

THE MASCULINITY OF LABOUR LAWS AND THE PARADOXES OF PROTECTIVE LEGISLATION FOR WOMEN

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Women have always participated in different kinds of economic activities in Bangladesh. This is true of women all over the world. From agricultural work in home-based production to highly skilled jobs in the formal sector, women everywhere contribute greatly to their national economies. Modernisation, globalisation and other related factors brought about substantial changes in the nature of women's work. However, their work and contributions remain largely ignored and unrecognised by society in general and policy makers in particular. Until recently, as commented by Debapriya Bhattacharya, a leading economist of Bangladesh, 'similar to many other developing countries, because of their traditional roles within and outside households and homestead, the contributions of Bangladesh's women to the economy remained invisible, unrecognised and unaccounted'¹. Within this scenario the last two decades has seen wide ranging changes in women's employment opportunities. Today more women are employed in the formal sector industrial employment in Bangladesh than ever before. Research shows that despite this huge change in the nature of women's employment, issues such as working conditions, wages, benefits, within both formal and informal sectors receive scant attention within policy circles. Therefore women workers are compelled to work under less than fair conditions and face wide scale discrimination.

Sociologists, feminists and development scientists have researched and explained the centrality of acknowledging the contribution of

1. Bhattacharya, Debapriya: *Women and Industrial Employment in Bangladesh: Challenges and Opportunities in the Era of New Technologies*, a paper prepared for the United Nations University, Bangladesh Institute of Development Studies, Dhaka, 1994, p. 12.

women to society and the economy². Moreover they stress the significance of identifying the problems faced by today's women who must work outside their homes due to changing economic conditions. Not only is it important to identify the problems that working women face today but it is also imperative to find the necessary solutions to these obstacles. In this respect the issue of the legal status of women workers in industrial employment is of foremost relevance. Although limited in its application only to those working in formal sector employment in Bangladesh, legislative guarantees under the labour laws are an important benchmark towards achieving the human rights of all women workers in Bangladesh.

The labour laws in Bangladesh are quite extensive and includes amongst others – health and safety provisions, measures enumerating the conditions of work, job security, employment benefits, allowances and wages, rules on the formation and protection of trade unions, and provisions of compensation for injuries during work. Despite the extent of issues covered by the law there is ample evidence that a lot of these measures are easily flouted and workers irrespective of their gender, often end up being deprived of even their basic rights. Moreover, within the existing patriarchal social system in Bangladesh, women workers as a social group are doubly deprived. Women workers are likely to suffer greater injustices at work. It is therefore necessary to research and analyze the content and nature of the law that regulates them, in order to make law more effective in dealing with the problems of working women and to help establish their rights at work. Primarily, investigating the *nature* of existing legislation can help determine the flaws that hinder women's access to the law or are obstacles to women in achieving their rights. This in turn helps to formulate appropriate legal reforms so that women may not face discrimination at work, receive fair treatment from their employers and work on equal terms as their

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2. Ester Boserup's ground breaking research made way for a change in this perception. See Boserup, Ester: '*Women's Role in Economic Development*', Earthscan Publications, London.

male counterparts. The questions that need to be explored for this purpose are whether specific characteristics of the legislative framework contribute to its non-enforcement, or are their more crucial social or economic parameters that may be limiting their observance?

This article is aimed at discussing some of the social factors that have influenced the nature and formation of the labour laws. Essentially the article explores the nature of labour legislation itself, as it emerges from the views of feminists and legal scholars alike. This is attempted by first looking into some of the historical facts that has helped shape this legislation. Within the labour laws '*protective legislation*' for women is a strongly debated issue and represents to a certain degree the paradoxical relationship that women workers have with the existing framework of the labour laws that regulate their employment. It is also interesting to note the ongoing debate between feminists and scholars of different backgrounds both for and against retention of *protective* legislation for women.

IS LABOUR LAW GENDERED?

