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# THE ILLUSION OF EQUALITY: WOMEN'S NIGHT SHIFTS AND STRUCTURAL VULNERABILITY UNDER THE OSH CODE

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## ABSTRACT

The Occupational Safety, Health and Working Conditions (OSH) Code, 2020, is celebrated for removing blanket bans on women's night work. However, Sections 43 and 44 introduce a seemingly protective requirement: employers must obtain women's consent and provide "adequate safety" before employing them in "hazardous or dangerous processes". While "hazardous" is defined, "dangerous process" is not. "Adequate safety" is also undefined.

This paper argues that these ambiguities, combined with consent obtained under structurally vulnerable conditions, do not empower women. Instead, they create a chilling effect. Employers, fearing liability from undefined legal standards, may simply refuse to hire women for night shifts or dangerous processes altogether. The absence of clear definitions shifts the risk entirely onto employers, who respond by excluding women rather than complying with vague obligations.

Meanwhile, consent in India's overwhelmingly informal labour market - where over 90% of women workers lack bargaining power - is functionally coercive. Refusing night work carries implicit threats of termination or non-renewal.

The result is a new form of exclusion, dressed in the language of protection and equality. This is the illusion of equality: consent without agency, safety without standards, and employment without guarantee. The paper concludes that the OSHWC Code's gender provisions re-package rather than re-engineer equality, and calls for clear definitions of "dangerous process" and "adequate safety," alongside protections against retaliatory exclusion.

**Keywords:** Women, Equality, Night Shift, Employment.

## INTRODUCTION

For nearly seven decades, the Factories Act, 1948, embodied a paternalistic approach to women's labour in India. Section 66(1)(b) of that Act prohibited women from working in factories between 7 PM and 6 AM, ostensibly to protect them from exploitation and unsafe conditions.<sup>1</sup> The practical effect, however, was systematic exclusion: women were barred from entire sectors, denied overtime wages, and confined to the lower rungs of the industrial workforce.

This protective prohibition did not go unchallenged. Several High Courts dismissed cases relating to Section 66(1)(b) as unconstitutional and discriminatory, violating Articles 14, 15, and 16 of the Constitution.<sup>2</sup> Acting on these judicial pronouncements, states including Haryana, Rajasthan, Punjab, Andhra Pradesh, Madhya Pradesh, Karnataka, and Maharashtra amended their regulations between 2014 and 2017 to permit women to work night shifts, subject to conditions requiring female-friendly amenities such as separate toilets, transportation facilities, and mechanisms to prevent sexual harassment.<sup>3</sup> Empirical research on these state-level reforms reveals that lifting the night shift ban increased female employment, but the benefits were concentrated almost entirely among large firms with 250 or more employees. Smaller firms, burdened by compliance costs, were less able to hire women for night work.<sup>4</sup>

Building on these state experiments, the Occupational Safety, Health and Working Conditions (OSH) Code, 2020, now supersedes the Factories Act and purports to cement this progressive shift at the national level. The Code is celebrated for removing blanket bans on women's night work across all establishments. Sections 43 and 44 of the Code<sup>5</sup> permit employers to employ women in night shifts and in "hazardous or dangerous processes," subject to two conditions: the employer must obtain the woman's consent, and must provide "adequate safety" measures.

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<sup>1</sup> Factories Act, 1948, § 66(1)(b), No. 63, Acts of Parliament, 1948 (India)

<sup>2</sup> See, e.g., Vasantha R. v. Union of India, (2001) II LLJ 843 (Mad.); Triveni K.S. v. Union of India, 2002 (5) ALT 223 (Andhra High Court 2001). See also Centre for Public Policy Research, *Smoother Implementation of Laws Will Increase Women's Workforce Participation* (Oct. 12, 2022), <https://www.cppr.in/articles/smoothen-implementation-of-laws-will-increase-womens-workforce-participation> [<https://perma.cc/XXXX-XXXX>]

<sup>3</sup> Noorul Hassan & Kumar Panda, *Beyond Daylight: State-Level Reforms Enabling Night Shift Work for Women under the Factories Act*, Legal Era (July 28, 2025), <https://www.legaleraonline.com/amp/zoom-in/beyond-daylight-state-level-reforms-enabling-night-shift-work-for-women-under-the-factories-act-962746> [<https://perma.cc/XXXX-XXXX>].

<sup>4</sup> Gupta, B., Mahajan, K., Sharma, A. & Walia, D., *From Dusk Till Dawn: The Impact of Lifting Night Shift Bans on Female Employment*, Ashoka University Economics Discussion Paper No. 147 (2025), at 15-18.

