

## THE LEGAL CONCEPT OF 'DOMESTIC SERVITUDE' IN THE JURISPRUDENCE OF THE FRENCH COUR DE CASSATION

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The social chamber of the French Cour de Cassation has recently handed down an interesting decision on a situation which it described as 'domestic servitude' which on the one hand, sets out the scope of the legal concepts of slavery, forced labour and servitude, and on the other hand provides clear guidance to the judiciary, arising from a number of European and international conventions, with respect to the positive obligations which rest on European states in connection with modern slavery.<sup>1</sup>

A young girl, born in Morocco in 1982, was at 11 years old the subject of a 'kafala' adoption under local law by a Moroccan couple resident in France. She lived in the couple's home in France from 1994, by which time she was 12 years old. After fleeing from their home when she reached the age of majority, with the help of a human rights association, she complained to the courts, including a claim for damages as a *partie civile*, and on 14 September 2010 the couple were convicted before the criminal chamber of the Versailles Court of Appeal of having obtained from this young woman the provision of unpaid services, or services with a remuneration which was manifestly disproportionate to the work undertaken, in circumstances where her vulnerability and her state of dependence was apparent or was known to them, pursuant to Articles 225-13 and 225-19 of the Criminal Code (as amended).<sup>2</sup>

The criminal court found that the minor was burdened all the time with the great majority of the domestic tasks for the family, which included responsibilities inappropriate for her age, and obviously, unpaid, that she was not permitted to go to school and that the couple concerned made no effort to integrate her socially in France.<sup>3</sup> The court also noted the girl had no leave to remain and was in France illegally, using the passport of the couple's children, which created for her a risk of being removed to her country of origin. In the circumstances, the criminal court awarded the victim €10,000 in damages for moral injury.

It should be noted that the minor also went to the employment courts (the *juridiction prud'homale*) seeking damages for economic loss and asking that such damages be assessed in line with the appropriate salary for her years of unpaid domestic work.<sup>4</sup> The social chamber of the Versailles Court of Appeal<sup>5</sup> refused her application for indemnity for economic loss, reasoning that although the couple had been convicted of having committed the offence of non-payment or inadequate payment for the work of a vulnerable person, nevertheless the amounts now sought were based on a presumed

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<sup>1</sup> Cour de Cassation [Cass.] [supreme court for judicial matters] soc., April 03, 2019, 16-20.490. See Social Chamber, 3 April 2019, appeal no. 16-20.490, published in the Annual Report.

<sup>2</sup> *ibid.* See Code Pénal [C. Pén] [Penal Code] art. 225-13 and 225-19 (Fr.).

<sup>3</sup> See Cour de Cassation, appeal no. 16-20.490 case (n 1).

<sup>4</sup> *ibid.*

<sup>5</sup> The French Cour d'Appel has powers and functions similar to the Employment Appeal Tribunal, not the England and Wales Court of Appeal.

employment contract, which was not justified as there was no evidence of an intention to create legal relations or to enter into an employment contract.<sup>6</sup>

The Versailles Court of Appeal considered that it was impossible to give judicial recognition to the existence of an employment contract, for two reasons: first, it was doubtful whether at the age of 11, this young woman would have consented to enter into an employment contract with no pay; and second, French law prohibits the paid employment of a minor under 16 years of age, save for exceptions in certain sectors, such as the theatre or the film industry, which are not relevant to this appeal.<sup>7</sup>

The Cour de Cassation, in deciding to quash and annul that decision of the Versailles Court of Appeal, relied on a number of European and international Conventions which prohibit slavery and situations of forced labour:<sup>8</sup> Article 4 of the European Convention on Human Rights and Fundamental Freedoms,<sup>9</sup> Articles 2 and 4(2) of the Forced Labour Convention, adopted by the General Assembly of the International Labour Organisation (ILO) on 28 June 1930 and ratified by France on 24 June 1937,<sup>10</sup> and Article 1(d) of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted on 30 April 1956 and implemented by France on 26 May 1964,<sup>11</sup> Article 1 of the ILO Convention concerning Minimum Age for Admission to Employment C138, implemented in France on 6 September 1990.<sup>12</sup>

