

INVOKING THE RIGHT TO HUMAN DIGNITY IN THE CONTEXT OF FARM WORKERS: LIBERATING AN OPPRESSED GROUP

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ABSTRACT

Farm workers in South Africa experience abuse at the hands of their employers despite their acknowledged contribution to the economy. There have been several attempts to address their ill-treatment, including government intervention. Notwithstanding such initiatives, little has changed. This article argues that unionisation of farm workers is necessary to address this problem as a means to make individual workers aware that they can take action in relation to an employer who infringes upon their rights. It further argues that the Department of Labour should actively monitor compliance with its regulations with the help of specialised labour inspectors.

1. INTRODUCTION

The institution of slavery has been a historical reality for centuries. However, as circumstances have changed and new laws and rules were developed, the traditional forms of slavery and forced labour and the positive law that supported such practices have been largely abolished. In South Africa, the Constitution of 1996 addressed the degrading and oppressive treatment of people by incorporating a Bill of Rights. Notwithstanding its existence slave-like practices still occur such as forced prostitution and the trafficking of people. Domestic workers and farm labourers may also be treated unjustly because of their subservient position. This article investigates the practices of forced labour on farms which appear to be a form of slavery and suggests solutions to curb such practices. The principal purpose in this article is to juxtapose the right to human dignity against the practice of ‘slavery’ in order to illustrate that forced labour on farms continues to violate the right to human dignity, and asserts that concrete measures

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must be undertaken to address this situation. Accordingly, it is apposite to commence by elaborating upon the meaning of the terms ‘slavery’ and ‘forced labour’.

2. UNDERSTANDING THE CONCEPTS ‘SLAVERY’ AND ‘FORCED LABOUR’

The problem of slavery has led the international community to draft treaties to encourage states to enact domestic laws to serve as a point of departure in the abolition of slavery. These international conventions include the Slavery Convention¹ and the Supplementary Convention on the Abolition of Slavery, Slave Trade and Institutions and Practices Similar to Slavery² (Supplementary Convention). In terms of these conventions, states are obliged to protect people from slavery and to outlaw various slave-like practices in their countries.³ These initiatives remain pertinent, for example, slavery was officially outlawed in Mauritania as recently as 2007 when the Mauritanian government acquiesced to international pressure to prosecute slaveholders: a 1981 law abolishing slavery had not been enforced.⁴ In South Africa forced labour on farms persists in contravention of legislation regulating labour law.

2.1. Slavery

Slavery is defined as the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.⁵ A slave is defined as a ‘person who is owned by another and obliged to work for him or her without being paid.’⁶ The *Report of the Temporary Slavery Commission to the Council of the League of Nations*⁷ argues that ‘this definition for slavery does not refer solely to the concept of slavery in the traditional sense, that is, as resulting from the African slave trade, but encompasses domestic slavery and other conditions such as debt slavery, the enslaving of persons disguised as adoption of children, and the acquisition of girls by purchase disguised as

1 This convention was signed in Geneva on 25 September 1926.

2 This convention was signed in Geneva on 7 September 1956.

3 Arjuna Naidu, ‘The Right to be Free from Slavery, Servitude and Forced Labour’ (1987) XX CILSA 108 at 109. See also Haysom Nicholas in Heaton Cheadle, *South African Constitutional Law: The Bill of Rights* (LexisNexis 2002) at 863.

4 Monica Mark, ‘Slavery still shackles Mauritania, 31 years after its abolition’ *The Guardian* (Mauritania 14 August 2012) <www.theguardian.com/world/2012/aug/14/slavery-still-shackles-mauritania> accessed 25 May 2017.

5 Art 1 (1) of the Slavery Convention.

6 *Oxford English Dictionary* (Oxford University Press 1999).

7 *Report of the Temporary Slavery Commission to the Council of the League of Nations* cited in David Weissbrodt and Anti-Slavery International, ‘Contemporary Forms of Slavery’ (26/05/2000) Working Paper UN Document E/C/N. 4/Sub.2/2000/3.

payment of dowry'. The last is sometimes called 'ukuthwala', which is the removal of young girls from their family homes in exchange for a dowry. The intention is for these girls to become wives in exchange for cattle or sheep. All of these acts or practices define conduct that is referred to as 'slavery'.

It is noticeable in the definition of slavery that certain features need to be present for conduct to constitute slavery, such as control and ownership over an enslaved person. An enslaved person is equated with property and has no rights and duties of his or her own other than those prescribed by the owner or with the owner's permission. The owner can dispose of or sell the slave as he or she wishes.⁸

Other features of slavery include the restriction of the individual's inherent right to freedom of movement;⁹ and a degree of control over the individual's belongings.¹⁰ All of these features have the element of choice and control over the path of life taken from them and passed on to a third party.¹¹ Once a person has been enslaved, he or she may remain a slave for the duration of his or her life; a status which he or she could transmit by inheritance to his children and his children's children. Thus, slavery was carried internally, from generation to generation, and there was no means of escape from slavery unless a person died.

