

A balance between our personal  
and professional life in Spain:  
employees' right to a flexible  
workday

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### *Abstract\**

*The Spanish Parliament is and has been concerned about equality at the workplace and the right of employees to reconcile work and family. Even though there are provisions within the Spanish Workers' Statute that aim at providing for such reconciliation, they have proved to be inefficient tools to achieve a better balance. This working paper analyses and evaluates the existing regulation in Spain on this subject. From an equality-based perspective, the article tries to identify the legal source of this inefficiency (mainly, collective negotiation). In the second part, the US system is analyzed for the search of a solution. Last, the paper proposes the recognition of an explicit, self-executing right to reconcile work and family for employees.*

*El Parlamento español se preocupa y se ha preocupado por la igualdad en el trabajo y el derecho de los trabajadores a conciliar trabajo y familia. A pesar de las previsiones incluidas en el Estatuto de los Trabajadores dirigidas a hacer efectiva dicha conciliación, éstas han resultado ser ineficaces para conseguir un auténtico equilibrio. Este artículo analiza y evalúa la regulación actual de la materia en España. Desde un punto de vista basado en la igualdad, se intentan identificar las causas (legales) de esa ineficiencia (básicamente, la negociación colectiva). En la segunda parte, se analiza el sistema norte-americano en búsqueda de una posible solución. Finalmente, se propone el reconocimiento de un derecho explícito de los trabajadores para conciliar vida y familia.*

*Título:* Equilibrio entre nuestra vida personal y laboral en España: el derecho de los trabajadores a una jornada flexible

*Keywords:* Employment Law, Working Time, Workday, Reconciliation, Personal and Professional Lives

*Palabras clave:* derecho laboral, tiempo de trabajo, jornada, conciliación, vida personal y laboral

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## 1. Introduction

The present paper is an analysis of the current Spanish employment legal system under the perspective of achieving a more flexible working scheme for employees. My purpose is to come up with a system that not only enhances gender equality, but also, and more importantly, one that does not put employees on the verge of having to choose between fulfilling their personal life or achieving their own professional expectations.

Notice that flexibility is a term used generally with regards to employers: flexibility is the channel through which employers can adjust their resources (employees, facilities, etc.) to their economic and productive needs. Flexibility comes to mean low costs in firing or ease to setting up and closing down a factory. Flexibility is desirable for employers, while employees thrive to achieve security in employment. Flexibility, as it has been used, is not desirable for employees. However, I will try to make the point that flexibility is also an objective for workers to keep in mind. In order to distinguish these two kinds of flexibility, I shall refer to the latter as flexibility with a human face, as part of employees' work-life balance rights.

After a study of the current Spanish legal *status quo*, I turned to the US system looking for a source of new solutions or perspectives. I found out, however, that the US legal system might not be the best one to hold as a model for the purposes I am furthering. A prior step to legally dealing with flexibility seems required in the US: there is no limitation in the amount of working hours. Without limitation, reconciliation seems an unattainable objective.

Before going deep into the issue, I need to point out 2 important elements. On the one hand, the flexibility issue is a broad topic: It ranges from flexibility at the work place, to flexibility in the remuneration, while it may be understood as well to have impacts on the general organization of labor. Due to such broadness on the issue, as well as a lack of time and the willingness to come up with something that, even if small, may be a first step towards an actual change of the *status quo*, I have only focused on flexibility in the working time (and in fact, as I said, on flexibility with a human face). Therefore, I will mainly treat flexibility in the length and distribution of the working time, leaving aside any other considerations regarding paid leaves or contracts' suspensions that are also at the heart of the move towards a flexible workday.

On the other, I realized that a great amount of work already written concerning this issue places flexibility and work-life balance rights in a non-legal conversation. That is, sociological, cultural, organizational and other perspectives are commonly used in treating the topic, but I have not encountered any global normative study of the issue in Spain.

My goal is to review the current legal rules and norms to, first, check if there is space for flexible business policies in the current legal framework and, second, decide what actions can be taken within such framework or, if not possible, propose a new legal framework which allows a real construction of a flexible workday.

This paper assumes that flexibility on the workday will carry benefits for both parties of the employment relationship. Employees, on the one hand, will take advantage of a more flexible workday by better balancing their personal and professional lives as well as by being allowed to pursue their professional expectations without neglecting their personal obligations. Employers may be better off as well, given that flexibility will have a positive impact on productivity (less absenteeism or lower recruiting costs, for example) and, in the end, on their annual profits.

