

# Gender and Labour Law

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## INDRODUCTION

The idea of a civil society among other things believes firmly in the Rule of Law, but what happens when the laws created to ‘protect’ our interests may pose a threat to the Basic freedoms guaranteed by our Constitution, that are generally agreed upon as precepts of a democracy such as say The Rights to Equality and those of Freedom that allow us to freely pursue our Economic interests in the form of our livelihood in the absence of a discriminatory environ.

And when we say laws that are created to ‘protect’ us, we can have two interpretations.

The first one being a ‘protection’ enshrined in a law that delineates the rights of individuals in a society. An easy way to put it is as follows – Your right to ‘freedom’ in moving your fist ends where my nose begins. So I am ‘protected’ against your fist by the laws of the land which will see your hand infringing upon the space that is my nose as an act of violation of my right to freedom and the law.

The second kind of ‘protection’ that laws lend is of a different nature. Rather the laws are ‘Protectionist’ in nature, assuming that a certain stakeholder group is weaker or at a disadvantage with respect to certain social or economic factor and need to be ‘protected’ or ‘uplifted’ at par with the other stakeholder group that is considered ‘privileged’. The analogy that comes to mind is that of a race. Suppose the contestants include a professional athlete and a regular joe, asking the professional athlete to give the Joe a 40 second lead is what would be considered a ‘handicap’ to make things fair to good old Joe. In contemporary politics and policy making it is a case of what is called ‘Positive Discrimination’.

But often a 40 second lead is not the only form this discrimination takes. We know it as the basis for Caste based Reservations in India which have a Socio-Economic basis to it, the nuances of which are the subject matter for another study.

Decoding the ‘protective measures’ for women, a 2001 ILO Report (ILO 89th Session 2001) broadly categorizes them into two types-

- a) those aimed at protecting women’s reproductive and maternal capacity<sup>1</sup>
- b) those aimed at protecting women generally because of their sex or gender, based on stereotypical perceptions about their capabilities and appropriate role in society<sup>2</sup>

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<sup>1</sup>Such measures include those dealing with maternity protection in the strict sense (maternity leave, job and income security, medical benefits) and protection of special conditions of work for pregnant or nursing mothers (nursing breaks, organization of working hours, restriction of exposure levels to particular substances and processes, prohibition of night work and work considered to be dangerous to the foetus or to pregnant or nursing women). (ILO 89th Session 2001)

However the case in consideration here being the blanket ban on Women Working night shifts that exists in Labour Laws (The Delhi Shops and Establishments Act,1954 being one) can also be viewed as a case of ‘Positive Discrimination’ which then would proceed to identify women as ‘disadvantaged section’ and therefore belong to the latter category.

## **CASE IN QUESTION**

The National Capital Region of Delhi comes under the jurisdiction of a commercial law and labor law, The Delhi Shops and Establishments Act of 1954 that in Section 14 makes a distinction between the working shifts of a man and a woman by restricting the latter to a shift timing during the day thereby effectively disallowing said Citizen from working after a set hour.

Prima Facie our attention is drawn to the Gender difference highlighted in the said law, and the restriction on an individual’s freedom to earn her livelihood as the Principle arguments to be used in a case against it.

## **TRACING BACK THE BLANKET BAN: INTERNATIONAL LABOUR DEBATES ON GENDER**

One very pertinent question that rises when we think about nighttime working restrictions on Women is that about the International perspective. A perfunctory but helpful insight is offered by tracing the ILO debates around the issue from the early years of the Twentieth Century to the later ones of the Twenty first. Night work for women was first prohibited in England, in 1844. More than 30 years later, England’s approach was followed by Switzerland in 1877, New Zealand in 1881, Austria in 1885, the Netherlands in 1889 and France in 1892. (ILO 89th Session 2001)

The argument used by the legislators was against a backdrop when women were viewed as physically weaker than men, as more susceptible to exploitation, and primarily as mothers and housekeepers. This would put into perspective the argument used and become the premise for the argument.

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<sup>2</sup> General protective measures, which have usually taken the form of blanket Prohibitions or restrictions, as in relation to night work, have always been questioned by some and recently have been subjected to extensive criticism as obsolete and unnecessary infringements of the fundamental principles of equality of opportunity and equal treatment as between men and women. (ILO 89th Session 2001)

The legislators' articulated motivation in enacting this prohibition was concern for women's safety, moral integrity and health and for family welfare. For these reasons, legislators of that period viewed adult women and children as belonging to a special class of factory workers needing special protection, who, in fact, were not considered to be competent to make valid choices. (ILO 89th Session 2001)

This was followed by demands for international prohibition of night work for women so as 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. (ASSOCHAM; NCW India n.d.)