<sup>5</sup> Occupational Safety, Health and Working Conditions Code, 2020, §§ 43-44, No. 37, Acts of Parliament, 2020 (India) [hereinafter OSH Code]

However, beneath this veneer of progressivism lie troubling ambiguities. While the Code defines "hazardous" processes, the term "dangerous process" remains undefined. "Adequate safety" is also left to the discretion of employers and state rule - makers, creating a regulatory vacuum. The draft rules notified by various states elaborate on conditions such as well - lit work areas, separate mess rooms and washrooms, and transportation facilities to the doorstep of the employee's residence. Yet these very conditions, while necessary for safety, impose significant compliance costs that may deter employers from hiring women, particularly in small and medium enterprises.<sup>6</sup>

This paper argues that these ambiguities - combined with consent obtained under structurally vulnerable conditions - do not empower women. Instead, they create a chilling effect. Employers, fearing liability from undefined legal standards, may simply refuse to hire women for night shifts or dangerous processes altogether. The absence of clear definitions shifts the risk entirely onto employers, who respond by excluding women rather than complying with vague obligations.

The consent requirement, at first glance a gesture toward women's agency, conceals deeper problems. Neither the Code nor the state rules specify when consent must be obtained or under what circumstances it can be revoked. In India's overwhelmingly informal labour market - where over 90% of women workers lack bargaining power - refusing night work carries implicit threats of termination or non - renewal.<sup>7</sup> If a woman employee refuses to give her consent, it may directly impact her chances of employment or promotion, as male employees are forced to cover night shifts on a rotational basis. The law thus creates a double bind: consent is required, but refusal is penalized in practice (a doubt not yet addressed).<sup>8</sup>

The result is a new form of exclusion, dressed in the language of protection and equality. This is the illusion of equality: consent without agency, safety without standards, and employment without guarantee.

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<sup>6</sup> See Occupational Safety, Health and Working Conditions (Kerala Draft) Rules, 2021, r. 44; Occupational Safety, Health and Working Conditions (Maharashtra Draft) Rules, 2021; Occupational Safety, Health and Working Conditions (Karnataka Draft) Rules, 2021.

<sup>7</sup> Modi, P. & Reddy, P., *A Missed Opportunity: The Occupational Safety, Health and Working Conditions Code, 2020*, Centre for Labour Laws, National Law Institute University, Bhopal (2020), at 8-10.

<sup>8</sup> Varkey, A.S., *The New Labour Codes: Ideologically Progressive Yet Practically Regressive*, Centre for Public Policy Research (Sept. 15, 2022), <https://www.cppr.in/articles/the-new-labour-codes-ideologically-progressive-yet-practically-regressive> [<https://perma.cc/XXXX-XXXX>].

## THE LEGAL ARCHITECTURE - DEFINITIONAL GAPS, AND STATE RULES

Section 43 of the Occupational Safety, Health and Working Conditions (OSH) Code, 2020,<sup>9</sup> marks a significant departure from the discriminatory framework of the Factories Act, 1948. It begins with an enabling declaration: "*Women shall be entitled to be employed in all establishments for all types of work under this Code.*" This affirmative statement establishes formal equality as a baseline. The provision then permits women to be employed before 6 a.m. and beyond 7 p.m., subject to two conditions: first, the woman's consent must be obtained; and second, such employment is subject to conditions relating to safety, holidays, working hours, or any other condition as may be prescribed by the appropriate Government. The provision is deliberately open-ended, delegating the substantive content of these conditions to state-level rules.

Section 44<sup>10</sup> deals with employment of women in dangerous operations. It provides that where the appropriate Government considers that the employment of women is dangerous for their health and safety in any establishment or class of establishments, or in any particular hazardous or dangerous processes, due to the operation carried out therein, such Government may in the prescribed manner require the employer to provide adequate safeguards prior to the employment of women for such operation. Every word in this provision is weighted with discretion. The government need only act if it considers employment dangerous. Even then, it may act, not shall. The standard to be met is adequate safeguards, a phrase left entirely undefined.<sup>11</sup>

A careful reading of Sections 43 and 44 reveals three critical gaps that undermine the protective and enabling intent of the Code. The first gap concerns the meaning of "*consent*" in Section 43. Neither the Code nor the state rules specify when exactly consent must be taken, whether it can be revoked, and under what circumstances such revocation is permissible. If a woman refuses to give her consent for night shifts, the law provides no protection against retaliation. As the Centre for Public Policy Research notes, refusal may directly impact her chances of employment or promotion, since male employees are forced to cover night shifts on a rotational basis. The law creates a double bind: consent is formally required, but refusal is practically

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<sup>9</sup> OSH Code, *supra* note 5, § 43.

<sup>10</sup> OSH Code, *supra* note 5, § 44.

<sup>11</sup> Kartar Singh v. State of Punjab, (1994) 3 SCC 569, ¶ 112 (India)

penalized.