Certain events and changed circumstances, for example, people becoming aware of their rights; the introduction of organisations (governmental and non-governmental) that deal specifically with human rights issues and the conditions under which slaves live, has resulted in changing the nature of slavery and the business of the slave-trade drastically. The institution of slavery, although officially prohibited, is now conducted in more sophisticated ways, the trafficking of people for sexual exploitation, abuse of farm and domestic workers and the abuse of illegal foreign workers. Presently, there are fewer instances where a person is owned by another, mostly in unidentified and illegal slave-operations where law enforcement agencies cannot be alerted to such practices.

2.2. Forced labour

There are two important conventions on the subject of forced labour. These are the Forced Labour Convention,¹² and the Abolition of Forced Labour Convention.¹³ The former requires member states to take steps to suppress the use of forced or compulsory labour

8 Argibay Carmen, 'Sexual Slavery and the Comfort Women of World War II' (2003) Berkeley JIL 375. See also Ralph Beppard, *Human Rights and Europe* (Grotius Publications 1995) at 107.

9 eg, a migrant worker whose passport has been confiscated by his or her employer.

10 eg, the child sold into prostitution, or the 'comfort woman' forced into sexual slavery.

11 See Benjamin Whitaker, *Slavery Report* (UN Sub-commission on Prevention of Discrimination and Protection of Minorities, 1984).

12 No 29 of 1930.

13 No 105 of 1957.

in all forms within the shortest possible period.¹⁴ The latter provides that member states must undertake to suppress and not to make use of any form of forced or compulsory labour for the following purposes:

- a. As a means of political coercion or education or as punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system.
- b. As a method of mobilizing and using labour for purposes of economic development.
- c. As a means of labour discipline.
- d. As a means of ensuring participation in strikes.
- e. As a means of racial, social, national or religious discrimination.¹⁵

In addition, the International Labour Organisation's (ILO) Declaration on Fundamental Principles and Rights at Work, adopted by the International Labour Conference at its eighty-sixth Session in 1998, declared that; all 'members states, even if they have not ratified these Conventions, have an obligation, arising from the very fact of membership in the ILO, to respect, promote and realize, in good faith and in accordance with their constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: the elimination of all forms of forced or compulsory labour'.¹⁶

The Forced Labour Convention defines forced labour to 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'.¹⁷ The most important element in this regard is the involuntariness in the performance of such duties. The author argues that the word involuntary should not have its literal meaning and should not be a decisive factor in determining whether or not forced labour exists.

By way of contrast it is proposed that in order to reach a conclusion whether forced labour is present, the socio-economic conditions of individuals, such as lack of the means of survival, must be taken into account. Poverty is such a factor: it compels people to take employment irrespective of the unjust conditions of work. Unemployment and poverty play a leading role in this regard, as they are inseparable and interlinked:¹⁸ people are compelled to put food on the table in order to sustain and serve their families. A lack of employment is a significant contributor to poverty whereas securing decent

14 Art 1 (1) of the Forced Labour Convention of 1930.

15 *ibid.*

16 Art 1 (1) of the Convention.

17 Art 2 (1) of the International Labour Organization's Forced Labour Convention of 1930.

18 See Mlungisi Tenza, 'A Marathon of Twenty Years of Eradicating Poverty: Is South Africa Making Progress' *RJOPES* <http://rjopes.emergingresource.org/issuesview.php?id=118&issue_name=Volume%204%20Number%202&issue_month=March&issue_year=2015> accessed 26 May 2017.

employment contributes to poverty alleviation. The strict definition of unemployment measures the number of people available and looking for work within a given specified period.¹⁹

Despite its prohibition,²⁰ this article argues that the conditions in which people find themselves produce other forms of forced labour in contemporary society. The definition of forced labour needs to be revisited and extended beyond its connection to the slave trade and other worst forms of human rights abuse. The failure of the economy to provide people with job opportunities and the failure by people to create for themselves the means of survival are factors that cannot be ignored in providing a new description of ‘forced labour’.

This article argues that the focus of the definition should shift from the consideration of factors such as involuntariness to prevailing social and economic conditions in which workers and other members of society find themselves. What is important is whether a person earns a living. ‘Forced labour’ in contemporary terms means the work done by people against their will and can extend to jobs that pay less than a prescribed minimum wage.²¹ On farms, for example, a living wage is not the issue but the fact that people are forced to work by mere fact that they reside on the farm.

