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**IMPEDIMENTS TO IMPLEMENTING ILO STANDARDS IN
DEVELOPING STATES:
A Papua New Guinea Perspective**

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Abstract

The primary object of the International Labour Organisation (ILO) is to advocate for decent labour standards. These standards, however, are not fully realised in developing countries. This paper will give several instances of factors impeding the implementation of ILO standards from a Papua New Guinea perspective. The essential aim of the paper is to show that prudent governance of a local state creates the ideal platform for implementation of international labour law standards. Labour law is not transplanted but adapted to compatible national conditions which require modifications to a certain extent¹. A cluster of effectively run local state institutions is not only a viable option but also a prudent bureaucratic framework for any development agenda. This paper will identify the eight factors that hinder prudent governance in Papua New Guinea that result in labour standards not being strictly observed. These eight factors are; The Inefficient Legislative Framework, Labour Surplus through the Government's Free Education Policy, Illegal Immigration, the Dysfunction of the Trade Unions, and Mismanagement of the Economy, Cultural Encroachment on State Institutions, Abuse of Political power and Corruption. The paper has a proposal for overcoming these obstacles.

I Introduction

Papua New Guinea is a developing nation in the South Pacific region. Over the past 25 years, corruption and mismanagement of the state and its institutions have left the country in a legal, political and economic turmoil. Obviously, this crippled scene has not been conducive for most international obligations to be realised. In particular, international labour standards are almost non-existent where state institutions are manipulated through the use of executive prerogatives that eventually lead to degradation of labour standards.

Having a vibrant set of institutions in a country will nourish development and progress for a nation to realise its full economic, political and social aspirations. This point is made quite clear by Tiernan Mennen on establishing viable and efficient state institutions for proper management of resources when he argued that a resource curse is the result of a poor array of state institutions.² He concluded that it can only be reversed by remodelling or establishing and strengthening of those institutions. This approach is also relevant to the adapting of ILO standards and giving effect to them. The four main pillars of ILO are the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation.³ These guiding standards impose general duties on employees and employers in both the public and the private sectors but the government plays an overriding role in ensuring a compelling and conducive environment for these standards to materialise. Since the government is the only body that is recognised by international law to sign up and adopt international law obligations it, therefore, has a crucial responsibility to provide a set of well-structured and compatible local institutions to give effect to those international obligations.

¹ Alan Bogg and Keith D. Ewing "Freedom of association" in Matthew W. Finkin and Guy Mundlak (ed) Comparative Labor Law (Edward Elgar, UK, 2015) at 296

² Tiernan Mennen "The Resource State: Deconstructing The Causality of Poverty, Bad Governance, And Natural Resource Rights" (2001) 23 ILP at 101

³ ILO "ILO Declaration on Fundamental Principles and Rights at Work"
<www.ilo.org>

Bogg and Ewing have identified that ILO standards cannot be transplanted but must be adapted by local governments by legislation according to their respective local circumstances and this has given rise to different convergence of new orthodoxies quite different from the principle aim of the standards.⁴ The authors have further emphasised that the local institutional modelling of labour organisations such as employers and employees unions are affected by both local and international forces and that the final result would not be a perfect reflection of the ILO standard. To an extent these findings may be reflective and truthful for Papua New Guinea where the local institutional capacities are dysfunctional.

II Inefficient Legal Framework

Despite having a legal foundation in the Constitution, Papua New Guinea does not seem to have an efficient and effective cluster of supportive legislative instruments to promote and improve labour standards. Section 42 of the Constitution provides that all persons have a right to freedom from all forms of forced labour. This constitutional provision is reflected in most of the international conventions and is actually one of the fundamental guiding principles of the four ILO standards—the elimination of forced or compulsory labour. However, there is no other legislation that specifically expounds on this constitutional provision, whether it be industry specific or for general labour protection in the country. On the international stage there are eight conventions identified by the ILO that cover its fundamental principles and standards⁵ and Papua New Guinea has ratified all of them.⁶ However, the local implementation of these international obligations has remained poor over the years.

