances of the case, and more specifically the analysis of the relationship between the spouses, that the trial judges will be able to decide that the refusal of sexual relations is a grievance causing divorce.

There is therefore no reason to request the change in the case law of the Cour de cassation sought by [the petitioner] to exclude the refusal to maintain intimate relations from the grievances likely to justify the granting of a divorce for fault."

18. On July 27, 2020, the rapporteur proposed that the appeal be dismissed. With regard to breach of marital duty, she noted the following:

"It will be recalled that the Cour de cassation recognizes the sovereign power of judges to determine not only the existence of acts attributable to the spouse, grounds for divorce for fault, but also to assess whether they constitute a serious or repeated breach of the duties and obligations of marriage making it intolerable to continue living together, in accordance with the provisions of Article 242 of the Civil Code (1^{ère} Civ, 1^{er} juin 2011, pourvoi n° 10-17.461 ; 2^e Civ., January 15, 1997, pourvoi n° 95-15740; 2^e Civ., April 29, 1994, *Bull.* II, n° 123; 2^e Civ. 20 July 1993, pourvoi n° 91-21253; 2^e Civ.

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22 January 1992, pourvoi n° 90-14540; 1^{ère} Civ. 21 November 2012, pourvoi n° 11-30.032; 1^{ère} Civ. 25 May 2016, pourvoi n° 15-18.890; 1^{ère} Civ. 27 September 2017, pourvoi n° 16-24.489).

The plea, which is directly contrary to this established case law, cannot lead to cassation.

19. In an unspecified decision dated September 17, 2020, the Court of Cassation dismissed the appellant's appeal, ruling that the grounds put forward were clearly not such as to lead to cassation.

THE RELEVANT LEGAL FRAMEWORK

I. DOMESTIC LAW

A. Marital duty and fault-based divorce

1. The provisions of the Civil Code

20. At the time of the events, the relevant provisions of the Civil Code were worded as follows :

Article 212

"Spouses owe each other mutual respect, fidelity, help and assistance."

Article 215, paragraph 1^{er}

"The spouses mutually bind themselves to a community of life."

Article 229

"Divorce may be granted in the event of :

- or by mutual consent ;
- acceptance of the principle of marriage breakdown;
- or definitive alteration of the marital bond;
- or fault.

Article 238, paragraph 1^{er}

"The definitive alteration of the marital bond results from the cessation of the community of life between the spouses, when they have been living apart for two years at the time of the writ of divorce."

Article 242

"Divorce may be requested by one of the spouses when facts constituting a serious or repeated breach of the duties and obligations of marriage are attributable to his or her spouse and make it intolerable to continue living together."

Article 266, paragraph 1^{er}

"Without prejudice to the application of article 270, damages may be awarded to a spouse to compensate for the particularly serious consequences he or she suffers as a result of the dissolution of the marriage, either when he or she was a defendant to a divorce granted on the grounds of definitive alteration of the marital bond and had not himself or herself filed for divorce, or when the divorce is granted to the sole detriment of his or her spouse."

Article 270

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

One of the spouses may be required to pay the other a benefit designed to compensate, as far as possible, for the disparity in living conditions created by the breakdown of the marriage. This benefit is a lump-sum payment. It takes the form of a lump sum, the amount of which is set by the judge.

However, the judge may refuse to grant such a benefit if equity so requires, either in consideration of the criteria set out in article 271, or when the divorce is granted to the exclusive detriment of the spouse requesting the benefit, in view of the particular circumstances of the breakdown."

21. The damage for which compensation may be sought under article 266 of the Civil Code is that which results specifically from the dissolution of the marriage. However, domestic law also allows spouses to seek compensation for fault committed by their spouse on the basis of the ordinary law of civil liability.

22. Law n° 2004-439 of May 26, 2004 dissociates divorce cases from the financial consequences of divorce. Article 270 paragraph 2 of the French Civil Code thus allows each spouse to request a compensatory allowance regardless of the type of divorce. However, article 270 paragraph 3 of the French Civil Code gives the judge the option of refusing to grant a compensatory allowance when the divorce is decided exclusively against the spouse requesting it "if equity so requires".

2. Case law on conjugal duty

23. According to long-standing case law, spouses are bound by a "conjugal duty" - i.e. an obligation to maintain sexual relations - the non-performance of which may justify divorce (Cass., 2^e civ, October 8, 1964, *Bull. civ. II* n° 599, November 12, 1965, *Bull. civ. II* n° 879, January 27, 1971, n(°) 70-11.864, *Bull. civ. II* n° 27, April 23, 1975, n° 74-11.819, *Bull. civ. II* n° 114, and December 17, 1997, n° 96-15.704).

24. In the latter 1997 ruling, the Cour de cassation held that a court of appeal, exercising its sovereign power to assess the evidence, had been able to consider that "the prolonged abstention from intimate relations attributed to the wife" constituted a fault justifying a divorce to her exclusive detriment, insofar as it "was not justified by sufficient medical reasons".