The author argues that the term ‘forced or compulsory labour’ cannot be fully understood from its literal meaning²² without having regard to two factors: first, that the work is performed against the person’s will and, second, the work entails unavoidable hardship.²³ In *People’s Union for Democratic Rights & Others v Union of India*,²⁴ workers were paid wages lower than the prescribed minimum wage, an act which was contrary to various legislative regulations in the industry. The matter was referred to the Supreme Court of India. The Court, in concluding that any work done for less than the minimum wage amounts to forced labour, wrote:

[I]t may be physical force which compels a person to provide labour or service to another or it may even be compulsion arising from hunger or poverty, want and destitution. Any factor which deprives a person of a choice of alternatives and compels him to adopt a particular course may properly be regarded as “force” and if labour or service is compelled as a result of such “force” it would be “forced labour”.²⁵

19 Esther van Kerken and Marius Olivier, ‘Unemployment insurance’ in Marius Olivier, Nicola Smit and Evans Kalula, *Social Security: A Legal Analysis* (LexisNexis 2003) at 419.

20 See (n 15).

21 *People’s Union for Democratic Rights & Others v Union of India* [1983] 1 SCR 456 at 491.

22 *X v Federal Republic of Germany* App No 4653/70 CD46 at 22.

23 ICFTU Burma Forced Labour, the ILO Resolution, and the ICFTU, 25 January 2001.

24 See (n 21).

25 *ibid.*

In short, forced labour is present when an employer uses the limited options available to indigent people and offers work, which is an abuse. Objective manifestations of abuse include a sub-minimum wage and horrific working conditions. Even if a person enters ‘voluntarily’ into a contract for work, she may still have her dignity impaired by the demeaning nature of the work and her inability to insist on better conditions or better pay.²⁶

3. HUMAN DIGNITY AS THE TRANSFORMATIVE RIGHT AND VALUE IN SOUTH AFRICA’S CONSTITUTIONAL DEMOCRACY

South Africa has signed and ratified the Slavery Convention as well as the conventions supplementing that Convention. As a result of being a signatory and having ratified these international instruments, it is under a positive duty to root out slavery in all its manifestations.²⁷ This duty not only entails the adoption of legislation which prohibits such practices, but requires the establishment of effective judicial and administrative measures to enforce the prohibition of slavery and slave-like practices.²⁸ Effective judicial measures will help to compensate victim(s) where a civil case has been opened. Where a criminal case has been opened and a conviction has resulted, a fine or imprisonment would be a suitable remedy. Administrative remedies are also applicable within a work environment. Examples of such remedies include an order directing an administrator to act in a manner the court or tribunal requires, or an order that compels the administrator to give reasons for his or her decision that adversely affects another person.²⁹

The claim that there is slavery in South Africa is contentious, but the author contends that in some instances farm workers live and work under terrible conditions with farmers wilfully failing to comply with the obligation to ensure acceptable conditions of work. This practice is an offence against the right to human dignity³⁰ and the right to fair labour practices.³¹

26 Stu Woolman, ‘Slavery, Servitude and Forced Labour’ in Stu Woolman, Theunis Roux and Michael Bishop (eds), *Constitutional Law of South Africa* (Juta 2005).

27 Art 5 of the Supplementary Convention places a duty on all member states to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery.

28 Iain Currie and Johan De Waal, *The Bill of Rights Handbook* (Juta 2013). See also art 3 of the Supplementary Convention, art 1 (1) and 25 of the ILO Convention 29, and art 1 of the ILO Convention 105 which details particular measures the state must undertake in compliance with the Conventions.

29 Iain Currie and Jonathan Klaaren, *The Promotion of Administrative Justice Act Benchbook* (Siber Ink, 2001) at 189.

30 S 10 of the Constitution.

31 S 23 (1) of the Constitution.

In order to comply with international law on the abolition of slavery, South Africa has included a section in the Constitution that deals with the abolition of slavery.³² The Constitution provides that ‘no one may be subjected to slavery, servitude or forced labour’.³³ This requires that active steps are taken to prevent the occurrence or acceleration of all forms of slave practices throughout the Republic, as well as to penalise those who are found to be allowing slave-like practices.

The Constitution acknowledges the position of international law within South Africa’s domestic law.³⁴ It contains specific provisions that emphasise the significance of international law in the Republic. These are sections 232 and 233. Section 232 deals with the status of international law in relation to South African law. It provides that ‘customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament’. Section 233 requires a court, when interpreting legislation, to ‘prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law’. The courts in the Republic have confirmed that international law forms part of our law and that it is the duty of a municipal or national court to ascertain and administer the appropriate rule of international law.³⁵ In *S v Makwanyane*,³⁶ the Constitutional Court held that:

International law could be used as one of the tools of interpretation. International agreements and customary law provide a framework within which the Bill of Rights can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of the Bill of Rights.