In addition, the Cour de Cassation relied on two judgments against France<sup>13</sup> by the European Court of Human Rights, which cast a great light on the modern notions of slavery and servitude.<sup>14</sup> In these two judgments, the European Court of Human Rights took into account the ILO Conventions – which link almost all of the member states of the Council of Europe, including France – and in particular, the Forced Labour Convention of 1930,<sup>15</sup> to interpret Article 4 of the ECHR.<sup>16</sup> The Court considered that there existed a striking analogy, which was not fortuitous, between Article 4(3) of the ECHR,<sup>17</sup> and Article 2(2) of Convention no 29 of the ILO Convention.<sup>18</sup> Paragraph 2(1) of the ILO Convention provides that:

2.1. For the purposes of this Convention the term **forced or compulsory labour** shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.<sup>19</sup>

<sup>6</sup> See Cour de Cassation, appeal no. 16-20.490 case (n 1).

<sup>7</sup> *ibid.*

<sup>8</sup> See Cour de Cassation, appeal no. 16-20.490 case (n 1).

<sup>9</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR),

<sup>10</sup> ILO Forced Labour Convention (No. 29) (adopted 28 June 1930, entered into force 01 May 1932) 39 UNTS 55.

<sup>11</sup> Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (adopted 30 April 1956, entered into force 30 April 1957) 266 UNTS 3.

<sup>12</sup> ILO Convention concerning Minimum Age for Admission to Employment C138 (adopted 26 June 1973, entered into force 19 June 1976) 1015 UNTS 297.

<sup>13</sup> *Siliadin v. France* App No [73316/01](#) (ECHR, 26 July 2005), *C.N. et V. v. France* App No 67724/09 (ECHR, 11 October 2012),

<sup>14</sup> See Cour de Cassation, appeal no. 16-20.490 case (n 1).

<sup>15</sup> Forced Labour Convention (n 10).

<sup>16</sup> See also *Van der Musselle v Belgique* (1983) Series A no 70, p. 16, para 32).

<sup>17</sup> ECHR (n 9).

<sup>18</sup> Forced Labour Convention (n 10).

<sup>19</sup> *ibid.*

Moreover, the ECHR has held that, pursuant to the 1926 Slavery Convention, ‘slavery is the state or condition of an individual over whom [the perpetrator] exercises the powers of ownership, or some of those powers’.<sup>20</sup> This definition corresponds to the ‘classic’ definition of slavery as it was practised for centuries, and derives from Roman law. Although, according to the case presented at the French Cour de Cassation, this young woman had plainly been arbitrarily deprived of her liberty, the evidence did not support a finding that in legal terms, she had been held in slavery in the true sense, that is to say, that the couple had exercised property rights over her, reducing her to the status of an ‘object’.

However, according to the Strasbourg court, interpreting the concept of ‘servitude’ envisages a ‘particularly serious form of denial of freedom’ (see the Commission’s report in the case of *Van Droogenbroeck v Belgique*<sup>21</sup>). It includes, ‘in addition to the obligation to perform certain services for another person ... the obligation for the “slave” to live in someone else’s property and the impossibility of changing her circumstances’.<sup>22</sup> It follows, having regard to the current jurisprudence on this question, that ‘servitude’ as understood in Article 4 of the ECHR Convention<sup>23</sup> must be analysed as an obligation to render services under the power of constraint, and that it is the impossibility of being able to change one’s circumstances which characterises the state of servitude, that is to say, a situation of ‘aggravated forced labour’.

