

## Night Work by Women: How Should Special Protective Measures for Women be Defined?

*Kamala Sankaran*<sup>1</sup>

### I. INTRODUCTION

In December 2000, a (state-level) High Court in India struck down as unconstitutional, a provision of a law that prohibited women from working at night in factories.<sup>2</sup> This decision comes at a time when the question of whether or not night work by women should continue to be banned is being debated in India. The Single Judge of the Madras High Court ruled that Section 66(1)(b) of the Factories Act 1948 was:

- a. in violation of the constitutionally guaranteed fundamental right to equality enjoyed by women,
- b. was discriminatory to women on the sole ground of sex, and
- c. interfered with the fundamental right of the petitioners to carry out their fundamental right to practise any profession, or to carry on any occupation, trade or business.

This paper will argue that there is a need for the International Labour Organisation (ILO) to adopt a broader notion of what constitutes special protection for women,

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<sup>1</sup> Reader, Campus Law Centre, Faculty of Law, University of Delhi, Delhi, India – 110007. Contact: kamala\_sankaran@hotmail.com.

<sup>2</sup> *Vasantha R. v. Union of India*, 2001 II LLJ 843 (Mad.) [hereinafter *Vasantha*]. The case was decided by the Madras High Court. An appeal from this Court lies to the apex Court, the Supreme Court of India. Both the Supreme Court and High Courts have the power of judicial review under the Indian Constitution.

taking into account the different working, social and legislative conditions prevailing in different countries. Such a framework of regulation should go beyond regulation of working hours or special considerations of pregnancy and maternity. It should include minimum standards to regulate social and working conditions within which night work is performed by women, which could then serve as a guide for judiciary and legislators in different countries. The paper will examine how international labour standards and Indian laws have treated the question of night work by women in the past and how workers, employers and the courts view the conflict between constitutional values of equality and special provisions for women permitted under the Indian Constitution.

## II. BACKGROUND

The question of whether night work by women should be banned has been debated for over a hundred years. The discussions within ILO have reflected this debate. The demand for prohibition of night work by women was first raised by the working class in Europe. Some industrialized countries in Europe enacted legislation in the early years of the twentieth century prohibiting women from working at night. This was followed by demands for international prohibition of night work by women, due to a “desire to equalize the costs of production and make uniform the conditions of industrial competition between States by inducing those States, which had not already prohibited night work for women to enact legislation to this effect.”<sup>3</sup> It was argued that unless there was a ban on night work by women, they would be unable to carry out their household roles as

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<sup>3</sup> ILO, Report III (Part 1B), International Labour Conference, 89<sup>th</sup> Session, NIGHT WORK FOR WOMEN IN INDUSTRY 24-25 (2001) [hereinafter ILO].

wife and mother. It was also argued that women were susceptible to ill health due to night work and that it was immoral since it interfered with their role at home.<sup>4</sup> In order to ensure that such a ban did not place employers at a disadvantage, governments negotiated international treaties for a simultaneous ban on the night work for women.<sup>5</sup>

In 1919 the ILO decided to completely prohibit night work for women in public and private industry. However, the Convention stated that night work could be permitted in cases of

- a. *force majeure*, when in any undertaking there occurs an interruption of work which was impossible to foresee, and which is not of a recurring nature, and
- b. also in cases where the work has to do with raw materials or materials in the course of treatment which are subject to rapid deterioration, when such night work is necessary to preserve such materials from certain loss.<sup>6</sup>

It was made clear that women could be asked to work at night in the greater national interest or in the economic interests of preventing loss of raw materials.

Subsequent revisions to the Convention concerning employment of women during the night sought to make the Convention flexible to encourage its ratification by a greater number of countries – women holding responsible positions of management who were not ordinarily engaged in manual

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<sup>4</sup> See *id.* at 25-26.