Generally a government chooses how it wishes to use the law on the basis of government policy. Various forces, social, political, economic and moral can influence the content of legal rules³. Labour legislation in Bangladesh as it stands today, is the product of British colonial rule which replaced customary or other informal rules that regulated the relationship between the employer and the employee with formal legislative measures. It is not unusual for laws formulated by the colonial rulers to have addressed the male workers alone, for this was a time when 'women's place' as perceived by society was within their homes and only in home based production. The entire body of law seems to have overlooked the fact that from the beginning of industrialization both in Britain and subsequently in the sub-continent women have always worked alongside men in the industries. Although their numbers may

3. Morris, Anne E. and Nott, Susan: '*Working Women and the Law: Equality and Discrimination in Theory and Practice*', Routledge, London, 1991, p.29.

have been much lesser than their male counterparts, they were not of insignificance.

De Sousa referring to how the British colonialists shaped the nature of labour law comments that: the labour subject constituted in law was not differentiated internally on grounds of caste and religion, but the subjectivity conferred was in no uncertain terms gendered and addressed to the male workers⁴. That is, *the law interpolated a male subject*. Any researcher exploring the labour laws is first struck by the fact that there are no women in labour law. The labour legislation in Bangladesh addresses the male worker even in its language and women are almost entirely missing in its text except in special provisions that take a protective stance towards them⁵. The legal language marginalises women by implying that 'he' includes 'she'. Of course this marginalisation of women in legal language is a reflection of her marginalisation in real life⁶. The legal language and reasoning has always been gendered, informed by men's experiences and derived from the powerful social position of men, relative to women. Essentially during the colonial era 'the laws and legal institutions were of men, run by men and for men essentially and only exceptionally for women'⁷. It is interesting to note that this legislation has undergone little change with respect to its treatment of women workers from what they were originally envisaged by the British colonialists. Indeed reading the texts and contents of the labour laws that are in force in Bangladesh today from rules dealing with conditions of work to compensation for injury, the absence of

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4. De Sousa, Valerian: '*The Constitution of the Colonial Labor Subject: Labor Law in Colonial India, 1881 to 1936*', Ph.D. Thesis, Graduate College of the University of Illinois at Urbana-Champaign, 1993, p.154.
 5. Islam, Farmin: '*Law as a Site of Resistance: Recourse to the Law by 'Garments Women' in Bangladesh*', unpublished Ph.D. Thesis, University of East London, 1997, p.7.
 6. Baxi, Upendra: '*On Being a Woman*', in *Mambrino's Helmet Human Rights for a Changing World*, Har Anand Publications, New Delhi, 1994, p.168.
 7. Sathe, S.P.: '*Gender, Constitution and the Courts*', in Dhanda, Amita and Parashar, Archana (ed.): *Engendering – Essays in Honour of Lotika Sarkar*, Easter Book Company, Lucknow, p. 205.

women is almost conspicuous. Occasional references to women are only made wherever it had been necessary to stress their 'vulnerability' physical or otherwise. So women find themselves mentioned in clauses that limit night-work or work near dangerous machinery, and maternity benefits but not so much in any other areas of the law. Therefore one has to concede that the labour law is essentially male oriented. However, the presence of an overwhelmingly male workforce may not have been the only reason behind its masculinity.

De Sousa elaborates on this point: 'The *maleness* of labour law is apparent in the narratives that always referred to the workers in the masculine, and also in the deeper structural imbalance established in the sphere of production not just of goods, but of culture and ideology as well. While this gendering can be traced to the colonial government's policies, Indian⁸ men were complicit because it secured their place in the patriarchal economy of power and authority. This held true in the world of work and the factory where the modernization of industry and the worker was a gendered process. While men were being reformed by the law to make them healthy and efficient workers, women's role in the social economy was being re-defined in a way that constructed them primarily as mothers in order to ensure the reproduction of patriarchal ideology and of labour power⁹. *So the basic character of the labour law was shaped not only by the composition of the workforce but by deeper social factors such as the patriarchal ideology of legislators and policy makers.*