25. Although the Cour de cassation has not reaffirmed this jurisprudence since then, it is still regularly applied by courts of first instance and appeal (see, for recent examples, CA Aix-en-Provence, 1^{er} October 2008, RG n°

07/01817, CA Rouen, 18 December 2014, RG n° 13/06454, CA Toulouse, 20 January 2015, RG n° 13/00856, and CA Colmar, 6 December 2016, RG n° 15/02103).

26. It is up to the trial judge to assess whether the facts are attributable to the spouse concerned, and whether they constitute a "serious or repeated breach of the duties and obligations of marriage" rendering "the maintenance of life together intolerable" within the meaning of article 242 of the French Civil Code. Thus, certain refusals of sexual relations are not considered to be culpable (see, for example, CA Montpellier, May 28, 1996, RG n° 95/05529, JurisData n° 1996-034226, and CA Bordeaux, February 27, 2001, RG n° 99/04229, JurisData n° 2001-137867, for a justification based on the existence of previous sexual abuse committed by the spouse; CA Amiens, June 19, 2014, RG n° 13/03059, JurisData n° 2014-019289, for consideration of acts of violence attributable to the spouse and his or her infidelity; CA Metz, October 27, 1983, JurisData, n° 1983-043752, and CA Paris, April 16, 2015, RG n° 13/16028 for consideration of the age or state of health of the spouse concerned).

27. Non-performance of a marital duty may also give rise to an action for damages against the defaulting spouse (CA Aix-en-Provence, May 3, 2011, RG n° 09/05752). In this ruling, the Court of Appeal upheld a husband's order to pay damages of 10,000 euros to his wife for the absence of sexual relations between the spouses for several years, on the grounds that such relations "are, in particular, an expression of their mutual affection, while they are part of the continuity of the duties arising from the marriage".

28. According to several authors, conjugal duty has its roots in canon law¹ - which once made *copula carnalis* (union of the flesh) a condition of the indissolubility of marriage and one of the duties attached to it -, and in customary matrimonial law².

3. Judicial practice

29. Studies of court cases involving alleged breaches of marital duty were published in 1985³, in 2000⁴ and in 2023⁵. Most of the decisions cited in the literature were handed down by courts of first instance or appeal. The authors

¹ Brugière, Jean-Michel, "Le devoir conjugal : philosophie du code et morale du juge", *Recueil Dalloz* 2000, p. 10, and Leroyer, Anne-Marie, "Regard civiliste sur la loi relative aux violences au sein du couple", *Revue trimestrielle de droit civil* 2006, p. 402.

² Branlard, Jean-Paul, *Le sexe et l'état des personnes. Aspects historiques, sociologique et juridique*, Librairie générale de droit et de jurisprudence, 1993.

³ Dekeuwer-Défossez, Françoise "Impressions de recherche sur les fautes cause de divorce", *Recueil Dalloz* 1985, chron. 219, p. 221, which studies a corpus of 371 decisions.

⁴ Brugière, Jean-Michel, aforementioned, who lists 124 fault-based divorce decisions taken on this basis between 1980 and 2000.

⁵ Mattiussi, Julie, "Le devoir conjugal : de l'obligation de consentir", in Garcia, Manon, Mazaleigue-Labaste, Julie, and Mornington, Alicia-Dorothy (dir.), *Envers et revers du consentement*, Mare & Martin, 2023, which lists 46 decisions subsequent to the law of April 4, 2006.

of these studies note that the attractiveness of such claims to litigants is steadily declining and, correlatively, that judges are increasingly reluctant to grant divorce on this basis alone. They do, however, attest to the persistence of this litigation. They note that divorce petitions based on allegations of breach of marital duty are mostly lodged by men, most often as counterclaims, and that they run up against evidentiary difficulties.

B. Criminalizing sexual offenses committed within a couple

30. Since 1984, the French Supreme Court has recognized the reprehensible nature of marital rape (Cass., crim., July 17 1984, *pourvoi* n° 84-91.288, *Bull. crim.* n° 260, and September 5 1990, n° 90-83.786, *Bull. crim.* n° 313). For a time, however, this jurisprudence was tempered by the maintenance of a presumption of consent to sexual acts performed in the intimacy of married life (Cass., crim., June 11 1992, n° 91-86.346, *Bull. crim.* n° 232).

31. Law n° 2006-399 of April 4, 2006 enshrined the aforementioned jurisprudence by inserting the following paragraph into article 222-22 of the penal code:

Article 222-22, second paragraph

"Rape and other sexual assaults are constituted when they have been imposed on the victim in the circumstances set out in the present section, whatever the nature of the relationship between the assailant and his victim, including if they are married. In this case, the presumption of consent of the spouses to the sexual act is valid only until proof to the contrary."

32. It also increased the penalties for sexual offences committed within a couple.

33. Law n° 2010-769 of July 9, 2010 finally abolished the second sentence of the second paragraph of article 222-22 and the presumption of consent it contained.