<sup>5</sup> See Christine Haight Farley, *Men May Work from Sun to Sun, But Women's Work is Never Done: International Law and the Regulation of Women's Work at Night*, 4 BU. WOMEN'S J. L. & SOC. POL'Y 44, 46 (1996).

<sup>6</sup> Night Work (Women) Convention, C4, *adopted* Nov. 28, 1919, art. 4. In the case of countries such as India and Siam, the Convention stated that the ban on night work were inapplicable in industrial undertakings that were not factories. See *id.*

work were exempted from its provisions.<sup>7</sup> Subsequently, women in higher posts of a managerial or technical character were also exempted from its provisions, as were women employed in health and welfare services and those who were not ordinarily engaged in manual work.<sup>8</sup> Night hours were defined in such a manner as to allow longer hours of work for women. The Convention Concerning Night Work of Women Employed in Industry adopted in 1948 provided sufficient flexibility to industry to permit a double shift system of work.<sup>9</sup> The revised Convention of 1948 further permitted the ban on night work for women to be suspended, by the government in the national interest, in cases of serious emergency only after consulting the employers' and workers' organizations concerned.

The Protocol adopted in 1990 to the Night Work (Women) Convention (Revised), permitted States to vary the duration of the night period after consulting worker and employer organizations and also to exempt the ban on night work for certain branches of activity or occupations. However, it stated that such variations or exemptions could not apply to women workers during a period of at least 16 weeks, before or after childbirth of which at least eight weeks should be before the expected date of childbirth.<sup>10</sup> It

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<sup>7</sup>See Night Work (Women) Convention (Revised), C41, *adopted* June 19, 1934.

<sup>8</sup>See Night Work (Women) Convention (Revised), C89, *adopted* July 09, 1948.

<sup>9</sup>Night Work (Women) Convention (Revised), C41, *adopted* July 09, 1948 defined 'night' as a period of at least eleven consecutive hours, including an interval prescribed by the competent authority of at least seven consecutive hours falling between ten o'clock in the evening and seven o'clock in the morning. The competent authority is to prescribe these intervals after consulting employers' and workers' organizations concerned. Different intervals can be prescribed for industries and areas.

<sup>10</sup>See Protocol of 1990 to the Night Work (Women) Convention (Revised), C89, art. 2, ¶1. This prohibition of night work by women shall apply to additional periods in respect of which a medical certificate is

further stipulates that a woman worker should not be dismissed or given notice of dismissal because of pregnancy or childbirth.

The international focus on the promotion of equality of women in the work place in later decades resulted in a review of protective standards relating to women at work. Whether the ban on night work ought to be lifted on the ground that it denied equality of treatment between men and women workers has been a source of sharp debate. The ILO Worker members

argued that the prohibition of night work helped to prevent the exploitation of women as cheap labour and to ease their double load due to work and family responsibilities. Thus, it might not be considered discriminatory except in the very few countries where the principle of equality of opportunity and treatment was fully applied.<sup>11</sup>

Scientific studies of the medical and psychological effects of night work showed that fatigue caused by night work led to greater accidents in industries and transportation; that there were greater risks of other illnesses associated with night work; and that there was disturbance of family life and hence greater stress faced by workers of both sexes due to night work.<sup>12</sup> In keeping with these scientific findings, the Convention No. 171 and Recommendation No. 178 was adopted by the ILO in 1990. Workers of both sexes who perform a certain number of hours of night work are to be provided with sufficient rest periods, health assessment, medical advice, and safety measures. This Convention applies to all employed persons except those employed in

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produced stating that this is necessary for the health of the mother or child. *See id.* at art. 2, ¶2.

<sup>11</sup> ILO, *supra* note 3, at 40.

