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Traumata of HIV/AIDS Infected Workers and their Right to Access to Justice: Special Attention to Human Trafficking, Child Prostitution, and Sex Workers in Indonesia

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ABSTRACT

*The Fact Sheet of WHO 2019 on HIV/AIDS (HA) reports that about 38 million are Infected (HAI). The evolutionary patterns of the dreadful disease indicate an increase in the victimisation of innocents. Undeniably, the HA myths further stigmatise the victims. A closer examination of their sufferings reveals that the common violation denies their basic right to livelihood. The list of employment-based violations inter alia includes Unfair Treatment, Poor Employer-Employee Relationship, Discrimination amongst Peers, Non-Renewal of Work Contracts, Cheap Labour, Screening Test, Breach of Confidentiality, Termination due to HA Phobia, Undermining the Skills and Abilities, Absence of Health Services and Social Securities. Although the Convention on the Rights of Persons with Disabilities, 2006 appeals for non-discrimination of the disabled persons at work and employment (Article 27) it is HA-specific less. The International Labour Organisation (ILO), since the adoption of Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No.159) and that of the Code of Practice on HA and the World of Work, 2001 and through its follow-up Recommendation 2010, has revived the spirit of decent work and employment without discrimination for the HAI. By examining the *lex specialis* evolved by the ILO on HA, the author intends to examine the following: Why there is a non-liquet as to a Convention on HA? Are the ILO guidelines and recommendations on the right to decent work of HA comprehensive? How to implement the norms of ILO for the victimised HAI labour group? Methodology will be descriptive and analytical.*

I. INTRODUCTION

The pandemic fear of HIV/AIDS is an epidemic. The myth and misconception of the epidemic at the workplace bring unendurable pressure to the

workers from all corners. Thus, in turn, impacts the workers and the nation's economy. Two key challenges that haunt the workers are stigma and discrimination, which impedes workable plans.

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The persons living with HIV/AIDS (PLHIV) and average persons do not have a soulful connection because of the stigmatisation. Society is moulded in such a way to view PLHIV as sinful and evil and immoral. This ideology of "*them and us*" has to be plugged in toto.² These irritants will weaken their day-to-day activities even if they are strong enough to do any work. Because of the labelling, the PLHIV become dormant and further suffer from psychological illness.

Many countries are coming forward with reasonable policies and programmes to the epidemic. Nevertheless, there is neither an effective national legal mechanism nor a definite statute against these malign practices based on HIV/AIDS. The growing trend in employment is that employers are not ready to accept PLHIV as an employee itself is discrimination. The unfair treatment successively reduced income impacts the family and the community. At the national level, the obligation of the government is to protect and give social insurance for PLHIV at work. If not, the aftermaths are the destruction of the nation's economy. What is more, the social exclusion of the epidemic people curtails their contributions to their communities. It weakens them economically as well as mentally.

A. Gender bias in employment

Globally women are viewed as objects and servitude to society and not treated on par with men. Women with HIV/AIDS epidemic stigma

get no or less income, whether employed or not. The lack of independence in choosing a healthy job again made them economically dependent. In plain words, the very sustenance of the women with HIV is in question! Be that as it may, the transgender with HIV/AIDS cannot be left out. The scope for the PLHIV under the cohort of 30 years has deprived the right to decent work.³ Pragmatically, work gives the source of income to secure one livelihood. To meet their basic daily needs, especially for PLHIV in obtaining the antiretroviral⁴ (ART) treatments.

B. Job Security

The question of job security to the PLHIV is another crucial factor to analyse. An alarming situation demands the workforce to battle against discouraging unemployment. They are mentally strained to deal with their epidemic in the workplace, afraid of losing their job. In many nations, discrimination remains a common factor for job loss. Suppose the employer comes to know about the sero-status of the worker, cast aside him/her from the job. Because of job loss, they keep it secret without knowing their employers and co-workers. Besides, another key aspect that made them afraid of PLHIV is *gossip*.⁵ In any community, things like gossips travel faster than the truth.