II. RELEVANT INTERNATIONAL LAW

34. The Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS n° 210 - "the Istanbul Convention"), opened for signature on May 11, 2011, was ratified by France on July 4, 2013. It entered into force for France on November 1 2014.

35. The relevant provisions of the Istanbul Convention are worded as follows :

Article 2 - Scope of the Agreement

" 1. The present Convention applies to all forms of violence against women, including domestic violence, which affect women disproportionately.

(...) "

Article 3 - Definitions

"For the purposes of this Convention :

a) the term "violence against women" is to be understood as a violation of human rights and a form of discrimination against women, and refers to all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life ;

b) the term "domestic violence" refers to all acts of physical, sexual, psychological or economic violence that occur within the family or household or between former or current spouses or partners, regardless of whether the perpetrator shares or has shared the same home as the victim;"

Article 5 - State obligations and due diligence

" (...)

2. Parties shall take the necessary legislative and other measures to act with due diligence to prevent, investigate, punish and provide redress for acts of violence covered by the scope of this Convention committed by non-State actors."

Article 12 - General obligations

" 1. The Parties shall take the necessary measures to promote changes in the social and cultural patterns of conduct of women and men, with a view to eradicating prejudices, customs, traditions and all other practices based on the idea of the inferiority of women or on stereotyped roles for women and men.

2. The Parties shall take the necessary legislative and other measures to prevent all forms of violence covered by the scope of this Convention by any natural or legal person.

(...) "

Article 36 - Sexual violence, including rape

" 1. The Parties shall take the necessary legislative or other measures to establish as criminal offences, when committed intentionally :

a) non-consensual sexual vaginal, anal or oral penetration of another's body with any part of the body or with an object;

b) other non-consensual sexual acts on others ;

(...)

2. Consent must be given voluntarily as a result of the free will of the person considered in the context of the surrounding circumstances.

3. The Parties shall take such legislative or other measures as may be necessary to ensure that the provisions of paragraph 1 also apply to acts committed against former or current spouses or partners, in accordance with their domestic law."

IN LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

36. The applicant complained that her divorce had been granted on the grounds of fault, on the grounds that she had shirked her marital duties. She invokes Article 8 of the Convention, which reads as follows:

"(1) Everyone has the right to respect for his private life (...).

2. There shall be no interference by a public authority with the exercise of this right except such interference as is in accordance with the law and is necessary in a democratic society in the interests of national security or public safety, for the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. On admissibility

1. *Thesis of the parties*

37. The Government argued that domestic remedies had not been exhausted. While admitting that a plea concerning, inter alia, a violation of Article 8 of the Convention had been raised before the Court of Cassation, it argued that this plea was new and that the Court of Cassation was not competent to rule on the existence of fault, this being a matter for the discretion of the trial judges.

38. The applicant seeks the dismissal of this preliminary objection. She first points out that she expressly raised a plea alleging a violation of Articles 4 et seq. of the Convention in her appeal in cassation against the Versailles Court of Appeal's judgment of November 7, 2019.

2. *The Court's assessment*

39. The Court recalls that the purpose of Article 35 § 1 of the Convention is to give the Contracting States the opportunity to prevent or remedy alleged violations before such allegations are submitted to it. Thus, the grievance to be referred to the Court must first be raised, at least in substance, in the form and within the time limits prescribed by domestic law, before the appropriate national courts. Nevertheless, only effective remedies capable of redressing the alleged violation need be exhausted. More specifically, the provisions of Article 35 § 1 of the Convention require the exhaustion only of remedies that are both relevant to the violations complained of, available and adequate; they must exist with a sufficient degree of certainty not only in theory but also in practice, without which they lack the requisite effectiveness and accessibility (see, among many others, *Sejdovic v. Italy* [GC], n° 56581/00, §§ 43-45, ECHR 2006-II, *Paksas v. Lithuania* [GC], n° 34932/04, § 75, ECHR 2011 (extracts), and *Vučković and Others v. Serbia* (preliminary objection) [GC], n°s 17153/11 and 29 others, §§ 70-71, March 25, 2014). In order to fully exhaust domestic remedies, it is in principle necessary to take the domestic

proceedings all the way to the juge de cassation and refer to him any complaints under the Convention that may subsequently be submitted to the Court (*Graner v. France* (dec.), n° 84536/17, § 44, 5 May 2020, and *Pagerie v. France*, n° 24203/16, § 117, January 19, 2023).

40. In the present case, the applicant lodged an appeal in cassation against the Versailles Court of Appeal's judgment of 7 November 2019 and raised a plea alleging violation of "Articles 4 et seq." of the Convention. On reading the applicant's memorandum, the Court notes that her criticism related specifically to marital duty (paragraph16 above). She expressly maintained that this marital obligation infringed her physical integrity - which corresponds to an aspect of the right to respect for private life guaranteed by Article 8 (*X and Y v. the Netherlands*, 26 March 1985, § 22, Series A n° 91, and *Y.F. v. Turkey*, n° 24209/94, § 33, ECHR 2003-IX) -, as well as her personal freedom. The Government admits this.