Most of the existing legislation, at least touching on labour standards, are outdated and irrelevant to the current circumstances. These pieces of legislation predate independence in 1975 and lack capacity to capture challenges and developments brought on by technology. The government has not addressed this legislative dilemma. This has led the Department of Labour and Industrial Relations, which is tasked to conciliating disputes between employees and employers, failing in most, if not all, of its duties.⁷

A relevant legislation to consider is the Industrial Organizations Act 1962 which creates and establishes the office of the Registrar of industrial organisations. The Registrar is appointed by the Minister responsible for labour and industrial relations. The primary function of the Registrar is to screen applications for associations such as unions. The Act requires that for a union to be recognised, it must be registered. A protection that is afforded to a registered union and its members is that it ousts civil liability against a registered union or any member of the union for acts performed in the course of settling disputes between other registered organisations. However, there is no requirement in the Act for all employees and employers to form or be in a union. This amount of discretion on the part of the employers and employees has led to a lack of interest in joining the union groups. Thus, collective bargaining is not fully realised when employees attempt to negotiate directly with the employer.

The other related legislation is the Industrial Relations Act 1962 .It establishes the Board of Inquiry, the Industrial Council and the Minimum Wages Board. The Council is arranged in a tripartite structure which consists of four government ministers, six members representing the Employers' Federation of Papua New Guinea and six members representing the public sector

⁴ See also Bogg and Ewing, above n 1 at 296

⁵ ILO “Conventions and Recommendations”
<www.ilo.org>

⁶ ILO “Ratifications of fundamental Conventions by country”
<www.ilo.org>

⁷ Schedule 2.4.6

unions and the private sector unions. The function of the Council is to seek ways and methods of improving the climate of industrial relations throughout the working environment and fostering a continual interchange of views between the Government and representatives of both employers and employees throughout all formal business sectors. The Council encourages representatives of employers and employees to have understanding between them which will increase harmony at the work place and promoting industrial congruence. Despite having this, somewhat prudent arrangement, there has been no effective implementation.

Furthermore, The Employment of Non-Citizens Act 2007, the Employment Act 1979 and the Public Service Management Act 1995 have done little to protect labour standards as no provision in these Acts encapsulates the four pillars of labour standards. The country also has an array of other legislation and legislative instrument which are industry based. However, some of these legislations are outdated and have never been amended to capture the latest technological advancement in modifying and inventions of new working machineries, tools and chemicals. These industry specific laws are:

- Industrial Safety (Chemical Treatment of Timber) Order 1975
- Industrial Safety (Excavation Works, Shafts and Tunnels) Order 1968
- Industrial Safety (Explosive-powered Tools) Order 1973
- Industrial Safety (Lifts) Order 1968
- Industrial Safety (Monocrotophos) Order 1971
- Industrial Safety (Tractors and Earthmoving and Mobile Construction Equipment) Order 1965
- Industrial Safety, Health and Welfare Act 1961
- Mining (Safety) Act 1977.
- Industrial Safety (Building Works) Order 1967

The enforcement of these Acts is rarely realised. There is no effective or proper institutional monitoring mechanisms apart for the Department of Labour and Industrial Relations. The trade unions may exist but do not carry out monitoring and reporting responsibilities. This inadequacy of a reporting mechanism was figured in the National Court case of *Pitil v Clytus*.⁸ In this case the plaintiff was a foreigner who owned a company in Papua New Guinea and the defendants were local employees of that company. The plaintiff sued the defendants for defamation after copies of complaint letters were sent to the Department of Labour and Employment and the Investment Promotion Authority (IPA) to advise them of the plaintiff's conduct. The defendants argued that they wrote the letters for their protection. The court said it had no difficulty accepting the argument that such authorities are entitled to receive any such complaints in their official capacities. But the question the Court had was, did it necessarily follow that people who provided such information were protected from criminal and or civil liabilities? The Court further said that the various industrial and labour laws and the Investment Promotion Authority Act are silent on these question. These institutional factors and lack of complaint mechanisms contribute to the poor monitoring of working conditions and systems of safety in all companies.

III Dysfunction of the Trade Unions

By virtue of the Industrial Relations Act 1962, the industrial relations in Papua New Guinea functions in a tripartite system, with government, employers and unions contributing to open dialogue. Unions have the right to organise and bargain collectively. In *PNG Ports Corporation*

⁸ *Pitil v Clytus* [2003] PGNC 85 N2422.

Ltd v Papua New Guinea Maritime and Transport Workers Industrial Union the plaintiff commenced legal proceedings against the defendant (a union) regarding an impending strike by members of the union⁹. A trial was conducted after the plaintiff sought injunctions to stop the impending strike. The court held:

(1) There is no law in Papua New Guinea that makes industrial action by employees including a strike intrinsically illegal. Though an employee has no express right to strike or engage in industrial action, the plaintiff failed to establish that the strike organised by the defendant was illegal or that any future strike action would be illegal.

