

Work-Life Balance and the Economic Crisis

ADAPT LABOUR STUDIES BOOK-SERIES

International School of Higher Education in Labour and Industrial Relations

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Work-Life Balance and the Economic Crisis:

*Some Insights from the Perspective
of Comparative Law
(Volume I: The Spanish Scenario)*

Edited by

Lourdes Mella Méndez
and Lavinia Serrani

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PREFACE

LOURDES MELLA MÉNDEZ

No one can deny the significance attributed to the issue of reconciling work and private life by contemporary society, the EU and other international organisations. Its relevance is evident in the cross-cutting nature of this topic and the need for each party to the employment contract to strike a proper balance between professional and personal responsibilities, based on the assumption that people can successfully harmonise their work with life. Following on from these considerations, the present work provides a detailed analysis of work-life balance and its regulation in a number of EU countries, emphasizing the consequences that the current economic crisis has brought about in this field.

This work consists of two volumes. The first one is concerned with Spanish Law and is divided into three chapters, each of which investigates three different, albeit complementary, aspects. Research included in Chapter I provides some general reflections which are decisive to understand the issue of work-life balance in Spanish legislation. The starting point of the analysis is the perspective of the Constitutional Court towards the issue, which is exemplified in Ruling 26/2011 of 14 March.

The support provided to the position of the Constitutional Court on the part of legislation intended to facilitate workers' reconciliation rights considers both the right to non-discrimination based on gender due personal circumstances and the protection of the family and childhood (Articles 14 and 39 of Spain's Constitution). Furthermore, questions arise also in relation to the position of the Constitutional Court to serve as guidance to solve any interpretative doubts arising from the application of the law every time the balance between work and family life is concerned (e.g. when determining the constitutional legitimacy of the employer's compliance with the relevant rules). Consequently, assessing whether an employer's decision constitutes an unjustified obstacle to the worker's reconciliation of work and personal life must consider his/her effective situation and the organisation of work at the employer's premises.

Regretfully, although the Constitution has recognised this right and numerous provisions have been implemented concerning the reconciliation of work and family commitments, many constraints exist in today's

Spanish society and corporate culture that hinder the development of a reconciliation path for working people. This is the challenge that the first paper attempts to deal with, since it is concerned with social and cultural changes within the family, the increasing need for flexibility on the employer's side, the lack of rules to fulfil the goals of adaptability and reconciliation, the dominant business structure in Spain (microenterprises), the growing decentralisation of production, and, finally, the deficiencies of public care facilities.

Along with these major shortcomings, one should recall the negative impact of the current economic crisis and the labour reforms put in place in 2010, 2012 and 2013 concerning reconciliation rights. In this sense, new labour legislation attempted to provide labour relations with more flexibility rather than ensuring workers' protection. Consequently, workers' general rights to balance work and family life and adjust working time to favour reconciliation (Article 34.8 of the Workers' Statute) are devoid of contents and have limited application, since they will depend on the terms laid down through collective bargaining. Yet entrusting collective bargaining with the power to decide on workers' rights to adjust their working day undoubtedly affects their odds of reconciling work and family responsibilities, also in consideration of the fact that today's negotiation between social actors is less and less effective.

The introductory section also considers the issues faced by self-employed workers, especially the economically dependent ones, since legislation governing this form of employment is fraught with major shortcomings and pitfalls as regards reconciliation. Some proposals are also put forward concerning the victims of violence at work.

After these general considerations, Chapter II considers the distribution of working time and rest periods, being time a decisive element in balancing work and family life. The interrelation of working time and work-life balance can be successful only if workers' personal demands are considered alongside employers' productive needs. Many contributions in the second chapter point out this aspect, highlighting how Spanish lawmakers introduced measures that in practice undermine reconciliation and run counter to the stated objectives of such initiatives. One example of the contradictory nature of these provisions is the irregular distribution of that 10% of employees' annual working hours that can be freely decided by employers, along with the use of extra hours in part-time work (Article 12 of the Workers' Statute). The regulation of these aspects has certainly been conditioned by Law 3/2012 of 6 July concerning urgent measures to reform the labour market and Royal Decree 16/2013 of 20 December devised to favour stable employment and improve workers' employability.

The foregoing measures are intended to ensure flexibility of working time. This would favour employers, who can count on employee availability, but would penalize workers, since they will find it more complicated to arrange their personal life. The provisions referred to above are also an attempt on the part of the Spanish government to promote reconciliation and shared responsibilities (e.g. by adapting working time to school hours) and other family needs. The effort to provide a proper distribution of working hours can be seen as a first step towards reconciliation, since it reasserts workers' right to remain in employment along with that of taking time off or interrupting work (e.g. to look after children and other sick relatives).

The analysis of Spanish Law concludes with Chapter III, which discusses the issues resulting from reconciliation and maternity rights (e.g. the birth, the adoption and the care of children). Striking a balance between work and family commitments might prove particularly arduous for female entrepreneurs. The protection offered to this category of workers by social security has been brought in line with that supplied to self-employed women. However, they are clearly placed at a disadvantage in that they cannot run their business while on maternity. Thus they find themselves in the uncomfortable position to either interrupt their working activity or to find a replacement. Working single parents facing maternity or paternity are also in a delicate situation in terms of work-life balance. A radical change in the way the traditional family is conceived has been witnessed and different family settings have emerged – often consisting of single parents – which pose issues at the time of exercising reconciliation rights. Being a single parent can undermine one's likelihood to access and remain in the labour market. Therefore, it is necessary that labour and social security legislation in Spain and the EU takes due account of these new family settings to avoid their social exclusion or discrimination.