This '*maleness*' of labour laws persists even today and is true even in case of developed countries of the world. Conaghan, commenting on this issue in case of Britain, has remarked that while scanning through popular textbooks, browsing thorough the mainstream law journals she found little to convince her that women are in any way 'visible' in the labour law. Except in a few 'recognised' areas such as sex discrimination law, equal pay legislation and the

8. Referring to men in undivided India in general;

9. De Sousa, Valerian: supra note, p.154.

maternity provisions, labour law is a world made up of full-time male breadwinners and the legal rules reflect this conception of the worker. Moreover, she adds that the models labour lawyers employ to analyze and evaluate the rules are gender blind in that they fail to recognise that for men and women experiences of work and workplace may be very different. As a result, the particular nature of women's oppression in the production process is unrevealed, and *labour law, by rendering women invisible legitimises patriarchal conceptions of work and workers.*¹⁰

Again, speaking in terms of labour law in industrialised society Petersen states that labour law of the industrialised countries to a very great extent sprang from the lives, living conditions and obligations of *men as waged workers*. In such a situation men were the chief breadwinners within their nuclear families and where the wife was supposed to be an unpaid worker in her capacity as a housewife. This influenced the values underlying labour law and the demands that became transformed into regulation¹¹.

TREATMENT OF WOMEN UNDER LABOUR LAWS AND EXAMPLES OF PROTECTIVE LEGISLATION IN BANGLADESH

According to Morris and Nott, there are three main aspects of the law's treatment of working women. These are *paternalism*, the *promotion of equality* and the *granting of additional rights*. They further explain that: 'Legal paternalism arises where the law is used to restrict an individual's freedom in the interests of that individual. The promotion of equality, on the other hand, relies on laws that require men and women to be treated equally. However when the law grants additional rights it does so because the individuals who benefit are seen to require more favourable

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10. Conaghan, Joanne: 'The *Invisibility of Women in Labour Law: Gender-neutrality in Model-building*', International Journal of the Sociology of Law, vol. 14, 1986, p.377.
 11. Petersen, Hanne: 'On Women and Legal Concepts: Informal Law and the Norm of Consideration', Social and Legal Studies: An International Journal, vol. 1, No. 4, 1992, p.496.

treatment than others. Essentially, paternalism and the granting of additional rights thus result in people being treated *differently*, whereas the promotion of equality requires the same treatment. There is, therefore, discrepancy and a potential conflict in these particular uses of law¹². One of the main areas of the labour laws that are examples of paternalism and granting of special rights but also reflect and reaffirm male attitude and patriarchal ideology towards women's work is that of '*protective legislation*'.

Many countries, including Bangladesh have 'protective' measures for working women contained under the labour or employment laws. Even though the majority of the legal provisions under the labour laws purport to be gender neutral, there are particular provisions that treat women 'differently' or 'protectively'. There are also provisions that have been specially designed for them albeit to the same effect. Parts of the labour law that have particular reference to women and children, or are devised to protect them from exploitation by the employer are known as the protective legislation¹³. This may be based on presumed physical weakness, such as the case with respect to prohibition of heavy lifting or work in dangerous environments; or on reproductive and family roles such as maternity benefits, prohibition of night work, child care assistance and the like¹⁴.

Presently, in case of Bangladesh the provisions regarding the restrictions placed on hours of work, night-work, dangerous occupations and the provision of crèche facilities under the Factories Act 1965, are examples of such protective legislation. On the other hand, the Maternity Benefits Act 1939 that provides for certain benefits for working women who are about to give birth, is an example of an 'additional' or special measure protective of their biological role. One of the most important examples of protective legislation for women workers is the Factories Act of

12. Morris, Anne E. and Nott, Susan: *supra* note, p.29.

13. Ibrahim, Barbara: '*Policies Affecting Women's Employment in the Formal Sector: Strategies for Change*', World Development, vol. 17, No. 7, 1989, p.1102.