<sup>12</sup> ILO, *supra* note 3, at 17-19.

agriculture, stock raising, fishing, maritime transport, and inland navigation.<sup>13</sup>

Under Convention No. 171, protection was to be afforded to all those employed persons who work at night; night work was deemed to include all work that is performed during a period of not less than seven consecutive hours, including the interval from midnight to 5 a.m. In the case of women workers, the Convention requires that alternate work be made available before and after childbirth and, if necessary, during pregnancy or a prolonged period after childbirth. During these periods women shall not be dismissed or given notice of dismissal, except for justifiable reasons not connected with pregnancy or childbirth.<sup>14</sup> The emphasis in this Convention is clearly on providing safety and health protection to *all* night workers: "Gender is not believed to be a factor affecting the tolerance to night work since the circadian rhythms of men and women appear to react in the same way to the phase shifting of work and sleep in connection with night work, though such factors as pregnancy and the additional load on women of family responsibilities may have a special impact on female shiftworking and may need therefore to be taken into consideration."<sup>15</sup> This approach is in marked contrast to the earlier Conventions on night work where women alone were singled out for protection. Women were banned from night work "in their own interests" although they could be compelled to work in the greater national interest or in certain economic conditions.<sup>16</sup>

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<sup>13</sup> See Night Work Convention 1991, C171, *adopted* June 26, 1990 and Night Work Recommendation 1990, R178. For the text of these labour standards, see ILC, Record of Proceedings, Authentic Texts (1990).

<sup>14</sup> See Night Work Convention 1991, C171, *adopted* June 26, 1990, art. 7.

<sup>15</sup> ILO, *supra* note 3, at 139.

<sup>16</sup> See exemption clauses in the various Night Work Conventions.

### III. POSITION IN INDIA

In India, women who work in factories and offices are prohibited from working at night.<sup>17</sup> The Factories Act adopted in 1948 stated that no woman shall be required or allowed to work in any factory except between the hours of 6 a.m. and 7 p.m., with the proviso that the hours may be varied provided that no woman may work between 10 p.m. and 5 a.m. However, the law itself provides ways in which this ban on night work of women can be circumvented. The Section also states that the State Government may make rules providing for the exemption from the ban on night work of women in fish curing or fish canning factories, where the employment of women during night hours is necessary to prevent damage to, or deterioration of any raw material. This exemption can be subject to such conditions, as the Government deems necessary.<sup>18</sup>

The Indian Constitution permits that the State may make special provisions for women and children.<sup>19</sup> On the basis of this provision, affirmative action taken in favor of women is not in violation of the Constitutional provision prohibiting discrimination against any citizen on grounds of religion, race, caste, sex, or place of birth.<sup>20</sup> As a result, if the ban on night work by women is seen as affirmative action towards

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<sup>17</sup> See Factories Act 1948 and the Shops and Establishment Act of different states. Women working in hospitals and in agriculture are exempt from such laws.

<sup>18</sup> See Factories Act 1948, § 66(2). For instance the rules made under this Act in the state of Tamil Nadu (where the present case arose) provide that no woman shall be employed before 6 A.M. or after 7 P.M. for more than three days in a week; and no woman shall be employed after 11 P.M. and before 5 A.M. The number of days on which a woman may be so employed cannot exceed fifty days in a year.

<sup>19</sup> See INDIA CONST. art. 15(3). Art.15(4) permits special provisions to be made for *inter alia* socially and educationally backward classes of citizens. See *id.* at art. 15(4).

<sup>20</sup> See INDIA CONST. art. 15(1).

women or as protective legislation to benefit women, such legislation cannot not be held to be discriminatory solely on the basis of sex.

In the landmark *Stoekel* case, the Court of Justice of the European Communities held that the Council Directive of equal treatment for men and women in regards to access of employment, vocational training and promotion, and working conditions was sufficient to hold that the ban on night work of women in Member States ran counter to the Council Directive.<sup>21</sup> In fact the Court of Justice ruled that the directive is to “be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.” The Court took the view that except for the cases of pregnancy or maternity, the social risks faced by women, such as the risks of attacks while working at night, are not “inherently different from those to which men are exposed.”<sup>22</sup> The Court also held that the directive could not be used to settle questions of greater family responsibilities faced by women. Thus the Court very explicitly took the view that the protective role of banning night work of women should be restricted to cases of pregnancy and maternity.