Acknowledging reconciliation rights as fundamental ones can support single parents, since in this case there is no need to apply the notion of “shared responsibilities”.

Lastly, some other papers deal with gender discrimination that might be related to maternity and might bring about the termination of the employment relationship, for instance during the probationary period. The other contributions in the first volume discuss the new benefits granted by social security to care for minors with serious illnesses.

The second volume is also divided into three chapters and provides an analysis of work-life balance in Comparative and International Law.

Chapter I collects research into the legal regulation of reconciliation in a number of European countries, namely in the UK, Germany and

Lithuania. The first chapter also includes a paper that provides a reflection on EU Law and its subjective and objective forms of protection against the dismissal of pregnant women. The situation of the UK is considered in two complementary papers. The first one focuses on the lack of specific rules on the issue of work-life balance and calls for a review of existing legislation on part-time and temporary employment, and minimum wage in order to analyse their main characteristics. In the second paper, consideration is given to the policies put in place by the UK government during the last economic crisis, which can be seen as a step backward in the promotion of work-life balance. Here, recession has been referred to as a smokescreen to centralise and review welfare policy. As far as Germany is concerned, the problem is that national legislation, although seen as innovative, is not sufficient to achieve effective reconciliation of work and family life and should be improved through collective bargaining and special agreements concluded by the parties. Yet the latter are only applied in large-sized firms, therefore action is needed on the part of medium and small-sized companies to promote work-life balance. In Lithuania, the economic downturn has impacted on society and policies significantly, favouring the emergence of a new social model. This new model places upon employers much responsibility when it comes to balancing productive and family needs, although policies concerning the reconciliation of work and family life are by now well-established.

As it is with the first volume, Chapter II of the second volume examines those aspects related to the management of working time that are decisive in striking a balance between family and work. In this connection, emphasis is given to the following aspects: the adjustment of one's workday and the distribution of working hours in Spanish Law; the reduction of working time in Italian legislation as a means to tackle unemployment in times of crisis while reconciling work and personal life; and finally, the recent developments in Belgian Law concerning work-life balance.

The last chapter provides an analysis of remote work and telework in three countries (Spain, Italy and Argentina) as new forms of employment to ensure reconciliation of working and family responsibilities. Four papers discuss the situation of working remotely in Spain. The first provides an assessment of distance work as regulated by Article 13 of the Workers' Statute following the 2012 labour reform. Attention is given especially to the legal configuration of this new working arrangement and its relation to traditional homework and telework, which feature the intensive use of technology. A comparison is also provided between the foregoing provision and the contents of the European Framework

Agreement of 16 July 2002 on Telework. Besides a general evaluation of Article 13 of the Workers' Statute, an investigation is given of different norms on telework which are currently under evaluation in the Spanish Autonomous Communities to reduce labour costs and modernise Public Administration. This section ends with an assessment of the legal framework of telework as a tool to reconcile work and family life in Spanish Law.

Comparatively, emphasis is given to two countries which are taken as a reference to develop telework: Argentina and Italy. In the former, telework has been given an institutional impetus and, although no regulation has been specifically enforced, numerous programmes exist to promote this working scheme in the public and the private sector. Likewise, a system has been devised to specifically certify the skills acquired by teleworkers, in order to value this form of employment. Later on, the focus of the analysis turns to Italy, where telework has been long implemented especially in Public Administration. The investigation of the Italian case is enriched by a comparison with the Spanish system and it is concluded that this working scheme should be implemented as a tool to effectively promote reconciliation rights and improve workers' quality of life.

The foregoing contributions were all presented at the International Conference "Work-life balance and the Economic Crisis: Research into Comparative Law", which took place in Santiago de Compostela on 25 and 26 April 2014. The event was organised together with the Association for International and Comparative Studies in the fields of Labour Law and Industrial Relations (ADAPT), the Spanish Association of Labour Law and Social Security (AEDTSS) and the University of Santiago de Compostela and brought together experts from different countries to discuss this important subject and its regulation, emphasizing the role of the economic crisis.

I would like to express my sincere gratitude to all the private and public bodies which made this event possible, among others Prof Tiraboschi and Dr. Serrani from ADAPT and Prof Cruz from AEDTSS, whose disinterested and unconditional support was decisive to organise this conference. Thanks must also go to speakers and participants, more generally, for providing their contribution to a lively debate and for making the event a successful one.

My final words are for readers, in the hope that they will find this work enjoyable and informative. Our desire is that an increasing number of people worldwide can benefit from a proper balance between work and family life.

CHAPTER ONE—

**WORK-LIFE BALANCE:
AN OVERALL PICTURE**

DETERMINING ELEMENTS FOR THE EFFECTIVENESS OF WORK-FAMILY BALANCE IN SPAIN*

JESÚS CRUZ VILLALÓN

1. Changes in the Social and Cultural Scene

Social and cultural changes produced in the last decades within businesses as much as in daily life have been progressively placing in the forefront measures that allow a complete reconciliation between family and work responsibilities.

The starting point is overcoming the assignment of social roles – frequently made through gender-related criteria – within the work and the family sphere. The first link in the process is derived from the progressively increasing incorporation of women in the labour market; an incorporation almost to a position of equality in many developed countries. It is enough to indicate that, in Spain, female employment has already reached about 46% of the total employed population. This is so despite the consideration given to the traditional intensive feminization of part-time work, a notable salary gap between women and men, and an evident glass house around the progress of women in the professional world.

