



Night Shifts and Gender Equality: Reassessing Protective Legislation for Women Workers in India

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ABSTRACT

Indian labour law has long restricted women's employment at night under the logic of protection, most notably in the Factories Act, 1948 and the state Shops and Establishments Acts. Courts and legislatures have increasingly questioned whether such restrictions protect women or limit their access to work. The Occupational Safety, Health and Working Conditions Code, 2020, in force since 21 November 2025, moves from prohibition to conditional permission, allowing night work with the woman's consent and subject to safeguards prescribed by the appropriate government. This paper examines that shift through the lens of Articles 14, 15, 16 and 19(1)(g) of the Constitution, judicial reasoning on protective discrimination, and India's international commitments under CEDAW and ILO standards. It argues that safety conditions must operate as enforceable duties of employers rather than as burdens carried by women, and it assesses whether the new framework achieves substantive equality or only formal equality.

Keywords: night work; women workers; protective discrimination; Article 15(3); OSH Code 2020; substantive equality; employer duty

1. Introduction

The question of when a woman may lawfully work is older than the Constitution, yet it has acquired fresh urgency. Women's labour force participation in India remains low by comparison with men and with many peer economies, and sectors that run in shifts, such as manufacturing, logistics, health care, hospitality, and business process services, are precisely the sectors in which night work is routine. A rule that closes the night shift to women therefore closes a large part of the labour market to them.

For most of the twentieth century the law answered this question with prohibition. The justification was protection: women were assumed to be physically weaker, more exposed to danger after dark, and responsible for the household in a way that made night work incompatible with family life. The Constitution complicates that justification. Article 15(1) forbids discrimination on grounds only of sex, yet Article 15(3) allows the State to make special provision for women. The central interpretive problem is where a protective provision ends and a discriminatory one begins.

The Occupational Safety, Health and Working Conditions Code, 2020 (the OSH Code) is the most significant legislative response to that problem. Section 43 entitles women to be employed in all establishments and for all types of work, and permits their employment before 6 a.m. and beyond 7 p.m. with their consent, subject to conditions on safety, holidays and working hours prescribed by the appropriate government. With the Code's commencement on 21 November 2025 and the notification of the Occupational Safety, Health and Working Conditions (Central) Rules, 2026 in May 2026, the framework is no longer prospective. It is operative law, and its first years of enforcement are the proper moment for assessment.

This paper pursues five questions. How has the law on women's night work evolved from the Factories Act, 1948 to the OSH Code? Do blanket restrictions pass the test of Articles 14, 15(1) and 15(3)? How have courts treated protective discrimination in employment? Does the consent-and-safeguards model in practice shift responsibility to employers? And what do ILO standards and comparative approaches contribute to reform? The paper's hypothesis is that moving from prohibition to conditional permission advances women's economic participation, but that unless safeguards are framed as enforceable employer duties, the change risks remaining formal rather than substantive.

The method is doctrinal, analytical and comparative. The primary sources are the Constitution, the Factories Act, the OSH Code and rules made under it, state Shops and Establishments legislation, and case law. The secondary sources are ILO instruments, CEDAW, scholarly commentary and government reports.

2. Historical and legislative background

2.1 The protective model

Restrictions on women's night work entered Indian law through colonial factory legislation, which regulated women's hours from the late nineteenth century and was shaped by the international labour standards then emerging. The Night Work (Women) Convention, 1919 (No. 4) was among the earliest ILO instruments, and it was followed by revised conventions in 1934 and 1948. India ratified the 1948 Convention (No. 89) in 1950, and that instrument was framed on the premise that women in industry should generally not be employed at night.

The Factories Act, 1948 carried this premise into the independent legal order. Section 66(1)(b) provided that no woman should be required or allowed to work in a factory except between 6 a.m. and 7 p.m. The proviso empowered state governments to vary these limits for women in a factory or class of factories, but not so as to permit work between 10 p.m. and 5 a.m. Parallel prohibitions appeared in sector-specific statutes, such as the Plantations Labour Act, 1951 and the Beedi and Cigar Workers (Conditions of Employment) Act, 1966, and in the Shops and Establishments Acts of many states, which at various times barred women from working after fixed evening hours.