Accordingly, South Africa’s actions are consistent with the abolition of slavery contained in international law. In addition, the Constitution contains a number of sections that have an impact on the eradication or prevention of the acceleration of slavery. These

32 S 13 of the Constitution.

33 *ibid.*

34 International law is defined as a body of rules and principles, which are binding on states in their relations with one another, see in this regard James Brierly, *The Law of Nations* (Clarendon Press 1963) at 1.

35 *South Atlantic Islands Development Corporation Ltd v Buchan* [1971] 1 SA 234 (C); *Nduli v Minister of Justice* [1978] 1 SA 893 (A); and *Binga v Administrator-General, SWA* [1984] 3 SA 949 (WA) at 967F-G.

36 *S v Makwanyane* [1995] 3 SA 391 at 413–4. See also *Prince v President of the Law of Society, Cape of Good Hope* [1998] 8 BCLR 976 (C) at 98C-D; *Kirsh v Kirsh* [1991] All SA 193 (C) at 204; *Government of the RSA v Grootboom* [2001] 1 SA 46 (CC) at 63; and *S v Williams* [1995] 3 SA 632 (CC).

include the right to equality and the elimination of unfair discrimination,³⁷ the right to pursue a livelihood,³⁸ and protection for children against exploitative labour practices and work that is hazardous to their well-being.³⁹ All of these sections demonstrate South Africa's commitment to eradicating or preventing slavery within its borders. However, this is not a guarantee that slavery (in its direct or indirect form) is not practiced in the Republic despite the existence of the Constitution and other laws expanding on the Constitution. The conditions that exist on some farms are contrary to the ambitions of the Constitution to improve the quality of life of all citizens and to free the potential of each person.⁴⁰ The question that arises is what needs to be done to change the *status quo*.⁴¹ This question is answered in paragraph five below.

3.1. Slavery and human dignity

A striking feature of South Africa's constitutional order is the prominence human dignity enjoys in the Constitution. In *Dawood & Another v Minister of Home Affairs*,⁴² the Constitutional Court said the following about the right to human dignity:

Human dignity informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality; the right not to be punished in a cruel, inhumane and degrading way; and the right to life. Human dignity is also a constitutional value that is of central significance in the limitation analysis. Section 10, however, makes it plain that dignity is not only a *value* fundamental to our Constitution; it is a justiciable and enforceable *right* that must be respected and protected. In many cases however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.

In a constitutional state, human dignity is understood to acknowledge, respect and protect all people (regardless of their race, colour or sex) both from the perspective

37 S 9 of the Constitution.

38 S 22 provides that 'every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.'

39 S 28 of the Constitution provides that: (1) Every child has the right – (e) to be protected from exploitative labour practices; (f) not to be required or permitted to perform work or provide services that – (i) are inappropriate for a person of that child's age; or (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development.

40 See the Preamble to the Constitution.

41 See recommendation in para 5 below.

42 [2000] 3 SA 936 (CC); [2000] 8 BCLR 837 (CC) at para 35.

of the state and also on the part of every individual.⁴³ At the very least, all people are entitled to be treated as subjects with absolute and equal worth.

The existence of slave-like practices is contrary to human dignity both as a fundamental right⁴⁴ as well as a foundational value.⁴⁵ In *Dawood & Another v Minister of Home Affairs*,⁴⁶ the Constitutional Court had to decide on the constitutionality of section 25 (9) (b) of the Aliens Control Act⁴⁷ which required spouses of permanent residents in the Republic to be in possession of a temporary residence permit before they apply for permanent residence. The question before the Court was whether it was constitutional for the Act to require that an immigration permit could be granted to a spouse of a South African citizen who was in South Africa at the time only if that spouse was in possession of a valid temporary resident permit. The Court held that immigration laws made it effectively impossible for the couples in question (migrant workers) to cohabit, and that cohabitation forms a central part of a marital relationship. Immigration laws that significantly impair the capacity of permanent residents to live with their spouses in South Africa are understood to constitute an unjustifiable limitation of their right to dignity. The dignity clause in the Constitution does more than protect against delictual injuries; it also protects people against certain kinds of regulatory restrictions on freedom of action. Section 25 (9) (b) of the Aliens Control Act was thus declared invalid.

In *Ferreira v Levin*,⁴⁸ Justice Ackermann had the following to say about human dignity and freedom:

Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their ‘humanness’ to the full extent of its potential. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual’s human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. Human dignity has little value without freedom; for without freedom personal development and fulfilment are not possible. Without freedom, human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people their freedom is to deny them their dignity.