The French Cour de Cassation in its judgment of 3 April 2019, adopted this jurisprudence from the Strasbourg Court and reminded itself that applying

the jurisprudence of the European Court of Human Rights (ECHR, *Siliadin v France*, 26 July 2005, no. 73316/01; *VN. et V. v France*, 11 October 2012, no. 67724/09), Article 4 of the Convention comprises one of the fundamental values of democratic societies, that the first paragraph of that Article is unqualified and allows for no derogation, even in a case of war or other public emergency threatening the life of the nation, as set out in Article 15(2) of the Convention (*Siliadin* [112]), and that the State can be held responsible both for its direct actions and for omissions in the effective protection of victims of slavery, servitude or forced labour, by reason of positive obligations on it (see *Siliadin* [89] and [112]).

Accordingly, the European Court of Human Rights has recognised, in similar situations also arising under Article 225-13 of the Criminal Code, the existence of situations both of forced labour and of the status of servitude – ‘aggravated forced labour’ – in the sense of Article 4 of the Convention (see *Siliadin* [120] and [129]; *VN. et V. v France* [91] and [92]).<sup>24</sup>

The French Supreme Court deduced therefrom that, despite there being no legal possibility to recognise the existence of an employment contract, as the complainant was a minor, civil damages for forced labour or servitude were necessary, having regard to the European

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<sup>20</sup> Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention (adopted 25 September 1926, entered into force 09 March July 1927) (1926 Slavery Convention) 212 UNTS 17.

<sup>21</sup> *Van Droogenbroeck* App no 7906/77 (Commission decision, 09 July 1980), p. 30, paras 78-80

<sup>22</sup> *ibid*, para 79. The original statement of the commission was as follows: ‘...plus de l’obligation de fournir à autrui certains services, la notion de servitude englobe l’obligation pour le “serf” de vivre sur la propriété d’autrui et l’impossibilité de changer sa condition’.

<sup>23</sup> ECHR (n 9).

<sup>24</sup> See Cour de Cassation, appeal no. 16-20.490 case (n 1).

and international texts concerning the positive obligations on states to prohibit and punish situations of servitude or forced labour.<sup>25</sup>

Given that the legal foundation of the complaint is expressed as a contractual liability, because it invoked the existence of an employment contract, the Cour de Cassation of its own motion changed the applicable legal basis of the appeal, basing the obligation for the couple to indemnify the victim on their 'delictual' or 'extracontractual' liability.<sup>26</sup>

Article 12 of the Civil Procedure Code provides that:

The judge shall decide each case in conformity with the applicable rules of law. He must give or restore their exact weight to the facts and actions in issue, without having regard to the description thereof proposed by the parties.

However, the judge cannot amend the description or the legal basis where the parties, by reason of an express agreement between them, and having regard to legal rights of which they have free disposition, have agreed to limit the decision to specific issues and points of law.<sup>27</sup>

By a decision of 21 December 2007,<sup>28</sup> the Cour de Cassation sitting in plenary session ended the jurisprudential hesitancy as to the requirement, or the possibility for a Judge of his own motion to seek the most appropriate legal provision, holding that:

if, among the principles underlying the litigation, Article 12 of the new Code of Civil Procedure requires the Judge to give or restore their correct description to facts and actions relied upon by the parties in their claims, that does not require him, save where there are specific provisions, to amend the description or the legal basis of such claims.

In this decision of 3 April 2019, the Cour de Cassation considered that the positive obligations arising out of the international and European Conventions set out above required it to amend the legal basis of the claim and that it would treat those specific provisions in the light of the jurisprudence of the above-mentioned plenary decision of the Court.<sup>29</sup>

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<sup>25</sup> *ibid.*

<sup>26</sup> See Cour de Cassation, appeal no. 16-20.490 case (n 1).

<sup>27</sup> Code De Procédure Civile [C. P. C.] [Civil Procedure Code] art 12 (Fr.).

<sup>28</sup> Cour de cassation [Cass.] 1e civ., Dec. 21, 2007, Bull. civ. I, No. 10 (Fr.).

<sup>29</sup> See Cour de Cassation, appeal no. 16-20.490 case (n 1).