2.2 Erosion of the prohibition

The prohibition began to weaken from the 1990s. The ILO itself adopted a Protocol in 1990 to Convention No. 89 allowing flexibility where the social partners agreed, and India ratified that Protocol in 2003. At the national level, a Factories (Amendment) Bill proposed in 2005 to allow night work for women with safeguards did not become law. The decisive pressure came from the courts. The Madras High Court, in *Vasantha R. v. Union of India*, held section 66(1)(b) of the Factories Act unconstitutional as an unreasonable restriction on women's equality and right to work, and later decisions reinforced the point. Several states then amended their legislation or issued notifications under the Factories Act and the Shops and Establishments Acts, permitting night work for women in specified sectors on conditions such as consent, transport and adequate security.

The result was a patchwork. Whether a woman could lawfully work at night depended on the state, the sector, and the particular statute, and employers faced inconsistent compliance obligations. A national model was proposed in 2016 in the Model Shops and Establishments (Regulation of Employment and Conditions of Service) Bill, which would have permitted night work with consent and safety arrangements, and states such as Maharashtra enacted legislation along those lines.

2.3 The OSH Code

The OSH Code subsumed thirteen earlier statutes, including the Factories Act, 1948. Section 43 replaces the numerical hour-limit with a consent-based permission. Section 44 separately deals with women's employment in dangerous operations, authorising the appropriate government to prescribe restrictions, and this distinction matters: night work is no longer treated as dangerous in itself, whereas particular hazardous processes may still attract regulation. The detailed night-work conditions are left to rules. Rule 83 of the Central Rules, 2026 prescribes safeguards at the central level, and state governments are framing their own rules, so the content of the conditions will vary across jurisdictions. A full assessment of the Code in operation therefore requires a state-by-state comparison of notified rules.

3. Constitutional framework: Equality and protective discrimination

3.1 Articles 14, 15 and 16

Article 14 guarantees equality before the law and equal protection of the laws, and permits reasonable classification based on an intelligible differentia having a rational nexus with the object sought. Article 15(1) prohibits the State from discriminating against any citizen on grounds only of religion, race, caste, sex or place of birth. Article 16(2) extends the same prohibition to public employment. Article 15(3) then provides that nothing in Article 15 prevents the State from making any special provision for women and children.

Taken together, these provisions create a tension that is the core of this subject. A night-work prohibition is a classification by sex. It can be defended only if it is a "special provision" within Article 15(3). The question is whether Article 15(3) is an exception that swallows the rule, or a provision that must itself be read consistently with the anti-stereotyping purpose of Article 15(1).

3.2 Article 15(3) as enabling, not licensing

The better reading, supported by modern case law, is that Article 15(3) authorises measures that advance women's position, such as reservation, maternity protection and positive measures against disadvantage. It does not license restrictions rooted in assumptions about women's incapacity or proper role. *Government of A.P. v. P.B. Vijayakumar* (1995) 4 SCC 520 upheld reservation for women in state services as a legitimate special provision, illustrating the affirmative function of the clause. *C.B. Muthamma v. Union of India* (1979) 4 SCC 260, which struck down discriminatory rules governing women in the Foreign Service, illustrates the opposite point: sex-based disadvantages in employment are suspect even when they are dressed in administrative language.

A night-work ban sits uneasily with this reading. It does not elevate women; it removes opportunity from them, and it does so by generalising about a class instead of assessing individual capacity or addressing the actual source of risk.

3.3 Article 19(1)(g) and Article 21

The right to practise any profession or carry on any occupation under Article 19(1)(g) is available to women as it is to men, and restrictions must satisfy the reasonableness test of Article 19(6). In *Charu Khurana v. Union of India* (2015) 1 SCC 192, the Supreme Court struck down a union rule excluding women from registration as make-up artists and described it as a gender-based restriction offending Articles 14, 19(1)(g) and 21. The dignity strand of Article 21 reinforces this approach: a woman's autonomy over whether and when to work forms part of her dignity. The Directive Principles, particularly Articles 39(a) and (d) and 42, support the same direction by calling for adequate livelihood, equal pay for equal work, and humane conditions of work.

