

FINAL REMARKS

The prohibition of women's night work in industry: Current thinking and practice

185. The Committee welcomes the selection by the Governing Body of the night work Conventions Nos. 4, 41, 89 and of the Protocol of 1990 to Convention No. 89 as the subject of a General Survey. Some 94 years after the adoption of the first international agreement on the subject and only five years after the entry into force of Convention No. 171, the latest ILO instrument dealing with the issue of night work, the Committee feels that a stocktaking exercise on the application of ILO standards concerning the employment of women during the night in industry is long overdue. The four instruments which form the subject of the present survey have received since their adoption a total of 165 ratifications. There have, however, been 66 denunciations and more States have announced their intention to denounce these Conventions. This shows, on the one hand, that the instruments examined here have been adequately ratified but, on the other, that some of those instruments have most likely lost their universal relevance over the years.

186. The present survey traces the evolution of ILO standards on night work by women in industry in the last 80 years. From the quasi-absolute prohibition on women's night work laid down in the Night Work (Women) Convention, 1919 (No. 4), to the provisions of the 1990 Protocol allowing for exemptions to the prohibition contained in Convention No. 89, the Committee has examined the ILO's efforts to design international labour instruments on night work by women in industry capable of offering the best guarantees of protection while keeping up with social progress and contemporary thinking on the situation of women in the working world. The Committee observes, in this regard, that the historical development of women's night work as traced in this survey demonstrates that the question of devising measures that aim at protecting women generally because of their gender (as distinct from those aimed at protecting women's reproductive and infant nursing roles) has always been and continues to be controversial. The survey of national practice also reveals that the general trend worldwide is to provide protection for women in night work in a fashion that does not infringe their rights to equality of opportunity and treatment.

187. The Committee notes that, while the question of establishing gender-specific restrictions on night work is without any doubt intrinsically linked – as analysed in greater detail in Chapter 4 above – to the principles of non-discrimination and equality of treatment between men and women, the present survey is principally focused on the application of protective measures concerning night work by women in industry. The broader issues of gender equality, non-discrimination and equal treatment have therefore been dealt with only where they are relevant to that issue, in the light of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111). Further, while the Committee has also made reference throughout the survey to the Night Work Convention, 1990 (No. 171), this instrument was not included in the list of instruments the Committee was asked to examine in the present survey.

188. The Committee recalls that, at the time of the first discussions aiming at the adoption of international protective legislation for women in the final days of the nineteenth century and the early years of the twentieth century, a passionate debate divided those who believed that protecting women would halt a development that threatened the sanctity of the family from those who warned that a considerable number of unmarried women workers would have to choose between death by starvation or prostitution if protective laws were introduced.¹ Fortunately, social progress together with economic development and technological advancement in the ensuing 90 years have proved both those views to be overly exaggerated, even though the debate about benefits or negative effects of special protective labour legislation prohibiting women's night work in industry continues in many countries.

The effects of night work: New solutions to old problems

189. Industrial societies rely more and more on automation of production and continuous shift work. Modern conditions also lead to fundamental changes in the concept of night work. A multitude of new working-time patterns has emerged showing a spread of irregular hours of work to different sectors, a search for greater flexibility in accommodating individual choices regarding working hours, weekend or night shift arrangements and rest days, and the appearance of complex combinations of work schedules. In recent years a considerable amount of scientific research has been conducted into all aspects of night work, providing valuable information on the human cost of working at night. As analysed in Chapter 1, it is generally agreed that night work is

¹ See Ulla Wikander, "Some kept the flag of feminist demands waving" in Wikander et al. (eds.): *Protecting women – Labor legislation in Europe, the United States, and Australia, 1880-1920*, 1995, pp. 35, 37.

particularly fatiguing and has adverse effects on the health of both male and female workers. There is also a broad consensus about the detrimental effects of night work on the workers' social and family life. The problems of rotating shifts stem mainly from working in opposition to the body clock and disrupting the sleep/wake cycle, which accounts in many cases not only for diminished alertness, chronic fatigue and excessive sleepiness but also for gastric and cardiovascular diseases. 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.

190. The improved understanding of the health complaints related to sleep deprivation and abnormal work-hours, has facilitated the design of new shift systems integrating occupational health measures, prevention of fatigue strategies, and anti-stress behavioural techniques. Recent international regulations such as those provided for in Convention No. 171, or the European Directive 93/104/EC, reflect the need for multifaceted protection of all night workers, but especially in respect to safety and health, social support and maternity protection. They also emphasize the need for participatory processes and enterprise-level consultations in introducing shift systems.

