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WOMEN WORKING IN NIGHT SHIFTS UNDER THE OSH CODE: SAFETY, CONSENT AND CONSTITUTIONAL VALIDITY

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Abstract

The protectionist clauses of the Indian labour laws have traditionally limited women employment in the night shifts on the basis of safety and morality. Although this was meant to protect the women workers, it usually ended up discriminating against them indirectly by reducing their economic options and defending gender stereotypes. The adoption of Occupational Safety, Health and Working Conditions Code, 2020 is a great change in labour regulation as it allows women to work night shifts under safety protection and with a voluntary choice.

This paper looks into the legalistic structure of the employment of women at night shifts in accordance with the OSH Code, and it is placed in a historical context and place within the constitution. The study examines how the Code is compatible with constitutional guarantees of equality, dignity, and personal liberty under Articles 14, 15, and 21 of the Constitution of India by reviewing landmark decisions of the Supreme Court, specifically, Anuj Garg v Hotel Association of India and Vishaka v State of Rajasthan. The paper also attempts a short comparative study of global labour standards, to evaluate the global strategies of addressing the problem of women working at night.

The paper concludes that although OSH Code is a positive step towards the elimination of protectionism in favor of empowerment, its constitutionality is largely determined by the ability to apply it, the strength of safety measures, and the availability of veritable consent. The potentially promising aspect of gender equality in night-shift employment will always be a promise unless structural and enforcement issues are taken into consideration.

Keywords: The Women Night Shift Employment, Occupational Safety, Health and Working Conditions Code, 2020, Gender Equality, Consent and Autonomy, Workplace Safety, Constitutional Validity.

Introduction

Dependence on women as a workforce has become a significant measure of societal development, economic growth, and gender equality in the modern India. As service based industries like information technology, healthcare, hospitality, logistics as well as manufacturing grow, round-the-clock operations have become highly demanded. As such, the employment of night shifts has become a new reality of contemporary labour markets. Traditionally, though, Indian labour legislation has been protectionist in nature, which is why the restrictions on the rights of women at night to work were often motivated by the need to safeguard women, their morals and health but the result was indirect discrimination against women since they could access fewer employment opportunities and remained economically dependent.¹

The introduction of the Occupational Safety, Health and Working Conditions Code, 2020 (hereinafter OSH Code) is a major change compared to the previous labour laws, as it allows women to work off-peak hours provided that safety, consent, and employer-related considerations are in place. The change in legislation is part of a larger shift in the paradigm of labour protection, as women as autonomous workers to make their own decisions on the subject of employment.² Meanwhile, the OSH Code also presents some difficult legal issues associated with the sufficiency of the safeguard, the voluntariness of the consent, and the scientificity of allowing women to work at night in a socio-economic environment where women safety issues are still widespread.

Constitutionally, limitations on night employment by women need to be reviewed in the context of Articles 14, 15, and 21 of the Constitution of India which safeguard equality before the law, which forbids discrimination on the basis of sex, and the right to life and personal liberty, including to work and dignity.³ The paper aims at analyzing the legal framework concerning the employment of women on night-shifts according to the OSH Code and especially the aspects of safety mechanisms, the notion of consent and constitutional principles. Through historical analysis of the development of labour laws, current statutory provisions and locating the debate in a comparative and a constitutional framework, the study seeks to determine whether the OSH Code has achieved the feat of balancing competing interests of

¹ Factories Act 1948, s 66; see also Government of India, *Report of the National Commission on Labour* (1969).

² Occupational Safety, Health and Working Conditions Code 2020, s 43.

³ Constitution of India arts 14, 15, 21.

protection and empowerment, or the world of work needs further legal and policy adjustments to achieve any meaningful gender equality.

Historical and Legal Context

The Indian legislations on labour laws that govern the employment of women have conventionally been influenced by a protectionist philosophy that is directed at protecting women against perceived dangers presented by night work. This was legally enforced in the Factories Act, 1948 which banned the working of women during the hours of 7p.m. to 6a.m. as an indication of safety, health and moral concern. As much as these provisions were meant to be welfare, they had an effect of restricting the economic roles of women and strengthened segregation of the sexes in occupation.⁴

As socio-economic conditions shifted and service-oriented industries grew, these blanket prohibitions were more of a growing incongruity with constitutional provisions of equality. Judicial review was a key factor to question this protectionist system. In *Air India v Nergesh Meerza*, the Supreme Court warned of the inadvisability of basing terms of employment on sex-based stereotypes.⁵ The jurisprudential change was solidified in *Anuj Garg v Hotel Association of India* with the Court overruling statutory discrimination against the employment of women, denying romantic paternalism, and focusing on substantive equality and autonomy.⁶ The progress in judicial development did not stop legislative reform, which was still patchy and inconsistent between the States and resulted on uncertainty and unbalanced application. The continuation of archaic statutory prohibition reflected the necessity to enact large-scale reform in line with constitutional norms. This historical development formed the basis of the introduction of Occupational Safety, Health and Working Conditions Code, 2020, which aimed to substitute the lack of regulations with the inclusion with safety and consent, allowing women to work during the night.

Occupational safety, health and working conditions code, 2020.

The Occupational Safety, Health and Working Conditions Code, 2020 is a compilation of thirteen central labour laws based on a consolidated framework with the objective of advancing safety and welfare at the workplace and regulatory efficiency. Another major change in the

⁴ Factories Act 1948, s 66.

⁵ *Air India v Nergesh Meerza* (1981) 4 SCC 335.

⁶ *Anuj Garg v Hotel Association of India* (2008) 3 SCC 1.