In the Indian context, special provisions to benefit women are not limited to cases of pregnancy and maternity. Quota based reservations for women in government jobs, reserving seats for women in elected bodies, and exclusive women’s colleges have been part of the constitutional scheme and have been upheld under Article 15(3) of the Indian Constitution as affirmative action that benefits women. It was in this background that the High Court struck down the ban on night work as unconstitutional in the *Vasantha* case, holding that the ban on night work was a restriction and not a case of affirmative action. The Court stated, “the provision is not a protecting provision so that it

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<sup>21</sup> See Case C-345/1989 judgment of 25 July 1991.

<sup>22</sup> *Id.* at ¶15.

could be tested with reference to Article 15(3) or Article 15(4) of the Constitution but is a restriction and therefore, the validity of such restricting provision has to be tested on the anvil of Article 15(1) of the Constitution.”<sup>23</sup> The Court stated that banning women from night work was discrimination based solely on sex that was prohibited under Article 15(1) and not saved by 15(3) or (4) since the ban on night work was not designed to protect women.

The case law of what constitutes ‘special provisions for women’ permitted by the Indian Constitution has been given a wide interpretation by the Indian Courts. For instance, constitutional and statutory provisions reserving seats for women in elected bodies,<sup>24</sup> quota-based reservation of government jobs for women,<sup>25</sup> and provisions in criminal law and procedural law discriminating in favor of women have been upheld by Indian Courts as special provisions to protect women.<sup>26</sup> Instead of addressing the question of whether such a liberal interpretation of protective measures for women was warranted, the Court in the *Vasantha* case sidestepped this issue and instead held that the ban on night work by women was a restrictive and not a protective measure. However, after holding that the ban on night work is discriminatory, the Court concluded its judgment by stating that it expects women to carry out their family responsibilities and that their chief responsibility “is to maintain a sound and healthy family life... to this chief responsibility, all other interests must be sub-ordinated.”<sup>27</sup> Thus the Court appears to subscribe to the view that the ban on night work was necessary for women to carry out their

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<sup>23</sup> *Vasantha*, *supra* note 2, at ¶72.

<sup>24</sup> See INDIA CONST. Art. 243D, 243 T.

<sup>25</sup> See *Government of Andhra Pradesh v. P.B. Vijay Kumar* AIR, 1995 SC 1648.

<sup>26</sup> See *e.g.*, provisions of law criminalizing adultery by men and not by women.

<sup>27</sup> *Vasantha*, *supra* note 2, at ¶106.

family responsibilities and therefore 'protective' of their interests! Unfortunately the judgment of the Court, by reiterating the view that the main responsibility of women is within the family, does a disservice to its own arguments relating to non-discrimination and equality.

The view of the Court in the *Vasantha* case that the ban on night work of women is not a protective measure, runs counter to what the ILO, the Government and workers have argued for decades.<sup>28</sup> The opinion of the Court that the ban on night work of women was not a protective measure would have been better served had it cited the provisions of the Factories Act that permits exemption to be granted in the case of fish workers. Clearly the exemption granted (on the lines suggested by ILO Convention No. 41) privileges the interests of business over the State interest in protecting women. In permitting night work by women in premises not covered by the Factories Act (such as hospitals), the claim of State interest in protecting women from doing night work is open to serious doubt. In the *Vasantha* case, the judgment cites the Government affidavit that women workers in factories "are not well educated and they do not come from higher strata of society", and that therefore to permit them to work at night would be unwise. Some women's groups also argued against the lifting of the ban on night work by women, citing the social conditions facing women, the greater violence faced by women in the streets and unsuitable conditions in the workplace as relevant factors.<sup>29</sup> In order to deal with these objections, the Court also laid

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<sup>28</sup> See e.g., the Royal Commission on Labour, while commenting on shorter hours of work for women, stated in 1931 "[t]he main arguments in favour of fixing the maximum hours for women at lower levels than those prescribed for men are that women have domestic duties perform and that they find long hours a greater strain." See also Farley, *supra* note 5 at 44.