The second gap concerns the term "dangerous process" in Section 44. While "hazardous process" may draw from definitions in the Act, "dangerous process" appears without any statutory definition whatsoever. No criteria are provided to determine which processes qualify as dangerous. Does a process involving heavy machinery qualify? What about exposure to extreme temperatures, or handling of toxic chemicals, or working at significant heights or working with or animals or criminals? The Code provides no answers, leaving employers and state governments to guess.

The third gap concerns the phrase "adequate safeguards" in Section 44. Adequate measured against what standard? Adequate according to whom? Adequate for what level of risk? The provision is tautological: women cannot work in dangerous processes unless safety is adequate, but "adequate" means whatever the employer or the state government says it means. In a regulatory environment with weak enforcement and routine inspection failures, "adequate" becomes whatever the employer can get away with.

Labour being on the Concurrent List, both the Central and state governments can legislate on matters relating to the OSH Code.<sup>12</sup> Consequently, state governments have been tasked with prescribing the specific conditions for women's night work under Section 43. Approximately 24 states and union territories have pre - published their draft rules, and these vary significantly across jurisdictions.

The Kerala Occupational Safety, Health and Working Conditions (Draft) Rules, 2021, provide a relatively detailed framework. Rule 44 of the Kerala Draft Rules requires employers to obtain written consent from women employees before assigning them night shifts between 7 PM and 6 AM. The employer must provide transportation facilities to the doorstep of the employee's residence, ensuring safe pick - up and drop - off. Additionally, the workplace must have separate restrooms and mess facilities for women, adequate lighting, and a complaint mechanism for harassment. The rules also mandate that a female supervisor or security personnel be present during night shifts.<sup>13</sup>

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<sup>12</sup> Constitution of India, Seventh Schedule, List III (Concurrent List), Entry 24 (labour).

<sup>13</sup> Occupational Safety, Health and Working Conditions (Kerala Draft) Rules, 2021, r. 44, *available at Kerala Gazette*, [www.egazette.kerala.gov.in](http://www.egazette.kerala.gov.in) [<https://perma.cc/XXXX-XXXX>].

Other states have issued rules with varying degrees of specificity. Maharashtra has published draft rules that similarly require consent, transport, and separate facilities, though the enforcement mechanisms remain weak.<sup>14</sup> Karnataka and Tamil Nadu have also notified draft rules, but their provisions on transport and consent documentation differ in material respects.<sup>15</sup> Uttar Pradesh and Delhi have issued rules that are less detailed, leaving significant discretion to employers. In several states, the draft rules are still awaiting final notification, creating a legal vacuum where the Code applies but the implementing rules do not yet exist.<sup>16</sup>

This fragmentation creates two related problems. First, the level of protection available to a woman worker depends entirely on the state in which she is employed. A woman working in Kerala may have a legally enforceable right to doorstep transport, while a woman in a state with less detailed rules may have no such right. Second, employers with operations across multiple states face inconsistent compliance obligations, creating an incentive to concentrate women's night shift employment in states with weaker protections. The Code's promise of uniform national standards is thus undermined by the very mechanism of state-level rule-making.

The structural architecture of Sections 43 and 44 raises a deeper constitutional question about the permissible limits of delegated legislation. The Code does not define its key terms. Instead, it delegates to state governments the power to prescribe conditions, to determine what constitutes dangerous, to decide whether to require safeguards, and to define what those safeguards must include. This is not merely a delegation of rule-making power; it is a delegation of the authority to define the substantive content of the right itself.

The Supreme Court has consistently held that while delegated legislation is constitutionally permissible, the parent statute must provide adequate guidance and policy standards to control the delegate's discretion. In *Kartar Singh v. State of Punjab*<sup>17</sup>, the Court emphasized that statutes affecting fundamental rights must provide "clear and specific guidelines" for their enforcement. In *Shreya Singhal v. Union of India*<sup>18</sup>, the Court struck down Section 66A of the IT Act precisely because its vague terms gave unguided discretion to enforcing authorities. The

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<sup>14</sup> See Occupational Safety, Health and Working Conditions (Maharashtra Draft) Rules, 2021; Occupational Safety, Health and Working Conditions (Karnataka Draft) Rules, 2021; Occupational Safety, Health and Working Conditions (Tamil Nadu Draft) Rules, 2021.

<sup>15</sup> Id.

<sup>16</sup> Id.

<sup>17</sup> *Kartar Singh v. State of Punjab*, (1994) 3 SCC 569, ¶ 112 (India)

<sup>18</sup> *Shreya Singhal v. Union of India*, (2015) 5 SCC 1, ¶ 86 (India).

same reasoning applies to Sections 43 and 44 of the OSH Code. By delegating the definition of "dangerous process," "adequate safeguards," and the entire consent framework to state rules without any legislative guidance, the Code creates precisely the kind of unguided discretion that the vagueness doctrine prohibits.