14. *Ibid.*

1965. The Act places certain restrictions on women's working hours. It stipulates that women are not allowed to work in a factory except between 7 a.m. and 8 p.m. and night-work is generally disallowed¹⁵. This restriction on night-work goes back to the colonial period. Special protective measures for women also include the prohibition of work by women in any factory that requires cleaning, lubricating or adjusting, on or near any part of or any machinery in motion. Employment of women near cotton openers is also prohibited¹⁶. There are general restrictions on the amount of weight women may carry and the Government may make rules prescribing the maximum weights which may be lifted by adult women in any particular factory¹⁷. Night work is also prohibited under the Shops and Establishments Act, 1965¹⁸.

The law also provides for special rights for pregnant women workers under the Maternity Benefit Act, 1939. This is also an example of protective legislation that recognizes women's biological responsibilities. The term 'maternity benefit' means the sum of money payable under the provisions of this Act to a woman¹⁹. When a woman worker has been in service for more than nine months in an establishment then she is entitled to maternity leave for a total of twelve weeks. This includes six weeks immediately preceding and including the day of delivery and another six weeks following the birth²⁰. During her leave period, a woman is entitled to, and her employer is liable for, the payment of maternity benefit at the rate of her average daily earnings²¹.

Legal scholars, feminists and mainstream writers are strongly divided on the issue of granting such protective and additional measures for women in labour legislation. Some are inclined to

15. Section 53 and 65 of the Factories Act, 1965.

16. Section 29, *ibid.*

17. Section 36, *ibid.*

18. Section 22 of the Shops and Establishments Act, 1965.

19. Section 2, clause (d) of the Maternity Benefit Act, 1939.

20. Section 4, *ibid.*

21. Section 4. *Ibid.*

perceive them as discriminatory because they represent the male ideology of women's weakness and need of protection, which ultimately curtails women's work opportunities. Others do not agree to this idea and treat these measures as necessary in recognition of women's biological and care provider roles. However, it is important to note that most of the debate on the issues of protective legislation surrounds the various restrictions on women's employment such as in the case of night work and limitations on working hours. Issues such as maternity rights are generally recognised as indispensable for working women.

TO BE OR NOT TO BE: THE DEBATE ON PROTECTIVE MEASURES

Protective legislation has always been a highly political issue. Introduced in Victorian Britain, it was supported by a somewhat unlikely alliance consisting of paternalistic reformers concerned with the moral degeneration of working women and their families. A group of powerful Tories who wanted to limit the growing power of manufacturing interests combined with some male trade unionists who saw the legislation as a means of protecting their jobs and their wages. Women themselves were divided, with some supporting and others opposing these provisions²². However, the majority of commentators on the subject viewed this legislation as protection for exploited groups. Often cited as an example of progress against bad working conditions in early commentaries on factory law, protective legislation was regarded as a 'turning point in the history of social policy'. Moreover, they held that it acknowledged the right of the state to intervene where there was an overwhelming need to protect exploited sections of the community²³. Regarded as a brave new step forward in social

22. Doyal, Leslie: 'Waged Work and Women's Well Being', Women's Studies International Forum, vol.13, no.6, p.594.

23. Hutchins and Harrison, 1911, cited in Fraser, Derek: 'The Evolution of the British Welfare State: A History of Social Policy Since the Industrial Revolution', Macmillan, London, 1973, p. 21.

policy not only by the liberal reformers, it even had Karl Marx amongst its proponents who regarded the passage of this legislation as a *victory for the working class in its struggle against capital for a decent existence*²⁴.