Justice Ackermann’s use of the word ‘freedom’ in the above paragraph could be interpreted to mean freedom from the chain of irregularities and ill-practices that can be categorised as slave-like practices. His use of the term ‘dignity’ seem to secure a space

43 Lourens Ackermann, ‘The legal nature of the South African constitutional revolution’ (2004) *New Zealand LR* 633 at 651.

44 S 10 of the Constitution.

45 *ibid.*

46 See (n 42).

47 Act 96 of 1991.

48 [1996] 1 SA 984, 1013–1014 (CC); [1996] 4 BCLR 1 (CC) para 49.

for self-actualisation.⁴⁹ This has, however, been criticised in the majority judgment.⁵⁰ The meaning of dignity in the context of slavery entails the proscription of those practices where the exercise of entitlements of ownership in one person by another ‘impairs substantially’ the ability of a person to develop optimally his or her unique talents.⁵¹ The crux of the right to human dignity should be rooted in the capacity of humans to act autonomously in ethical matters, that is, their capacity to reflect critically on what is worthwhile and appropriate to pursue and direct their own lives in accordance therewith, taking responsibility for how they do this, including the impact that they have on the lives of others.

The article argues that the effect of slavery on the right to human dignity will have a severely detrimental effect on the existence of self-reliance and the individual autonomy of every person. The dignity of a human being is harmed when individuals or groups are marginalised, ignored or devalued.⁵² In exceptional circumstances, however, dignity will not be impaired by virtue of the fact that someone exercises control and ownership over another human being. For example, the exercise of control over people below the age of majority by their parents or legal guardians will not negatively impair their right to dignity and cannot be described as slavery as defined in the Slavery Convention.⁵³ Moreover, not all instances where parents and/or legal guardians are involved will

49 The majority in *Ferreira v Levin* rejected Justice Ackermann’s view that the Interim Constitution’s s 11 (1) and Final Constitution s 12 (1) contain a residual freedom right. The current Constitutional Court however, has accepted Justice Ackermann’s notion that dignity is meant to secure the space for self-actualisation. It is important to note that self-actualisation is not, on this account, realised through political participation, but rather through a commitment to negative liberty. Ferreira’s dignity as freedom is developed in a long line of cases. See, for example, *Prinsloo v Van der Linde* [1997] 3 SA 1012 (CC); [1997] 6 BCLR 759 (CC); *President of the Republic of SA v Hugo* [1997] 4 SA 1 (CC); [1997] 6 BCLR 708 (CC) at para 41. (‘Dignity is at the heart of *individual* rights in a free and democratic society’); *National Coalition for Gays and Lesbian Equality v Minister of Justice* [1999] 1 SA 6 (CC); [1998] 12 BCLR 1517 (CC) at paras 28–30. In finding the common law criminalisation of sodomy a violation of the right to dignity, the Court held: ‘it is clear that the constitutional protection of dignity requires us to acknowledge the value and the worth of all individuals as members of society.’ The language echoes J Ackermann’s emphasis in Ferreira on the inextricable link between dignity and the need for individual freedom from state intervention. Individual freedom – negative liberty – thus becomes the foundation for dignity. Dignity, in turn, becomes the basis for equality.

50 *ibid*

51 Dignity rests instead on the recognition of a core set of entitlements that are the necessary, if not sufficient, conditions for self-actualisation. For the most part, current South African dignity jurisprudence does not specify those positive goods that a person requires for self-actualisation, see *Government of the RSA v Grootboom* (n 36). The Court finds violation of section 26 of the Constitution and grounds the entitlement to adequate housing in the right to dignity. But while the Court describes the entitlements secured through socio-economic rights essential components of a just political order because they are necessary for self-actualisation, it is loath to tell the government exactly how it should go about making provision of the goods.

52 Like the imposition or the exercise of slavery on another person.

53 See (n 15).

constitute a possible infringement of a minor's dignity. An example would be where the exercise of entitlements that are tantamount to ownership, whether by a legal guardian or parent, in the context of sexual trafficking and sexual exploitation would amount to slavery because someone is in control to such a great extent that it is equivalent to the exercise of ownership of a human being and contrary to law.

3.2. Prohibition of slavery and oppression by statute

In South Africa not only the Constitution has the task of eradicating and prohibiting the institution of slavery and related practices as legislation also plays an important role. The legislature, as the law-making body ensures that the Constitutional provisions are given 'teeth' by adopting legislation to supplement its mission, which is to achieve equality and the advancement of human rights and freedoms.⁵⁴

In so doing Parliament has introduced certain pieces of legislation to add value to what the Constitution pronounces. These include the Labour Relations Act (LRA);⁵⁵ Basic Conditions of Employment Act (BCEA);⁵⁶ Employment Equity Act (EEA)⁵⁷ and the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA).⁵⁸ The adoption of this legislation ensures that the institution of slavery is not only condemned but abolished. These Acts completely overhaul previous legislation that contained no reference to these practices. Significantly, the adoption and promulgation of the LRA changed the *status quo*, for example, farm workers, domestic servants, public sector workers and several other sub-categories of employees, who were not covered by the previous LRA of 1956, are now protected in terms of the LRA.