C. Holding employment and career development

²STIGMA, DISCRIMINATION AND LIVING WITH HIV/AIDS A CROSS-CULTURAL PERSPECTIVE, 1, (Pranee Liamputtong ed., 2013).

³HIV Stigma and Discrimination in the World of Work: Findings from the People Living with HIV Stigma Index Ilo.org, (Nov. 11, 2020),

https://www.ilo.org/global/publications/WCMS_635293/lang--en/index.htm.

⁴HIV/AIDS Medicines | HIV Cure | HIV Treatment | MedlinePlus Medlineplus.gov, (Dec. 5, 2020), <https://medlineplus.gov/hivaidsmedicines.html>

⁵*Supra note 2.*

Another major challenge faced by the PLHIV is unfair treatment in the workplace. Once the employer knows about the epidemic, change the nature of work. The worst-case scenario is that they are even denied promotion in their work. As stated earlier, many PLHIV has been unable to hold back their employment because of revealing their sero-status. In a few cases, the employer, without knowing the fact, terminates them from the job. Many workers are expelled from their job due to disclosure of HIV. It is high time to bring anti-discrimination and secrecy protections to all HIV-associated victims and abolish HIV testing at the workplace.⁶

As stated, the PLHIV at the workplace itself is a life-threatening issue. However, human trafficking and child prostitution are more threatening than HIV/AIDS. The root of the HIV/AIDS epidemic is prostitution and other sexually transmitted diseases. Globally the workers in the sex industry are mortified and mistreated. Is *flesh trade* can be considered a trade? Are effective reformatory and rehabilitation policy exists for the disabled? The most-regretful evil practice of pain and discrimination of victims of the sex trade and its resultant HIV/AIDS globally. For this, the author has taken Indonesia, a tip of an iceberg, as a case study. Thus, the sketch of the paper is gestated into three parts. Part I projects human trafficking and child prostitution in Indonesia. Part II examines the effective International Labour

Legal Concern of ILO. Part III Non-Compliance with international legal obligations by Indonesia. Part IV deals with the remedy to the hopeless victims through a solution-based approach.

II. HUMAN TRAFFICKING AND CHILD PROSTITUTION

Indeed, Human Trafficking⁷ is a grave violation of human rights and degradation of human dignity. The worst form of labour involves children in illicit trafficking. Furthermore, the utmost victimisation is prostitution. Child prostitution is a humanistic problem, and it deserves the interest of the International Community. This inattention impedes the development of the children in their nascent stage. Every child occupied in prostitution is vulnerable to mortification and maltreatment. In many instances, the present and former prostituted are deprived of their basic fundamental right.

Child trafficking for prostitution is a global issue and transboundary. The cohort of the children is mostly between 12 to 18 years, and the majority are girls. In Asian countries, especially in Indonesia, India, Nepal, Bangladesh, and Pakistan, the recruitment process of children in the "*flesh trade*" is of two types direct and indirect. In the former, the broker takes a larger share from the boss, ordered children. While later, the intermediary takes the larger share, and the broker's role is less and takes a smaller

⁶HIV self-testing at the workplace Ilo.org, (Nov. 9, 2020), https://www.ilo.org/global/WCMS_651792/lang-en/index.htm

⁷Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,

supplementing the United Nations Convention against Transnational Organized Crime Unodc.org, (Dec. 10, 2020),

https://www.unodc.org/documents/treaties/Special/2000_Protocol_to_Prevent_2C_Suppress_and_Punish_Trafficking_in_Persons.pdf

portion from the profit. The process of this immoral recruitment is operational in an organisational setup. Apart from socio-economic issues, other triggering factors motivate vulnerable groups to indulge in prostitution.