(2) Employees in Papua New Guinea have an implied right, subject to any express prohibition imposed by law, to engage in non-violent industrial action taken in the context of a genuine industrial dispute. Such a right is properly regarded as part of the fundamental right of all employees to withdraw their labour, recognised by international labour laws and treaties to which PNG is a party, and as an enforcement of the Basic Right of every person to freedom based on law conferred by Section 36(2) of the Constitution and the right to belong to industrial organisations under Section 47 (freedom of assembly and association) of the Constitution.

The national trade union centre in Papua New Guinea is the Papua New Guinea Trade Union Congress (PNGTUC), which had a membership of over 70,000 as of 2007. The right to strike is protected, while discrimination against union activity is illegal. In *Air Niugini Ltd v Doiwa*¹⁰ A dispute arose between the Association and Air Niugini when Air Niugini failed to pay a 5% Consumer Price Index (CPI) adjustment declared by the Government to members of the Association because of financial limitations. The Association commenced proceedings in the National Court to enforce its claim. The National Court ordered Air Niugini to comply with the award and make appropriate payments. Afterwards, Air Niugini dismissed 61 engineers. In response to this, the remaining engineers who had not been dismissed, walked off their jobs in support of their colleagues. On 30 July 1999, Air Niugini dismissed another 25 engineers. Out of a total of 96 engineers who were terminated, 7 had their termination notices revoked, as they were not liable to be dismissed. The matter went before the industrial tribunal which ordered re-instatement. It found that Air Niugini was the primary offender in not implementing the CPI adjustment. It found the actions of Air Niugini to terminate officers to be harsh and oppressive. Being dissatisfied, Air Niugini applied for judicial review of the Tribunal's decision. The National Court refused the application for judicial review by Air Niugini and Amet CJ made the following remarks:

In conclusion, I wish to make some obiter remarks in relation to the climate of industrial relations between employers and employee organisations in recent years. In both the Telikom Workers Union and Post PNG and Air Niugini and the Aircraft Engineers Association, industrial unrest have resulted from the employer organisation not honouring its contractual responsibility to implement wage adjustment for cost of living increases. Employer organisations have contractual legal duty to implement awards and cost of living adjustments immediately. Employee organisations and individual employees ought not to be compelled to take court actions or threaten industrial actions to enforce basic contractual entitlements.

The PNGTUC is affiliated with the International Trade Union Confederation. However, most members of the unions and even the heads of the unions are somewhat irresponsive when it comes to state involvement. In a country with high a level of corruption and political influence, most corporate giants or employers have sought the assistance of politicians behind closed

⁹ *PNG Ports Corporation Ltd v Papua New Guinea Maritime and Transport Workers Industrial Union* [2017] PGNC 107 N6747.

¹⁰ *Air Niugini Ltd v Doiwa* [2000] PNGLR 347.

doors and the unions have been weakened with their officials influenced by politicians. The collusion between politicians and employers has had a significant impact on labour standards. Mostly, employers enjoy this environment of low cost labour and high profit margin. Politicians getting involved with commercial interests have largely contributed to the degradation of labour standards in Papua New Guinea. This corrosive scheme has tremendously weakened the union movements as well as other labour and human rights issues.

Trade unions have never launched an effective negotiation to improve the poor rate of labour pay in the Papua New Guinea. The Minimum Wages Board is responsible for determining matters relating to minimum wages and conditions of employment of employees and recruitment and repatriation costs, deferred wages, allowances and penalty and overtime rates, hours of work and leave. The current rate per hour is K3.00 which is equivalent to NZ\$1.30. This is low when compared to other countries such as Australia and New Zealand which have minimum rates of AUS\$17.00 and NZ\$15.00 per hour respectively. The trade unions have never aggressively voiced their concerns on the poor labour rates. The inability is partly because of lack of political will on the part of the Government to legislate any improved changes and also the lack of a properly coordinated union movement.

The other factor that weakens the strength of the trade unions to operate freely and independently from government influence is the fact that the Department of Industrial Relations has centralised the freedom of association and collective bargaining. The department promotes a conciliation mechanism through the tripartite system so that there is no exercise of strong bargaining powers outside and independently of this legislative scheme. This arrangement also weakens the unions' ability and the right to strike. In these cases, the individuals take upon themselves to launch legal proceedings to protect their employment rights. The Employment of Non-Citizens Act 2007, the Employment Act 1978 and the Public Service Management Act 1995 deal with employment related issues but no union has been seen protecting individual employee's right in court or in negotiation using these laws.