Consequently, it is easy to imagine that the difficulties of reconciliation between work and family responsibilities emerge with intensity. On the one hand, there are the requirements of the working woman to establish a system that will ensure compliance with her work obligations, which will be compatible with family responsibilities. On the other hand and concurrently, it is impossible to conceive that the traditional assignment of roles, in which the majority of family responsibilities are taken on by the woman, will persist in such a way that it will be demanded also of the man to take on corresponding and balanced family responsibilities. Thus, it leads us to consider that the requests of reconciliation in this field must be solely an issue that affects the working woman.

In addition, there are other social phenomena that appear, which until now were too marginal in quantitative terms to be considered. Such phenomena are: the increase of single-member homes where you have one

person living alone, an increase of single parent homes, and the extension of life expectancy which demands more attention to the elderly on behalf of middle-aged people who work.

Naturally, past experience will lead to a process of profound cultural change, with implications in many areas. In taking account of the many legal changes, the new system should devise public policies directed at guaranteeing the effective reconciliation of family and work commitments.

2. The Clash between Objectives and Results

Starting from the change of scene briefly outlined above, the first observations are directed towards labour legislation, which for long decades has been drawn according to a certain model. This model was mainly based on a worker whose essential profile fits that of a married man with complete dedication and availability to his family obligations, in the measure in which his spouse was not incorporated within the labour market and took on full and total responsibility of the family. As a result of the previous transformations, it is demanded that labour legislation adapts to new realities and attends to the new requirements with new rules that start from the consideration that there are a plurality of family situations in contemporary society.

The first impression is that there exists a wide consensus, as much political as social, around the need to establish a different model that attends to those requirements of reconciliation mentioned; in a way that it would seem as though the habitual contrast of interests in the world of work did not present itself in this aspect. This is also confirmed by the fact that legislative reforms that are introduced with this goal are generally welcomed by all political positions and by the major actors in the industrial relations arena, without the preconception that one has greater sensibility towards this issue compared to others.

Still, if we proceed to give a broad description of the labour reforms that have been progressively accumulating changes with this central goal, the legal amendments are numerous, the institutional aspects that are object of reform are significant, and the measures introduced are stringent in some of their content.

Despite this, without the need to provide actual data, it is easy to perceive that the range of reforms carried out in this period does not correspond in any way to the results achieved. To this end, it can be of common acceptance that the current situation is much further from the one that claimed to be the ultimate goal of reconciliation desired from such reforms.

On this premise, the modest pretention of this work is none other than attempting to identify the determining elements, of positive law and relevant case law, internal and external to the labour market, and included in the content of the connected reform. The aim is to reach the same result of converting the present subject in an important issue pending in our labour market and more in general for the functioning in its ensemble of our social and cultural framework.

3. The Determining Factors of Constitutional and Supranational Recognition

3.1. The Constitutional Determinants

The first difficulty with which we are confronted derives from positive law, originating from the absence of an explicit constitutional recognition of the right to reconciliation. As easily perceived, the objective of the reconciliation between work and family needs, as it presents itself nowadays, was not addressed in the political and social debate happening at the moment of the elaboration of the 1978 Spanish Constitution. This explains why we do not find a mention of the subject in the text of the Constitution; in some cases there are traces of it, but no direct configuration.

It does not mean that this objective of reconciliation does not present itself as a value deserving of protection from the constitutional perspective, but the difficulties manifest themselves in a worse way when there is a specific precept that receives it as such and in an explicit manner. This scenario leads us to a more complex process of interpretation, which obligates us to extract the said phenomenon as a constitutional value by direct way, by means of rights and principles that link the objectives and the expected results with the protection of the reconciliation. This happens with outcomes featuring greater weakness, deficiency or absence of a comprehensive or general character, which provoke evident difficulties that cannot be kept hidden.

The first indirect way and the one observed as the most utilized, and to a certain point the most productive, is resorting to the constitutional prohibition of discriminatory treatment. The range and technical perfection of the institution of discrimination protection leave an open constitutional space to gamble on the protection of labour and family reconciliation.

Essentially, two elements favour the possibility of resorting to the prohibition of discriminatory behaviour contained in Article 14 of the Constitution.

On the one hand, we have a peaceful consolidation at these stages between: 1) the efficacy amongst individuals of the fundamental rights and especially protection against discrimination, which is an unavoidable part of promoting reconciliation since it is a reality in other areas of the workplace; and 2) particularly, a system of working conditions offered by the employer that are favourable to reconciliation. As will be immediately noticed, obstacles do not cease to appear. The efficacy amongst individuals, and especially with regard to their contractual labour relations, is dependent on certain determinant conditions, does not fully reconcile with other interests, and, ultimately, still does not reach the same intensity of demand as that produced when the public authorities face the mandatory respect of the principle of equality.

On the other hand, it has been established that the theory relative to the discrimination protection shall be extended to situations of indirect discrimination, a key aspect in facing discrimination on grounds of sex or gender with regard to the protection of compromise. In fact, the way by which it penetrated the connection between gender discrimination and the guarantee to reconciliation has been, justly, through the concept of indirect discrimination. This way, on the premise that family responsibilities are still in a prevalent way, taken on today on behalf of women, the difficulties of reconciling them with the correlative work obligations entails a scene of clearly derogatory treatment of the woman in the workplace and concerning working conditions.

