

WORKING WOMEN AND TIGHT ROPE WALKING: AN AGENDA TO REFORM WORKPLACE FLEXIBILITY LAWS

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Abstract

Substantial variations in labour force demographics and the necessity of work life balance have highlighted the importance of welcoming labour flexibility favourable to women workers to the modern workplaces. Conscious of the growing needs for viable labour flexibility, the research appraises the efficacy of international and national labour framework in facilitating labour flexibility for women employees. This qualitative research is primarily rooted in International Labour Organization (ILO) instruments and labour legislation in Sri Lanka. Secondary sources such as commission reports, texts of authority and research studies have been used in finding answers to the research problem. The paper offers a critical examination on key ILO conventions on working time and work life balance and argues that most of them are designed to meet the needs of traditional male bread winner household. The research proceeds to prove that Sri Lanka labour statutes do not expressly deal with labour flexibility and are reluctant to diverge from traditional working concept also due to gender and cultural ideological factors. Grounded on this line of argumentation, the paper aims to highlight the necessity of reframing the international and national labour law frameworks in facilitating labour flexibility for working women.

Keywords: Labour flexibility, working women, workplaces

Introduction

Despite decades of increased educational participation and attainment in education among women, female employment still lags behind that of men.¹ According to the 2018 Global Gender gap index, the economic participation and opportunity gap is the second-largest gender disparity which maintains at 41.9%.² Sri Lanka is ranked 125 with a score of 0.549 under the sub index of economic participation and opportunity gender gap.³ This low integration of women indicates a significant missed opportunity in professional domain for women leading to the development of many fields without diverse talent limiting its innovative and inclusive capacity. On the other hand, this

¹ Amna Silim, Alfie Stirling, *Women and Flexible working* (Institute of Public Policy Research 2014)²

² Global Gender Gap Report (World Economic Forum 2018)

³ Ibid 254

tendency has also resulted women working below their 'qualification grade' and female underemployment in terms of hours. It is also worth noting that predominantly women are affected by the tensions rising due to the conflicting responsibilities of work and life because of the rise of ageing population, dual-earners, female breadwinners and increasing care and domestic responsibilities.

Flexible working options can play a significant role in addressing these adverse labour market outcomes and effectively reconciling commitments in their work and domestic lives. These arrangements can be defined as any type of working arrangement that allows work to be carried out outside the spatial and temporal limitations of a standard working day.⁴ With the advancement of technology, there is spectrum of unstructured, structured, autonomous work structures that alters the time and/or place that work gets done on a regular basis such as flextime, extended

⁴ Georgetown University Law Center, 'Flexible working arrangements: A definition and examples' <<https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1009&context=legal>> accessed 24th April 2019

leave, part time work, compressed work week, telecommuting, work from home and job share.

Despite the vital necessity flexible working to work life balance in the modern context the guidance provided by the International Labour framework in designing sustainable and flexible working arrangements assuring the necessities of rising female labour force participation are very limited. Most of the ILO conventions on working time are too restrictive to meet the modern realities of flexible working and failed in garnering broad ratifications by ILO member states including substantial number of third world countries. With this impact and the prevailing cultural, gender ideologies in the contexts, Asian third world countries including Sri Lanka still follow an outdated legal framework on working hours unfavorable to flexible working and work life balance on the side of the female employees. This paper intends to explore the effectiveness of ILO responses in facilitating flexible work arrangements and attempts to examine the effectiveness of the national legal framework of Sri Lanka in

adopting of international legal standards and international legal trends on flexible working.

ILO and Flexible arrangements

Tracing the history of the international standards of working time it can be observed a downward trend in hours of work which moved in tandem with increases in wages and productivity.⁵ The first international labour standard, the ILO Hours of Work (Industry) Convention, 1919 (No. 1)⁶ accomplished a long-sought trade union objective, the eight-hour workday, into international law, alongside a 48-hour weekly limit on working time⁷, a radical notion at a time when 60-plus hour work weeks were still common everywhere. However, it allows working 56 hours in cases of processes which are required by reason of their nature to be carried on continuously by a succession of shifts and

offers the opportunity of averaging hours of work over a period of time.⁸ The convention also provides leeway for few permanent and temporary exceptions to the general standard to be made after consultation with the organization of employers and workers concerned, special regard being paid to collective agreements, if any, existing between such workers' and employers' organizations.