A logical way to crack open this argument would be crack the premise of it, a move into the 21<sup>st</sup> Century would validate many of the myths around the 'Weaker Sex' being scrutinized if not denounced. The counter of course being that a woman has moved away from a primary role in the household if the employment numbers at the time of the imposition of the ban are to be compared to the current scenario both in absolute and relative percentages.

In 1919, at the Washington Convention, the ILO decided to completely prohibit night work for women in Public and Private Industry. However, the Convention stated that the night work should be permitted in case of, *force majeure*, understood to be a case of 'Circumstances beyond human control'<sup>3</sup>

However what is interesting to note that the convention made it clear that women could be allowed to work at night in the 'greater national interest' or in the 'economic interests of preventing loss of raw materials.' And interestingly the task of defining what their 'Greater National Interest' could be was left to the 'Greater Interest' of the Government. The timeline gets particularly interesting after this convention and before the one in 1948. Of the many events that happen, the two great Wars of the World certainly cause a shift in the way labor and the laws governing it were viewed.

True, war had always been an exemption from most 'Laws' being ratified by other 'Laws' in place. But it certainly is a plausible argument. Of the millions of women who had taken to work in the factories, farms and hospitals to support the 'all hands at deck' philosophy that a war entails, what would happen to them after the war got over? Were they expected to go back to 'Status quo' once

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<sup>3</sup> See (ASSOCHAM; NCW India n.d., 9) Pg-9, These circumstances were further refined and defined as being when in any undertaking there occurs an interruption of work which was impossible to foresee and which is not of a recurring nature or in case 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 losses.

they had proven to themselves as much as to the society that perhaps they were not much of as much porcelain as was thought? What about the impact of the exposure of late working hours on women? Was the myth shattered in their minds?

While we may not have a quantifiable way to assert a claim to any of these questions, they are certainly questions worth thinking about. The corpus of literature of 'Universal Suffrage' and the opinions of the thinkers of the time may be extended to the questions and we may conclude that it did change 'something'.

The change is reflected in the ILO Convention of 1948. The Convention concerning night work for women employed in industry defined night hours in such a manner as to allow longer hours of work for women and provided sufficient flexibility to industry to permit a double shift system of work. The revised Convention of 1948 further permitted the ban on night work to be suspended by the government in the national interest, i.e., in case of serious emergency only after consultations with the employers and workers organizations concerned.

The General Conference of ILO in June 1990 had adopted a protocol known as Protocol of 1990<sup>4</sup> under those provisions the competent authority in a country under its national laws and regulations is authorized to rectify the duration of the night shifts or to introduce exemptions from ban on night works for women for certain branches of activity or occupations.

The Court of Justice of European community<sup>5</sup> states that the protective rule banning night shift work for women should be restricted to cases of pregnancy and maternity only and a blanket ban on nightshifts for women was completely in violation of Council Directive of equal treatment to men and women with regard to access in employment, vocational training, and promotion and work conditions. (ASSOCHAM; NCW India n.d.)

## **TRACING GENDER PARITY IN LABOUR LAWS IN INDIA- A CASE LAW OVERVIEW**

Labour Laws in India are subject to the concurrent list of Indian Constitution. This therefore gives the right to make laws to both The Parliament and State Legislatures. We have The Factories Act, 1948 and various State Shops and Establishments Acts. The first relevant Case by way of the precedent is the Factories Act itself.

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<sup>4</sup> See (P89 Protocol of 1990 to the Night Work (Women) Convention (Revised), 1948) Article 1

<sup>5</sup> See (ASSOCHAM; NCW India n.d.) Pg 11

Originally, The Factories Act 1948, under Section 66, banned women from working in night shifts by stating that no women shall be required or allowed to work in any factory except between the hours of 6 AM and 7 PM.<sup>6</sup> On the 10<sup>th</sup> June 1999, The High Court of Mumbai in its judgment passed an interim order allowing deployment of women in Santa Cruz Electronic Export Processing Zones (SEEPZ) in the nightshift. In 2001, The High Court of Andhra Pradesh in its judgment struck down Section 66 (1) (b) of the Factories Act 1948 as unconstitutional.<sup>7</sup>