The legislature further strengthened the capacity of the LRA through the enactment of the BCEA and EEA. The BCEA gives effect to the right to fair labour practices referred to in section 23 (1) of the Constitution, by establishing and making provision for the regulation of basic conditions of employment while the EEA ensures that the provisions of section 9 of the Constitution are dealt with in the form of specific legislation to expedite the process of transforming the workplace through the elimination of unfair discrimination and advancement of equality in the workplace of an employer⁵⁹ or designated employer. The EEA describes a 'designated employer' as an employer who employs more than fifty employees, or an employer who employs fewer than fifty

54 S 1 (a) of the Constitution.

55 Act 66 of 1995. The Act was promulgated following the adoption of the Interim Constitution of 1993.

56 Act 75 of 1997.

57 Act 55 of 1998.

58 Act 4 of 2000.

59 S 213 of the LRA defines a workplace as a place or places where the employees of an employer work. If an employer carries on or conduct two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation.

employees but whose annual turnover in any given year exceeds certain levels which are laid down in the EEA.⁶⁰ A designated employer also includes municipalities, organs of state, and an employer appointed as a designated employer in terms of a collective agreement.⁶¹ Of seminal importance with respect to the author of the discrimination alleged to have been committed is the fact that where the discrimination is alleged to have been perpetrated by a public official, an organ of state or a private individual or institution, the relevant legislation which must be invoked is PEPUDA. Given that farm workers inevitably find themselves at the mercy of farmers, PEPUDA would be the relevant legislation to prove that the conduct complained of amounts to unfair discrimination and therefore is invalid.

4. THE PLIGHT OF FARM WORKERS

A farm worker refers to any person who is involved in farming activities, including a general worker on a farm, all domestic workers who work in a house on a farm and also a security guard (not employed in the private security industry) who is employed to guard the farm and areas where farming activities take place.⁶² These workers experience dual hardships in that they are forced or feel compelled to perform farm work and to compound matters they are paid wages lower than the minimum wage – there is a minimum wage set out in a sectoral determination.⁶³ The *New Age* reports that:

The state of South African farm workers is the worst amongst the world. They are also the most oppressed workers in the country. As we approach International Workers Day we are reminded that despite all the strides modern day slavery still thrives on our farms. Workers experience extreme exploitation while also suffering from physical and psychological abuse. Their precarious work and living conditions can be equated with that of modern day slavery, a step above the grave.⁶⁴

The fact that a person lives or stays on a farm compels him or her to work even if doing such work is against their will. The fact that they live on a farm means that some or most of them work throughout the year, including holidays, with no additional payment for overtime worked. Some employers make it a requirement that a resident on the farm has to work on the farm otherwise, he or she must leave.⁶⁵ As a result, farm dwellers have no choice other than to work on the farm or for the farm owner.

60 Sch 4 to the EEA.

61 S 1 of the EEA.

62 See Basic Conditions of Employment Act 75 of 1997: Provision 1(3) of the Sectoral Determination 13: Farm Worker Sector.

63 See in this regard, *People's Union v Union of India* (n 21).

64 Solly Phetoe, 'Pity the Poor Farm Worker' *The New Age* (Johannesburg) <www.thenewage.co.za/pity-the-poor-farm-worker-2/> accessed 23 May 2016.

65 See *Hattingh and others v Juta* [2013] 3 SA 275 (CC) para 43.

The reaction against the living conditions and low wages at some stage brought this industry to a standstill in the Western Cape Province: farm workers decided to strike demanding a living wage of R150 per day contrary to their wage of between R60 and R80 per day. The strike started in the De Doorns area and spread to neighbouring farms. After intervention by the Minister of Labour a minimum wage of R105 per day was agreed, which was seen as victory for the workers.

There are three categories of people who are vulnerable to unreasonable working conditions on farms. The first category refers to those people who reside on their employer's farm. Most of these people were born, grew-up and lived on the farm with their families. The author interviewed fifteen employees in this category who work on a farm in Richmond, KwaZulu-Natal. These people did not want to be named for fear of victimisation. It transpired during the interview that they have lived on the farm since childhood. They are not permanently employed. Mr Jacob Kheswa (not his real name) said he grew up on this farm, worked on the farm throughout his childhood and is still working on the same farm. His father was working on the same farm and died while working for the same employer. Kheswa further relayed that they do not have warm water and during winter it becomes difficult for them as they have to wake up very early in the morning.