It is however well known that the passage of such legislative measures was not always grounded upon philanthropic concerns. A number of other considerations influenced by patriarchal ideology also played a role. Both paternalism and granting of special rights by a male dominated legislature and decision making process had the effect of infantilising women and thereby reproducing the patriarchal values of women's presumed vulnerability. O'Donovan has remarked that, "*protective legislation...was imbued with beliefs about the primacy of women's domestic role, couched in the language of paternalism*"²⁵. Similarly, Creighton finds that there can be no doubt that these philanthropists did want to improve the standard of life of the working classes, but there is reason to think that self-interest also played a significant part²⁶. Walby is of the opinion that the promotion of protective measures against women was a strategy employed by men, as employers and fellow workers, to exclude women from employment in eighteenth century England. She thus argues that this so called 'protective' legislation was an important attempt to maintain and reinforce the patriarchal structuring of society and an attempt to construe it as benign and progressive are misplaced. It enforces rather than diminishes gender inequality because of its impact on the position of women in paid work. Moreover, she is of opinion that protective legislation was regressive in its effect on women and is more appropriately described as patriarchal than as reformist²⁷.

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24. Marx, Karl: '*Capital*', vol. 1, Lawrence and Wishart, London, 1954, p. 2808.
 25. O' Donovan, Katherine: '*Sexual Divisions in Law*', Wiedenfeld and Nicholson, 1985, p.165.
 26. Creighton, W.B.: '*Working Women and the Law*', Mansell Publishing, London, 1979, p.24.
 27. Walby, Sylvia: '*Patriarchy at Work*', Polity Press, London, 1986, p.100 - 101.

Even in undivided India under British rule, when protective legislation was first introduced to the sub-continent, male patriarchal attitudes played a major role in influencing this legislation. The role of women in the preservation of family, upholders of tradition, and morality was used as argument both in favour of and against such legislation is evidence of the prevalent attitude towards women. However, both the government and the business community may have manipulated these issues from time to time in order to initiate their own interests.

Legal provisions that were primarily 'imports' that were supplanted into this region by the British colonialists faced little or no resistance from the local male dominated society. Elite and influential men both within and outside the legislature supported these measures to a great degree. This is therefore a striking example of how two patriarchies merged to position women in society. The Victorian ideals of women's morality and place in society as envisaged by the colonial rulers, were endorsed by the legislature in undivided India, whose own patriarchal ideology was unlikely to question such a proposition²⁸.

However, when factory legislation with protective measures for women and children were first introduced in undivided India, there was opposition to these restrictions by employers as well as women workers themselves. The former's argument was based largely on losing the competitive edge that they were able to establish in the market by using the cheap labour of women. The Bengal Chamber of Commerce went as far as describing it as an attack on the process of Indian industrialization itself²⁹. Soon, other considerations also emerged. While the factory law³⁰ put limitations on the hours of work for women, night work was banned by the Act of 1934 on the ground that it was *contrary to*

28. Islam, Farmin: 'Development of State Policy and Labour Legislation in Bangladesh: Implications for Women in Industrial Employment', Empowerment: A Journal of Women for Women, Dhaka, Vol.7, 2000, p.104.

29. Nair, Janaki: 'Women and Law in Colonial India: A Social History, Kali for Women, New Delhi, 1996, p.111.

30. Factories Act of 1934.

*the social custom in India*³¹. Other legislation followed that put further restrictions on women's employment such as the banning of women in underground work in mines. Nationalists who supported the ban, saw the withdrawal of women's labour from the mines as a necessary sign of 'civilization'. On the other hand those who supported the ban, such as the government of Bihar, Bengal and Orissa itself, contended that whereas prohibition of women's underground work had strengthened family life in Europe and America³², here it would result in women becoming immoral!³³.