41. The Court is not convinced by the Government's argument that the applicant was merely challenging the Versailles Court of Appeal's factual assessment of fault. On the contrary, it considers that this ground for appeal was aimed at developing domestic case law, a fact not lost on the respondent to the appeal (paragraph17 above).

42. The Court also notes that the conjugal duty has a basis in case law (paragraphs23 and25 above). It was therefore open to the Cour de cassation to determine, in the exercise of its duty to interpret the law and unify case law, whether this was one of the duties of spouses and, if so, whether its breach was likely to constitute a fault within the meaning of article 242 of the Civil Code (paragraph20 above).

43. In these circumstances, the Court considers that the applicant validly raised her grievance before the domestic courts and that the latter had the opportunity to rectify the situation in the domestic order before the matter was referred to the Court. The Government's plea of non-exhaustion of remedies must therefore be rejected.

44. Finding that this complaint is not manifestly ill-founded or inadmissible on any other ground under Article 35 of the Convention, the Court declares it admissible.

B. Background

1. Thesis of the parties

a) The applicant

45. The claimant maintained that by reaffirming the existence of the marital duty and granting the divorce to her exclusive detriment on the grounds that she had refused to have sexual relations with her husband, the domestic courts had infringed her right to respect for private life.

46. Firstly, she argues that this interference was not "prescribed by law" within the meaning of Article 8. In this respect, she points out that no

provision of the Civil Code obliges spouses to have sexual relations. She also claims that the Cour de cassation has abandoned the notion of marital duty since a judgment of September 5, 1990 (paragraph 30 above). It maintains that the solution adopted in the present case reverts to an archaic vision of marriage. It is also contrary to recent developments in French criminal law, which now expressly criminalizes forcing one's spouse into a sexual relationship (paragraphs 30-33 above).

47. In any event, she maintains that at the time of the dispute, civil case law lacked consistency and that it was impossible for her to foresee, given her age and state of health, whether she would continue to be bound by such an obligation.

48. Secondly, she criticizes the legitimacy of the aim pursued by this interference, as none of the grounds listed in Article 8 § 2 seem to her to justify the infringement of her sexual freedom.

49. Thirdly, she contests the necessity of this interference. Referring to the *S.W. v. United Kingdom* judgment (22 November 1995, § 44, Series A n° 335-B), she maintains that rape between spouses cannot go unpunished without disregarding the fundamental aims of the Convention. In her view, it should not be possible for a civil wrong to result from the exercise of a right protected by domestic law and by the Convention. Lastly, she points out that fear of punishment, even of a civil nature, can have the effect of vitiating consent to sexual relations within the couple.

50. Replying to the Government, she pointed out that neither Convention law (*Piotrowski v. Poland* (dec.), n° 8923/12) nor domestic law required the domestic courts to grant a divorce at all costs. In his view, there was nothing to prevent the rejection of all the parties' claims if they were ill-founded.

51. Fourthly, the applicant criticizes the quality of the domestic decision-making process. From the point of view of the procedural obligations attached to Article 8, she complains that the domestic courts failed to take into account the fact that her refusal to have intimate relations could be justified by her husband's violence and by her health problems.

b) The government

52. The Government does not dispute that the facts complained of constitute interference with the right to respect for private life.

53. He maintains, however, that this interference was provided for by law. He states that, under article 215 of the Civil Code, spouses are mutually obliged to "community of life", which is generally understood to imply "community of bed". While admitting that no provision of the Civil Code expressly obliges spouses to maintain intimate relations, he maintains that this obligation results from well-established case law (paragraphs 23 to 25 above), which the Cour de cassation has never called into question. He adds that it was up to the trial courts to assess whether the alleged breach of marital duty constituted a fault within the meaning of article 242 of the French Civil Code, or whether it was justified by the circumstances of the case.

54. He went on to argue that the aim of the interference was to "protect the rights of others" within the meaning of Article 8 § 2. More specifically, the aim was to protect the spouses' right to terminate their marriage when it no longer seemed possible to continue living together (*N.N. and T.A. v. Belgium* , n° 65097/01, § 42, May 13, 2008).

55. Finally, he claims that the disputed interference was necessary.

56. In this respect, he argues firstly that Contracting States have a certain margin of appreciation when it comes, as in the present case, to reconciling the competing rights of two individuals.

57. Secondly, he points out that marital duty is not absolute and cannot be enforced. He further argues that criminal law, by punishing sexual offences between spouses, guarantees their freedom to refuse any intimate relationship (paragraphs -3033 above).

58. Thirdly, he argues that the spouses have freely consented to their marriage and have deliberately submitted to the duties it entails.

59. Fourthly, he argues that a spouse whose spouse refuses to be faithful to him or her can only be released from his or her duty of fidelity by divorce, as this measure makes it possible to reconcile the competing interests of the spouses.