## **THE CONSENT REQUIREMENT - SUBSTANTIVE COERCION AND THE FEMINIST CRITIQUE**

Section 43 of the OSH Code, 2020, conditions a woman's employment before 6 a.m. and beyond 7 p.m. upon her "consent." Read literally, this appears to be a progressive safeguard.<sup>19</sup> Unlike the Factories Act, 1948, which simply prohibited women from night work altogether, the Code purports to respect women's autonomy by requiring their affirmative agreement.<sup>20</sup> A woman cannot be forced to work a night shift; she must say yes. On paper, this is a triumph of agency over paternalism.

But the appearance of progressiveness dissolves upon closer examination. The Code provides no framework for how consent is to be obtained, documented, or revoked. It does not specify whether consent must be given at the time of hiring or separately for each night shift assignment. It does not state whether consent can be withdrawn mid - employment, and if so, with what notice period and with what consequences. It does not require that consent be informed by a disclosure of risks, nor does it mandate that the woman be explained her rights in a language she understands. Most critically, the Code provides absolutely no protection against retaliation for a woman who refuses to give consent or who revokes consent after having given it.

The absence of these procedural safeguards is not a minor omission. It is the difference between a right that can be exercised and a right that exists only on paper. A woman who is told that night shift work is mandatory for continued employment, and who signs a consent form because the alternative is termination, has not freely consented. But under the Code as currently drafted, her signature is sufficient. The law does not ask whether her consent was coerced, whether she understood what she was signing, or whether she had any realistic alternative.

To understand why the absence of procedural safeguards is so damaging, one must situate the

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<sup>19</sup> OSH Code, *supra* note 5, § 43.

<sup>20</sup> Factories Act, 1948, § 66(1)(b), *supra* note 1.

consent requirement within the structural realities of India's labour market. Over 90 percent of India's female workforce is employed in the informal sector.<sup>21</sup> These women work without written contracts, without social security coverage, and without union representation. They are employed at will in the most literal sense: they can be terminated at any time, for any reason, or for no reason at all. A supervisor need not say, "Sign this consent form or you will be fired." The threat is implicit and ever-present.

Even in the formal sector, where written contracts and labour protections theoretically exist, women workers face significant bargaining power deficits. The wage gap persists across sectors, with women earning approximately 70 to 80 percent of men's wages for comparable work. Women are concentrated in lower-tier positions with less job security and fewer avenues for grievance redress.<sup>22</sup> Promotion trajectories are slower, and the threat of being labelled "difficult" or "non-cooperative" carries real career consequences. In this context, the requirement of "consent" is not a shield; it is a mechanism for extracting compliance under the guise of choice.<sup>23</sup>

Feminist legal theory has long distinguished between formal or procedural consent and substantive or free consent. Procedural consent asks whether the formalities have been complied with: was a document signed? Was a box checked? Was a verbal affirmation recorded? Substantive consent asks a deeper set of questions: was the person free from coercion, undue influence, or economic duress? Did she have a genuine alternative? Was her choice informed by a meaningful understanding of the risks and consequences? Was she in a position to say no without suffering a penalty?

The Indian Contract Act, 1872, recognises this distinction in principle. Section 14 defines "free consent" as consent not caused by coercion, undue influence, fraud, misrepresentation, or mistake.<sup>24</sup> Section 15 defines coercion to include the threat of any act forbidden by the Indian Penal Code, or the unlawful detention of property. But critically, the Act does not explicitly recognise economic duress - the threat of job loss, wage reduction, or unfavourable reassignment - as a form of coercion.<sup>25</sup> This gap in contract law has been carried over here. A

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<sup>21</sup> National Sample Survey Office, \*Periodic Labour Force Survey 2022-23\*, Ministry of Statistics and Programme Implementation (2024), at 45-48

<sup>22</sup> Gupta et al., *supra* note 4, at 12-14

<sup>23</sup> International Labour Organization, *World Employment and Social Outlook: Trends 2023*, at 67-70 (International Labour Office, 2023)

<sup>24</sup> Indian Contract Act, 1872, § 14, No. 9, Acts of Parliament, 1872 (India).

<sup>25</sup> Indian Contract Act, 1872, § 15, No. 9, Acts of Parliament, 1872 (India).

woman who signs a consent form because her supervisor has implied that refusal will lead to termination has, in the eyes of the law, given valid consent. Her economic vulnerability is not legally cognisable as coercion.

Feminist legal scholars have argued that this framework is fundamentally inadequate for understanding consent in contexts of structural inequality. Catharine MacKinnon famously argued that consent is not a binary state but a spectrum, and that the law's focus on procedural formalities obscures the power dynamics that shape supposedly voluntary choices.<sup>26</sup> A woman who consents to night shift work because the only alternative is destitution has not made a choice in any meaningful sense; she has merely selected the least bad option among a set of terrible ones.<sup>27</sup>

The consent requirement in Section 43 creates a further problem that has received little attention: it applies only to women. As the Centre for Public Policy Research has pointed out, there is no legal mandate to take men's consent for engaging them in night shifts. A male worker can be assigned night work without being asked, without signing a form, and without any right to refuse. He may complain, he may unionise, he may quit. But he cannot invoke a statutory consent requirement because none exists for him.