These scenarios run contrary to the ILO's principles such as the one extracted from the ILO homepage on Convention Nos 87 & 98 which provides that: ¹¹

The exercise of the rights to freedom of association and collective bargaining requires a conducive and enabling environment. A legislative framework providing the necessary protections and guarantees, institutions to facilitate collective bargaining and address possible conflicts, efficient labour administrations and, very importantly, strong and effective workers' and employers' organizations, are the main elements of a conducive environment. The role of governments in providing for an enabling environment is of paramount importance.

IV Mismatch of the Economy

Sometimes the ILO's views come into conflict with orthodox economic theories. The ILO insists on separating general economic improvement from working conditions of labour in principally holding that; the poor economic settings in a country should not be a reason for failing to observe labour standards. However, conservative economic theory disputes this by saying the working conditions of labour are contingent upon immediate market forces and other variable factors¹². Nevertheless, the ILO accepts that while economic factors that immediately determine the national income must be considered, the observance of the ILO standards must

¹¹ ILO "Promoting Jobs, Protecting people"
<www.ilo.org>

¹² See John D R Craig and S Michael Lynk *Globalisation and the Future of Labour Law* (Cambridge, 2006) at 333-339.

not be relegated unnecessarily. Amidst this confronting atmosphere, Joe Stiglitz has strongly called for the appreciation of wider economic, social and political perspectives¹³. This wider perspective is necessary in terms of Papua New Guinea's current struggling position.

Papua New Guinea has an abundance of both agricultural and natural resources which fundamentally drove its economy from the early post-independence days to the late 2000s. Coupled with the existing seven gold and copper mining and one oil drilling, is the newly developed LNG project in 2009. The LNG project has taken a new twist in the resource sector. The country shifted its attention and heavily relied on non-renewable resources as its major revenue collector. The lucrative natural resource sector has swayed government attention and revenue collection in other sectors such as agriculture and tourism have been abandoned or less attended to. This has resulted in severe detrimental consequences. The unpredictable commodity prices has seen the drop in oil processes in the recent past and revenue collection has been low. Other non-extractive sectors could not generate enough income which resulted in depletion of foreign reserves as the government relied heavily on imported commodities and its increased expenditures on infrastructures. This has forced the government to borrow a lot both domestically and internationally.

The drilling and piping of the Liquefied Natural Gas (LNG) started in 2009. Since then the country has faced a number of problems as a result of influx of foreign revenue. The exploration and construction phase of the LNG project has seen a hefty influx of cash in the economy. About US\$19 billion¹⁴ were expended at that stage. The increase in the cash flow has triggered a hysterical spending spree by the government on unplanned infrastructural developments. The contract awards by the state through its procurement process for such developments were marred with nepotism and secret kickback arrangements which resulted in inflated construction costs. This unhealthy scene created a perfect habitat for the Dutch disease syndrome.

The government is the equity partner in the giant LNG project and had to source funds to participate in the construction phase of the project. This would require several billions of dollars to participate in the construction phase as a shareholder. Since the government initiated several infrastructure developments around the country, it had to borrow by mortgaging the unpredictable LNG revenue to complete the projects. A concurrent expenditure on equity Participating and infrastructural developments was expensive and dangerous financial moves a government could ever make when the financial returns for the participation are not only unpredictable but also delayed.

Corruption played a dangerous role in these developments. The infrastructural projects were awarded to contractors at such strangely hefty costs through kickback arrangements that the government had to further borrow locally or internationally to complete them. Most of these infrastructure developments were not properly planned and prioritised and more funds were needed to complete the projects under inflated prices. The excessive borrowings have exceeded the country's legal debt. There have been numerous call from the opposition side in the parliament and the general public for the Prime Minister to resign The Sydney Morning Herald of Australia ran an editorial under the heading, *Corruption crisis in Papua New Guinea catches Australia out*:

Mr O'Neill has used every means at his disposal to avoid facing the corruption charges, which both he and the law firm deny. Within a week of the warrant being issued he sacked the

¹³ See Graig and Lynk, n at [333-339].