60. Fifthly, he argues that the Versailles Court of Appeal could not rule on J.C.'s subsidiary claim without infringing article 1077 of the French Code of Civil Procedure, which states that "[a] claim made in the alternative in another case [of divorce] is inadmissible", as this procedural rule had not been applied at first instance (paragraphs 10 and 13 above). In these circumstances, he contends that breach of marital duty was the only ground on which the divorce could be granted. He points out that the domestic courts were bound to rule within the limits of the parties' claims, and regrets that neither of the spouses regularly raised the issue of the permanent alteration of the marital bond (paragraph 20 above).

61. Sixthly, he points out that the recognition of the fault committed by the claimant did not entail any pecuniary consequences for her.

3. *The Court's assessment*

a) **General principles**

62. The Court recalls that the notion of "private life", within the meaning of Article 8 of the Convention, is a broad concept which covers, in particular, sexual life (*Dudgeon v. the United Kingdom* , 22 October 1981, § 41, Series A n° 45, and *E.B. v. France* [GC], n° 43546/02, § 43, 22 January 2008). It also recalls that respect for personal autonomy is an important principle underpinning the interpretation of Article 8 guarantees (*Pretty v. United Kingdom* , n° 2346/02, § 62, ECHR 2002-III, *Christine Goodwin v. United Kingdom* [GC], n° 28957/95, § 90, ECHR 2002-VI, *M.L. v. Poland* , n° 40119/21, § 91, December 14, 2023, and *Pindo Mulla v. Spain* [GC], n° 15541/20, § 137, September 17, 2024; see also *M.C. v. Bulgaria* , n° 39272/98, §§ 165-166, ECHR 2003-XII). The right to respect for private life

must thus be understood as guaranteeing sexual freedom (see, already, *J.L. v. Itali e*, n° 5671/16, § 134, May 27, 2021, and *M.A. and others v. France*, n°s 63664/19 and 4 others, § 138, July 25, 2024) and the right to self-determination (*Pretty*, cited above, § 66, and *K.A. and A.D. v. Belgium*, n°s 42758/98 and 45558/99, § 83, February 17, 2005).

63. The primary purpose of Article 8 of the Convention is to protect the individual against arbitrary interference by public authorities (see, among others, *Libert v. France*, n° 588/13, §§ 40-42, February 22, 2018, and *Drelon v. France*, n°s 3153/16 and 27758/18, § 85, September 8, 2022). In addition to this negative commitment, there are positive obligations inherent in effective respect for private or family life, which may involve the adoption of measures aimed at respecting private life even in the relations between individuals (*X and Y v. the Netherlands*, 26 March 1985, § 23, Series A n° 91, and *Söderman v. Sweden* [GC], n° 5786/08, § 78, ECHR 2013). The boundary between positive and negative obligations does not, however, lend itself to precise definition (*X, Y and Z v. the United Kingdom*, 22 April 1997, § 41, *Reports of Judgments and Decisions* 1997-II, and *Fernández Martínez v. Spain* [GC], n° 56030/07, § 114, ECHR 2014 (extracts)).

64. Interference with the rights guaranteed by Article 8 can only be justified if it is provided for by law, is aimed at one or more of the legitimate aims listed in that paragraph and is necessary, in a democratic society, to achieve that aim or those aims.

65. The words "prescribed by law" require not only that the measure complained of have a basis in domestic law, but also that the "law" be accessible and that it be stated with sufficient precision to enable the persons to whom it applies to regulate their conduct: if necessary with the aid of enlightened advice, they must be in a position to foresee, to a degree reasonable in the circumstances of the case, the consequences likely to derive from a particular act (see, for example, *Rotaru v. Romania* [GC], n° 28341/95, § 52, ECHR 2000-V, and *Vavříčka and others v. Czech Republic* [GC], n°s 47621/13 and 5 others, § 266, 8 April 2021). The term "law" is to be understood in its substantive and not formal sense. It therefore includes both written law, which is not limited to legislative texts but also encompasses lower-ranking legal acts and instruments, and unwritten law. In short, "law" is the text in force as interpreted by the competent courts (*Leyla Şahin v. Turkey* [GC], n° 44774/98, § 88, ECHR 2005-XI, and *Vavříčka and others*, cited above, § 269).

66. The list of exceptions to the right to privacy contained in the second paragraph of Article 8 is exhaustive, and the definition of these exceptions is restrictive. To be compatible with the Convention, a restriction on this right must, in particular, be inspired by a purpose that can be linked to one of those enumerated in that provision (*S.A.S. v. France* [GC], n° 43835/11, § 113, ECHR 2014 (extracts), and *L.B. v. Hungary* [GC], n° 36345/16, § 108, 9 March 2023).

67. The principles relating to the assessment of the necessity of an interference with the rights guaranteed by Article 8 were summarized in the

Vavříčka and Others judgment (cited above, §§ 273-275), to which reference is made.