It is interesting to note how the discourse of the opponents and supporters of protective legislation of that era were similar in that most of their arguments were overwhelmingly grounded in the question of 'morality' or on women's perceived 'role' in society. The majority of the commentators were themselves men, resulting in literature that suffers from a partial or male view of the issues concerning women workers and protective legislation. Das in 1938 wrote that concerns for the weaker sex are not totally unfounded and women workers were in need of legal protection under the prevalent social situation³⁴. On the other hand Mukherjee writing around the same period wrote: "*it seems imperative that she (India) is badly in need of a law to guard against moral danger to women. The nucleus of danger.....lies in the external activity of women. There is really sufficient reason to believe that the moral danger emanates more from out-door work than in-door work*"³⁵. Such examples of what may have been the dominant perspective among policy makers and social philosophers on the issue are not entirely uncommon even today. Whatever may have been the attitude of these individual writers, it is plausible that

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31. Das, Rajani Kanta: '*Principles and Problems of Indian Labour Legislation*', University of Calcutta, Calcutta, 1938, p.18-19.
 32. Where entire families worked in groups;
 33. Nair, Janki: supra note, p.107.
 34. Das, Rajani Kanta: supra note, p.11.
 35. Mukherjee, Pankaj Kumar: '*Labour Legislation in British India: A Study in the Legal and Economic Aspects of Labour*', Chukerverty Chatterjee and Co. Ltd., Calcutta, 1937, p.54.

labour legislation, particularly the protective measures, did not benefit women workers and may have even been detrimental to their work opportunities.

Scholars on the subject have confirmed that despite introduction of these legislative measures that were generally accepted as being favourable for women workers, in reality little or no changes occurred to their condition. Indeed they may have even contributed in making their work less attractive and more expensive to employers, which in turn resulted in their removal from certain types of industries. Sengupta comments that the most remarkable paradox as regards the elimination of women from some of the older and larger factories of India is that the very legislation which were passed to protect and benefit women were ultimately the main causes of their removal³⁶.

Therefore, during the colonial era, the other most significant reason behind the marginalisation of women workers in the industrial sector other than cultural factors that prevented women from working in the industries in the first place, was the introduction of protective legislation passed in deference to reformist demands. As sanctions were introduced against women working at night in underground quarries or longer than nine hours in a day, their work became less cost effective when returns from their labour could no longer be maximized. Furthermore, safety requirements became another excuse to keep women away from certain sections of industries. Women were specifically removed from the softener feeder in the jute industry because their saris became entangled in the machinery and no attempt was made to introduce uniforms in this regard³⁷. Rohini comments that the main reason behind reduction of women workers in the cotton textile industry in Bombay between 1925 and 1947 was the restriction on night work³⁸. Similar measures against women workers were also taken

36. Sengupta, Padmini. *Women Workers in India*, Asia Publishing House, London, 1960, p.7.

37. Hossain, Hameda et al: *No Better Option? Industrial Women Workers in Bangladesh*, University Press Limited, Dhaka, 1990, p. 19.

38. Rohini, P.H. *Women Workers in Manufacturing Industry in India: Problems and Possibilities*, in Afshar, Haleh (ed.): Women, Development and Survival in the Third World, Longman, London, 1991, p.270.

by employers in other industries and dismissing them or depriving them of permanency was a way of evading legislation on maternity benefits or crèches. Early research such as that of Rao's recorded similar findings that the passage of maternity benefits legislation in some provinces of undivided India would most likely mean less of an inducement to employers to engage more women³⁹.

Many observers would now be inclined to view these statutory restrictions on the employment of women as being irrelevant to modern conditions of living. This is so because such provisions do not adequately take account of the changed patterns of employment, social attitudes and so on. What is more, they may even be positively harmful to women and their employment opportunities and there is enough evidence that proves this point. The process of limiting opportunities of women's work as a result of protective legislation occurs at different levels. Firstly, because employers can point to them as a justification for treating women less favourably than men. Therefore discrimination in case of pay and benefits can be made to look more acceptable. Secondly, because they may serve to reinforce male prejudices and sex stereotyping, resulting in women being segregated by sex in different occupations. Thirdly, they may even give rise to resentment on the part of males who do not receive the benefits of the legislation but who must accept that women should be treated as equals in relation to terms and conditions of employment⁴⁰.