The continued relevance of the instruments on women's night work

191. As summarized in Chapter 3 above, the record shows a clear trend to move away from the approach taken in Conventions Nos. 4, 41 and 89. The Committee has noted in its conclusions in paragraphs 153-155 that, in many countries, effect is no longer given to those instruments, while in others consideration is being given to denouncing them. Moreover, based on the indications contained in Chapter 5, the likelihood of Convention No. 89 and its Protocol receiving further ratifications would appear rather remote.

192. On the other hand, the Committee cannot overlook the fact that, at present, 66 States are formally bound by the provisions of Convention No. 89 (three of which are also parties to the Protocol) or Convention No. 41. To those, one should add 12 more States which prohibit or restrict women's night work in varying degrees without, however, being parties to any of the instruments under review. The number of member States whose national legislation continues to conform to the provisions of Conventions Nos. 4, 41 or 89 is still significant.

193. In the light of the preceding analysis, the Committee considers that Convention No. 4 is manifestly of historical importance only. It is a rigid instrument, ill-suited to present-day realities concerning working schedules, industrial production and composition of the labour force. Among the 30

countries which are still bound by Convention No. 4, it appears that three (*Cuba, Italy, Spain*) have simply omitted to denounce it since they have already denounced Convention No. 89. One country (*Lithuania*) has enacted internal legislation to denounce the Convention but has not as yet formally registered its denunciation with the International Labour Office, while another country (*Austria*) will in all probability denounce it soon as a result of its obligations arising from its EU membership. As for the remaining 25 ratifications, 21 are from countries which are already parties to one of the revising instruments – either Convention No. 41 (12 ratifications) or Convention No. 89 (nine ratifications) – and as such may not be deemed to have an interest in remaining bound by Convention No. 4.² The Committee is, therefore, of the opinion that for all practical purposes Convention No. 4 no longer makes a useful current contribution to attaining the objectives of the Organization, and that ILO member States should be prepared eventually to take appropriate action. This should be “shelved” and, when the time comes, should be included among the Conventions which will be considered for abrogation.

194. With regard to Convention No. 41, the Committee notes that it is currently in force for only 16 countries and that it remains closed to further ratifications following the adoption of the revising Convention No. 89. It should be noted that at the time Convention No. 41 was closed to ratification, only four member States were still bound by its provisions and that the current number of ratifications is only due to the fact that some African countries, upon acceding to independence and becoming Members of the ILO in the late 1950s and early 1960s, committed themselves to continue to apply the Conventions previously ratified by the colonial powers. The Committee further notes that one country (*Estonia*) has announced its intention to denounce this instrument on the first occasion, and that in three other countries (*Argentina, Benin, Suriname*) the Convention has ceased to apply in practice following the adoption of new labour legislation lifting the prohibition of night work for women. The Committee is, therefore, led to the conclusion that, not only is Convention No. 41 poorly ratified and its relevance is diminishing, but also that it would be in the interest of those member States which are still parties to this Convention to ratify instead

²In this connection, the Committee wishes to recall its earlier observation on Convention No. 4 concerning the problem of the simultaneous application of two Conventions on the same subject. Noting that the legislation of some Members simultaneously bound by two Conventions concerning night work of women, while in harmony with the more flexible provisions of a revising Convention, did not fully conform with certain clauses contained in Convention No. 4, the Committee commented that “a State Member which is bound simultaneously by two Conventions concerning night work of women is confronted with the following alternatives: (a) to ensure the observance of the obligations arising cumulatively from the two Conventions so that it can avail itself only of those permissive clauses (exceptions) which are authorized both under Convention No. 4 and the revising Convention; or (b) if the Member concerned wishes to avail itself of exceptions authorized under the revising Convention but which go beyond those permitted under Convention No. 4, to denounce the latter”; see ILC, 48th Session, 1964, Report III (Part IV), p. 39.

the revising Convention No. 89 and its Protocol which allow for greater flexibility and are more easily adaptable to changing circumstances and needs.

Protection and equality: The obligation for periodic review

195. There is no doubt that the present trend is to move away from a blanket ban on night work for women in industry and to give the social partners at the national level the responsibility for determining the extent of the permitted exemptions. It is also evident that more attention is now being paid to regulating night work for both men and women. On the basis of the reports reviewed, it is clear that many countries – some of which draw upon the technical assistance of the ILO – are in the process of easing or eliminating legal restrictions on women’s employment during the night with the aim of improving women’s opportunities in employment and strengthening non-discrimination. The Committee has been pleased to note that this trend is not limited to regions or countries which have already reached a certain stage of social or economic development, but often extends to countries where social attitudes and stereotypical views about the position of women in the labour market persist. While expressing its firm hope that such a trend will continue, the Committee considers it necessary to emphasize that a process of revision should not result in a legal vacuum with night workers being deprived of any regulatory safeguards. Night work is generally considered to have harmful effects for all workers and calls for a regulatory legal framework.