In a report, the International Labour Organisation (ILO) affirmed that the number of children pinned in the Worst Forms of Child Labour (WFCL) is higher than imagined. The victims of these types of exploitation, it is guessed, are 180 million children under the cohort of 18 years.⁸ These remediless children stuck like torture, slavery, debt bondage, trafficking, and forced labour in armed conflicts, prostitution, erotica and other unlawful things. Is it the child's fault, or does the State make them useless to society? Are children in hopeless situations will get remedy and rehabilitation?

To gauge the mistreatment of prostituted children is of two cases: dependent and independent. The dependent victims are under the check of brokers, intermediaries, and local pimps. They work in discotheques, clubs, pubs, bars, and massage parlours. The working hours are between 6 to 13 hours, mostly at night.⁹ It is apparent that they suffer physiologically, psychologically and sexual ill-treat. Because of the above exploitation, the prostitutes turn the epidemic to themselves and society. They also have minimum or nil support from their employers regarding prevention and protection plans accessible to them.

⁸Center for Population and Policy Studies (CPPS), Gajah Mada University, Child trafficking for prostitution in Central Java, Yogyakarta and East Java: a rapid assessment (ILO) (2004), 4, (Nov. 12, 2020),

In comparison, independent victims not under the control of any pimps or brokers go through less abuse.¹⁰ They choose flexible working hours, and the clients or customers are engaged in prostitution. In terms of the epidemic of HIV/AIDS and other sexually transmitted diseases, they are less guarded.

III. INTERNATIONAL LABOUR LEGAL CONCERN OF ILO

Indonesia is a beautiful archipelagic country with cultural diversity. It has diverse cultures known for its morals, values, norms and principles deduced from *jus sacrum* (sacred law). There was no direct evidence of when sexual misuse of women and children began. During the period of European colonialism, the locals sold the women and children to the soldiers for money.¹¹ The women were viewed and treated as sex objects to please the needs of the colonial thinkers.

The origin of all the present malevolent problems was traced back to the 16th century, and the colonial thinkers separated the Church and the law-making. Earlier it was considered that law is from the Almighty and rulers were the representatives of God, *jus scriptures* (Holy Scripture) were the guidance for law-making. Affirmatively saying still, it is the *jus sacrum* (sacred law) the solution for all the man-made problems. The colonial thinkers hate the *principle of universality, equality, and unity in diversity*. They had an obsession over the concept

https://www.ilo.org/jakarta/whatwedo/publications/WCMS_123816/lang--en/index.htm

⁹ *Id.*

¹⁰ *Supra note 7*

¹¹ *Supra note 7*

of *divide and rule* policy. Across the world, they implemented their ideology successfully. Yet the human greed pulled them to sideline the *jus sacrum* and bring their innovative concept called *lex humane* (man-made law).

The establishment of the International Labour Organisation (ILO) signalled the significance of addressing the notion of Employer and Employee relationship their concerns and requirements as a matter of international labour legal concern. After the United Nations (UN) advent, the ILO has developed the institutional framework for several branches of International Labour Jurisprudence. For example, HIV/AIDS, Child Labour, Wages, Differently Abled Workers, Migrant Workers, Collective Bargaining, Forced Labour, Sea Farers, Decent Work, etcetera. The ILO, by way of its Director-General and International Labour Conference mechanism in combination with the UN, its specialised agencies, and Inter-Governmental Agencies and Civil Societies has indeed addressed the legal scheme of settlement of labour disputes.

The Labour Disputes involving the violation of international human rights norms are necessarily an international labour legal concern. Moreover, it is not a correct approach of dividing the human rights violations as national and international. Although the member States ratify the conventions and regular supervisory mechanism of the ILO has no effect. Also, there is no

effective implementation of these instruments by the States.