In the first part of this paper I have analyzed the Spanish legal system in general and regarding the regulation of the working time, in particular. The role of collective negotiation as well as a critique of the current system is also provided in this first part. After that, I have analyzed how the US system treats the working time issue, with the willingness to somehow find a solution for the problem of inflexibility in Spain. After that, I expose what would be for me a perfect world to, in the last part, come up with some proposals to begin our way to achieving my perfect world.

## ***2. Legal regulation on working time in Spain***

### **2.1 Spanish legal framework**

The employment legal Spanish framework is made up of the Spanish Constitution, the Workers' Statute together with a wide range of employment and Social Security laws and regulations, the collective bargaining agreements and the employment contract.

The Spanish Constitution (1978) sets forth the general rules for coexistence and establishes the basic rights and obligations. Below the Constitution there is a collection of Spanish laws and regulations. For Employment and Labor Law purposes and, in particular, for the regulation of working time, the most relevant law is the Worker's Statute, which regulates the employment relationship, trade unions' relationships, collective employment regulations, etc. Besides the Workers' Statute, there is a range of laws and regulations that are also applicable to employment relationships (Social Security regulations, Occupational Hazards, etc.)<sup>1</sup>.

Collective bargaining agreements play a key role in the regulation of employment relationships and also in the specific regulation of working time. They may have different scopes of application, depending on their functional or geographical scope (and all employers and employees within those scopes are subject to the corresponding bargaining agreement, regardless of their affiliation to the union or employer's representation).

Collective bargaining agreements can only establish better employment conditions than the ones established in the Workers' Statute, and cannot constitute a downgrading of them.

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<sup>1</sup> It's worth mentioning that all these laws and regulations are affected and have to comply with European Union Directives and Regulations, as Spain is member of the European Union.

Another source of regulations for employment relationships is the individual employment contract, which must necessarily respect all conditions established both in laws and regulations and in the applicable collective bargaining agreements, even though it can provide for better conditions than the ones established either by law or by the applicable collective bargaining agreement.

## 2.2. Working time regulation

The regulation of the working time in Spain is mainly composed of national laws and collective bargaining agreements. The Spanish Constitution establishes that the public powers shall guarantee the “required rest” through, among other measures, the limitation of the workday.

The role played by the law is confined to the establishment of limits to the working time, which is divided into different time units (either day, week or year, as we will see). The Spanish legislator has not only rejected the chance to establish a workday, but it has chosen to delegate such power to collective or individual negotiation.

The main general provisions on working time are established in Sections 34 to 38 of the Workers’ Statutes (hereinafter, “WS”). The basic idea of such regulation is that it mainly foresees limits to the length of the workday and, therefore, leaves to the employment parties (employers and employees) the final decision on its distribution. The most salient features of such regulation are:

- a. The length (and the distribution) of the workday shall be agreed through collective or individual negotiation (in the form of collective bargaining agreements or individual employment contracts, respectively)<sup>2</sup>.
- b. The possible outcomes of such negotiation are legally limited. The limits are: (1) The maximum length shall be of 40 hours per week based on a 1 year period; (2) a workday cannot, in principle, last longer than 9 hours per days (unless a different working pattern is provided in the collective bargaining agreements or a particular agreement between employers and employees’ representatives); (3) in any case, at least a 12-hours rest must be awarded to employees between a working day and the next one (so-called “daily rest”); and (4) an uninterrupted 1 day and a half rest must be awarded to employees (so-called “weekly rest”).

The reference to the calendar year as the standard to establish the maximum workday (instead of plainly setting a workweek of a certain length) has brought a great deal of flexibility, since it allows a given workweek to be longer than 40 hours (the workday is not limited to working a certain amount of hours per week, but instead takes into account a longer period of time as a standard). As long as the annual average does not overpass the 40 hours per week limit (and

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<sup>2</sup> In case there is no provision in the applicable collective bargaining agreement or in the individual employment contract, the maximum legal standards shall be deemed to apply.

respects the other limits abovementioned), the working time can be flexibly distributed throughout the year.

c. Over the ordinary working time, there is also overtime work available, which is limited to a maximum of 80 hours per year. Its remuneration method (either cash or time) shall be determined by the applicable collective bargaining agreement or employment contract. The provided default rule is payment with paid rest within a 4-months period after its realization.

d. The Workers Statute foresees the possibility of collectively agreeing on an “irregular distribution of the workday” (either through collective bargaining agreements, or through an agreement between the company and employees’ representatives<sup>3</sup>).

