

CHAPTER 4

CONVENTIONS ON THE NIGHT WORK OF WOMEN AND THE PRINCIPLE OF EQUAL TREATMENT

156. For the great majority of the governments which provided replies for the purposes of the present survey, all Conventions on night work of women are synonymous with sex discrimination and are contrary to the overriding principles of equality of opportunity and equal treatment in the workplace.

157. Several States (*Brazil, Colombia, Germany, Panama, Portugal, Seychelles, Spain*) expressed the view that the prohibition of night work of women would be contrary to national constitutional law. In the case of *Germany*, reference was made to a 1992 judgement of the Federal Constitutional Court which ruled that the prohibition on night work for women in force at that time was incompatible with article 3 of the Basic Law, which provides, inter alia, that no one shall be discriminated against on account of sex.¹ The Government of *Panama* recalled that the Supreme Court in its judgement of 29 April 1994 had found article 104 of the Labour Code prohibiting women's employment in underground work to be unconstitutional, considering that the protection intent reflected in that provision was contrary to the principles of equality and non-discrimination in employment as endorsed in articles 19 and 20 of the Constitution. Similarly, the Government of *Colombia* referred to Constitutional Court judgement C-622 of 1997 by which article 9 of the 1967 Labour Code prohibiting night work for women in industry was declared non-applicable.² For *Portugal*³ and *Spain*,⁴ the Conventions and the Protocol are contrary to the constitutional principle of equality for all citizens before the law, while *Brazil* invoked the principle of equality between men and women, enshrined in the new Federal Constitution of 1988, to argue that the legislation giving effect to Convention No. 89 has now fallen into disuse. According to the views of other

¹ For more on this decision, see "Night work for women", in *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 8, 1992, pp. 180-188.

² In the words of the judgement, "there is no doubt that under the present-day constitutional framework, all men and women should participate under the same conditions in the economic, labour, social and political processes and activities, which would result in the elimination of all restrictions on the enjoyment of women's rights".

³ Constitution of 2 April 1976, arts. 13, 58(3b).

⁴ Constitution of 27 December 1978, art. 14.

governments, specific legislation prohibiting night work of women would contravene national anti-discrimination laws such as the Federal Sex Discrimination Act of 1984 in the case of *Australia*, and Title VII of the Civil Rights Act in the case of the *United States*, or existing gender-neutral night work legislation as in the case of *Namibia*.

158. In the opinion of some governments, any prohibition on women working at night would contravene obligations arising from the formal acceptance of other multilateral treaties. The Government of *Australia*, for instance, stated that ratification of the Conventions or of the Protocol on night work of women would infringe their obligations under the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and could also potentially be in conflict with the ILO's own Workers with Family Responsibilities Convention, 1981 (No. 156), and Recommendation (No. 165). The Government of *Suriname* also referred to the need to harmonize national legislation with CEDAW rules and principles as a ground for possible denunciation of Convention No. 41. As for the Governments of *Peru* and *South Africa*, they considered Convention No. 89 to be at variance with the provisions of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

159. There were also numerous statements (*Botswana, Canada, Netherlands, New Zealand, Norway, Peru, Spain, United Kingdom, Uruguay*) to the effect that the mere intention to regulate women's access to night employment rather than to prescribe gender-neutral restrictions for night work was inherently discriminatory in nature and remained unjustifiable. The Government of *Cuba* expressed the view that a general prohibition of night work for women is discriminatory and in conflict with the principle of equality of opportunity while it is also contrary to the policy of full employment bearing in mind that women make up 43 per cent of the manual labour force and as much as 68 per cent of the technical workforce of the country. *Belarus* and *Rwanda* took the position that policies aimed at creating equal opportunities for women and men had become essential and would therefore favour the adoption of night work regulations applicable to all workers. For its part, the Government of *Greece* recalled that, in the light of the *Stoekel* judgement delivered by the European Court of Justice in 1992, prohibiting the night work of women had been found to be incompatible with the European Council Directive 76/207/EEC. The Government of *Chile* referred to the arguments put forward at the time of the denunciation of Convention No. 4 and reiterated that the instruments prohibiting night work of women in industry are conceptually rigid, discriminatory and unrealistic. It also stressed that legal limitations on women's working hours prevented the total integration of women into the labour market and were unjustifiably restrictive of women's equal rights in matters of employment and occupation. The Government of *Suriname* considered that the prohibition of night work for women can only be perceived as an obstruction to

equal employment opportunities. The Governments of the *Czech Republic*, *Israel*, *Japan* and *Singapore* recalled that recent amendments to past laws prohibiting women's night work were introduced precisely for the purpose of ensuring equal employment opportunities for female workers and further promoting equal treatment of men and women.