Similar rules were established by the Hours of Work (Commerce and Offices) Convention, 1930 (No. 30).⁹ The objective of Convention No. 30 is to extend the hours of work standards prescribed by Convention No. 1 to all those persons not covered by Convention No. 1, except for those employed in agriculture, maritime or inland navigation, fisheries and domestic service. Similar permanent and temporary exceptions¹⁰ were provided by the convention which would be applicable after

⁵Lee Adams, 'The Family Responsibilities Convention Reconsidered: The Work-Family Intersection in International Law Thirty Years On' (2014) 22 *Cardozo Journal of International and Comparative Law* 201. 232

⁶ ILO Hours of Work (Industry) Convention, 1919 (No. 1)

⁷Article 2 of ILO Hours of Work (Industry) Convention, 1919 (No. 1)

⁸ Article 4 of the Convention ILO Hours of Work (Industry) Convention, 1919 (No. 1)

⁹ ILO Hours of Work (Commerce and Offices) Convention, 1930 (No. 30)

¹⁰ Article 6 and 7 of ILO Hours of Work (Commerce and Offices) Convention, 1930 (No. 30)

consultation with the workers' and employers' organizations.¹¹

It can be observed that the definitions of the exceptions to the normal scheme of working hours authorized by these Conventions are very restricted.¹² Some of these exceptions are directly connoted to the form of work organization. For instance, Shift work is acceptable subject to the condition that the average number of working hours over a period of three weeks or less does not exceed eight per day and forty-eight per week. In addition, if shift work is rendered necessary by the continuous operation of an industrial plant, hours of work can reach fifty-six hours per week on average, without prejudice to the compensatory rest that may be provided for in national legislation.¹³

Same applies to many innovative flexible working arrangements agreed upon between employers and employees and adopted by industrial, individual enterprise

level which eased the tight ropewalking of female employees such as staggered working time arrangements, variable daily shifts lengths, annualized working hours, on-call work, flexi time system. The rigid working hours in the aforesaid ILO instruments were designed to meet the needs of traditional male bread winner household. Thus, these stringent limits on working hours are no longer sufficient to accommodate the diversity of modern living and working arrangements. The necessity of relaxing the working hours in order to meet the modern realities of working arrangements was also pinpointed by the committee of Experts on the Application of Conventions and Recommendations. Further the relatively light number of ratifications for both the conventions by developed economies buttress the archaic nature of the conventions.

In this backdrop, with the wave of work life balance started in the end of twentieth century, Workers with Family Responsibilities Convention, 1981 (No.

¹¹ Article 8 of ILO Hours of Work (Commerce and Offices) Convention, 1930 (No. 30)

¹² ILO, *Working time in the twenty-first century: Discussion report for the Tripartite Meeting of Experts on Working-time Arrangements* (International Labour Office, Geneva, ILO 2011) 4

¹³ *ibid*

156)¹⁴ was designed by ILO highlighting the necessity of enabling the workers to engage in employment without conflicting employment with family responsibilities. The debate on the text of Convention 156 makes clear that the Committee envisioned designing measures to enable workers with family responsibilities to combine employment and family obligations without conflicting both work and social services.¹⁵ Reasonable flexibility in work is needed for workers with family responsibilities as perhaps the single most effective way to allow them to meet their dual responsibilities concurrently. Though facilitation of flexible working was not directly indicated in the convention, the view of creating effective equality of opportunity and treatment for male and female workers can indirectly support the acceleration of flexible working arrangements in the national policy frameworks.

ILO convention No.156 was supplemented by the Workers with Family

Responsibilities Recommendation, 1981 (No. 165).¹⁶ It recommended that particular attention should be given to general measures for improving working conditions and the quality of working life, including measures aiming at the progressive reduction of daily hours of work and the reduction of overtime, and more flexible arrangements as regards working schedules, rest periods and holidays, account being taken of the stage of development and the particular needs of the country and of different sectors of activity.¹⁷

ILO convention No 156 strengthened with the Workers with Family Responsibilities Recommendation, 1981 (No. 165) is an innovative effort in augmenting 'growing consciousness on work life balance'. But the adequacy of the direction provided for reforming the regulation of work and family for the twenty first century is a moot point. Further the open-endedness of the instrument likely reflected a desire to permit the widest flexibility possible for

¹⁴ Workers with Family Responsibilities Convention, 1981 (No. 156)
¹⁵ Supra(n2) 34

¹⁶ The Workers with Family Responsibilities Recommendation, 1981 (No. 165)

¹⁷ Article 18 of the Workers with Family Responsibilities Recommendation, 1981 (No. 165).

member states, was criticized at the time as too vague.¹⁸ So this ambitious yet fuzzy attempt did not succeed in garnering broad ratifications by ILO member states including most South Asian third world countries including Sri Lanka and India and remains largely hortatory.