The second category is casual workers. They are brought to the farms by labour brokers or come on their own as they live in surrounding rural areas or townships. They usually come to work during the harvesting season. Once the work is done they leave.

The third category is migrant workers. A migrant worker is a person who travels in search of employment.⁶⁶ These labourers usually come from the rest of the African continent. Because of their desperate need for employment, they are prepared to accept any payment no matter how low it may be. It is argued that employers turn to this category of workers because they are cheap labour. Also, it is easy to hire and dismiss such workers as they are hesitant to claim their rights if the employer fails to comply with the law. However, case law has held that the mere fact that foreigners work in South Africa without the required documents does not exclude them from the remedies offered by labour law or other statutory law in the Republic. In *Discovery Health Ltd v Commission for Conciliation, Mediation and Arbitration (CCMA)*,⁶⁷ the employee had a temporary residence and work permit. His permit was not renewed on time after which it expired. When the company discovered that his permit was not valid, it dismissed him. He approached the CCMA for relief. The CCMA held that it had no jurisdiction to hear the matter because the contract was unlawful as he had failed to comply with the Immigration Act⁶⁸ which requires that a foreign national who works in the Republic be in possession of a valid work permit. This decision, however, was reversed in the Labour

66 *Oxford English Dictionary* (OUP 1999).

67 *Discovery Health Ltd v Commission for Conciliation Mediation and Arbitration* (Case No JR 2877/06 dated March 2006).

68 Act 13 of 2002.

Appeal Court where it was held that an illegal foreigner was entitled to the protection of labour laws of the Republic and that the CCMA has jurisdiction to determine whether she was an employee for the purposes of section 185 of the LRA and consequently entitled to remedies offered by South Africa's labour legislation.

Under the new constitutional order there is great expectation that conditions on the farms would change. Contrary to that expectation the current laws designed to protect workers across all sectors and categories of employment seem to fail these people. As stated above, people are forced to work for an employer or the farmer if they reside on the farm. A further grievance is that they are not allowed to bury family members on the farm. It would seem that they are viewed as being part of the farm only if it benefits the employer or the farmer. In most cases workers are not allowed to form or join trade unions because the employer considers it a threat to production and to him.⁶⁹ The Minister of Labour has prescribed minimum payments of R105 per day for farm workers,⁷⁰ but on closer examination employers have not heeded this order and pay lower wages. These actions by employers impact negatively on the status and dignity of farm workers.

5. SUGGESTED WAYS OF SOLVING THE PROBLEM

5.1. Unionising farm workers

As stated above, farm workers have a history of their human rights being abused. Such rights are also affected by a variety of malpractices at the hands of their employers. They have become the most vulnerable category of workers amongst all sectors of the country's economy. Illegal evictions, unfair labour practices, assaults and even murder characterise the plight of farm workers. In most instances they are voiceless because they are partially or totally illiterate and do not know what rights accrue to them. The employer infringes such rights without fear that action may be taken against him or her, as these workers do not know when their employer's conduct is contrary to law or infringes their rights.

In order to address these serious consequences, the author argues that farm workers need to be unionised. To say that the 'employer's workplace is unionised' implies that there is one or more unions that represent workers in the workplace. A trade union is defined as an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organisation.⁷¹ The

69 S 18 provides that 'everyone has the right to freedom of association.'

70 See South Africa, Department of Labour, Sectoral Determination 13: Farm Worker Sector (prepared by Minister of Labour Oliphant MN) <www.labour.gov.za/DOL/downloads/legislation/sectoral> accessed 24 June 2015.

71 S 213 of the LRA.

Constitution grants workers freedom of association.⁷² This right is also given effect by the LRA.⁷³ The right to freedom of association includes the right to choose to associate with third parties.⁷⁴ It allows employees to join or not join any union active in the workplace and to participate in its activities.⁷⁵ The employer is not allowed to victimise employees for the sole reason of their having joined a union of their choice. If the employer dismisses an employee for reason of joining a trade union such a dismissal would be automatically unfair.⁷⁶

As workers, farm workers have the right to join a union and to participate in its lawful activities.⁷⁷ The advantage of having a union that represents their interests is that their voice can be heard more easily when they act as a group compared to a situation where they act as individuals. Membership of a trade union provides an effective means of communication for those who feel that their demands are not being given serious consideration by the employer. It creates a space both to speak and to be heard within the context of the rights and responsibilities of the employer and employees in light of the fact that one of the duties of the union is to educate its members about their rights.⁷⁸ Having a trade union as a representative of employees⁷⁹ reduces the chance of retaliation by the employer as it will be difficult for the employer to dismiss all of his employees if they are members of a union.