¹⁴ See generally homepage "Project Overview"
<www.pnglng.com>

attorney-general and the police commissioner. Their replacements were later charged with corruption for conspiring with him to put an end to the Paraka investigations. Neither has been convicted.

Since the government failed to monitor and control revenue from other sectors, it borrows to stay afloat. The first shipment of the LNG was made in 2014. To date, the revenues are not coming into the country but servicing loans off-shore. All state coffers have dried up and most government department and institutions cannot afford to buy simple things like printers. Sometimes public servants do not get paid on time which forces government employees to borrow money from lenders on the streets with promises to repay with interest. This is a typical example of paradox of plenty or resource curse. The massive influx of cash since 2009 has quickly dried up within a matter of 5 years as a result of inflated contracts in the numerous infrastructural projects.

Retrenchment and layoffs of labour in the private sectors are rapidly increasing resulting in unemployment and an increase in crime rates. There is growing concern from government workers that they too might get laid off as the government does not have the money to pay. This fears are taking shape as the government is planning to cut expenditure in its recently introduced 100 day plan announced by the Deputy Prime Minister, Charles Abel. On the same note, the country's foreign reserves have dried up. This has in turn forced the central bank to place quotas for currency requests for imports from big companies which has forced companies to import less and charge high prices. The kina value has dropped dramatically in the recent months while the country is heavily indebted to both international and local borrowings and so tax was lately increased to generate more revenue to cater for the loans. This has further shifted the workers to the edge of their survival due to high goods and services Tax (GST) and low pay. The United States Department of State published a report that is relatively true of the state of corruption destroying the economy. The report insinuated that corruption is fuelled by the economic boom that is caused by the resource sector¹⁵.

V Abuse of Political Power

In Papua New Guinea, the abuse of political powers do greatly affect employment and labour standards. Thus, it is only necessary that a brief outline of the political structure and how it affects state institutions is provided. Papua New Guinea's political legacy is in a bit of disarray. Papua New Guinea was colonised by Australia until 1975 when it gained political independence. Papua New Guinea is a democracy that adopted the Westminster parliamentary system of government. It has a unicameral parliament and an intertwined tier of federal and unitary like government in three forms. Firstly the National government which is the supreme and top tier of government. Secondly, the provincial governments with less law making powers on minor issues as well as less revenue generating powers. Finally, the local level government with minor law making powers. This is a constitutional arrangement.

The National government is the overriding authority in controlling the economy by selling resources and collecting all duties, taxes and tariffs as revenue and it is the principle negotiator of all resource explorations. The provincial governors are part of the National parliament and are regarded as the Members for Parliament and they, together with the other 89 electoral MPs, vote for the Prime Minister. The Prime Minister allocates all the 36 ministerial portfolios to some of the 89 electoral members who are in the Government camp. Together with the ministers and the Prime Minister at the helm as chairman make up the parliamentary executive

¹⁵See also US Department of State homepage "Countries/Jurisdictions of Primary Concern - Papua New Guinea"
<www.state.gov>

called the National Executive Council (NEC). The Prime Minister has a vast uncontrollable prerogative power to stripe ministerial portfolios off the members any time he/she pleases. All the government appointments for the heads of departments, chief executive officers and board of state owned enterprises and CEOs and boards of regulatory bodies are made by the NEC. The NEC likewise has an uncontrollable prerogative that it can hire and fire public servants anytime it wishes. This has resulted in many unjustifiable terminations when the higher political will is seen as not being served by individuals at the helm of these organisations. Terminations also result in cases where political cronies needed to be fitted in.

Papua New Guinea holds national elections every five years since 1975. This year (2017) was the tenth election. All past elections have been marred with violence and rigging. There have been numerous deaths and tribal fights erupting with properties burnt down and people becoming homeless. The courts have been flooded with election petitions every election period. This year's election was the worst of all. There were clear evidence of rigging with highest number of people dying in election related violence. There were instances of forced declarations, illegal voting and ballot paper hijacking. The election writs were supposed to be returned on the 28th of July to the Electoral Commissioner but because of the delays caused by violence and rigging, the Supreme Court has, on application by the Ombudsman, extended time for the return of writ to the 31st of July 2017¹⁶. Unusually, there was an election still being conducted for a provincial seat (Southern Highlands Province) when writs have fallen due and formation of government had taken place and government business operating into to second month.