68. The Court recalls in particular that national authorities enjoy in principle a certain margin of appreciation in this matter. The extent of this margin of appreciation depends on a number of factors determined by the circumstances of the case. The narrower the margin, the more important the right in question is in guaranteeing the individual's effective enjoyment of his or her fundamental or intimate rights. When a particularly important aspect of an individual's existence or identity is at stake, the margin left to the State is also restricted. Conversely, where there is no consensus among the Contracting Parties to the Convention either on the relative importance of the interest at stake, or on the best means of protecting it, the margin of appreciation is wider, especially where delicate moral or ethical issues are at stake. Similarly, the margin of appreciation is generally wide where a balance must be struck between competing private and public interests or different rights protected by the Convention (*Evans v. the United Kingdom* [GC], n° 6339/05, § 77, ECHR 2007-I, *S.H. and Others v. Austria* [GC], n° 57813/00, § 94, ECHR 2011, *Vavříčka and Others*, cited above, §§ 273 and 275).

69. In application of the latter principle, the Court has held that States generally enjoy a wide margin of appreciation when drafting divorce legislation and when implementing it in practice, as such exercises involve reconciling divergent personal interests (*Babiarz v. Poland*, n° 1955/10, § 47, January 10, 2017).

b) Application in this case

i. On the existence of interference

70. The claimant is not complaining about the divorce as such - which she also requested - but about the grounds on which it was granted.

71. The Court considers that the reaffirmation of the marital duty and the granting of the divorce for fault on the grounds that the applicant had ceased all intimate relations with her husband constitute interference with her right to respect for private life, her sexual freedom and her right to control her own body. While it is true that domestic law now largely dissociates the pecuniary consequences of divorce from any wrongs committed by the spouses (paragraph22 above), the fact remains that these measures are particularly intrusive, in that they touch on one of the most intimate aspects of an individual's private life (*Dudgeon*, cited above, § 52, *Smith and Grady v. United Kingdom*, n°s 33985/96 and 33986/96, § 90, ECHR 1999-VI, *Y.F. v. Turkey*, cited above, § 33, and *K.A. and A.D. v. Belgium*, cited above, § 83). Moreover, the Court of Appeal's conclusions are particularly stigmatizing, insofar as the applicant's refusal was considered a "serious and repeated" violation of the obligations of marriage, making it "intolerable" to continue living together (paragraph14 above).

72. As these interferences with the applicant's rights were made by public authorities, the Court considers that they must be examined from the angle of negative obligations.

ii. On the justification for interference

α) On the existence of a foreseeable legal basis

73. The Court recalls that it is primarily for the national authorities, and in particular the courts and tribunals, to interpret and apply domestic law. Unless the interpretation adopted is arbitrary or manifestly unreasonable, the Court's task is limited to determining whether its effects are compatible with the Convention (see, among many others, *Leyla Şahin*, cited above, § 87, *Sanchez v. France* [GC], n° 45581/15, § 128, 15 May 2023, and *Pindo Mulla*, cited above, § 132).

74. In the present case, the Court noted that the divorce had been granted under articles 229 and 242 et seq. of the French Civil Code (paragraph20 above), which provide that a divorce may be granted for fault where one of the spouses is responsible for facts constituting a serious or repeated breach of the duties and obligations of marriage, which render the maintenance of life together intolerable. The parties' disagreement relates solely to the extent of the "duties and obligations of marriage", and more specifically to the persistence of the conjugal duty.

75. The applicant's main contention is that domestic law does not oblige spouses to have sexual relations.

76. The Court notes, however, that the Court of Cassation has long held that spouses are bound by a marital duty and that failure to perform this duty may constitute a fault justifying divorce (paragraph23 above). The judgment of September 5, 1990 to which the applicant refers was not handed down in divorce proceedings, but in criminal matters: it merely reiterates the reprehensible nature of marital rape (paragraph30 above). Despite this development in case law, the Cour de cassation confirmed in a judgment of December 17, 1997 that "the prolonged abstention from intimate relations attributed to the wife" was of such a nature as to justify the pronouncement of divorce for fault, insofar as it "was not justified by sufficient medical reasons". Although the Cour de cassation has not reaffirmed this case law since then, it has never been overturned and continues to be applied by the lower courts (see paragraphs25 and29 above). The Court therefore concludes that the interferences at issue were based on well-established domestic case law.

77. In the alternative, the claimant argues that the exact scope of the marital duty was unforeseeable.

78. In this respect, it is true that domestic case law does not regard every refusal to have sexual relations as wrongful. It leaves it to the trial courts to determine whether such refusal is sufficient to characterize a serious or repeated breach of the duties and obligations of marriage justifying divorce (paragraph26 above). It also accepts that certain circumstances, such as the