In 2000, Madras High Court ruled<sup>8</sup> that Section 66(1) (b) of the Factories Act 1948 was a violation of the constitutionally guaranteed fundamental right to equality enjoyed by women, was discriminatory to women on sole ground of sex and, interfered with the fundamental right of petitioners to carry out their fundamental right to practice any profession or to carry on any occupation, trade or business. The Court also made provisions for the safety and security of women before declaring Section 66 to be Unconstitutional.<sup>9</sup>

On 10<sup>th</sup> August 2005, the Factories (Amendment) Bill, 2005 was introduced by Union Government in the Lok Sabha, which envisages that the employer ensures occupational safety and adequate protections to the women employed. The owner of the factory has to ensure occupational health, equal opportunity for women workers, adequate protection to their dignity, honour and safety and their transportation from factory to the nearest point of their residence.

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<sup>6</sup> (See The Factories Act, 1948) provided that: 1. State government may make rules providing for the exemption from the restrictions to such an extent and subject to such conditions as it may prescribe, of women working in fish-curing or fish canning factories, where the employment of women beyond the hours specified in the said restrictions is necessary to prevent damage to or deterioration in any raw material. The rules made under the Sub Section (2) shall remain in force for not more than three years at a time. Women working in Hospitals & Agriculture are exempted from Factories Act, 1948 and State Shops and Establishment Acts regarding ban on nightshifts for women employees.

<sup>7</sup> See Andhra Pradesh High Court, (2002-III-LLJ)

<sup>8</sup> See -Madras High Court Vasantha R. vs Union Of India (Uoi) And Others on 8 December, 2000, Equivalent citations: (2001) IILLJ 843 Mad, Bench: E Padmanabhan

<sup>9</sup> The measures given by Madras High Court state that before the Central and State Government introduce rules following measures should be adopted by every employer who wants to employ women in their factory in nightshifts; employers should prevent and deter any sexual harassment and provide procedures to resolve, settle or prosecute any such act; the employers should maintain a complaint mechanism, including a complaint committee headed by women and half the members of the committee should be women; women should be employed only in batches, of not less than ten or not less than two thirds of the total nightshifts' strength; separate work sheds, canteen facilities, all women transport facility, additional paid holiday for menstruation period, medical facilities should also be provided besides two or more women wardens to work as special welfare assistants; the employer shall provide proper working conditions with respect to work, leisure, health and hygiene and there should be proper lighting in and around the factory where female workers may move, there should be security at entry and exit points of factory and at least twelve consecutive hours of rest or gap between shifts; the employers should send fortnightly reports to the inspector of factories about night shifts including any unwanted incident and also to the local police station. (ASSOCHAM; NCW India n.d.)

## **ARGUMENTS AGAINST THE RESTRICTIONS IN SECTION 14**

The study so far of tracing the changing Social, Political and Economic contexts of Blanket Bans on Women Working during the night is culminated in the Primary arguments against Section 14 of the Delhi Shops and Establishments Act, 1954.

While it is the endeavour of this paper to mainly point out the premise of arguments that have been used in other countries and in India before and may be used to substantiate that the Section in the Delhi that imposes a blanket restriction on women working night shifts is an infringement on the Constitutional rights ,it is also to be noted that in the light of the changes and amendments we have seen in the ILO convention debates and in the cases pointed out in the context to India, the Delhi Restriction stands redundant due to the failure to recognize and consider changes in what were similar restrictions.

### **ANALYSIS**

#### **a. Principle Arguments**

The first Argument against the restriction on night working hours being on the basis that the section discriminates on the basis of Gender and also restricts an individual's ability to earn a livelihood. Interestingly both the above infringe upon citizens Constitutional rights to Equality and Freedom to earn a living which by itself is a strong case in the interest of a Public Interest Litigation against Section 14.

The Second argument looks towards the logic of Redundancy that a study of the law reveals. The relevant Section in the Act has not been amended since 1954, that is, its year of conception. We recognize unequivocally the changes India has undergone since in the forms of Social, Political and Economic background and question the act's inability to transform in response to a dynamic environment and also cite Case Law which was used to pass the amended Factories Bill in 2005

#### **b. Secondary Argument**

In the third argument we look at an important albeit universal aspect of legislation-Implementation and Execution .In other words reality. In highlighting the difference between theory and practice we try and look at how, if it all it has, this act has effected operations on the ground.



Are women really banned from working at night in Delhi? Does it imply their 'safety'? In what offices? What about Hotels, Bpo's and everywhere else we swear we have seen women work at night? What is the penalty for such an offense? Have the inventors of the *Jugaad* system found a way around here too?