The struggle for power involves heavy handed tactics, bribery and promises of favours. This is all packaged as corruption. Corruption has reached an unprecedented stage and is pretty much impossible to contain. The laws passed by the parliament have all been selfishly designed to concentrate power in the parliamentary executive which has produced a near totalitarian form of government. All state appointments are made by NEC according to political affiliations and loyalties. This has effectively hindered checks and balances and has therefore flourished maladministration in all sectors of the country. There is no proper job security under this sort of political condition. Termination of employment based on political beliefs and association is rife in the country. For example, in the recent past eight national airline pilots have been terminated because they joined the nationwide protest by students and citizens in demanding the Prime Minister resign as a result of corrupt allegations¹⁷. Unfortunately, for the pilots, the airline company is owned by the state and political influence led to their terminations.

VI Cultural Implications

Fighting for labour rights abuse is not seen in traditional cultural settings. In the cultural settings, nothing is seen as mistreatment of labour standards. This is contrary to the ILO's attempts to promote or call for effective policies to promote full, productive and freely chosen employment which is central to any development efforts. This requires a strong political will and foundational institutions to support it¹⁸.

Papua New Guinea has a total population of around 8.4 million people and is one of the most multilingual and culturally diversified countries in the world. The country has more than 800

¹⁶ See also Sally Pokitan "Court Extends Return of Writs" (19 July 2009
< <http://www.looppng.com>>

¹⁷ See generally Sam Koim "Is PNG in a Leaderless State?" (17 May 2016)
<www.facebook.com>

different languages and different customs. More than three quarters of the population is illiterate and live in villages and engage in subsistence village farming for survival. More than seventh-five percent of the land is owned by customary land owners. The other, less than twenty-five per cent of the land, is owned by the government. The natural resources including forest, marine resources and minerals and oil and gas are owned by the government.

There is a common custom of forgiveness and mediation procedure called the Melanesian way. People do not resort to the court systems to have their grievances settled but resolve them outside of the court systems with the exchange of gifts, money or other products to settle conflicts. These cultural orientations have kept people ignorant to their fundamental rights and instances of abuses are seen as normal. The corporations and companies operating in the country have taken advantage of the people's ignorance of their rights and employment of blue collar workers with scanty benefits has been on the rise. The government has done little to protect semi-educated or illiterate workers in any form of employment. The majority of the country's semi-educated or illiterate population is seriously exploited by foreign companies.

Child labour is seen as a cultural norm for early discipline and preparation for maturity for self-survival. Papua New Guinea has a system of childhood chores and responsibilities as acceptable to the development and preparation of maturity and independent survival. However, instances of adoption or fostering have been seen to be quite abusive in that the adopted or fostered children have been given more work than is considered acceptable to their age. Australia¹⁹ and New Zealand²⁰ have expressed similar concerns on fostered children

This area requires the governmental scrutiny but to date there are no legislative or institutional framework to govern and regulate this important aspect of child labour. There are also instances of children employed in coffee, tea, copra, oil palm and vanilla plantations around Papua New Guinea. However, the lack of state protection in conjunction with lack of monitoring ILO standards has been absent for a long time.

The courts have been, somewhat, the only institutions detecting and condemning labour law abuses. In a criminal case in *State v Donny*²¹ the defendant was employed by Emirau Marine Products in Kavieng as a Pay Clerk and Supervisor in the vanilla buying business of the company. She was criminally charged because she devised a fraudulent scheme and started stealing cash from her employer. However her children were cheaply used by her employer in the vanilla production. The National Court detected this instance of abuse and said:

There is the unpaid wages of the accused's five children who were employed as cheap labourers from 2000 to 2003, which the Court must condemn. It seems that Emirau Marine Products had breached the provisions of the Employment Act in employing under age children to provide cheap labour without remunerating them. The company should therefore be prosecuted for such a breach of the labour laws.

¹⁹ See generally Brendan Trembath *National Children's Commissioner 'very concerned' by figures showing hundreds of kids in foster care abused*

ABC (28 Jan 2015)

<www.abc.net.au>

²⁰ See Generally Sharon Lundy *CYFS need to listen to carers* Radio New Zealand (27 August 2015)

<www.radionz.co.nz>

²¹ *State v Donny* [2004] PGNC 145 N2609

It is not clear what became of the company afterwards but this case indicates the positive proactive step taken by the judiciary in curtailing instances of labour abuses, especially of children.