The States Parties to International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) separate the civil and political rights and economic and social-cultural rights. The victims of human rights violations at the workplace are primarily individuals. Whether individuals have access to International Labour Justice? Comparatively, the ICESCR experienced less reception than ICCPR in guaranteeing human rights by the States. The Optional Protocol of the ICESCR adopted by the UN General Assembly (UNGA) in 2008 came into force in the year 2013 gives mandate to Committee on Economic Social and Cultural Rights (CESCR) to receive complaints from individuals or groups of people whom rights being violated. However, the CESCR will take cognisance only after the *exhaustion of the local remedy principle* is satisfied.

Realising Justice for victims includes rehabilitation and access to Justice. Among other remedies, the victimised labour force should be provided with justice access—for instance, the ILO Report on Forced Labour. The victims have to seek Justice in their domestic States where the oppressor is the State itself, or State-sponsored oppression.¹² The CESCR adopts general comments that guide the provisions of its instrument. The States parties do not even respect the guidance of the CESCR. Crucially, the

¹²International Labour Office, ILO Standards on Forced Labour-The new Protocol and Recommendation at a Glance, Page.no.20, Geneva: ILO, (2016), available at:

https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_508317.pdf (Last visited on February 19, 2019).

suffering of the victims has become a matter of universal concern. In international law "victim-oriented approach" has taken a central position. Understandably, the UN has been at the forefront of promoting the socio-legal requirements of the victims. The definition of victims¹³ is of two approaches, namely honouring the victims, by way of right to benefit from remedies and reparation also it reaffirms the international legal principles, namely, accountability, Justice and the rule of law.¹⁴ The ILO, in its several reports, repeatedly inked the non-implementation or poor implementation of the International Labour Standards by the member States. The factor that constitutes International Labour Disputes is that the States is suppressing human rights violations in all the sectors around the globe.

IV. PART-III NON-COMPLIANCE WITH INTERNATIONAL LEGAL OBLIGATIONS

At the outset, the motto of the ILO is 'If you desire peace, cultivate justice' (*Si istum vis tollere pacem colunt justitiam*). Presumably, the emergence of International Labour legal concern is because of the formation of the ILO.¹⁵ It gives many guidelines and always comes up with workable plans to eradicate the problems. Remember that both child trafficking and child

prostitution are interlaced evils and cannot be severed. These harms are practised in full throttle in many nations, prominently in Indonesia. To underline, Indonesia has been a member State of the organisation from 1950, ratified 20 ILO conventions out of 190.

The Republic of Indonesia made commendable efforts to remove the shame of involving children in prostitution. That is to say, powerful instruments like the Forced Labour Convention, Abolition of Forced Labour Convention, WFCL Convention and CRC. For instance, Article-1 of C138 concerning minimum age that each member State shall draft national legislation to abolish child labour. Article-2 of C182 defines the term 'child' coming under 18. Article-3 of C182 gives an inclusive definition of the term 'the worst forms of child labour', namely, slavery, human trafficking, debt bondage, child prostitution, and impairments of the safety and morals of children. Article-5 of C182 says that each member shall establish a monitoring body for the effective implementation of the Convention. But time and again, it is proving a failed State. There is a glut of international legal instruments ratified¹⁶ but no or less implementation.

In order to find solutions to the problems, the UN deduced principles from customary international

¹³Victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law*

and Serious Violations of International Humanitarian Law : resolution / adopted by the General Assembly, 21 March 2006, A/RES/60/147, available at: <https://www.refworld.org/docid/4721cb942.html> [accessed 29 April 2021]

¹⁴ *Id.*, at 4.

¹⁵ About the ILO, Ilo.org, (Dec. 11, 2020), <https://www.ilo.org/global/about-the-ilo/lang-en/index.htm>

¹⁶*Supra note 7*

law. It extended the standards by presenting an optional protocol to the CRC. Human trafficking in Indonesia and worldwide runs the risk of vulnerable groups involved in child prostitution and child pornography. The UNCRC Optional Protocol strongly condemns these activities and mandates its member States to implement them in their national laws. The CRC is based on recognising the principle of human dignity and protecting the child before and after their birth. Moreover, taking care of their mental and physical health also give them proper spiritual, moral and helpful education. Yet, are they safe!

