

## CHAPTER 5

### LOOKING AHEAD: RATIFICATION PROSPECTS

**170.** It is clear that the reticence of most non-ratifiers is due to their conviction that the Conventions prohibiting night work for women have outlived their time and that restricting women's access to night employment is today undesirable on two principal accounts: first, it runs counter to the overriding principle of gender equality in that it restricts the individual worker's freedom of choice on working time solely on the basis of sex. Secondly, it prevents the optimal utilization of the available workforce and thus hinders productivity. The inconsistency between the restriction of women's access to night employment in industry and the principle of non-discrimination and equality of treatment has been invoked by all 15 States that have so far denounced Convention No. 89.

**171.** It should also be noted that the Office has recognized on several occasions that member States are required to initiate a review process of their protective legislation aiming at the progressive elimination of any provisions contrary to the principle of equal treatment, except for those connected with maternity protection, and with due account being taken of national circumstances. This results from an ongoing commitment to apply the same standards of protection to men and women alike in accordance with the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), and from the widely ratified UN Convention on the Elimination of All Forms of Discrimination Against Women.

**172.** With regard to the ratification prospects of the four instruments under review, the Committee refers to Convention No. 89 only, since Convention No. 41 is closed to ratification, the Protocol of 1990 cannot be ratified alone, while Convention No. 4 is most unlikely to receive any new ratifications some 81 years after its adoption. It is indicative that Convention No. 4 was last ratified 23 years ago, and that the Working Party on Policy regarding the Revision of Standards in its 1996 review of the Conventions on night work of women had estimated the ratification prospects of Convention No. 4 as minimal.<sup>1</sup>

**173.** The Committee can only stress that, according to the replies of member States, the prospects of ratification of Convention No. 89 and its Protocol appear to be thin. In fact, only two States parties to Convention No. 89

<sup>1</sup> See GB.267/LILS/WP/PRS/2, p. 27.

(*Bangladesh, Slovenia*) have reported that they are considering favourably the possibility of ratifying the 1990 Protocol to Convention No. 89 without indicating, however, whether the ratification process had been formally engaged so far. In the case of *Slovenia*, the new draft Labour Relations Act is believed to take full account of the provisions of the Protocol and is expected to provide the legal basis for the ratification of that instrument, while in *Bangladesh* the Tripartite Consultative Council has recommended the ratification of the Protocol, and its recommendation is now being submitted to the Cabinet and to a parliamentary commission. It should also be noted that two of the three States parties to the 1990 Protocol, i.e. *Cyprus* and the *Czech Republic*, have stated their intention to proceed to the denunciation of Convention No. 89 shortly. Among the States which are non-parties to any of the Conventions under review, only the Government of *Papua New Guinea* expressed the view that there are good prospects of ratifying Convention No. 89 and its Protocol after completion of a major review of the Employment Act, 1978.

**174.** Several States (*Australia, Botswana, Canada, Finland, Hungary, Japan, Namibia, Singapore, Sweden, United States, Viet Nam*) have firmly excluded the possibility of ratifying any of the instruments considered here. In their view, preventing women from having access to night employment, with the exception of expectant or nursing mothers, would constitute direct discrimination and would unreasonably deprive women of job opportunities. Furthermore, the Government of *Bulgaria* stated that it did not envisage ratification as it has started accession negotiations with the European Union and Convention No. 89 has been found to contradict Community law.

**175.** Many countries expressed serious concern about the implications that night work prohibitions or restrictions for women would have on employment. The Governments of *Belarus* and *Ukraine* have stated that a major obstacle to ratification was the sharp increase of unemployment especially affecting women and also the growing number of single-parent families which has rendered night work increasingly widespread. According to the report of the Government of *Ethiopia*, the socio-economic underdevelopment and in particular the high unemployment scenarios currently prevailing in the country constitute a major disincentive to ratification of Convention No. 89 and its Protocol. The Government of *Mexico* recalled that women's participation in the country's workforce had doubled since 1970 from 17.6 per cent to 36.8 per cent in 1997, while a policy of prohibition or restriction of night work for women would inevitably reduce their working opportunities. The concern about employment seems also determinant in the case of *Argentina*. The Government of *Mauritius* reported that the provision of the Industrial Expansion Act by which women working in export processing zones were excluded from the scope of the prohibition against night work has been instrumental in the success of the EPZ regime, and that therefore the situation could not be changed without implications on recruitment of female workers and employment levels. Finally,

the Government of *Dominica* stated that, even though its legislation is mostly in conformity with the provisions of Convention No. 89, formal ratification of this Convention would curtail employment of women in sectors such as manufacturing, hotel and restaurant or wholesale and retail trades and would pose additional financial burdens to small family-operated businesses.