spouse's age, state of health or abusive or violent nature, may justify non-performance of the conjugal duty (*ibidem*). The Court points out, however, that the requirement of foreseeability of the law does not go so far as to impose a degree of precision such that the citizen can be absolutely certain of the consequences that may flow from its application. Many laws are necessarily formulated in more or less vague terms, the interpretation and application of which depend on practice (*Silver and Others v. the United Kingdom* , March 25, 1983, § 88, Series A n° 61, *Michaud v. France* , n° 12323/11, § 96, ECHR 2012, and *M.K. v. Luxembourg* , n° 51746/18, § 56, May 18, 2021). It further recalls that it is for the national authorities, and first and foremost the courts, to interpret and apply domestic law (*Paradiso and Campanelli v. Italy* [GC], n° 25358/12, § 169, January 24, 2017, and *Sanchez*, cited above, § 126). Consequently, the fact that domestic law confers on trial judges the power to assess whether or not the breach of a matrimonial obligation is sufficiently serious to justify divorce is not such as to call into question its foreseeability. The Court considers that the case law in question was sufficiently precise to enable the applicant to regulate her conduct, if necessary with the support of enlightened counsel.

79. In view of the foregoing, the Court considers that the interferences at issue were "prescribed by law" within the meaning of Article 8 § 2.

β) On the legitimacy of the aim pursued

80. It is for the Court to determine whether the impugned restrictions were inspired by an aim capable of being linked to one of those enumerated in the second paragraph of Article 8 (*Parrillo v. Italy* [GC], n° 46470/11, § 163, ECHR 2015, and *L.B. v. Hungary*, cited above, § 108), such review being summary in most cases (*Leyla Şahin*, cited above, § 99, *Merabishvili v. Georgia* [GC], n° 72508/13, § 297, 28 November 2017 and *L.B. v. Hungary*, cited above, § 109).

81. The Government points out that the interferences at issue were intended to protect the rights of others, and more specifically the right of each spouse to terminate the marriage bond when it is no longer possible to continue living together (see, to this effect, *N.N. and T.A. v. Belgium*, cited above, § 42).

82. Noting that domestic law guarantees the right to divorce and that disunity has an impact on the rights of each spouse, the Court recognized that the purpose of the interference at issue, which referred to the right of each spouse to terminate marital relations, was linked to the "protection of the rights and freedoms of others" within the meaning of the Convention.

83. However, it remains for the Court to decide the question, closely linked to that of the existence of a legitimate aim, of whether the restrictions in question are justified, in other words whether they are based on relevant and sufficient grounds and whether they are proportionate to the aim pursued (see, on this point, *Merabishvili*, cited above, § 302, and *L.B. v. Hungary*, cited above, § 109).

γ) On the need for interference

84. It is necessary to ascertain whether the domestic courts struck a fair balance between the competing individual interests at stake, namely, on the one hand, the applicant's sexual freedom, and on the other, her spouse's right to obtain an end to the marriage bond if he considers that the sexual abstinence imposed on him renders its continuation intolerable. In this respect, the Court does not rule out the possibility that forcing a spouse to remain in the marriage despite a finding of irremediable impairment of the marital bond may, in certain circumstances, result in excessive interference with his or her rights (*Ivanov and Petrova v. Bulgaria* (dec.), n° 15001/04, § 61, June 14, 2011, and *Babiarz*, cited above, § 50; see also *F. v. Switzerland*, December 18, 1987, § 38, Series A n° 128, and *Aresti Charalambous v. Cyprus* (dec.), n° 43151/04, § 56, July 19, 2007).

85. Insofar as the interference in question affects one of the most intimate aspects of the applicant's private life, the Court considers that the margin of appreciation left to the Contracting States is narrow (*Dudgeon*, cited above, § 52, and *S. and Marper v. the United Kingdom* [GC], n°s 30562/04 and 30566/04, § 102, ECHR 2008). It recalls that only particularly serious reasons can justify interference by public authorities in the area of sexuality (see *Dudgeon*, cited above, § 52, *Smith and Grady*, cited above, § 89, and *K.A. and A.D. v. Belgium*, cited above, § 84). On this point, the present case differs markedly from *Babiarz*, where none of the rights invoked by the spouses in the divorce proceedings between them were of such a nature or importance (compare *Babiarz*, cited above, §§ 37 and 47).

86. In the present case, the Court notes that the conjugal duty, as set out in the domestic legal order and reaffirmed in the present case (paragraphs 14 and 19 above), takes no account whatsoever of consent to sexual relations, even though this constitutes a fundamental limit on the exercise of the sexual freedom of others.

87. In this respect, the Court recalls that any non-consensual sexual act constitutes a form of sexual violence (see, on this point, *M.C. v. Bulgaria*, cited above, § 163). It has also consistently held, under Article 8 alone or in conjunction with Article 3, that Contracting States must establish and implement an appropriate legal framework offering protection against acts of violence that may be committed by private individuals (*Söderman*, cited above, § 80 and references cited). Obligations relating to the prevention of sexual and domestic violence have also been included in Articles 5 § 2 and 12 § 2 of the Istanbul Convention (paragraph 34 above).