National Policy on Child Labour

The Republic of Indonesia has unfringeable rules, regulations and laws concerning human rights. These laws are primarily on par with the international standards stated above. The Central Bureau of Statistics (CBS) exposed that roughly 43 per cent are child labours, and 20 per cent are involved in the worst form of child labour.¹⁷ The government has implemented a plethora of social programmes to minimise and curtail child labour. The National Action Plan for the Elimination of the Worst Forms of Child Labour (NAP-EWFCL) in three phases has taken effort to eliminate child labour conclusively. While addressing the problems, the government, through its programmes, suggested giving financial assistance to low-income families, compulsory and free education, etcetera.¹⁸

The government departments called to eliminate child labour are the Ministry of Manpower and Transmigration, Ministry of Women's Empowerment and Child Protection, National Commission on Child Protection, Ministry of Health, and Ministry of Social Affairs. These Ministries are involved in various activities of child labour laws, penal policy, focalsing on the annihilation of child labour by 2022. However, are these enforcement mechanisms functioning as they should be? The effective mechanism carried by the Ministry of Manpower and Transmigration lacks action.

In this way, trafficking children for prostitution, the ILO and other non-State actors have had taken ways to overcome the issues at hand. Furthermore, at intervals, the ILO give reports, guidelines, and techniques to handle the challenges without disrespecting the respect of the workers. However, the Indonesian government attempts to handle the problems of children at the workplace remains unsatisfactory.

In reality, the workers in prostitution and the workers in other worst forms of labour are altogether different. Trafficking humans itself is inhumane, whatever perhaps the age group. Besides, accommodating that the worst forms of labour include prostitution itself a prejudiced view. The voice of victims in sex work cannot confine under the definition of 'labour'.

¹⁷ Indonesia. Ministry of Manpower; ILO-IPEC, Roadmap towards a child labour-free Indonesia in 2022 (ILO) (2015), (Nov 12, 2020), https://www.ilo.org/jakarta/whatwedo/publications/WCMS_377170/lang--en/index.htm

¹⁸2014 Findings on the Worst Forms of Child Labor - Indonesia, (Dec 20, 2020), <https://www.refworld.org/docid/560e3e5715.html>

V. SOLUTION-BASED APPROACH

Prostitution is not a trade. It prevails everywhere, especially in the failed States.¹⁹ Wherever illicit trafficking happens on a massive scale, those are all instances of a failed State. Indonesia is a case of a failed State. All over the world in the labour market has been elasticated where women, children are exploited in many aspects.

In general, human, from their inception, learn lessons and extracts morals and values from only one source, namely Scriptures. The scripture-based approach cautions against these dehumanised activities. The religious belief is that the curse and wrath of God itself will come to these unhuman matters includes prostitution. In this approach, it is believed that if prostitution and illicit trafficking exist, then all will be sanctioned with God's curse. No benefit can be expected from the Creator. Therefore, the visible horizon from both *jus divinum* and *lex humane* the prostitution, illicit trafficking, and child labour ought to be eradicated and entirely extirpated.

The angles and the context of the modern-day challenges taken are incorrect. Encourage the sex industry by using safety devices as a preventive step against AIDS rather than prohibiting the industry or institution of illicit trafficking. The WHO advised using the safety device, but the

International Community must save human resources.²⁰ This Cure-based approach itself is erroneous. Because this type of value-less plan encourages prostitution one way or other, and it is a threat to humankind. The World Health Organisation has to look into the problem even broader. Society at large has to be educated and encouraged with value-based packages. The side by side to prevent HIV/AIDS is to create awareness. The ILO, in its fundamental Convention.No.182 under Article 7 para 2(a), upholds education as betterment in terms of prevention.²¹

To deal with the problems of PLHIV must be seen from a significant spectrum which is the political will of the States in general. The point is to realise the nations join together in rebuilding politics, economy, and environment with a common agenda. The countries are collectively addressing contemporary issues like deforestation, glacier melting. Likewise, countries should take cognizance, prohibit illicit trafficking, and ban prostitution from global trade. However, why does this unity not spark the nations' conscience to eradicate child prostitution and illicit human trafficking?