Nevertheless, an obstacle arises, which is not yet surpassed by our constitutional legislation, at least for what concerns the current dominant interpretation of the scope of the constitutional mandate on anti-discrimination and protection. I am referring to the fact that the most traditional conception of the prohibition of discriminatory conduct allows a particularly facilitated containment of those behaviours that implicate a positive and fixed decision that finds its direct cause in the superior family responsibilities of an individual. To give some specific examples, this view easily considers as directly damaging to the antidiscrimination mandate, those methods of selecting personnel during the contracting process or the professional promotion process that may implicate rejections of the contract, or the professional deferment of a working woman due to her pregnancy and maternity (STC¹ 182/2005, of July 4th,

* Translation from Spanish by ADAPT Languages.

¹ STC – Sentencia Tribunal Constitucional (Judgment of the Spanish Constitutional Court).

BOE² August 5th) including deferment for not being able to participate in training because of maternity (STC 66/2014 of May 5th, BOE June 3rd), or the specific dismissal of an individual for this same reason. The most pragmatic example of this last circumstance can be found in the ruling made to resolve such disputes by granting unpaid leave to a worker with family responsibilities, for the fact that she is temporary and is not bound indefinitely (STC 203/2000, of July 24th, BOE August 24th).

Nevertheless, the real aspirations of reconciliation are superior and are situated above everything in another area; that of the adaptation of the employment and work conditions to the family needs. In other words, for reconciliation to be effective it inevitably requires measures of positive action; that is, of a differentiated treatment of those who solicit an adjustment of working conditions to fulfil family responsibilities. For fairness, these individuals could offer greater flexible availability to the business. Ultimately, a different agreement is needed for different workers.

From this distinct point of view and from the constitutional point of view, the confirming step has been that of considering positive action measures in this subject, as perfectly lawful, even when a differentiated treatment is needed. Their enforcement is possible by national labour legislation or collective bargaining, without concern for the differentiation, provoking a constitutional prohibited discriminatory treatment.

Conversely, what is not peaceful and certainly in no case has been declared by our constitutional law, is that Article 14 of the Spanish Constitution provides, in an immediate manner, an instruction guide to the employer on positive action measures; on the adjustments of employment conditions in order to fulfil the needs of certain workers in regards to work and family reconciliation. On the contrary, the starting point for case law in relation to the exercise of fundamental rights is the opposite: the employer, unless otherwise stated by a specific norm, is not obligated to adjust the organization of the business to completely satisfy the exercise and enjoyment of fundamental rights and public liberties of citizens. The case law that is more developed in this respect, is that regarding rights related to religious freedom (STC 19/1985, of February 13th, BOE March 15th), or even with the right to education, particularly the aspect concerning professional development (STC 129/1989, of July 17th, BOE August 9th).

On the subject of reconciliation, constitutional law is the most ambiguous, but in any case it can be affirmed that it has reached the next

² BOE - Boletín Oficial del Estado (Official State Gazette of the Government of Spain).

step: considering from a constitutional perspective of the measures of positive action, an intervention that does not oppose the mandatory adoption, on behalf of the employer, of the rules on the prohibition of discrimination.

In accordance with this, the positive action measures that exist concerning reconciliation are not able to prevail over the employer on the constitutional mandate of prohibition of discrimination, until the ordinary legislator enforces the mandate. Although, what can be affirmed is that the constitutional text contains other precepts, which, again in indirect terms, end up imposing on the legislator, representative of the public power, a mandate of incorporation for the positive action measures; in order to materialize, in practice, a favourable context that promotes reconciliation, in such a way that it will end up converting itself into a constitutional imperative for the national standard. The precept that with the greatest force has imposed such a constitutional mandate is probably the one that has passed most unnoticed in case law as much as in doctrine. I am referring, specifically, to Article 9.2 of the Constitution, when it establishes that “It is the responsibility of the public authorities to promote conditions ensuring that the freedom and equality of individuals and of the groups to which they belong are real and effective, to remove the obstacles preventing or hindering their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life.”

There can be no doubt that the reconciliation between work and family responsibilities is an inevitable determinant to achieve the equality of individuals, especially of those groups who take on with greater intensity the family responsibilities, particularly and indisputably women. At the same time this objective is reached not exclusively on the premise of formal equality, but its success is also based on a “real and effective” equality as Article 9.2 of the Constitution establishes. Finally, this material equality is effectively attained only through the introduction of positive action methods. Ultimately, compliance with Article 9.2 CE³ is required from the Constitutional perspective of these types of measures.

In truth, two limits or determining factors are presented by the mentioned Art. 9.2 CE in relation to the previous conclusion. The first of these limits is that Art. 9.2 is systematically left out of the constitutional precepts that enumerate fundamental rights and public liberties and there is no doubt that its impact is inferior; even just for the simple fact that a possible transgression of this mandate does not give way to an appeal to constitutional legal protection. The second factor, probably of greater

³ CE – *Constitución Española* (Spanish Constitution).

importance, is found in the circumstance in which the mandate promoting the real and effective equality of Art. 9.2 CE is from a subjective perspective, circumscribed to the sphere of “public authorities”. In a negative sense, in said precept, we do not see a mandate that aims at the efficacy between private individuals, but only a mandate that works as an intermediate to what is established by the public authorities by way of national norms. In other words, Art. 9.2 CE imposes on public authorities the establishment of positive action measures that can implicate responsibilities, obligations and duties upon the employer. In an equally negative sense, though, Art. 9.2 CE does not directly impose on the employer, the duty to adjust employment conditions and the organization of the business in such a way that satisfies the necessities of reconciliation, but only does so in a mediated way and indirectly in the measure in which public authorities punctually comply with what is stipulated in the previous precept. In conclusion, a limited and insufficient intervention by the public authorities on the mandate contained in Art. 9.2 CE, in principle, cannot be surpassed by way of direct imposition on the employer of the compliance of the mandate contained in Art. 9.2 CE.