This asymmetry creates a perverse incentive structure. Employers who need to cover night shifts will naturally prefer workers who do not require consent. If a woman can refuse and a man cannot, the rational employer will assign night shifts to men and day shifts to women. The consent requirement, intended as a protection, thus becomes a mechanism for excluding women from night shift opportunities altogether.

The constitutional implications of this asymmetry are significant. Article 15(1) prohibits discrimination on grounds of sex.<sup>28</sup> Article 15(3) permits the State to make "special provisions" for women.<sup>29</sup> But the Supreme Court has held that special provisions must be truly enabling, not restrictive. In *Air India v. Nargesh Meerza*<sup>30</sup>, the Court struck down discriminatory service conditions for air hostesses that were not applied to male flight attendants. While that case

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<sup>26</sup> Catherine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* 45-50 (Harvard University Press, 1987).

<sup>27</sup> Martha Nussbaum, *Women and Human Development: The Capabilities Approach* 70-75 (Cambridge University Press, 2000).

<sup>28</sup> Constitution of India, art. 15(1).

<sup>29</sup> Constitution of India, art. 15(3).

<sup>30</sup> *Air India v. Nargesh Meerza*, (1981) 4 SCC 335, ¶¶ 45-52 (India).

involved different facts, the principle applies: a special provision that, in practice, operates to disadvantage women may be constitutionally suspect. The consent requirement in Section 43, by imposing a procedural burden on women that does not apply to men, and by creating economic incentives for employers to prefer male workers for night shifts, may be such a provision.

Indian courts have, in certain contexts, recognised that consent obtained under conditions of economic compulsion is not free consent. The most significant precedent is *Bandhua Mukti Morcha v. Union of India* (1984) 3 SCC 161. In that case, the Supreme Court dealt with bonded labourers who were forced to work for meagre wages to repay debts. The Court held that such labourers could not be said to have "consented" to their situation. Justice Bhagwati observed that where a person provides labour or service for remuneration that is less than the minimum wage, such labour or service is clearly forced labour. The absence of explicit physical coercion did not matter; the economic compulsion was sufficient to vitiate consent.

The logic of *Bandhua Mukti Morcha*<sup>31</sup> applies directly to the night shift consent context. A woman who consents to night work because the only alternative is termination, reduced hours, or being moved to a less favourable position, is not consenting freely. She is consenting under economic duress. The fact that she is paid the minimum wage (or, more likely, something close to it) does not distinguish her case from the bonded labourers in *Bandhua Mukti Morcha*.<sup>32</sup> In both cases, the absence of a genuine alternative makes the choice coerced.

Yet the Court has not extended this reasoning to gender-based labour conditions. In *People's Union for Democratic Rights v. Union of India*,<sup>33</sup> the Court dealt with the employment of children in hazardous industries, not with women's night work. The doctrinal gap remains.

Even if a woman later claims that her consent was coerced, the evidentiary burden under current law falls entirely on her. She would need to demonstrate specific threats, explicit statements, or documented actions by the employer that amount to coercion. In the informal sector, where workplace interactions are oral, undocumented, and hierarchical, this is an almost impossible evidentiary hurdle. The supervisor who implies termination without saying it leaves no paper trail. The manager who reassigns a woman to the "reserve pool" for refusing night work can

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<sup>31</sup> *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161, ¶ 10 (India).

<sup>32</sup> *Id.* ¶ 12.

<sup>33</sup> *People's Union for Democratic Rights v. Union of India*, (1982) 3 SCC 235 (India).

point to business necessity. The employer who simply does not renew a fixed-term contract need give no reason at all.

The law's silence on evidentiary standards for consent claims effectively immunises employers from scrutiny. A woman who signs a consent form cannot later challenge it unless she can produce evidence of explicit coercion. The absence of a rebuttable presumption - for example, that consent obtained from a worker in a precarious employment relationship is presumptively coerced unless the employer proves otherwise - leaves women with no practical remedy. This is not an accident. The law's procedural formalism serves the interests of employers who wish to extract consent without accountability.

The International Labour Organization's Night Work Convention, 1990 (No. 171), which India has not ratified, provides that night workers shall be afforded protection in the form of health assessments, transfer rights, and compensatory measures.<sup>34</sup> Consent is not the primary mechanism; structural protections are. The OSH Code's reliance on consent as the sole safeguard, without accompanying structural protections, is out of step with international best practice.