The constitutional framework thus points toward a specific distinction. Measures that address a genuine, evidence-based risk and target its source are defensible. Measures that assume women's vulnerability and respond by excluding them are not.

4. Judicial approach

4.1 The older line: Classification and deference

The Supreme Court's early treatment of women's employment rules was marked by deference. In *Air India v. Nergesh Meerza* (1981) 4 SCC 335, the Court examined service regulations that affected air hostesses with respect to retirement age, marriage, and pregnancy. It accepted that air hostesses and male cabin crew formed distinct classes and upheld several conditions, but it struck down the provision requiring termination upon a first pregnancy as unreasonable and arbitrary, observing that it violated women's dignity and the maternity function. The decision is therefore double-edged. It validated classification by sex in some respects while recognising that rules built on women's reproductive role can be unconstitutional.

4.2 Vishaka and the use of international norms

Vishaka v. State of Rajasthan (1997) 6 SCC 241 marked a shift in method. In the absence of domestic legislation on sexual harassment, the Court read Articles 14, 15, 19(1)(g) and 21 together with CEDAW and issued binding guidelines. Two consequences matter here. First, the decision located safety at work within the equality and livelihood guarantees, so that a hazardous workplace becomes an obstacle to the right to work and not merely a regulatory matter. Second, it fixed the duty to provide a safe environment on the employer. The guidelines later became the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, section 19 of which obliges employers to provide a safe working environment.

4.3 Anuj Garg and the rejection of paternalism

The most directly relevant decision is *Anuj Garg v. Hotel Association of India* (2008) 3 SCC 1, decided in December 2007. The Court struck down a provision of the Punjab Excise Act that prohibited the employment of women in premises where liquor was consumed. It held that protective discrimination of this kind rests on stereotypes and operates as paternalism, and that the State's duty is to make the environment safe, not to exclude women from it. The Court accepted that a legislative objective of protection could be legitimate but insisted that the means must be proportionate, observing in substance that a law which denies women opportunity in the name of safety fails the test of equality. The reasoning is the doctrinal foundation for contesting blanket night-work bans.

4.4 Later developments

Subsequent cases have strengthened the anti-stereotyping approach. In *Joseph Shine v. Union of India* (2018) 2 SCC 189, the Court struck down the offence of adultery on the ground, among others, that its premises treated women as property and as lacking autonomy. In *Secretary, Ministry of Defence v. Babita Puniya* (2020) 7 SCC 469, the Court held that denying permanent commission to women officers on assumptions about domestic obligations and physical capacity could not be sustained, and it spoke of substantive equality. Both decisions demonstrate that formal justifications couched as protection will be examined for the stereotypes underneath them.

The doctrine therefore stands as follows. Protective discrimination survives only where it is tied to a real, specific need (pregnancy and maternity being the clearest case), is proportionate, and does not shift the cost of the State's or the employer's failure onto women.

5. The OSH Code, 2020 and employer safeguards

5.1 What the Code does

The Code makes three important moves. It declares women entitled to be employed in all establishments and for all types of work. It permits night employment with the woman's consent. And it delegates the conditions to rules framed by the appropriate government. This structure removes the

categorical ban while preserving a framework within which safety obligations can be imposed. As a matter of constitutional design it is a clear improvement over blanket prohibition, and it aligns with the proportionality reasoning of *Anuj Garg*.

5.2 Consent: Protection or burden?

Consent is the Code's central device, and it has two faces. On the one hand, it respects autonomy: a woman who does not wish to work nights is not compelled to, and she retains the choice to do so. On the other hand, consent in employment is not given between equals. In sectors with high unemployment and weak unionisation, a worker may find it difficult to refuse a night shift, or to withdraw consent once given, without risking her livelihood or progression. A consent requirement can then operate as a formality that records acquiescence while transferring the risk of night work to the woman.