A third precept concerning this subject would be the one relating to the constitutional protection of the family: “The public authorities ensure social, economic and legal protection of the family” (Art. 39.1 CE). Once again, we can resort to a constitutional precept of which the indirect interpretation gives a head start to an openness towards protective measures of reconciliation, as long as reconciliation is established as an undeniable instrument of social protection for the family. Initially, this was a constitutional provision with certain elements of weakness, for several reasons. The first reason is its systematic location only in the part concerning the guiding principles of social and economic policies, inside the third chapter of Title I of the Constitution on fundamental rights and duties. This part, as we know, is of a lesser binding force, aside from the fact that once again we are situated in the sphere of a mandate addressed to public authorities and not directly binding so cannot impose immediate obligations on the employer. Besides that, still relevant is the fact that the constitutional text does not bind the matter directly with the subject of work/labour relations. Ultimately, we are confronted with difficulties similar to those pointed out prior by the previous precept: Art. 9.2 CE.

In any case, constitutional law has succeeded in linking the protection of the family of Art. 39.1 CE with the protection against discrimination of Art. 14 CE, which brings to the conclusion that all those legally contemplated measures that tend to facilitate the compatibility of work and family life possess “a constitutional dimension”. This constitutional

dimension “has to prevail and serve as an orientation for the solution of any possible interpretative doubt” (STC 3/2007 of January 15th, BOE of February 15th; 24/2011 of March 14th, BOE of April 11th; 26/2011 of March 14th, BOE of April 11th).

Now, some clarifications are required regarding the previous constitutional law. With the current law, the constitutional relevance of the reconciliation measures is not fully affirmed; in the sense that, there is a direct and immediate guarantee that such measures of positive action are enforced as fundamental constitutional rights. In fact, we must indicate that, in the end, the mentioned rulings will only reach as far as the establishment of hermeneutic criteria of application of the referenced legal measures, in a way that they will forcibly appreciate, on the legal foundation of the ruling, the constitutional dimension of the reconciliation.

However, in no case can this conclude that from a constitutional perspective the measures of reconciliation are necessarily prevalent when these same measures contrast with the organizational necessities of the business in relation to the defence of its productivity. The telling proof of this is that, at the end, the failure of these rulings does not lead to the recognition of the right of the worker (man or woman) in question, to claim the adjustment of his/her work conditions to satisfy his/her expectations of reconciliation. The outcome is much weaker from a procedural perspective: the failure, at best, causes the ruling, after the appeal to protection, to be annulled bringing the referring judicial authority to dictate a new pronouncement that takes into consideration the constitutional dimension of the reconciliation. (STC 3/2007 of January 15th, BOE of February 15th; 26/2011 of March 14th, BOE of April 11th).

This also occurs when the Constitutional Court notices that the Court of First Instance, while applying the work measure contained in the ordinary legislation, proceeds to interpret it with the knowledge of the constitutional dimension of such reconciliation measures. Though it does not assist the claim of the worker, it considers the interpretation correct through a simple acceptance proceeding, stating the legislator did not go beyond the recognition and reach of the said measure.

The last of the constitutional precepts that could link together, in an indirect way, some types of reconciliation measures, is the one which contemplates a new mandate for the public authorities and aims at guaranteeing “the need of rest by limiting the duration of the working day” (Art. 40.2 CE). Reconciliation measures, as we will see in the next part, give rise to interventions in order to promote work leave in favour of family responsibilities, which, in the end, entail a limitation of the workday schedule. In any case, besides the fact that with these precepts all

the legal obstacles aforementioned are reiterated (the mandate oriented exclusively towards the public authorities, positioned exclusively in the area of informant principles of social and economic policies) additional elements emerge that make it even more difficult to extract greater potential from the precept. On the one hand, by reducing the workday, as we will see ahead, the precept will actually promote reconciliation between work and family to a lesser extent. On the other hand, the constitutional objective is expressively that of guaranteeing “the necessary rest”, meanwhile the attention to family responsibilities entails attention to new workloads and obligations and so does not promote rest. Finally, in a complementary way the limitation of the workday schedule in this precept is constitutionally contemplated as a universal measure for the subjective right in favour of all workers as a guarantee of the free development of personality (Art. 10.1 CE), in this case and from the perspective of the workers. In conclusion, this is in a negative sense, not at all a direct basis for those measures of positive action exclusively for those workers who assume special family responsibilities.

In any case, if we go beyond the potentiality of these constitutional precepts, which indisputably favour the reconciliation between work and family life, they do not have the sufficient strength to achieve the inevitable step of imposing measures of positive action that influence the organization of the business and the needs of the workers. In conclusion, to these effects, the constitutional text demonstrates clear elements of aging regarding the results of the reception expressed by the acknowledgement of the legitimate interests of workers with family responsibilities in need of reconciliation with work obligations.

3.2. The Determinants of European Legislation

The perspective of the current issue is not very different from the perspective of the legislation of the European Union, especially when the analysis is carried out from the point of view of the original law.