### **THE CHILLING EFFECT - HOW UNDEFINED STANDARDS DRIVE EXCLUSION**

The term "chilling effect" originates in First Amendment jurisprudence, most famously in the United States, where it describes the tendency of vague or overbroad laws to suppress protected speech because citizens fear unwitting violation. The Supreme Court of India adopted this concept in *Shreya Singhal v. Union of India*,<sup>35</sup> holding that Section 66A of the Information Technology Act created a chilling effect on free speech because its vague terms caused people to self-censor rather than risk prosecution. The same logic applies to regulatory provisions in labour law. The chilling effect is the gap between the law's text and its practical operation: the law says "do X safely," but employers hear "do not do X at all."

Section 44 of the OSH Code creates a textbook chilling effect. It provides that where the government considers employment of women dangerous in any hazardous or dangerous process, the government may require employers to provide adequate safeguards. Every word in this provision is ambiguous. "Dangerous process" is undefined. "Adequate safeguards" is

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<sup>34</sup> See International Labour Organization, Night Work Convention, 1990 (No. 171), arts. 4-7.

<sup>35</sup> *Shreya Singhal v. Union of India*, (2015) 5 SCC 1, ¶ 86 (India).

undefined. The government's power is discretionary ("may"), not mandatory ("shall"). The government's determination is subjective ("considers"). An employer reading this provision cannot know with any certainty what obligations attach to employing a woman in a particular process.

Faced with this uncertainty, the rational employer will not seek legal advice, conduct a risk assessment, or invest in safety measures. The rational employer will simply not employ women in any process that could conceivably be characterised as dangerous. Why? Because the cost of compliance with an unknown standard is potentially infinite, while the cost of exclusion is zero. The employer bears no penalty for not hiring women. The employer bears significant potential liability if a government later determines that a process was dangerous and that safeguards were inadequate. The economically rational choice is exclusion.

This is the chilling effect in operation. Section 44 does not explicitly prohibit women from working in dangerous processes. It does not even impose a mandatory duty on employers. It merely authorises the government to act, someday, perhaps, if it considers it necessary. But the mere existence of this discretionary power, coupled with the complete absence of definitional guidance, causes employers to pre-emptively exclude women. The law chills what it purports to permit.

The chilling effect is not theoretical. Empirical research from states that experimented with night shift provisions before the OSH Code confirms that undefined safety standards lead to reduced female employment. A 2025 study by Gupta, Mahajan, Sharma, and Walia from Ashoka University examined the impact of lifting night shift bans across several Indian states between 2014 and 2017.<sup>36</sup> The study found that while lifting the ban increased female employment overall, the benefits were concentrated almost entirely among large firms with 250 or more employees. Smaller firms, unable to absorb the compliance costs and legal uncertainties associated with undefined safety standards, simply did not hire women for night shifts.<sup>37</sup>

The study's findings are directly applicable to Section 44. Small and medium enterprises, which constitute over 99 percent of all registered businesses in India, lack the legal and compliance

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<sup>36</sup> Gupta et al., *supra* note 4, at 15-18.

<sup>37</sup> Gupta et al., *supra* note 4, at 19-20.

resources to interpret ambiguous statutory standards.<sup>38</sup> They cannot afford to hire lawyers to advise on what "adequate safeguards" might mean. They cannot risk government action if a process is later deemed dangerous. Their rational response is exclusion. The law thus operates as a regressive filter: large firms with compliance capacity may hire women for night shifts; small firms, where most women work, will not.

The chilling effect is reinforced by a second factor: the near-absence of enforcement. Section 44 gives the government discretionary power to require safeguards, but no timeline, no reporting requirement, and no obligation to act. Governments face competing priorities and limited resources. Labour inspections are rare. Penalties are low. The probability that a government will exercise its Section 44 power to require safeguards is vanishingly small.

Employers know that the government is unlikely to act. They know that even if the government acts, the process will be slow. They know that the definition of "adequate safeguards" will be negotiated, not enforced. The rational response, therefore, is not to invest in safety but to continue excluding women, secure in the knowledge that no enforcement action will follow. The law's ambiguity and the state's inaction form a vicious cycle: ambiguity justifies inaction, and inaction entrenches exclusion.