Legal scholars and feminists today are generally of the view that the statutory restrictions are open to criticism, because of their necessary implication that women are in some sense inferior to men, and are therefore in need of protection. Moreover, there is considerable variation in the applicability of some of the protective measures and many areas where women are employed in vast numbers are unprotected by legislation, particularly those working in the informal sector. There is an obvious risk that such inconsistencies could be a source of grievance for men and

39. Rao, Shiva: *The Industrial Worker in India*, George Allen and Unwin Limited, London, 1939, p. 241.

40. Creighton: *supra* note, p.33-34.

women, both inside and outside the protected area⁴¹. Several writers, both from Western countries as well as those in the South, have stressed the negative effects of protective measures on women workers⁴². Chatterji explains that the sexist assumption that women need to be protected from 'dangers at work' almost accuses women workers of being weaker and more vulnerable to danger at the workplace than men. It also implies that they are unable to protect themselves after certain hours of the day. If that is the case danger from men to women at certain hours is almost taken for granted and is legitimized through the enactment⁴³. Vogel commenting on the effects of the introduction of protective legislation in United States stated that sexual difference was enshrined in the doctrine of separate spheres more firmly than ever. It enjoyed the blessings of reformers, the labour movement, and many women activists, as well as of the state. The ideological foundations of the structural inequality of women in the modern labour market and within the society at large were therefore reinforced⁴⁴.

Areffin points to the fact that such restrictions may indeed have the effect of excluding women from certain jobs. Moreover, she states that there is no reason to forbid women from working during night shifts if they themselves choose to do so and sufficient support facilities for their welfare are provided⁴⁵. Chatterji too is of the view that women should at least be given the choice whether they want to work nights or not. The decision to take up a job that requires night-work should rest with the person concerned and not with the government that frames legislation to limit individual

41. Ibid.

42. Chatterji, Shoma: *'The Indian Women's Search for Identity'* Vikas Publishing, Delhi, 1988; Rohini, P.H., supra note; Young, Kate: *'Planning Development with Women: Making a World of Difference'*, The Macmillan Press, London; Vogel, Lise: *'Mothers on the Job: Maternity Policy in the U.S. Workforce'*, Rutgers University Press, New Jersey, 1993.

43. Chatterji, Shoma: supra note, p. 170.

44. Vogel, Lise: supra note, p.29.

45. Areffin, Jamilah: *'Women and Development in Malaysia'*, Pelanduk Publications, Malaysia, 1992, p. 138.

choice on the grounds of sex⁴⁶. Areffin adds that instead of being merely symbolic about their concern for the welfare of women workers, perhaps a fairer and more prudent solution would be for the legislature to provide control and regulation with respect to employment of women at night. There should be more incentives to encourage employers to provide suitable facilities such as transport and housing to women who **choose** to work on night-shifts. These measures will not only safeguard the safety and welfare of women workers, but also allow them to actively participate in nation building⁴⁷.

Ibrahim however, differs from the above views and supports the preservation of what she calls women's 'hard won rights'⁴⁸. She speaks against the labour deregulation occurring in developing countries as a result of pressure from employers, and states that these reversals of policy respond to persuasive arguments that if given greater flexibility, employers will be able to increase overall employment which on the other hand will boost the economy. Employers may even reinforce those arguments with agreements to provide compensatory services for women. For example in the case of night work, legislation may require employers to provide transportation or otherwise assure the safety of women working night shifts. Ibrahim further adds that inevitably, compensatory services address only some of the problems caused by practices such as night-work Disruption of family schedules and the attendant strains on women who cannot fulfill child-care responsibilities are never adequately confronted. Once night-work is legalised, its voluntary nature is very difficult for governments to monitor, women are very often pressured into accepting the late shifts regardless of the hardships entailed⁴⁹.