In fact, there is no mention of the objectives of reconciliation in the constitutive Treaties, in particular in the Treaty on the Functioning of the European Union. Specifically, no reference to reconciliation is contemplated in regards to the topics that are the objects of coordination for the national laws, through the corresponding Directives of the European Union (Art. 153 TFEU⁴). The outcome will be the absence of a specific Directive on the issue of reconciliation. Besides this, the general

⁴ Treaty on the Functioning of the European Union.

reference made to the protection against discrimination is only for pre-determined causes, which include a reference to gender, but not to other personal or social situations like those mentioned in the text of the Spanish Constitution (Art. 10 TFEU).

Some recent changes in this subject derive from the passing and binding character of the Charter of Fundamental Rights of the European Union. Of these changes we highlight the following. First of all, the prohibition of discrimination is incorporated, for the first time, as a generic rule for all personal or social circumstances, surpassing the fixed list used until now (Art. 21). There is also a specific mention of the positive action measures concerning equality between men and women in its classic interpretation of permission, and not of imposition: “The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex” (Art. 23). Finally, for the first time the protection of the family is directly linked to the measure of reconciliation, alluding to specific rights: “to reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child” (Art. 33). As we can easily observe there is no general acknowledgement to reconciliation rights, but exclusively the mention of two of these rights: in a classic prohibitive interpretation of behaviours, merely punitive (dismissal) and only one of them in an positive action interpretation (maternity leave and benefits).

As a result of this, again, the only way in for these measures of reconciliation has been through indirect infiltration. Specifically, through actual Directives that give way to the coordination of certain measures that can favour reconciliation: the Directive on equality between men and women, the Directive on security and health in the workplace, the Directive on part-time work, and the Directive on parental leave.

Though always isolated in character and without the ability to construct a general interpretative reference on the subject, it is worth identifying certain aspects addressed by European case law: recognizing as a discrimination based on gender the difference of treatment of part-time workers on the matter of social protection done by demanding contributions that are not based on the principles of proportionality (ECJ⁵ 11-22-2011, c 385/11, Elba Moreno); the assessment of the impact on positions to abolish in situations regarding workers who take maternity leave (ECJ June 20th 2013, c 7/12 Riežniece); the right to take paternity

⁵ European Court Judgment.

leave when the mother is not employed (ECJ September 19th 2013 c 5/12, *Betriu Montroll*); the right not to be excluded from vocational training opportunities due to her pregnancy or prolonged absence attributed to maternity (ECJ March 6th 2014, c 595/12, *Napoli case*); recognizing discrimination in the calculation of the protective award for the termination of the contract on the basis of the reduced salary received at the moment of the contractual resolution, when this amount depends on a temporary situation derived from the reduction of the work schedule in order to attend to family responsibilities (ECJ February 27 2014, c 588/12, *Lyreco*); the retention of the status of “worker” as part of the freedom of movement of workers despite leaving the job or not seeking a job due to the justifiable condition of pregnancy (ECJ June 19th 2014, c 507/12, *Saint Prix*).

3.3. The Determinants of the International Legal Framework

To end the description of the intervention that has been carried out in the supranational sphere, it is essential to reference the intervention in this sphere on behalf of The International Labour Organization, especially through its Conventions.

Of all these conventions the one that is to be emphasized most for its importance is Convention 156 of June 13th 1981 on the Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities. From our point of view, this convention has an additional value because it was ratified by Spain on September 11 1985, and thus, is internally binding in our labour system.

The text recognizes a wide variety of rights to workers, in view of the fact that they suffer prejudice for the specific circumstance of taking on particular family responsibilities in a way that will promote a certain treatment at work that will facilitate with efficacy the reconciliation: prohibition of discrimination (Art. 3), free choice of employment (Art. 4), right to take account of needs in terms and conditions of employment and in social security (Art. 4), right to services, public or private, aimed at child-care and family care (Art. 5), promotion of informative and educational measures in order to engender a cultural change on the issue (Art. 6), right to adjustments of the professional training offered to those who must reconcile (Art. 7), and the declaration that family responsibility cannot constitute a valid reason for termination of employment (Art. 8).

As is confirmed, the variety of rights and interventions are certainly widespread in the referenced Convention, constituting an instrument that is key to interpreting the reach of our internal legislation, or better, the

limits of possible future legal reforms inspired by flexibility and deregulation of workers' rights. In many aspects, this consolidates the regulation of the ordinary legislation on the matter, reinforcing the prohibitive rules of derogatory treatment caused by the assumption of family responsibilities.

Nevertheless, as is usually perceived in the legal texts of the ILO, there is an habitual dose of reception of the principles that has a direct and difficult impact on the positive legal labour system, to the extent that the generic or ambiguous character does not allow a forced incorporation of new measures on the subject of reconciliation. In fact, once more from the perspective that we are addressing in this study, the mentions of measures of positive action are rather scarce, and the few that exist, have such a level of vagueness that they consent considerable leeway of discretionary nature to the national legislator.

For what concerns the rest of the conventions of the ILO that could be referenced in comparison, for the possible impact on reconciliation measures, they present the inconvenience of not having been ratified by Spain. Specifically, in respect to the conventions not ratified by us, it is worth mentioning: Convention 175 on part-time work and Convention 183 on maternity leave.