The relatively light number of ratifications to ILO 156 also suggest that specifying particular substantive outcomes or mandating expenditures for workers with family responsibilities is not likely to result in wider acceptance of this convention.¹⁹ It can be proposed that labour standards in the form of required procedures rather than specified outcomes would be more appropriate and practical in meeting the real work world requests.²⁰

Adding process- oriented rights such as right to request flexible working and a right to convert back to earlier terms and conditions if such a job is available as adopted in United Kingdom would be more

realistic in achieving work- life balance of women rather than setting arbitrary and unrealistic objectives.

Developed economies v Asian third world countries

Despite the failure of ILO in providing adequate guidance and incentive to facilitate flexible time arrangements, the legal structures of industrialized countries have designed legislative interventions to flexible work for women in employment by mainly providing the right to request reduced hours. For instance, United Kingdom introduced a right to request flexible working through section 47 of the Employment Act 2002 to limited categories of employees with parental or caring responsibilities.²¹ Later this right was expanded to all employees with 26 weeks' continuous employment by the Children and Families Act 2014.²² Since the new

¹⁸Supra(n2)39

¹⁹ Supra(n2) 47

²⁰ Richard B. Freeman, *a hard-headed look at labor standards in International Labour standards and economic interdependence* (Werner Segenberger and Duncan Campbell eds. 1994) 79, 89

²¹ Doug Pyper, 'Flexible working' (2018) Briefing paper Number 01086, <<https://researchbriefings.parliament>

[.uk/ResearchBriefing/Summary/SN01086](https://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN01086) >accessed 29th May 2019

²²The Flexible Working Regulations 2014 of United Kingdom

legislation came into force, around 36% of female employees with dependent children under the age of six have requested more flexible hours.²³ In Sweden, parents have a legal entitlement to reduce their working hours up to 25% until the child's eighth birthday, with a return to full hours guaranteed thereafter. In Sweden part-time employment rates are above the European Union average, with workers able to move between part- and full-time work with little difficulty.²⁴ Although these new legislative interventions need improvements, interestingly they have shifted from enabling flexibility conditional to specified activities to extending access to reduced or part-time employment not only to women but to all or most of the working age population.

Unlike the western industrialized economies, the concept of flexible working is not much developed and abundant in Asian third world jurisdictions.²⁵ Culture

and gender Ideological factors distinctive to this context play a pivotal role in this regard. Traditional views of gender are still widely held and fathers are still not expected to help with household chores, but rather occupy the role of privileged person in the family.²⁶ Childcare is often carried out by women sometimes with the help of grandparents and more affluent employees hire domestic helpers.²⁷ Work and family are viewed as independent and compartmentalized.

Further the mindset that one needs to be in office seems more customary in Asian third world countries. Ideal workers are defined as employees who demonstrate profound dedication to their jobs in terms of long hours, unlimited availability and visibility within the workplace.²⁸ Individuals who are unwilling or unable to be seen within the organization at all times are often classified

²³ P Moss, *International Review of Leave Policies and Research* (Leave Network,2014)29

²⁴ Ibid

²⁵ work life balance policies and practices <http://shodhganga.inflibnet.ac.in/bitstream/10603/30836/9/09_chapter4.pdf> accessed 16th April 2019

²⁶ Boston College Global work force round table, 'Flexible working arrangements in Asia' <<https://www.bc.edu/content/.../Flexible%20Work%20Arrangements%20in%20Asia>> accessed 24th May 2019

²⁷ ibid

²⁸ Dulini Fernando, The rhetoric and reality of the work life balance agenda <<http://www.ft.lk/columns/The-rhetoric-and-reality-of-the-work-life-balance-agenda/4-652172>> accessed 1st May 2019

as ‘unprofessional’ and/or uncommitted.²⁹ Flexible working arrangements are seen as ‘favours’ than entitlements. This leads to the lack of demand from female employees for flexible working arrangements. On the other hand, the lack of female representation in the Labour unions, gender discrimination experienced by women at workplaces often lead to demands of female employees for flexible working arrangements left unheard. In this backdrop, the legal responses reassuring flexible working arrangements are inadequate or mostly non-existent in the Asian third world countries.