If these questions seem to be embedded in your subconscious, they exist and considering the generally experienced if not validated truth that information is preceded by skepticism, these questions are worth going back to.

Which brings us again to the concept that is the cornerstone of every research-reality. Like every law this law too is subject to Exemptions. Section 14 is subject to exemptions under Section 4 of the Delhi Shops and Establishments Act. The theoretical procedure is to apply to the Labor Commissioner in a prescribed format and after due consideration on the nature of the establishment, its need for an exemption, exemption may be granted.

But a quick scanning of newspaper articles and chats with local establishments (a certain coffee shop that requested anonymity on paper) reveals that the fundamental precept of *Jugaad* prevails.

Where there is a will, there is a way and where there is a law, there is a loophole. With techniques ranging from 'black' currency to the more subtle nuances of doctoring documents to pass off under the radar as 'Public Utility Services' organizations have done it all. If one were to think of all the places one has seen women work night shifts-restaurants, call centers, airports (ground staff or customs staff), bars, clubs etc. thinking about where they don't work at night alongside their male counterparts might seem like a task.(Call Centres May Get Wake-up Call Over Shops Act 2002)

The extent to which this rule is flouted itself questions its existence on paper and this is a subsidiary argument to the other major concerns that have been expressed.

## CONCLUSION

### The Role of Executive Affirmative Action- Where the State and Private Stakeholders can align

Researching the Reality of this case indicates that 'A fear of safety' is a primary reason why women and their families are apprehensive about their stepping out to work at night. A Stark Observation is the frustrated reluctance among working women to work late, a major part of this reaction is credited to the increasing no. of cases of Rape and assault against Women during night hours. They express their utter disgust at the situation out there but don't think that keeping themselves shut in their houses will solve anything, not for long anyways.

Another interesting observation is how the Market is reacting to this 'demand for safety'. Case in point, the number of Cab services claiming to be 'guarantees of safety for women' as rising in number and popularity. There are customized 'Only women' cabs, 'to the doorstep drop' facilities and others. This in addendum to stricter enforcement could very well be an unintended Public-Private Partnership that gives dual benefits to the target group - Working Women.

The market logic can be extended to view how Corporations are reacting to this.

While under Section 4 for Exemptions under the current Delhi Shops and Establishments Act, there is an undertaking that entails the Employer to provide for 'safe' transport with at least on male Escort till the last stop, considering the general state of follow through or the lack thereof, not much can be said about the effect that a provision similar to that in the Factories Act will or will not have if the enforcement cannot keep track of the offenders and they are penalized to set a precedent.

The market response to this is seen in how Private Enterprises enter into a competition over the provision of 'better facilities'. For employees safety is soon become a yardstick to measure a 'pay package'. Much like Working Environments, Work Culture, Amenities in an office and other forms of non-monetary compensation, Safety and Transportation too is taking a place. What pushes companies is then the drive to attract and retain their female employees as well promote a 'Gender Sensitive' policy that caters to the needs of their Women Employees. It can also be viewed as a motivator of sorts for the female workforce that may as motivators are envisaged to, improve the output and quality of work of the employees. While we argue for the provision of a choice to work at night which the current legislation denies, we keep in mind the arguments about the 'repercussions of not 'protecting' the women' that are often used against this logic.

As a citizen of this country an individual is under the rule of law principle is entitled to being 'protected' as understood to be physical safety. The provision of a mechanism that guarantees the safety of any citizen is under the gambit of Enforcement bodies and certainly not a matter of legislation.

Even if it were it is not as though the number of rape cases has gone down as a result of not allowing women to work at night, so even on those grounds the 'protectionist' argument does not hold.

Consider the following hypothetical situation - A rabid dog bites a person, what would you do? Impose a ban on people interacting with the dog or treat the Dog for Rabies?

The former would give you short-term relief; remember there is still a rabid dog at large. The latter would ensure that an interaction with the dog in the future will be substantially safer.

So would be the answer to this problem.

It is in a state's benefit to recognize its own failure in this regard and work to substantially improve law and order. By restricting the fundamental Economic freedoms of individuals they display an astonishing short-sightedness in disregarding its long term economic Implications and impact on Civil liberties.

A solution involving Public Policy has to recognize its duty towards the protection of its citizens and the subsequent respect of their rights.

A similar if not better solution is envisaged for Delhi.

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