160. In their Special Survey on Equality in Employment and Occupation in respect of Convention No. 111, 1996, the Committee referred to the definition of discrimination in Article 1, paragraph 1(a), of Convention No. 111 as "any distinction, exclusion or preference [based on sex] which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation".⁵ They observed that distinctions based on sex, which most commonly disadvantage women, "stem from traditional attitudes that still persist strongly in certain societies".⁶ The Committee noted that "Whilst in the early days of the Organisation emphasis was placed primarily on protecting women from working conditions that were excessively arduous and hazardous to their health, the current trend is to give greater importance to promoting equality between men and women."⁷ In considering special measures of protection or assistance, they observed that "special measures tend to ensure equality of opportunity and treatment in practice, taking into account the diversity of situations of certain persons, so as to halt discriminatory practices against them. These types of preferential treatment are thus designed to restore a balance and are or should be part of a broader effort to eliminate all inequalities"⁸ And, further, that "Because of the aim of protection and assistance which they are to pursue, these special measures must be proportional to the nature and scope of the protection needed or of the existing discrimination."⁹

161. The Committee considers that recognition of the principle of equality between men and women is intended not only to eliminate legal provisions and practices which create advantages and disadvantages on the basis of gender, but also to achieve now and in the future effective equality of rights for both sexes by equalizing their conditions of employment and their roles in society so that women can enjoy the same employment opportunities as men. For this reason, differences in treatment between men and women can only be permitted on an exceptional basis, that is when they promote effective equality in society between the sexes, thereby correcting previous discriminatory practices, or where they are justified by the existence, and therefore the persistence, of overriding biological or physiological reasons, as in the case in particular of pregnancy and maternity. This requires a critical re-examination of provisions

⁵ See ILC, 83rd Session, 1996, Report III (Part 4B), para. 23, p. 12.

⁶ *ibid.*, para. 35, p. 15.

⁷ *ibid.*, para. 11, p. 4.

⁸ *ibid.*, para. 135, p. 43.

⁹ *ibid.*, para. 136, p. 43.

which are assumed to be “protective” towards women, but which in fact have the effect of hindering the achievement of effective equality by perpetuating or consolidating their disadvantaged employment situation.

162. The Committee therefore concludes that a blanket prohibition on women’s night work, such as that reflected in Conventions Nos. 4 and 41, now appears objectionable and that it cannot be defended from the viewpoint of the principle of non-discrimination. Any regulatory framework, which seeks to restore a balance and eliminate inequalities for women, should not obstruct their access to employment or to particular occupations.

163. In the Committee’s view, providing for gender equality and non-discrimination in employment will in some cases involve a gradual approach towards the desired objective. The more this process progresses, the less the need is felt for protection of women workers, as is recognized in Convention No. 111. It would, however, be unwise to believe that eliminating at a stroke all protective measures for women would accelerate the effective attainment of equality of opportunity and treatment in employment and occupation in countries at different stages of development. Before repealing existing protective legislation, therefore, member States should ensure that women workers will not be exposed to additional risks and dangers as a result of such repeal.

164. The Committee therefore considers that the relationship between the prohibition of night work and the universal acceptance of non-discrimination in employment and occupation as a fundamental human right may, in some situations, call for a phased approach. As was pointed out by the Office at the time of the adoption of the UN Convention on the Elimination of All Forms of Discrimination Against Women, States parties to the instruments under review in this survey are under an obligation periodically to review their protective legislation with a view to determining the appropriateness of eventually repealing those laws and regulations in conflict with the principles of the Convention. It is recognized, therefore, that the ban on women’s night working in industry stands in the way of attaining the ultimate objective of the elimination of all forms of discrimination against women and that eventually it has to be dispensed with. It should not be forgotten, nevertheless, that the review process, which is to be guided by the identified needs and priorities of each country, and in which it is hoped that women workers themselves will play a full part, cannot be expected to proceed with uniform criteria or to produce the desired results within a uniform time frame in all of them. The Committee can therefore endorse the view that the gender-specific prohibition against industrial work during the night should progressively become irrelevant; and it is hoped that the prohibition will be overtaken by laws and practices, which offer adequate protection to all workers. This is, though, subject to the understanding that national and, within countries, regional and sectoral conditions and progress in achieving the elimination of discrimination vary considerably; and that some

women workers will still need protection along with the pursuit of genuine conditions of equality and non-discrimination.