**176.** A few countries (*Antigua and Barbuda, Ecuador, Zimbabwe*) saw no need to ratify any of the instruments under review in the near future, as existing legislation did not present difficulties and the interests and welfare of women workers were sufficiently protected. Other countries such as *China* did not envisage ratification for the time being because national laws and regulations were not believed to be as yet up to the standards of the Conventions.

**177.** Among the States parties to Convention No. 89, two Members (*Dominican Republic, Zambia*) have announced their decision to denounce the Convention at the expiration of the current period of ten years when the Convention will again be open to denunciation, while two other Members (*Austria, South Africa*) have reported that the denunciation of Convention No. 89 was under consideration. Another three Members (*Brazil, Ghana, Malawi*) have made known that, following the recent enactment of new legislation, Convention No. 89 had ceased to apply and that therefore it would not be possible to ratify the Protocol. Two more Members (*Romania, Rwanda*) have indicated that the ratification of the Protocol was not likely, as modern practice was in favour of the abolition of the night work prohibition for women and socio-economic conditions such as rising unemployment called for initiatives and policies promoting equality of opportunity between men and women. Among the States having ratified Convention No. 41, *Estonia* has declared that it considers all four instruments on women's night working to be outdated and that it will denounce Convention No. 41 on the first occasion, while *Suriname* reported that the possibility of denunciation of Convention No. 41 was still under examination.

**178.** As regards the observations received from employers' and workers' organizations, the *Korean Employers' Federation (KEF)* expressed the view that the rationale of the night work prohibition for women has been much weakened in recent decades and therefore the ratification of the relevant instruments is viewed as undesirable. In a similar vein, were the comments made by the *Mauritius Employers' Federation (MEF)* according to which there seems to be no justification for the ratification of any of the Conventions or the Protocol given the present situation of the country's laws and practices.

**179.** In conclusion, the outlook for the possible acceptance of the Protocol in the coming years appears uncertain. Indeed, the fact that two of the three member States parties to the Protocol (*Cyprus, Czech Republic*) have announced their intention to withdraw their acceptance is far from encouraging.<sup>2</sup> For a

<sup>2</sup> It is most uncommon for international labour Conventions to be denounced only a few years after ratification. The following table shows the very limited cases where member States

number of countries, the problem seems to stem from the fact that the Protocol cannot be ratified separately from the “mother” Convention so that, even if they were prepared to accept the innovative provisions of the Protocol, they would still have serious objections to accepting first the principle of the prohibition of night work for women in the terms used in Convention No. 89. However, the Committee considers that Convention No. 89, as amended by the 1990 Protocol, remains the most pertinent legal instrument for those member States which would not yet be prepared to dismantle all protective regimes for women in the name of gender equality, while at the same time seeking flexibility in the application of such protective legislation and of course giving full consideration to the ratification of the Night Work Convention, 1990 (No. 171).

**180.** The Committee notes that governments were also requested to provide information concerning the possible ratification of the above-cited Convention.<sup>3</sup> The replies have not always been explicit or elaborate on this point, yet they allowed the Committee to discern some emerging trends with respect to this instrument and its measure of acceptance.