Code is that it is no longer bound to the previous protectionist labour laws which had blanket bans against women working during night hours. Rather, the OSH Code allows women to work night shifts under the safety precautions and with their own will, which is an indication of modern constitutional and economic realities.⁷

According to Section 43 of the Code, the relevant government is empowered to publish terms of women employment of night-shift, and the main responsibility of the employer would be to provide safety, dignity, and proper working conditions, including proper lighting, safe transport, surveillance systems, and sexual harassment. Through controlling terms as opposed to limiting, the Code conforms to the judicial pronouncements that disadopt the exclusionary measures and insists on emphasizing on the substantive equality.⁸ The OSH Code also supports the constitutional requirement of Articles 14, 15 and 21 by acknowledging the women as independent workers who can make informed decisions on employment. The necessity of consent is aimed to eliminate cases of coercion but there is no statutory definition of consent which casts doubts over its practical applicability. However, the Code is a legislative change in the right direction, that is balancing female right to work with the duty of the State to provide occupational safety.

Safety Concerns for Women Working Night Shifts

The main issue that is brought up when it comes to women working on night-shift is safety. Women are at risk at several levels such as personal security according to the commuting requirements, susceptibility to harassment or assault in the workplace, and health due to disturbed circadian rhythm and working long hours,⁹ with the POSH Act, 2013, and judicial pronouncements like *Vishaka v State of Rajasthan*¹⁰ underlining the responsibility of the employer to deliver a safe working environment because safety is considered as part of the constitutional rights provided in 14, 15, and 21.¹¹

OSH Code, 2020, obliges employers to provide safe working conditions, transportation, adequate lighting and road redressing to women working in night shifts,¹² which is a

⁷ Ministry of Labour and Employment, Government of India, *Occupational Safety, Health and Working Conditions Code, 2020*.

⁸ Occupational Safety, Health and Working Conditions Code 2020, s 43.

⁹ National Crime Records Bureau, *Crime in India Report* (latest edn).

¹⁰ *Vishaka v State of Rajasthan* (1997) 6 SCC 241.

¹¹ Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013.

¹² Occupational Safety, Health and Working Conditions Code 2020, s 43.

progressive and rights-based practice, however, there are still challenges in the practice. Economic coercion and social pressures can subvert the voluntariness of consent and the absence of effective enforcement may lessen legal protection to mere formalities. To actualise the constitutional promise of equality and dignity among women workers therefore is the sincere safety and autonomy.

Comparative Perspectives

There has been a shift in the international labour standards whereby gender-specific restrictions on night work are being abandoned in favour of gender-neutral safety standards, reduction of risks, and voluntary engagement. In developed countries like the United Kingdom and the United States, the Night Work Convention, 1990 of the International Labour Organization (ILO) (No 171)¹³ not only frowns upon blanket prohibitions against women on night work but also insists upon fair protection of all night workers, whether male or female, in terms of health and security as well as working conditions, as opposed to exclusion on the basis of sex.

The European Union Working Time Directive (2003/88/EC) also has a similar construction to this, however; employers are obliged to conduct risk assessment, offer health surveillance and provide safe transportation of night workers, which is equally applied to both men and women, in line with the substantive equality concepts.¹⁴ The OSH Code of India, 2020, also takes an equivalent conceptual position in terms of this international model by allowing women to work at night with a permission and safety protection. Nonetheless, unparalleled challenges like asymmetrical implementation, lack of infrastructures, and socio-economic strain underscore the discrepancy between the legal clauses and the actual protection body. Through comparative experiences it is seen that India should be in a position to boost monitoring, accountability and awareness programmes in translating statutory rights into reality, safe and dignified opportunities to the women in night work.¹⁵

Conclusion

Introduction of the Night -shift employment of women into the Occupational Safety, Health and Working Conditions Code of 2020 is an intervention that signifies a revolutionary change in the Indian labour law as it is not a protectionism as it was previously but a rights-based

¹³ International Labour Organization, *Night Work Convention* (Convention No 171, 1990).

¹⁴ European Union, *Working Time Directive* (Directive 2003/88/EC).

¹⁵ Health and Safety Executive (UK), *Night Work: Guidance for Employers and Workers* (HSE 2015).

policy that is based on equality, dignity and autonomy. The OSH Code is in compliance with constitutional provisions in Articles 14, 15, and 21 which were strengthened by landmark decisions like *Anuj Garg v Hotel Association of India* and *Vishaka v State of Rajasthan*, permitting night work on safety precautions, and the voluntary consent of the worker. These court cases highlight that women should not be marginalized in the economic sphere based on the perceived frailty and that the legal frameworks should aim at providing safe and decent working environments.

Although this is progressive in intent, realisation of substantive equality still faces the threats of practical challenges. Constant safety hazards, poor transportation and infrastructure, inappropriate enforcement processes, and socio economical strains can be detrimental to both the voluntariness of consent and the dignity of women employees. Unless these problems are tackled, the statutory permission may end up a mere figurative change.

Recommendations

1. **Equal National Safety Standards:** The government ought to prescribe general safety standards on transportation, lighting, surveillance and emergency condition of women during the night shifts.
2. **Definition of Consent:** Consent should be clarified in the law so that it becomes voluntary and informed as well as revocable especially where the economically disadvantaged are involved.
3. **Enhanced enforcement:** There should be regular inspections, punitive actions against non-compliance and mechanisms of redressing grievances incorporated with the POSH framework.
4. **Occupational Health Measures:** Employers are supposed to introduce gender sensitive health examination in order to deal with physical and psychological effects of night work.
5. **Awareness:** Safe transport and public infrastructure. The awareness activities should be done through public awareness campaigns, sensitisation at the workplace, and investment in safe transport and public infrastructure to provide meaningful participation.

It is only through a combination of legal reform and enforcement and structural facilitation that the OSH Code will be able to realise its constitutional promise of safe, dignified and voluntary employment of women during the night.

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