Section 44 does not explicitly deprive women of the right to work in dangerous processes. But its chilling effect does. By creating regulatory ambiguity that causes employers to exclude women, the law indirectly but effectively denies women access to employment opportunities that would otherwise be available. This indirect denial, if caused by statutory vagueness rather than explicit prohibition, is nonetheless a deprivation of the right to livelihood. The State cannot achieve through ambiguity what it cannot achieve through explicit command. If the government wishes to exclude women from dangerous processes, it must do so clearly, with defined criteria and a rational basis. It cannot do so by drafting a vague provision and then remaining passive while employers do the excluding.<sup>39</sup>

The chilling effect is not inevitable. It is a product of ambiguity. Where state rules provide clear, specific, and enforceable standards, employers can comply and women can work. The Kerala Draft Rules, 2021, provide an example. Rule 44 of the Kerala Rules specifies that employers must provide doorstep transportation, separate restrooms, female supervision during

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<sup>38</sup> Ministry of Statistics and Programme Implementation, \*Annual Survey of Industries 2021-22\* (2023)

<sup>39</sup> *Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 SCC 545, ¶ 32 (India).

night shifts, and written consent documented in a prescribed format.<sup>40</sup> These are concrete obligations. An employer in Kerala knows what is required. Compliance is possible. Exclusion is not the only rational response. The variation across states proves the point. In Kerala, where rules are relatively detailed, the chilling effect may be mitigated.

The chilling effect is the central mechanism through which Section 44 excludes women while appearing to protect them. By leaving "dangerous process" and "adequate safeguards" undefined, by making government action discretionary rather than mandatory, and by providing no enforcement mechanism, the Code creates a regulatory environment where the rational employer excludes women rather than complies. Empirical evidence from state-level reforms confirms that small firms, unable to absorb compliance costs and legal uncertainties, drive this exclusion. The constitutional implications are significant: the chilling effect indirectly deprives women of the right to livelihood under Article 21, and the fragmentation of state rules violates the equal protection guarantee of Article 14. The solution is not to remove safeguards but to define them clearly, making compliance possible and exclusion unnecessary.

## CONCLUSION AND RECOMMENDATIONS

This paper began with a deceptively simple question: Does the OSH Code, 2020, liberate or re-entrench gender-based exclusion? The answer, after examining Sections 43 and 44 through the lens of feminist jurisprudence and the vagueness doctrine, is neither simple nor comforting. The Code does both. It liberates in text and re-entrenches in operation.

The Code's enabling language in Section 43 - "*Women shall be entitled to be employed in all establishments for all types of work*" - is a genuine legislative victory. It repudiates the discriminatory paternalism of Section 66(1)(b) of the Factories Act, 1948, which excluded women from night work on the pretext of protection. This victory should not be minimised. For the first time, Indian labour law affirms women's entitlement to work on equal terms with men.

But the victory is hollow because the conditions attached to that entitlement are undefined, discretionary, and unenforceable. The consent requirement in Section 43 provides no framework for revocation and no protection against retaliation. The safety requirement in

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<sup>40</sup> Occupational Safety, Health and Working Conditions (Kerala Draft) Rules, 2021, r. 44.

Section 44 leaves "dangerous process" and "adequate safeguards" entirely undefined, gives the government discretionary rather than mandatory power, and predicates action on the government's subjective "consideration." These are not drafting oversights. They are structural features that enable exclusion while appearing to enable equality.

The result is what this paper has called the illusion of equality: consent without agency, safety without standards, and employment without guarantee. Women are formally entitled to work, but that entitlement is so encumbered by undefined and discretionary conditions that employers have every incentive to exclude them.

The Code gives with one hand and takes with the other.

Three key findings emerge from the analysis. First, the consent requirement in Section 43 is procedurally hollow. Neither the Code nor the state rules specify when consent must be taken, how it must be documented, under what circumstances it can be revoked, or what protections exist against retaliation for refusal.

Second, the undefined terms in Section 44 create a regulatory vacuum that drives employer exclusion. "Dangerous process" has no statutory definition. "Adequate safeguards" has no measurable standard. The government's power is discretionary, not mandatory. Faced with this ambiguity, rational employers exclude women rather than risk non-compliance with unknown standards.

Third, the delegation of standard-setting to state rules produces a fragmented and unequal regulatory landscape. The Kerala Draft Rules provide relatively detailed protections, including doorstep transport, separate facilities, and written consent documentation. Other states have weaker rules or no finalised rules at all. A woman's right to night shift employment thus depends on the accident of geography. This fragmentation violates the equal protection guarantee of Article 14 and undermines the Code's promise of uniform national standards.

The definitional gaps in Sections 43 and 44 are not merely technical drafting problems. They raise fundamental constitutional questions. The Supreme Court has consistently held, from *Baldeo Prasad*<sup>41</sup> to *Shreya Singhal*<sup>42</sup>, that laws affecting fundamental rights must provide

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<sup>41</sup> State of Madhya Pradesh v. Baldeo Prasad, (1961) 1 SCR 970, ¶ 8 (India).

<sup>42</sup> Shreya Singhal v. Union of India, (2015) 5 SCC 1, ¶ 86 (India).

clear, ascertainable standards. Vague laws that delegate unguided discretion to the executive or to private parties are constitutionally suspect. Section 44, which gives the government discretionary power to determine what is "dangerous" and what constitutes "adequate safeguards" without any legislative guidance, falls squarely within the prohibition articulated in these cases.