Flexible working in Sri Lankan legal context

In Sri Lanka, the labour legislations do not have any provision that expressly deals with flexible working arrangements. Wages Board Ordinance of 1941³⁰, Shop and

Office Employees Act of 1954³¹, Factories Ordinance of 1942³² adhering to the outdated international standards of restrictive- protective approach contain rigid working hours, rest intervals and different types of holidays. The normal period during which any person may be employed in or about the business of any shop or office should not exceed eight hours and in any one week must not exceed forty five hours under the Shop and Office Employees Act of 1954.³³ The Act does not provide for minimum hours of work in a day or week. Therefore, it could be construed that the Act applies to the part – time workers as well.³⁴ The total hours worked, exclusive of intervals for meals and rest should not exceed nine hours in any day and not exceed 48 hours in any week under the Factories ordinance.³⁵

²⁹ *ibid*

³⁰ Wages Board Ordinance of Sri Lanka No 24 of 1941

³¹ Shop and Office Employees Act (Regulation of Employment and Remuneration) Act of Sri Lanka No 19 of 1954

³² Factories Ordinance of Sri Lanka No 45 of 1942

³³ Section 3(1) (a) &(b) of the Shop and Office Employees Act (Regulation of Employment and Remuneration) Act of Sri Lanka No 19 of 1954

³⁴ A.Sarveswaran, ‘A Reflection on Ratification of ILO Conventions to Promote Family Friendly Employment in Sri Lanka’ SL Labour gazette (2019) 70 (1) 1,9

³⁵ Section 67 of the Factories Ordinance No 45 of 1942

It is also evinced that the masculine norms and gendered structural assumptions still haunting in labour legislations are hindering women from engaging in modern flexi time arrangements. For instance, female workers cannot be employed for more than ten days on night work, during any one month.³⁶ Similar limitations and prohibitions in night work are imposed by section 67(A) 2 of the Factories Ordinance³⁷ and the Shop and Office Employees' Act.³⁸

However, the 2018 amendments to the Shop and Employees' Act and Maternity benefits ordinance provided more opportunity for mothers to spend considerable time with the babies. The amended shops and office act provides maternity leave for eighty-four days for any number of children³⁹ and allows working mothers to take two nursing intervals at

such times as she may require.⁴⁰ The maternity benefits ordinance as amended in 2018 provides maternity leave for twelve weeks for any number children.⁴¹ Though these new amendments are comforting efforts for working mothers they make rights to flexible working conditional to a specified activity namely caring for young children. Sri Lanka needs to rethink in providing access to flexibility as a part of protection against discrimination based on broader family care-giving responsibilities. Country needs to further broaden this concept by incorporating paternity leave or parental leave for the legal framework.

The common employer-oriented flexible working arrangements are often used in the Sri Lankan informal economic structure such as part time, seasonal employment, shift work. But non regulation of these arrangements by the prevalent labour law structure provides leeway for the exploitation of the female employees in the informal economies and jeopardizes the

³⁶ The Employment of Women, Young Persons and Children Act No.47 of 1956

³⁷ Section 67(A) ()2 of the Factories Ordinance of Sri Lanka No 45 of 1942

³⁸ Section 10 of Shop and Office Employees Act (Regulation of Employment and Remuneration) Act of Sri Lanka No 19 of 1954

³⁹Section 2 of Shop and Office Employees (Regulation of Employment & Remuneration) (Amendment) Act, No.14 of 2018

⁴⁰ Section 2 of Shop and Office Employees (Regulation of Employment & Remuneration) (Amendment) Act, No.14 of 2018

⁴¹ Section 2 of the Maternity Benefits (Amendment) Act, No.15 of 2018

decent work norms of the workers of above categories. Further the flexible working arrangements being more concentrated on elementary, informal occupations and less focused on professional and managerial roles can tend high- skilled mothers to shift to informal economy pushing themselves to take up work of a lower level than what they are capable of. This is a suboptimal outcome for both employees and employers as it represents a significant opportunity cost and a loss of potential output.

Conclusion and Final remarks

Flexible work practices can result in higher rates if employment and better matches between qualifications and job skilled level for women and mothers while enabling them to balance the work and life.

Thus, the ILO needs to consider in framing a modern legal framework balancing the needs of female workers and enterprises. Relatively light number of ratifications including substantive number of third world countries to the discussed

conventions suggests that prevalent 'specifying particular substantive outcomes model' is not likely to result in a wider acceptance of these conventions. Structuring the international regulations in the form of procedures rather than specified outcomes would be more beneficial leading them to be considered as "fundamental social rights".⁴² Sri Lanka same as many Asian third world countries, lack a legal framework that support flexible working arrangements. Cultural, gender ideologies, masculine norms embedded in law often devalue the importance of flexible working arrangements. Modifications of the prevalent outdated labour laws to cater flexible working thereby promoting a family friendly employment policy is imperative in reducing the weak employment outcomes towards women and to utilize the full potential of women workers. However, the efficacy of the modifications without an attitudinal change in the society in flexible working is a moot point.

⁴² Supra(n18)

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