88. However, the Court found that the obligation at issue does not guarantee free consent to sexual relations within the couple. This rule of law has a prescriptive dimension with regard to the spouses' conduct of their sexual life. Moreover, ignoring it has legal consequences. On the one hand, refusal to submit to conjugal duty may, under the conditions laid down in article 242 of the French Civil Code, be considered as a fault justifying the granting of a divorce, as was the case here (paragraphs 20 and 23-26 above).

On the other hand, it may entail pecuniary consequences and form the basis of an action for damages (paragraphs 22 and 27 above).

89. The Court concludes that the very existence of such a marital obligation is contrary both to sexual freedom and the right to control one's own body, and to the positive obligation of prevention incumbent on contracting states in the fight against domestic and sexual violence.

90. While the Government argues that the criminalization of sexual offences committed within a couple is sufficient to ensure the protection of everyone's sexual freedom, the Court considers that this criminal prohibition is not sufficient to render ineffective the civil obligation introduced by case law. It observes that the latter runs counter to the advances made in criminal law (paragraphs 30 to 33 above), as well as to France's international commitments to combat all forms of domestic violence (paragraph 34 above).

91. The Court cannot accept, as the Government suggests, that consent to marriage implies consent to future sexual relations. Such a justification would deprive marital rape of its reprehensible character. However, the Court has long held that the idea that a husband cannot be prosecuted for the rape of his wife is unacceptable and contrary not only to a civilized notion of marriage but also, and above all, to the fundamental objectives of the Convention, the very essence of which is respect for human dignity and freedom (*S.W. v. the United Kingdom*, cited above, § 44, and *C.R. v. the United Kingdom*, 22 November 1995, § 42, Series A n° 335-C). In the Court's view, consent must reflect the free will to engage in a given sexual relationship, at the time it occurs and in the light of its circumstances.

92. Moreover, in the present case, the Court cannot discern any reason of particular gravity capable of justifying interference in the field of sexuality (see *Dudgeon*, cited above, § 52, *Smith and Grady*, cited above, § 89, and *K.A. and A.D. v. Belgium*, cited above, § 84). She noted that the applicant's spouse had the possibility of seeking a divorce on the grounds of definitive alteration of the marriage bond. In this respect, it was incumbent on him to comply with the requirements of article 1077 of the Code of Civil Procedure, by submitting this application as his principal claim and not as a subsidiary claim, as he did in the present case (paragraphs 13 and 60 above). His rights could therefore be defended by other means.

93. From all the foregoing considerations, the Court concludes that the reaffirmation of the marital duty and the granting of the divorce to the applicant's exclusive detriment were not based on relevant and sufficient grounds, and that the domestic courts failed to strike a fair balance between the competing interests at stake. The foregoing is sufficient to find a violation of Article 8 of the Convention.

II. ON THE APPLICATION OF ARTICLE 41 OF THE CONVENTION

94. Under article 41 of the Convention :

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the domestic law of the High Contracting Party allows only imperfect

reparation to be made for the consequences of that violation, the Court shall, if appropriate, afford just satisfaction to the injured party."

A. Moral damage

95. The claimant is seeking a symbolic one euro for the non-material damage she believes she has suffered as a result of the slanderous nature of the divorce pronounced against her exclusively, specifying that she was particularly bruised by the sanction thus pronounced against her on a matter affecting her sexual life.

96. The government has no objection to this request.

97. The Court considers that the applicant has suffered definite non-material damage. In view of the amount claimed by the applicant and the particular circumstances of the case, the Court considers that the finding of a violation of Article 8 in itself provides sufficient just satisfaction for any non-pecuniary damage suffered by the applicant (*Vegotex International S.A. v. Belgium* [GC], n° 49812/09, § 164, 3 November 2022).

B. Costs and expenses

98. The claimant seeks reimbursement of 36,500 euros for costs incurred before the national courts and the Court.

99. The Government objected to this request, pointing out that the applicant had not produced any evidence to justify the reality and necessity of her expenses.

100. According to the Court's case law, an applicant can only obtain reimbursement of his costs and expenses to the extent that their reality, their necessity and the reasonableness of their rate are established. The Court requires the production of fee notes and detailed invoices; these must be sufficiently precise to enable it to determine the extent to which the aforementioned conditions are met (*İzzettin Doğan and Others v. Turkey* [GC], n° 62649/10, § 192, 26 April 2016, and *Altay v. Turkey* (n° 2) , n^(o) 11236/09, § 87, 9 April 2019). In the present case, the applicant has not provided any evidence of her costs and expenses. The Court therefore rejects her claim in this respect.

FOR THESE REASONS, THE COURT UNANIMOUSLY,

1. *Declares* admissible the complaint of violation of Article 8 of the Convention;
2. Holds that there has been a violation of Article 8 of the Convention;
3. *Holds* that the finding of a violation in itself constitutes just satisfaction;
4. *Dismisses* the remainder of the claim for just satisfaction.

JUDGMENT H.W. v.

Done in French, then communicated in writing on January 23, 2025,
pursuant to article 77 §§ 2 and 3 of the regulation.

Victor Soloveytchik
Clerk

María Elósegui
President