Once a union has been formed or the workers have joined the union active in the workplace, one of its primary duties (as representative of workers) is to take workers' concerns or demands to the employer or negotiate with the employer on such issues, despite any apparent resentment by the employer towards the formation of trade unions. It is submitted that the formation of a trade union will serve as a deterrent to employers who intentionally and without valid cause infringe or act contrary to relevant labour law or other law governing the right to equality and non-discrimination. It is envisaged that through the involvement of trade unions, workers will, eventually, be united and speak with one voice. The more united workers are, the stronger is their voice. The effect of the presence of trade unions in the workplace is that the employer will not be at liberty to dismiss employees at will without following the correct procedure and for a valid reason.

72 S 18 of the Constitution.

73 S 4 (1) of the LRA.

74 *See Law Society of the Transvaal v Tloubatla* [1999] 11 BCLR 1275, 1280–1281, [1999] 4 All SA 59 66–67 (T).

75 S 4 (1) of the LRA.

76 S 187 (1) (d) of the LRA.

77 See s 23 (2) (b) of the Constitution.

78 S 12 (1) of the LRA.

79 S 213 of the LRA defines a trade union representative as a 'member of a trade union who is elected to represent employees in a workplace.'

5.2. Individual action

In addition to assistance by a trade union, if there is a dispute between employees and an employer, workers can take action against employers on their own. The matter needs to be referred to the council created to resolve labour disputes in the workplace, if there is one with jurisdiction over the matter in dispute. If there is no council, it must be referred to the CCMA for conciliation and later arbitration if they enter into an agreement to that effect.⁸⁰ However, this process becomes difficult as farm workers are invariably illiterate and may fall victim to prejudicial conduct perpetrated by a farmer, such as undertaking to allow the former farm worker to remain on the farm only to evict them a few months later. In such an instance, when the victims approach the CCMA it will be too late for the CCMA to entertain the matter.⁸¹ The best option for the victims is to approach the High Court. This route, however, may not be possible due to the high costs and extended length of time involved.

5.3. Monitoring through specialised labour inspectors

The word ‘monitoring’ is understood to mean observe and to check progress over a period of time and to report to relevant authorities. To have principles and policies that speak to the conduct of employers against their employees on the farms compels policy-makers to adopt strategies on how to monitor employer-compliance with the law. Such a monitoring system needs to be put in place with people appointed to oversee whether proper implementation of ministerial recommendations takes place and to report back to the Department of Labour.

It has become clear that workers on farms are the worst affected by the failure of employers to obey the law, so the Department of Labour needs to appoint specific people to oversee the conduct of employers in this sector. It is a common practice that labour inspectors are responsible for reporting labour abuse and employers who fail to comply with the law.⁸² This article argues that the labour inspectors appear to be ineffective seemingly on account of the fact that they are exposed to corruption.⁸³ Consequently, farmers continue to break the law in the presence of institutionalised labour inspectors.⁸⁴ It would be wise to ensure the appointment of independent persons in order to report to the Department on the conditions on farms and recommend other measures. The

80 S 191 of the LRA.

81 The employee has thirty days after dismissal to refer the matter to the CCMA, s 191 (1) (b) of the LRA.

82 See in this regard <www.iol.org/labadmin/info/WCMS_112980/lang--en/index.htm>

83 Mnqobi Ngubane, ‘Life on Farms: Still Hard, Despite the Laws and Promises’ *Institute for Poverty, Land and Agriarian Studies* (18 August 2015) <www.plaas.org.za/blog/life-farms-still-hard-despite-laws-and-promises> accessed 23 May 2016.

84 *ibid.*

appointment of an *ad hoc* team of inspectors to undertake this function will help reduce the levels of human rights abuses on the farms. These appointees must act as specialised teams of inspectors and should be composed of a variety of stakeholders including unions, academics, legal practitioners and civil society.

6. CONCLUSION

Almost all international human rights instruments prohibit slavery and forced labour. These prohibitions serve as a reminder of a time in history when human beings were treated as property, subject to trade and abuse.

In South Africa, slavery was abolished in the early 1830s. The Constitution and subsequent legislation confirm the abolition of all conduct which involves the subservience of one person to another, whether in the labour context or in the socio-political environment of the state. Despite this commitment indirect practices perpetuating inequitable conduct continue long after the policy of apartheid ended. Especially black Africans work on farms under the conditions described and for such low wages that their employment is exploitative and corresponds to a slave-like practice. To change these conditions will require the active involvement of all stakeholders. This article recommends that farm workers be empowered to exercise their right to freedom of association effectively by forming unions to represent them when negotiating with their employers. The farmer is bound to listen to them if they speak as a united voice rather than as a fragmented workforce. Most of the conditions on the farms could be altered if there is a strong union to voice the workers' concerns.