It is reported by the US State Department of Labour that in 2015, Papua New Guinea made a minimal advancement in efforts to eliminate the worst forms of child labour. The Government adopted the country's first National Action Plan to Eliminate Child Labour and commenced implementation of a new social programme aimed at identifying children working on the street and ensuring that they are returned to safe living situations and to school. However, the United States Department of Labor said Papua New Guinea has some of the worst forms of child labour and sexual exploitation and there are no laws or institutions to curb these trend of grave concern²².

VII *Illegal Immigration*

The Department of Foreign Affairs and Labour and Industrial Relations are responsible for issuing work permits and visas to non-nationals. These two departments have come under heavy criticism in recent years for the level of corruption and maladministration. Most of the departments' senior staff have been alleged to have colluded with employer companies and visas and work permits have been granted illegally. This is quite explicit in a National Court judgment in the case of *Spirit Haus Ltd v Marshall*:²³

Section 6 of the Employment of Non-Citizens Act (Ch. 374) requires every employer to apply for work permits for every non-citizen they wish to employ. The Secretary of the Department of Labour may or may not grant such an application, depending on the application meeting a number of conditions, including special skills and expertise. A grant of a work permit is also dependant on a valid entry visa under the Migration Act (Chp.16). A work permit and an entry visa for employment purposes are inter-related. The grant of one paves the way for a grant of the other and the opposite applies where there is a decision against a grant of one of them.

This scenario has led to many legal employees losing their jobs as a result of spill and fill. Most non-nationals who come through these schemes do not meet the qualification and English speaking requirements but are given top management positions both in private and public sectors. A recent scam was revealed in the Department of Foreign Affairs when two senior officers asked for more fees from a local company owner who applied for work a permit and a visa for a non-national. The two senior officers, one from the Department of Labour and Industrial Relations and the other from the Department of Foreign Affairs, asked for visa and work permit fees which were not stipulated and after paying several times the employer realised the unnecessary and excessive charges and laid a complaint in the police station. Police investigations commenced and the two officers were finally arrested²⁴.

In 2009 there was a nation-wide anti-Asian rioting. The government set up a Parliamentary Bipartisan Committee investigating the anti-Asian rioting. As reported by Radio New Zealand, the committee was shocked that "senior immigration officials told the committee that officers receive bribes and are involved in other corrupt practices to allow foreigners into Papua New

²² US State Department of Labor "Child Labor and Forced Labor Reports: Papua New Guinea"
<www.dol.gov>

²³ *Spirit Haus Ltd v Marshall* [2004] PGNC 166; N2630

²⁴ See also Pacific Island Report "PNG Government Officials Caught In Sting Operation Charged With Corruption", (8 August 2017)
<www.pireport.org>

Guinea". The Committee found there was an estimate of more than 15,000 foreigners living and working in Papua New Guinea illegally and the responsible departments did not have the capacity and funding to curb this situation²⁵. Shane Mcleod, an Australian journalist, reported in ABC local radio that in 2003 an investigation was conducted which led one foreign affairs Minister to say the Immigration Act was abused by government officials for their personal gain. The investigation revealed that Papua New Guinea was a 'passport scam' which led illegal immigrants to come in and work or gain further access to other destinations such as Australia, New Zealand, Canada and the United States²⁶.

The private sector is also heavily penetrated by corrupt forces. Business houses and multinational corporations have been seen avoiding tax, breach of employment and immigration laws. Investigations and prosecutions are almost non-existent or if started, would be deliberately dragged on and until people give up and cases vanish without any chance of revival. This has led to angry protests against business houses owned and operated by Asians. At the core of all these mayhem, it is the politicians and senior bureaucratic officials who are in collusion with business owners and executives to facilitate for the avoidance of the rule of law. This was quite succinctly put by Grant Walton in his book entitled, *Anti-corruption and its discontents, Local national and international perspectives on corruption in Papua New Guinea*:²⁷

The private sector has long been associated with corruption in PNG. The coalition was active in addressing private sector corruption. Their concern about Asian business led to an anti-Asian prospect-cum-riot in 2009. This violent confrontation is an unconstructive way of dealing with the problem, leading, as it did, to death and destruction.