**181.** In one country (*Brazil*), the Bill ratifying Convention No. 171 is currently processed by the Committees of the National Congress and the ratification process could be completed shortly. In another country (*Costa Rica*), Convention No. 171 is now before the Legislative Assembly for discussion, while in *Slovenia* legislation is being amended to take full account of the principles of the Convention following which ratification could be undertaken. Two countries (*Burundi, Germany*) have reaffirmed their intention to ratify the Convention without giving, however, any further details. The Governments of four countries (*El Salvador, Greece, Romania, Yemen*) have reported that consultations with social partners have been initiated, while *Egypt* has indicated that the question of ratification is under consideration. Finally, two countries (*Morocco, Rwanda*) have stated that they are in the process of enacting specific regulations inspired by Convention No. 171 without specifying, however, their intentions as to ratification.

proceeded to denounce a Convention less than five years after ratification (excluding denunciations as a result of the ratification of revising instruments):

<i>Country</i>	<i>Convention</i>	<i>Date of ratification</i>	<i>Date of denunciation</i>
Brazil	C. 4	1934	1937
	C. 110	1965	1970
	C. 158	1995	1996
Malta	C. 4	1988	1991
Mauritania	C. 4	1961	1965
Sri Lanka	C. 4	1951	1954
Venezuela	C. 103	1982	1985

<sup>3</sup> Convention No. 171 came into force on 4 January 1995 and, as at 8 December 2000, it had been ratified by six member States as follows: Belgium, Cyprus, Czech Republic, Dominican Republic, Lithuania and Portugal.

**182.** On the other hand, a number of countries (*Angola, Canada, Colombia, Cuba, Ecuador, Japan, Malawi, Malaysia, Mauritius, New Zealand, Nicaragua, Pakistan, Paraguay, Spain, Thailand, Uruguay*) have indicated that they are not considering ratification at this stage. More concretely, the Government of *Canada* expressed doubts as to the compatibility of the provisions of the Convention with national legislation which is of general application and which does not distinguish between night and day work. In the view of the Government of *Spain* Convention No. 171 reflects a negative and restrictive outlook on night work and is excessively regulatory in nature. The Government of *Japan* considered that although labour laws comply with most of the standards laid down by Convention No. 171, there are still problems hindering ratification. In the case of *Mauritius*, the hesitation was due to concerns for employment in its export processing zone. Finally, it should be noted that, for the Government of *South Africa*, even the provisions of Convention No. 171 are discriminatory since they are inflexible and still place limitations on the night employment of women.

**183.** The Committee has also been in receipt of comments by four workers' organizations, all of which called upon their respective governments for the prompt ratification of Convention No. 171. The *New Zealand's Council of Trade Unions (CTU)* expressed support for the ratification of Convention No. 171 arguing that the national economy had undergone substantial deregulation since 1984, that collective bargaining at the national level had been reduced to almost nothing, and that much of the protection for night workers that existed in collective agreements at the time of the denunciation of Convention No. 89 no longer existed. Likewise, the *Federal Chamber of Labour (BAK)* of Austria expressed a favourable view with regard to ratification of Convention No. 171 considering gender-neutral protective measures to be necessary in view of the planned denunciation of Convention No. 89 and the anticipated legislative changes with respect to night work for women. For its part, the *Central Organization of Finnish Trade Unions (SAK)* considered it very important that Finland should start preparations for ratification of Convention No. 171. Finally, the *Confederation of Mexican Workers (CTM)* stated that the ratification of Convention No. 171 could be useful for workers because it would enhance protection for women and young workers at night.

**184.** In conclusion, it would appear that member States would tend to have, in general, a more positive attitude towards Convention No. 171 than towards Convention No. 89 together with its Protocol which apply exclusively to women workers. Yet, the Committee notes that Convention No. 171 has been ratified, or is expected to be ratified based on information contained in the reports, by those States which have already denounced or intend to denounce Convention No. 89. Although the two instruments are often perceived as mutually exclusive, member States could still, technically speaking, ratify both Conventions. The two instruments are the result of much differing approaches to

the problem of night work: whereas the Protocol follows the gender-oriented perspective of Convention No. 89, Convention No. 171 addresses the issue of night work for both men and women in its occupational safety and health dimension. While a major premise of the Conventions on night work of women is the vulnerability and special need of protection of the female worker, Convention No. 171 shifts its focus to the nature of night work as such, meaning work detrimental to health, generative of difficulties for the family and social life of the worker, and calling for special compensation. The Committee deems it necessary, therefore, to emphasize that the standards set out in the Protocol and the Convention of 1990 on night work may operate perfectly well in parallel in those countries which decide to relax some but not all limitations on women's night work and which want to offer optimum protection to those female workers who would be entitled to engage in night work.