For consent to carry real weight, the framework should specify that it is informed, in writing, revocable without penalty, and not a condition of hiring or promotion. It should also be clear that consent does not waive any safeguard. The employer's duty to provide transport, security and a safe workplace must exist independently of whether a woman has agreed to the shift.

5.3 Safeguards: Who bears the duty?

The conditions commonly prescribed for night work include safe transport between workplace and home, adequate lighting and security, supervision, toilets and rest facilities, and measures against sexual harassment, together with the presence of other women workers in the shift. These measures are significant, and if enforced they address the real sources of risk that justified the old bans. Their effect, however, depends on how they are drafted and enforced.

Three weaknesses deserve attention. First, because the conditions are left to rules, the protection a woman receives depends on the state in which she works, and the rules vary in precision. A condition framed as a general obligation to provide "adequate" safety is harder to enforce than one specifying transport arrangements, response protocols and accountability. Second, the Code's enforcement design emphasises facilitation, web-based inspection and graded penalties. If breach of a night-work condition carries a modest penalty and is detected only on complaint, the incentive to comply is weak, and the practical burden of reporting falls on the worker. Third, some measures create tensions of their own. Surveillance through cameras or tracking of transport, while helpful for safety, raises privacy concerns of the kind recognised in *K.S. Puttaswamy v. Union of India* (2017) 10 SCC 1, and it may become a means of monitoring women workers rather than protecting them. The rules should therefore regulate how such data are collected, stored and used.

There is also a risk of indirect exclusion. Where safeguards are costly and the legal duty is unclear, employers may respond not by complying but by avoiding the employment of women in night shifts altogether. The Code would then be formally open but practically closed. Policy design should therefore pair clear duties with proportionate support for compliance, such as shared transport arrangements for smaller establishments, so that the cost of safety does not become an economic argument against hiring women.

5.4 Formal and substantive equality

Formal equality asks whether the law treats women and men alike on its face. By removing the ban, the Code advances formal equality. Substantive equality asks whether women can in fact use the opportunity, taking account of their different circumstances and the structural obstacles they face, including unsafe commutes, unequal domestic responsibilities and workplace harassment. Judged by that test, the Code's success depends on whether safeguards are binding and enforced. Without that, the Code offers women a choice they cannot safely exercise.

6. International standards and comparative perspective

6.1 CEDAW

India ratified CEDAW in 1993. Article 11 requires States Parties to eliminate discrimination in employment and to ensure equal opportunities, including the right to work, and Article 11(3) provides that protective legislation shall be reviewed periodically in the light of scientific and technological knowledge and revised, repealed or extended as necessary. Article 4(2) protects special measures for maternity, which are not regarded as discriminatory. The CEDAW approach thus supports a distinction between maternity-related protection, which is legitimate, and general restrictions on women's work, which must be justified on current evidence and reviewed. The Supreme Court's use of CEDAW in *Vishaka* and in later cases shows that the Convention can inform the interpretation of fundamental rights.

6.2 ILO standards

ILO standards on women's night work have moved from restriction to regulated flexibility. The 1919, 1934 and 1948 Conventions embodied the protective model, and many member states denounced them as inconsistent with equality. The 1990 Protocol to Convention No. 89, which India has ratified, allows exceptions after consultation with employers' and workers' organisations. The Night Work Convention, 1990 (No. 171) and Recommendation No. 178 adopt a different approach: they apply to all night workers regardless of sex, and require health assessments, alternatives for workers who cannot work nights, special measures for pregnancy and maternity, and compensation and social services appropriate to night work. To the

authors' knowledge, India has not ratified Convention No. 171. India has, however, ratified the Equal Remuneration Convention, 1951 (No. 100) and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), which supply further grounds for assessing sex-based restrictions.

The lesson from Convention No. 171 is that night work is a health and safety issue for all workers, and that gender-neutral protections for night work can coexist with gender-specific safeguards where the risk is particular to women, such as commuting risk and harassment.