165. In examining reports submitted under article 22 of the ILO Constitution on the application of Convention No. 111, the Committee has had on a few occasions the opportunity to comment on protective legislation relating to night work of women (for instance, direct requests addressed to the Governments of *Algeria, Belarus, Jordan* and *Zambia* in 1999, and to *Malawi* in 1998). While being aware that “the specific needs of each country may vary”, the Committee has invariably invited the governments concerned to “consider the possibility of reviewing these provisions – in consultation with the social partners and in particular with women workers – to appreciate whether it is still necessary to prohibit access to women to certain occupations”. The Committee has also consistently drawn attention “to the provisions covering this question in: (a) the Protocol of 1990 to the Night Work (Women) Convention (Revised), 1948 (No. 89); (b) the Night Work Convention, 1990 (No. 171), and the Safety and Health in Mines Convention, 1995 (No. 176), with the corresponding Recommendations; and (c) the ILO resolution on equal opportunities and equal treatment for men and women in employment, 1985”. In another direct request addressed to the Government of *Lebanon* in 1997, the Committee requested the Government “to reconsider the relevant provisions of the Labour Code [...] in light of the modern approach to bans on women’s night work which is based on a balanced approach between protection of the mother and child and opening employment opportunities to women”.

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166. There is no doubt that women are amongst the categories of workers who are the most disadvantaged in the world of work. Women continue to suffer from considerable inequality in the labour market. Unemployment rates for women are higher than for men in two countries out of three. Average hours of unpaid work by women tend to be about twice those of men in the industrialized economies as a whole. Women account for the major share of part-time employment, that is about 70-80 per cent of the total in most of the advanced economies.¹⁰ These figures only serve to demonstrate the imperative need for greater equality and measures to combat persistent phenomena such as occupational segregation and wage discrimination, in particular since women make up nearly 70 per cent of the world’s poorest population and more than 65 per cent of the illiterate.

¹⁰ See *World Labour Report 2000 – Income security and social protection in a changing world*, pp. 43-49. See also: L.L. Lim, *More and better jobs for women – An action guide*, 1996, pp. 9-35.

167. Even though night work is generally acknowledged to be harmful for all workers, it is sometimes regarded as having a stronger impact on some women. This is not because of any lesser biological or psychological aptitude for night work, but is rather due to social traditions, deep-rooted in many countries, which require from women both industrial and household work. Women are also subject to abuses such as physical assault and, when working at night, may be particularly vulnerable if transport and related systems are inadequate.

168. The Committee recognizes that the full realization of the principle of non-discrimination requires the repealing of all laws and regulations which apply different legal prescriptions to men and women, except for those related to pregnancy and maternity. At the same time, the Committee is aware that, as a long-term goal, the full application of this principle will only be attained progressively through appropriate legal reforms and varying periods of adaptation, depending on the stage of economic and social development or the influence of cultural traditions in a given society.

169. It is true that in those countries where technological progress has removed or reduced the hazards involved in industrial occupations and where the evolution of ideas about women's role in society has led to effective measures being put in place to eradicate discrimination and removed the need for special protective measures, Convention No. 89 may appear to be an anachronism. The struggle for the protection of women, which was a high point of the trade union movement, was inspired by social conditions and a view of women which have nowadays largely disappeared in many countries. The Committee believes, however, that, for some parts of the world, progress towards full implementation of the principle of non-discrimination will proceed at a more gradual pace. The Committee cannot be expected to identify at which stage a country or a particular part of a country will be able to determine the actual impact of any existing special protective measures prohibiting or restricting night work for women and to take appropriate action. Nor should it substitute its own view for the view of those best placed to decide this issue, not least the women themselves. The protections afforded by Convention No. 89 and its Protocol should therefore be available to those women who need them, but they should not be used as a basis for denying all women equal opportunity in the labour market.

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