VIII Labour Surplus: The Free Education Policy

The government's free education policy is the main factor contributing to the excess number of drop outs who could not afford decent and formal employment but only make themselves available as cheap labourers. The rate of unemployment as well as cheap employment has increased over the years. This has been largely due to an increased labour supply compared to the decreased demand for labour. The government has, since 2011, introduced a free education policy that all children attending schools from elementary to grade 12 will not pay any fees. Contrastingly, this has seen children and even adults who left school some time ago, flood the schools. Given the small number of tertiary institutions in the country, the level of drop outs and misfits in the formal education system has risen. By equipping these drop-outs with fair literacy and numeracy skills, they, by default are easy cheap labours. Many Asian and other companies have taken advantage of this plight and have engaged the dropouts in fast food restaurants or small shanty shops on very low pay.

IX Corruption

²⁵ See also Radio New Zealand "PNG Parliamentary Committee "shocked" at immigration corruption" (7 November 2009)

<www.radionz.co.nz>

²⁶ See also The World Today "Report Outlines Corruption in PNG Immigration System" (13 November 2003)

<www.abc.net.au>

²⁷ See general Grant W Walton *Anti-Corruption and its Discontents: Local, National and International Perspectives on Corruption in Papua New Guinea* (New York, 2008).

One of the factors affecting the efficient or at least an effective system of labour standards in Papua New Guinea is corruption. In all the factors raised above, a sense of corruption transcends in every paragraph and is quite eminent. What then is corruption? Corruption has no formal or universally accepted definition but it implies a sense of immoral and unethical conduct on one hand and illegal use or abuse of power and trust for personal gain on the other. Corruption is so rampant in Papua New Guinea that it affects employment and the right to equally participate in every aspects.

A report by Transparency International Papua New Guinea entitled, *The socioeconomic effects of corruption on Papua New Guinea both present and future*, States in the first paragraph that report that:²⁸

One of the factors that cause development stagnation in PNG is corruption. Corruption is defined as ‘the abuse of entrusted power for personal gain’ and it is a global phenomenon. In PNG, corruption is widespread and endemic, penetrating all levels of society. Although, corruption flourishes in secrecy, the social and economic effects of it are visible and affect everyone in the country.

Corruption kills all other humane conditions, and labour rights are no exception. Corruption bankrupts governments, depletes resources and increases poverty and violence. The National Research Institute in Papua New Guinea has found that corruption is consuming millions of kina every year²⁹. A glance at the above factors discussed will indicate that corruption and mismanagement of a country leads to the destruction of all other human rights.

Australia, as a former coloniser of Papua New Guinea, has emphasised good governance for its ex colony and has taken measures to curb or reduce the level of corruption in PNG through its AUS Aid programmes but this has proved less effective. Mostly because of political corruption behind the veil of national sovereignty.³⁰

X Proposal

Given the above set of problems that are identified as hindering an effective implementation of ILO standards, the following proposals are put forward for improvement. Firstly, the government must introduce viable legislation, which includes the reviewing and amending of the current legislation, so that they carry through sanctions with strict enforcement mechanisms. The police, customs, the Department of Labour, the Department of Foreign Affairs and Trade and the Department of Health must be tied in so that a collaborative effort is achieved. Furthermore, the existing legislations needs to be reviewed and amended where necessary.

Secondly, the trade unions should be empowered and left to operate independently of any government influence. The conciliation mechanisms under the tripartite system should be abolished. The tripartite system itself must be abolished. The relevant legislation has to be amended to bring about this outcome. Protection for union members must also be tightened so

²⁸ See Gabriel Kuman TIPNG *The socioeconomic effects of corruption on Papua New Guinea both present and future* (6 June 2015)

<www.transparencypng.org.pg>

²⁹ See also Albert Ayius and R J May “Corruption in Papua New Guinea: Towards an Understanding of Issues” 47 NRI 2007 at 1-71

< www.pngnri.org>

³⁰ See also Grant Walton “The politics of Australian anticorruption policy to Papua New Guinea” in *The Changing Face of Corruption in the Asia Pacific*, pp.281-293

that members are not subjected to employment termination and other detrimental consequences. Trade unions should be made compulsory so that all employees and employers should join them respectively and protections must be offered to the unions so the collective bargaining is seen to be fairly played out.

XI Conclusion

It is true that every institution is affected by external factors but how well it manages those external factors depends entirely on how efficient and effective its internal management practices are. The ILO standards are guidelines adopted by a country but how well it manages the ILO standards depends very much on how well it manages its own internal institutions. Papua New Guinea has a disarray or dysfunctional internal institutions and therefore the ILO standards do not exist in practice. Therefore the proposed recovery measures, if heeded by the government, are the only way the country will move forward not just for labour standards.

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