<sup>29</sup> See the application of the All India Democratic Women's Association, Tamil Nadu State Committee before the Court in the *Vasantha* case. *Vasantha*, *supra* note 2, at ¶¶27–29.

down certain conditions that would have to be met by the employers before women could be employed in the night shift, while declaring the prohibition of night work by women to be unconstitutional.<sup>30</sup>

This judgment by the Madras High Court in India has given rise to a serious debate in trade union circles and within the women's movement. The National Commission on Labour, appointed by the Government of India to look into several labour questions, has recommended that the ban on night work by women can be lifted if the number of women workers per shift in an establishment is not less than five, and if the management is able to provide satisfactory arrangements for their transport, safety and rest after or before shift hours.<sup>31</sup>

#### IV. CONCLUSION

The *Stoeckel* case and Convention No. 171 have confined protective measures for women to cases of pregnancy and maternity. There have been differences among countries over what constitutes protective measures for women and these

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<sup>30</sup> *Vasantha, supra* note 2, at ¶ 105. Such safeguards deal with transport facility, a night rest room for women, toilets, safety provisions to deal with sexual harassment among others. These safeguards are in sharp contrast to the regulation of night work in the case of the fish processing industry, where the State Government has only regulated the hours of work and not specified any conditions that must be met with regard to safety, health and social services.

<sup>31</sup> *See* Report of the National Commission on Labour (2002), at ¶6.121(d), available at <http://www.labour.nic.in>. Unlike countries in Europe who have denounced Conventions C41 and C89 on the basis that women do not require protection except in cases of pregnancy and maternity, trade unions in India argue that there is a need to continue to prohibit night work of women. Since factories employing women are in the export sector, it is argued that the demand for permitting night work is driven by the need to have a third shift rather than an assessment of women workers' real position in the workplace.

have changed over time. As noticed earlier, the industrialized countries and the ILO had treated the ban on night work by women as a protective measure for women, in order for women to carry out their family responsibilities. The ILO has characterized the debate on the question of night work by women as divided into two views. "Special protective measures for women may be broadly categorized into two types: those aimed at protecting women's reproductive and maternal capacity, and those aimed at protecting women generally because of their sex or appropriate role in society."<sup>32</sup> The later ILO standards, such as the Protocol adopted in 1990 and Convention No. 171, seek exemption only for women's reproductive and child-rearing role, and ignore the social reality within which many women operate in developing countries. The view of the Court in the *Stoeckel* case that the risks of attacks faced by women who work at night are not 'inherently different' from that faced by men may not be true in all situations. Opposition to lifting the ban on night work by women in countries such as India has not been based on perceptions of women's "appropriate role in society", but rather on the reality of increased violence faced by women in the streets, sexual harassment at the workplace and lack of basic amenities for women who work at night.<sup>33</sup> There is thus a need for the ILO to recognize that social factors have a bearing on the question of permitting night work by women and that women workers may require special protection on this basis.

The last word has not been said on this question. Under Indian law, the appeal from this case can lie before a larger

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<sup>32</sup> ILO, *supra* note 3, at 3.

<sup>33</sup> Recommendation No. 178 focuses on social services such as the schedules of local public transportation, housing within reasonable distance to the workplace and quality of rest available to night workers as factors that should be taken into account when permitting night work by women. However, these requirements are not considered to be prerequisites for permitting night work by women.

Bench of the same High Court and can subsequently be presented to the Supreme Court of India. It is hoped that in these forums, the questions of equality, non-discrimination within the work sphere, violence faced by women in society and the unequal burden borne by women within the home will be separately addressed.