4. An Initial Response by Infra-Constitutional Law: Openness towards Leave

The majority of the measures introduced, with special intensity and almost in an isolated form, in a first phase of the matter, have been none other than recognizing different workers' rights that enable a partial exoneration from working in order to attend to family responsibilities.

These exonerations include: paid leave (Art. 37.3 of the *Estatuto de los Trabajadores* – Workers' Statute – from this point on ET), reduction of the workday period with or without corresponding cut of the worker's remuneration (Art. 37.4, 4 bis, 5 ET), and suspension of the employment contract (Art. 45 ss ET).

Naturally, these are measures that affect, so to say, a clean cut between work schedule and time dedicated to the family. This is done in such a way that when workers exercise the corresponding responsibilities they are given a real possibility of coverage of those family responsibilities that are addressed by the measures. So, for this same reason behind the production of these rights, their exercise sometimes provokes certain collateral results or boomerang effects that end up provoking scarce effectiveness in the satisfaction of the intended reconciliation in its fullest sense.

In fact, the first observation from a subjective point of view is that the interested parties, if not the exclusive ones, who exercise the mentioned rights of leave from work, are women. Due to this, men tend to be the ones who assume in a greater measure the labour duties left undone by the absent women workers. Whether it is for cultural reasons, for the comparative negative effects derived from the absence of work or from simple personal preferences, it is almost always women who suspend their work contract, enjoy the corresponding remunerated leave or reduce their workday based on the requirements of attention to family responsibilities.

This all goes beyond the fact that the norm is formally presented as neutral. It recognizes that, practically in all cases, the entitlement of such rights to compensated work leave goes to men just as much as women.

The result is none other than the persistence of the assigning of roles within the family, in such a way that men continue to take on family responsibilities in a more reduced way.

In addition, though these types of leave can allow an almost complete attention to domestic or family tasks, the same cannot be said in respect to the development of professional activity. We do not mean that work leave produces a breach of contract by the worker in question, after all the employment contract consists precisely of a recognition of the pertinent right to work leave, but we are saying this in the sense that during this period of absence (more or less prolonged), services are not provided and neither is the person present at the workplace. On these terms, it can be stated that, in a strict sense, these rights which materialize into labour absences do not constitute authentic types of reconciliation; since what they do is consent primacy to the attention of family necessities and so are not compatible with work needs, but rather replace work.

This type of work situation ends up harming the person who goes on leave to take on family responsibilities. There is no doubt that this negative effect is well known at such stages and that because of it, the reaction has been to establish precise rules regarding compensation to counteract such consequences: from the consideration of a prohibited discriminatory conduct such as the differentiated treatment due to the exercise of the current right of absence to the incorporation of positive measure that counteracts the negative effect; within which we can cite as prominent the maintenance of the right to professional development and training during the periods of work leave.

Nevertheless, and despite everything previously mentioned, such counter measures, as much as they are broadened and extended to all imaginable aspects, will always have a palliative character or at the most a partial counteraction to the prejudices derived from the work leave of

those who enjoy the presented rights; even more accentuated when it is confirmed that those that enjoy these rights in a greater measure are working women. In fact, it can never be forgotten that work, beyond the biblical condemnation, is an instrument of personal development, of socialization with the rest of the people with whom a job is shared, in such a way that the maintenance and enrichment of the employability of workers is only attained by way of effective provision of services by the employee in question. In short, for as much as we attempt to counteract, this type of work leave, especially when intense and prolonged in time, leads to a deterioration of the professionalism of a worker, placing him/her in a position of disadvantage compared to those who do not utilize such rights, and ultimately, placing him/her in a position of greater comparative professional weakness.

In conclusion, without underrating the value of all these regulations regarding absence from work due to the attention of family responsibilities, today, these rules should not be contemplated as the prevalent measures with the effect of achieving the objectives of reconciliation. In any case, they must be favoured always and especially when they are exercised in a context that promotes their joint exercise for male and female workers, for, from the gender perspective, they are neutral in their practical application.

5. Family Reconciliation and the Flexibility Demands of a Business

Starting from the inconveniences that could arise from a work leave period, we begin to see the adoption of different types of measures, which are expected to make family responsibilities and work responsibilities more fully reconcilable.

For this purpose, we highlight those particularly relevant measures that claim to adapt work schedules with family responsibilities of workers, in particular, by introducing hourly flexibility options that allow the worker to choose, with some leeway, the work schedule that is more in accordance with the attention needed to be dedicated to family responsibilities. According to what has been previously indicated, it is easy to deduce that such methods are not situated in the range of the workday's duration, but of its distribution. They are presented as a complete measure of reconciliation between family and professional life, so that with a general character they are not subject to the aforementioned risks derived from simply being absent from work.

Now then, for all that affects the Spanish regulations in this field, we observe an evident disparity of treatment concerning this measure

compared to the one mentioned in the previous part. While absences from work become contemplated as a strict subjective right of workers, to be exercised as a unilateral right, the case of schedule adaptation or mobility is presented like a typical “soft law” rule; which reveals an initial recognition of the measure, but for all aspects is dependent on what has been agreed upon through collective bargaining (Art. 34.8 ET).

Ultimately, from the formal point of view, the precept is superficial in content, of which material content depends solely on what is established by the collective agreement on its application, to the extreme case that the lack of any precaution whatsoever by the collective agreement does not have any repercussion at all (STS⁶ May 20 1999, rec. 2286/2008 and October 19, 3009, rec. 3910/2008). At best, the precept can be interpreted as an implicit mechanism of imposition of a duty of collective bargaining on the basis of the principle of contractual good faith in this field, but without at any moment coinciding with the obligation of making a pact, as the necessary content of the collective bargaining of this field.