Ultimately it is time to spiritualise the ILO by incorporating all the morals, values, mutual

¹⁹The description of failed State is the people unable to get political, social, economic, cultural form of independence. The government of failed States is unable to perform representative governance because of either lack of accountability, lack of good governance, or oppression.

²⁰ Hiv/Aids - WHO Who.int, (Dec. 24, 2020), <https://www.who.int/news-room/fact-sheets/detail/hiv-aids>

²¹ ILO Convention C182 - Worst Forms of Child Labour Convention, 1999 (No. 182) Ilo.org, (Dec. 28, 2020), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312327

sharing, human dignity, and other ideals spillover from the law of divine (*jus divinum*) inked in the form of Holy Scriptures (*jus sacrum*). If the ILO embraces all the ideals enshrined in the *jus divinum* in its legal instruments will bring a change. To eradicate the social evils that exist in society, the above spiritualistic ideals have to be propagandised positively.²² Then the nations also accept and implement it in their national law without any political will.

VI. CONCLUSION

The PLHIV live in fear of stigmatisation and discrimination in all aspects of their lives. The right to access to Justice by individuals was initially accepted by the Central American Court of Justice 1907 (CACJ). The CACJ is an inspirational forum that allows humans to address their grievances against the regional States. The recent trend in modern international law is a movement for special law (*lex specialis*) and special court. They are the International Tribunal for Law of the Sea (ITLOS), World Trade Organisation (WTO), and International Centre for Settlement of Investment Disputes (ICSID). These courts comprise expert members as judges to deal with subject-specific cases. The parties to the dispute in these forums are still States; development in the notion of access to Justice in special courts by individuals will provide an adequate remedy. The multi-door Court arrangement would facilitate the parties to

the dispute to choose an appropriate forum to access Justice.²³

In modern international law under Article 34 of the Statute of the International Court of Justice (ICJ), the States can only be the party to the dispute. The individuals cannot seek Justice in the ICJ. Therefore, it is high time to bring a special court to implement the special law (*lex specialis*) to secure labour dignity from human rights violations. Moreover, the ICJ suffers from a lack of expertise to deal with labour matters. Again, this reiterates the need for the international labour court to render international labour justice with the judges' competence in the field of labour law.

In the case of Indonesia and even in other nations, stopping sexual trafficking and prostitution will not by itself be a solution. The myths and discrimination towards PLHIV are scientifically unproven and pointless. It has to be schooled to the nation through national propaganda that these things are illogic and against common sense. The ILO legal instruments perhaps do not deal with myths explicitly. But the factual finding through its reports exhibits the exploitation of the children, also the need for rehabilitation programmes for the HIV/AIDS-affected children. The *principle of non-discrimination* should be adopted stringently in the working place. Employers should treat PLHIV on par with their fellow

²² Van de Glind, Combating trafficking in children for labour exploitation in the Mekong sub-region: a proposed framework for ILO-IPEC action and proceedings of a Mekong sub-regional consultation (ILO) (1998), 20, (Dec.28, 2020), <https://www.ilo.org/wcmsp5/groups/public/---asia/---ro->

[bangkok/documents/publication/wcms_bk_pb_3_en.pdf](https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_bk_pb_3_en.pdf)

²³GERADINE MEISHAN GOH, DISPUTE SETTLEMENT IN INTERNATIONAL SPACE LAW A MULTI-DOOR COURTHOUSE FOR OUTER SPACE, 243, (Martinus Nijhoff, 2nd Edition, 2007)

workmen. Every nation must guarantee PLHIV workers and sex workers their sustenance and fortify medical treatment. They must be treated with compassion and accommodated in society with kindness.