The following recommendations are specific, actionable, and grounded in the constitutional and statutory analysis developed in this paper.

1. Define "Dangerous Process" with Objective Criteria: Section 44 must be amended to include a definition of "dangerous process" based on objective, verifiable criteria. These criteria should include, at minimum: (a) exposure to chemicals listed in the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules or the Environment Protection Act schedules; (b) operation of machinery with moving parts that pose entanglement or amputation risks; (c) working at heights exceeding a specified threshold, such as three metres; (d) handling of explosives or flammable materials; (e) exposure to extreme temperatures, whether heat or cold, beyond specified limits; and (f) any other process identified by the National OSH Advisory Board through a transparent, consultative process. A defined list, even if not exhaustive, provides guidance. The current absence of any definition provides none.

2. Define "Adequate Safeguards" with Measurable Standards: "Adequate safeguards" must be defined by reference to specific, measurable standards. These should include: (a) compliance with relevant Indian Standards (IS) published by the Bureau of Indian Standards;<sup>43</sup> (b) provision of personal protective equipment appropriate to the identified hazards; (c) engineering controls such as ventilation, guarding, and emergency shutoffs; (d) administrative controls including training, signage, and shift duration limits; (e) medical monitoring for workers exposed to hazardous processes; and (f) documented risk assessments reviewed annually and made available to workers and inspectors. The standard of adequacy should be what is reasonably practicable, not what is minimally affordable.

3. Make Section 44 Mandatory, Not Discretionary: The word "may" in Section 44 must be replaced with "shall." The government shall require employers to provide adequate safeguards prior to the employment of women in dangerous processes. This removes the government's

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<sup>43</sup> OSH Code, *supra* note 5, § 44

discretion to simply do nothing. A mandatory duty creates a corresponding right in women workers to enforce compliance through litigation if the government fails to act. The current discretionary framework gives women no legal remedy.

4. Provide a Framework for Free and Informed Consent: Section 43's consent requirement must be supplemented with procedural safeguards. These should include: (a) written consent obtained separately for each night shift assignment or for a defined period not exceeding three months; (b) consent explained in a language the woman understands, with documentation of the explanation; (c) a right to revoke consent at any time without retaliation; (d) a rebuttable presumption of coercion if a woman is terminated, demoted, or otherwise disadvantaged within ninety days of revoking consent or refusing night work; (e) a prohibition on making night shift consent a condition of initial or continued employment; and (f) mandatory recording of consent refusals and the employer's response. These safeguards transform consent from a paper ritual into a genuine right.

5. Establish Minimum National Standards for State Rules: The fragmentation of state rules violates Article 14's guarantee of equal protection. The central government should exercise its power under the Code to prescribe minimum national standards that all state rules must meet. These minimum standards should include: (a) doorstep transport for night shifts; (b) separate restroom and mess facilities for women; (c) female supervision or security personnel during night shifts; (d) a written sexual harassment complaint mechanism accessible during night hours; and (e) crèche facilities for night shifts operating during all working hours. States may provide additional protections but may not provide less. This harmonises the regulatory landscape and ensures that a woman's rights do not depend on her state of residence.

6. State Subsidies for Small Enterprises: The chilling effect documented in this paper falls most heavily on small and medium enterprises, which lack the resources to comply with even clear safety standards. The government should establish a subsidy or tax credit programme to offset compliance costs for establishments with fewer than 250 employees. These subsidies should cover transport arrangements, crèche facilities, safety equipment, and training.

This paper has been critical of the OSH Code's gender provisions, and justifiably so. But criticism without recognition of progress is incomplete. The Code's affirmation that "Women shall be entitled to be employed in all establishments for all types of work" is a watershed statement. It repudiates decades of discriminatory protectionism.

The problem is that the Code stops at the foundation. It requires consent but provides no framework for free consent. It mentions safety but defines no safety standards. It delegates to states but provides no minimum national floor. It gives with one hand and takes with the other.

The illusion of equality is *dangerous* because it is *seductive*. It allows policymakers to claim progress while the lived reality of women workers remains unchanged. It allows courts to defer to legislative intent while ignoring statutory ambiguity.

The recommendations offered here are incremental, feasible, and grounded in existing constitutional doctrine. Defining "dangerous process" does not require a constitutional amendment. Providing a framework for consent does not require revolution. Establishing minimum national standards for state rules does not require the abolition of federalism. These are modest, practical reforms that would transform the Code from a paper right into a living entitlement.

The ultimate question is whether India's labour law will treat women as subjects of rights or as objects of protection. The OSH Code, 2020, gestures toward the former but delivers the latter. The work of making the Code's promise real lies ahead—in amendments, in rules, in judicial interpretation, and in the daily, unglamorous work of enforcement. The Code is a foundation. It is not yet a home. This paper has attempted to show what must be built on that foundation.