This is not an unreasonable claim when confronted with the situation faced by women in countries of the South, where women

46. Chatterji, Shoma: *supra* note, p.172-173.

47. Ariffin, Jamillah: *supra* note, p.138.

48. Ibrahim, Barbara: 'Policies Affecting Women's Employment in the Formal Sector: Strategies for Change', *World Development*, Vol. 17, No.7, 1989, p. 1102.

49. *Ibid.*

continue to bear the main responsibility of the household functions and childcare. Moreover, in many Asian and African countries there are no facilities available to make housework less burdensome for women. Those who argue in favour of protective legislation with respect for instance to night-work, do so on the grounds of women's double roles⁵⁰. Coyle adds a new perspective to this debate and is of the view that at least protective legislation recognizes the vulnerability of female labour. She states that this legislation should continue not in its present protective/paternalistic form but as part of a progressive move to minimize socially undesirable working hours for everyone. She further argues that the problem with the current legislation is that it does not genuinely 'protect' women but rather operates paternistically to reinforce women's condition of inequality. Protective legislation must be argued for on the basis of different criteria. That is to say, it is not because of their domestic commitments that women need such legislation, but because it is a progressive demand⁵¹.

Finally, Creighton comments that discussion of whether protective legislation should be retained is a self-defeating exercise in many respects, since so many of the arguments are circular in nature. The issue of retention or abolition of protective legislation is not something that can be easily determined or readily applied to all countries around the globe⁵². It is an issue that depends largely on the individual situation and circumstances of each country. What may be readily applied to a developed country may not be applicable to Bangladesh or Thailand. Any state contemplating reforms of the law must take into account the nature of women's employment, the economic condition, as well as its social and cultural values. Doing away with protective legislation on hours of work may not be the best answer for women who continue to bear sole responsibility for housework and childcare.

The above discussion does reveal the paradoxical relationship that women workers have with the labour laws, particularly with those

50. Chatterji, Shoma: *supra* note, p.172.

51. Coyle, Angela: 'The Protection Racket?', *Feminist Review*, No. 4, 1980, p.10.

52. Creighton, W.B.: *supra* note, p.35.

protective measures that tend to view them as essentially different or in some respects weaker than men. Although there is no scope of denying women's biological roles as the mothers and caregivers, broad based generalizations based on these factors alone limits their opportunities. Women workers must be free to be able to decide the exact conditions of their work and should not be compartmentalized as a separate category to be treated differently by policy makers with a patriarchal mindset. Although the issue of women's rights at work has emerged as an outstanding subject of deliberations in this present century a close scrutiny of the issues reveal that these are not any different from the basic human rights of all people. Human beings in general irrespective of male and female deserve minimum wages, congenial and healthy working atmosphere and job security. In developing countries such as Bangladesh sometimes the law has been peripheral to the real situation in the labour market. The concept of social welfare, on which some of these legislative measures are based, depends in the very first place upon the productivity of labour, which in turn is the result of technical developments. Secondly it most certainly depends on the forces of the labour market, on which the law has only a slight influence. Thirdly, it also depends on the effective organization of the workers in trade unions. Therefore, according to Davies and Freeland, law is often a *secondary force in human affairs*, particularly in cases of labour and labour relations⁵³. Moreover, the essentially male-oriented nature of this law and its tendency to treat women differently makes it even more difficult for women workers to stand on equal footing with men. Protective legislation on the other hand further represents the paradoxical relationship that women workers have with labour laws. However, the entire body of law does contain provisions that are of undeniable significance to women workers and form an essential starting point towards achieving their human rights at work. Moreover, it is necessary to perceive women workers not only as vehicles of social change and economic development, but deserving of rights and opportunities alongside men in society.

53. Davies, Paul and Freeland, Mark: '*Kahn-Freund's Labour and the Law*', Stevens, London, 1983, p.13.