In any case, and beyond the possibilities of technical articulation of an incisive regulation on the subject, what is most relevant is that this measure and, more in general, the whole set of interventions on the legal system dictating the employment contract that are conducted on the subject of reconciliation in the last years, coincide with a process that is more and more accentuated by demands of flexibility; like the mechanism of fulfilling the requirements of a global economy with always more intense doses of constant adaptation to the requirements of the market.

In these circumstances, from certain fields, without revealing the pressures that provoke the new setting for work flexibility in all spheres of work relations’ management, it is considered that this matter is connected to the effectiveness of certain fundamental rights; in particular, those related to equal opportunity between men and women, or more thoroughly, between those who take on or do not take on greater family responsibilities. In the measure in which this connection is presented, there is a strengthening of the actual measures in order to guarantee reconciliation, and, in the end, it is advocated that they be allocated in a sphere of immunity or of an impregnable border that blocks the hits from labour flexibility.

Despite this, it is proven that these types of reconciliation measures, pragmatically in the case of schedule adjustment mechanisms, enter in direct confrontation with the flexibility requirement on behalf of the business. This occurs in such a way that the previous attempt to reinforce

⁶ *Sentencias del Tribunal Supremo* (Rulings by the Supreme Court of Spain).

the rules of reconciliation ends up being ineffective in practice; since it is impossible to prevent the measures on the subject of reconciliation from being weakened when the flexibility requirements, justified by economic, technical, organizational and productive reasons, come into play. All that is needed is a simple comparison of different legal intensity, through which the legal system can gather the recognition of the irregular workday to attend to the employer's needs as a regulation of "hard law" that recognizes in all its effects, the unilateral business right (Art. 34.2 ET), in contrast with the weakness that identifies the corresponding right to schedule adaptation in order to attend to family responsibilities.

We must call attention to the fact that when the law establishes legal procedures needed to attend to each focal point (flexibility and reconciliation) it does so separately, as if they were allocated in isolated spaces. Considering this, we must shine a light on the fact that as we get closer to the practical reality of these modifications, we will observe how the interests are found immediately intertwined, and for this reason, interrelated. The difficulty arises when the legislator attends to the necessities of business flexibility and does not take into consideration that this could have a negative repercussion on the necessities of reconciliation, without addressing the search for a balance of interests, in no way an easy task. Specifically, whether much is omitted or not, when one confronts the alteration of work hours, for example, through the substantial modification of the regulated working conditions in Art. 41 ET, even if these are justified immediately by business reasons, workers continue to experience repercussions regarding the expectations of the reconciliation of family life. Vice versa, when the legislator introduces a mechanism of recognition of the abilities to alter work schedules in order for the worker to attend to his/her interests and is immediately bound to the predetermined substantiated family reasons, it does not stop the repercussions that will influence the employer's organizational necessities.

A paradigmatic case also constitutes the regulation on part-time work, which consists of a clearly ambivalent institution. On the one hand, it is being affirmed that in some cases it can constitute an important method that will better facilitate the reconciliation, for the worker will not need to dedicate all of his/her time to the professional activity. On the other hand, it is considered to be a contractual method that can specifically attend to the business's flexibility needs. Nevertheless, the technical difficulty is met when searching for a regulation, to square the circle, that will encourage the two contrasting sets of interests. Surely, current norms demonstrate specific references to the necessities of reconciliation for those regulated by part-time contracts. These norms also recognize the

right to renounce the fulfilment of complementary hours for reasons derived from the need to attend to family responsibilities (Art. 12.5 and ET), or the demand of voluntary transformation of a part-time contract to a full-time contract (Art. 12.4. g ET). Nevertheless, there is other data indicating that part-time work is converting more into an instrument of flexibility for the employer than into a medium of reconciliation. On the one hand, statistical data shows a steep increase of obliged part-time work, in such a way that 57.4% of part-time workers are working involuntarily, which leads to more than 9.2% of the total employed population wishing for an extended workday. On the other hand, the recent modifications in part-time work, result of legislative reforms introduced at the end of the year, have aimed at the exclusive objective of extending the rules that facilitate the fulfilment of flexibility needs of employers, without incorporating any rule at all to counteract the attention on reconciliation: new regimen of complementary hours and overtime (Art. 12.5 ET), and greater flexibility in the work schedule.

Something similar happens in the contractual method used for telework, especially regarding the current legal regulation of the denominated “distance work” (Art. 13 ET). In the same way, on behalf of some, it is equally contemplated as a method that can facilitate reconciliation because work can be executed in the worker’s home allowing him/her to attend to domestic responsibilities. Nevertheless, he/she has to carry out a systematic design that does not provoke a similar result as that felt in respect to work leave: the worker’s prevalent use of this method, if not exclusive, in such a way that it maintains the unbalanced division of family responsibilities amongst the members. In principle, it is a regulation that presents itself as aseptic or neutral from the perspective that we are analyzing here, so does not specifically mention reconciliation nor the demands of flexibility. Thus, since the general rules on flexibility are applicable to these types of workers, the method cannot always guarantee the due balance between the interests of one and of the other. Ultimately, everything depends on the organizational system of work in effect within the business, just like the intensity of the use of the organizational rights exercised by the employer, especially those methods that allow an “on-line” contact with the worker and the demand of a “just in time” result in the provision of services.