196. As the Committee has been consistently pointing out in individual observations concerning the question of revision of gender-specific legislation, member States are under an obligation to review periodically their protective legislation in light of scientific and technological knowledge. This obligation stems from Article 11(3) of the 1979 UN Convention on the Elimination of All Forms of Discrimination against Women, as later reaffirmed in point 5(b) of the 1985 ILO resolution on equal opportunities and equal treatment for men and women in employment, and similarly endorsed in the legal opinion of the Office regarding the compatibility between the UN Convention on the Elimination of All Forms of Discrimination against Women and certain ILO Conventions on the protection of women.

197. Besides, the obligation for periodic review simply gives expression to an overriding principle, according to which the pursuance of a policy of equality of opportunity and treatment in employment or occupation needs continuous action. As the Committee has underlined in a previous study, “the promotion of equality of opportunity and treatment does not aim at a stable situation that may be attained once and for all, but rather requires a permanent process so that policy may be adjusted to changes in society in order to eliminate

the various forms of distinctions, exclusions and preferences based on grounds laid down in the 1958 instruments”.³

198. In the process of reviewing special protective legislation with a view to excising all discriminatory constraints, special consideration should be given to the principles contained in the Workers with Family Responsibilities Convention, 1981 (No. 156). As the Committee observed in the 1993 General Survey on this Convention, “because measures to allow men and women to harmonize their work and family commitments are a natural extension of the well-accepted principles on equality, Convention No. 156 and Recommendation No. 165 must be viewed as a necessary part of the overall goal of ensuring that every man and woman should have the opportunity to play a full role in social, economic and public life and also in the family”.⁴

The quest for a new balance: The ILO tools

199. The Protocol to Convention No. 89 represents a further step in the process designed for those States that wish to offer the possibility of night employment to women workers and feel that some institutional protection should remain in place to avoid exploitative practices and a sudden worsening of the social conditions of women workers. The Protocol is proposed as a tool for a smooth transition from outright prohibition to free access to night employment. The Night Work Convention, 1990 (No. 171), is part of the same process since it was drafted for the needs of those countries which would be prepared to eliminate all restrictions on night work for women and to conclude that the harmful effects of night work should be regulated, if at all, for men and women alike.

200. It should thus be clear that, in guiding its standard-setting action in matters of women’s employment – often depicted as a dilemma of protection *or* equality – the ILO has always opted for protection *and* equality. In adopting the Protocol to Convention No. 89 and Convention No. 171, the ILO has sought to satisfy the differently prioritized needs of its constituents without losing sight of its primary objective, that is fixing socially acceptable conditions for night workers. The two instruments may have much more in common than appears at first glance. Indeed, Convention No. 89, as revised by the 1990 Protocol, remains focused on protection even though in substance it expands considerably the exemption possibilities with regard to the prohibition of night work for women, while Convention No. 171, even though it was devised as a gender-neutral instrument, does provide special protection to women under certain circumstances.

³ See ILC, 75th Session, 1988, Report III (Part 4B), para. 240, p. 244.

⁴ See ILC, 80th Session, 1993, Report III (Part 4B), para. 266, p. 98.

201. The Committee hopes that the present survey will help to clarify both the advisability of regulating night work in general and the acceptability of special protective measures for women having regard to the principles of non-discrimination and equality of treatment between men and women. The Committee concludes that Convention No. 89, as revised by the 1990 Protocol, retains its relevance for some countries as a means of protecting those women who need protection from the harmful effects and risks of night work in certain industries, while acknowledging the need for flexible and consensual solutions to specific problems and for consistency with modern thinking and principles on maternity protection. The Committee believes that a considerable number of governments and employers' and workers' organizations may not clearly understand the full range of possibilities offered by the Protocol with a view to permitting women's night work in certain cases and under specific conditions.

202. In light of the preceding analysis, the Committee considers it necessary that, in addition to encouraging the ratification of Convention No. 171, greater efforts should be made by the Office to help those constituents who are still bound by the provisions of Convention No. 89, and who are not yet ready to ratify Convention No. 171, to realize the advantages of modernizing their legislation in line with the provisions of the Protocol. Bearing in mind that an increasing number of States decide to no longer give effect to, or to denounce, Conventions Nos. 4, 41 or 89, while at the same time Convention No. 171 has not yet attracted many ratifications, the Committee stresses that there is a risk of a complete deregulation of night work through the removal of all protective measures for women and the failure to replace them with a legislation offering appropriate protection to all night workers.