6.3 The United Kingdom and the European Union

The United Kingdom removed statutory restrictions on women's night work in the 1980s, and the Sex Discrimination Act, 1986 and the Employment Act, 1989 dismantled the remaining restrictions on women's hours of work. Night work is now regulated through the Working Time Regulations, 1998, which limit night workers' average hours, require free health assessments, and apply to workers irrespective of sex. At the European level, the Court of Justice held in *Stoeckel* (Case C-345/89, 1991) that a national prohibition on night work for women was contrary to the Equal Treatment Directive. The comparative lesson is that regulation shifted from the person (women) to the activity (night work), and that the duty fell on the employer to make the work safe and healthy for any worker who performs it.

The comparison has limits. Public transport, policing and urban safety differ across jurisdictions, so a transposition of European norms is not appropriate without adaptation. Even so, the principle is transferable: a workplace regime should be designed around the hazards of the work, and the duty to control those hazards should lie with the person who profits from the work.

7. Findings and recommendations

7.1 Findings

First, the law on women's night work has moved from categorical prohibition, rooted in assumptions about women's vulnerability, to conditional permission, a movement driven by judicial reasoning, state-level reform and changing international standards. Second, blanket prohibitions are difficult to reconcile with Articles 14, 15(1) and 19(1)(g), and the reasoning in *Anuj Garg* and the later anti-stereotyping decisions places a heavy burden on any sex-based restriction that is not grounded in maternity or a specific, evidenced risk. Third, the OSH Code is constitutionally sound in design, but its effect depends on the content of the rules and the strength of enforcement. Fourth, the consent requirement, though valuable, can become a means of transferring risk to women unless it is made meaningful and supplemented by non-waivable employer duties. Fifth, international and comparative experience supports moving toward gender-neutral night-work protections combined with targeted safeguards.

7.2 Recommendations

The following reforms are proposed:

Make safeguards non-waivable employer duties. The rules should state expressly that conditions on transport, security, lighting, facilities and harassment prevention bind the employer regardless of the woman's consent, and that breach attracts penalties sufficient to deter non-compliance.

Give consent substance. Consent should be informed, written and revocable without penalty, and should not be a condition of recruitment, promotion or retention.

Specify the conditions. State rules should replace general standards such as adequate safety with measurable requirements, including transport arrangements, minimum staffing, response protocols and designated responsible officers, and should be harmonised so that protection does not turn on the state of employment.

Regulate surveillance. Rules on cameras, tracking and data should limit collection and use to safety purposes, consistent with the right to privacy.

Adopt gender-neutral night-work protections. Health assessments, rest, and alternatives for those unable to work nights should apply to all night workers, in line with ILO Convention No. 171, with gender-specific safeguards limited to maternity and demonstrable risk.

Link with the POSH framework. Internal Committees should be functional in establishments with night shifts, and compliance with section 19 of the 2013 Act should form part of night-work inspection.

Monitor outcomes. Governments should collect and publish data on women's night-shift employment, complaints and enforcement, so that the claim that the Code advances substantive equality can be tested empirically.

8. Conclusion

The shift from prohibition to conditional permission corrects an old constitutional wrong. The Constitution does not ask whether women should be protected; it asks who should bear the cost of making the workplace safe. The answer given by *Vishaka* and *Anuj Garg* is that the State and the employer bear it. The OSH Code will advance substantive equality only if its safeguards are drafted and enforced in that spirit. Where they are not, women will have gained a right to work at night that they cannot safely exercise.

9. References

Constitution of India, arts. 14, 15, 16, 19(1)(g), 21, 39, 42.

Factories Act, 1948, s. 66.

Plantations Labour Act, 1951; Beedi and Cigar Workers (Conditions of Employment) Act, 1966.

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

Occupational Safety, Health and Working Conditions Code, 2020, ss. 43, 44.

Occupational Safety, Health and Working Conditions (Central) Rules, 2026, r. 83.

Model Shops and Establishments (Regulation of Employment and Conditions of Service) Bill, 2016; state Shops and Establishments Acts and notifications.

Convention on the Elimination of All Forms of Discrimination against Women, 1979, arts. 4, 11.

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