The irregular distribution of the workday consists on an agreement that allows working a different number of hours on certain weeks, depending on the season and workload of the company at a given moment (having to respect the daily and weekly rests mentioned above). This allows companies that have a variable workload throughout the year to plan a not-uniform distribution of the working time, making it possible for corporations to better adjust to their productive needs. In lack of an agreement, the working time distribution needs to be regular, that is, the number of hours of service per week has to be the same every week.

Such an agreement, together with the 1-year standard used to calculate the average of 40 hours of work per week, is 2 great sources of flexibility in the distribution of the working time<sup>4</sup>. However, one might realize that this it is not a source for “human flexibility”<sup>5</sup> (which would enable employees to better adjust their work to their personal life, implementing their work-life balance’s rights), but is instead flexibility provided to employers. This was introduced aiming, in the end, at improving productivity at the workplace (having employees working when they are most needed by the employer), but disregarding the chance to also allow employees to flexibly establish their working time (and therefore, missed the chance to obtain a win-to-win effect).

This flexibility focusing on employees’ needs, however, was meant to be introduced later on by the “Law on Equality” (Law 3/2007, of March 22<sup>nd</sup>, for the effective equality between men and

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<sup>3</sup> When referring to “collective bargaining agreements” we refer to those agreements between employers and employees’ representatives that regulate general working and employment conditions and have been agreed upon following the legal rules set in the Workers’ Statute. An agreement between the employer and employees’ representatives refers to that only covering a single employment condition, or several conditions, but without following the strict regulations for general collective bargaining agreements.

<sup>4</sup> See TOSCANI GIMÉNEZ (2009): “The chance to agree on an irregular distribution of the working time, the possibility to mount up the weekly rests, or compensate overtime with resting periods (and not money), has provide an insolate and unknown deal of flexibility”.

<sup>5</sup> Flexibility may be understood in many different senses. Mainly it can be seen as a mechanism to optimize companies’ resources (human, economic, etc.) as part of a new conception of work, respecting its human dimension; or as a mechanism to eliminate protective rules and labor guarantees for employees.

women), which recognized a list of work-life balance rights (“derechos de conciliación”) as a mechanism to achieve an actual equality between men and women. Previous to the current unstable labor situation due to the special hardship of the economic crisis in Spain, work-life balance rights were one of the major concerns for the legislator. The Law on Equality introduced a great deal of rights in this sense (e.g. paternity leave) and, a “generic right to adjust the workday” to employees in the Workers’ Statute (Section 34.8 WS). This was therefore a second chance to introduce flexibility with a human face in the Spanish legal framework. The same pattern as in the irregular distribution of the working time was followed here: the determination of such adjustment is also assigned to collective negotiation (or to individual negotiation as allowed by the applicable collective agreement), as we will see<sup>6</sup>.

### 2.3. Current regulation of work-life balance rights: “flexibility for employees”

The Law on Equality introduced a great amount of rights into the Spanish legal system, some of which have been made part of the Workers’ Statute, as the main legal source of the Spanish Employment/Labor Law. With respect to the regulation of the working time, the Law on Equality has mainly brought in, as I said, a general right to adjust the length and distribution of the workday, but also new paid leaves (among which, paternity leave) and modification on the preexisting paid leave for breastfeeding, reduction of the workday and vacations.

Some of these rights are already established (and regulated) in the Workers’ Statute (and therefore are self executing), but others (those which, to me, may involve greater flexibility) need to be developed and recognized through collective bargaining. Otherwise, they would remain as a mere recognition of a right (but without any actual application).

Without prejudice of all the rights recognized in collective bargaining agreements (whatever its scope is), I hereby describe and discuss the whole range of work-life balance rights available in the Spanish Labor legal system that may have an impact on a flexible organization and distribution of the working time.

#### **a. Section 34.8 WS (introduced by the Law on Equality): workers have the right to adjust the length and distribution of their workday to make effective their work-life balance rights.**

“The employee shall have the right to adjust the length and distribution of the workday to effectively implement his right to work-life balance in the terms foreseen in the collective negotiation or in the agreement reached with the employer with respect to, if existing, collective negotiation”.

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<sup>6</sup> See VIQUEIRA PÉREZ (2010). I share the opinion with VIQUEIRA PÉREZ, when she says that *this* “right to adjust the workday” comes into play only through collective negotiation or individual agreement with the employer. Reading the plain language of the statute, we can only understand that the adjustment and distribution of the workday to which the employee is entitled depends on the collective negotiation or individual agreement”.

This is a general right granted to employees, which consists of a general right to adjust the length and distribution of the workday to implement their rights to work-life balance. Even though it is not limited in its content (any distribution is possible, for example), it does require the pre-existence of either a collective bargaining agreement or an individual agreement with the employer to actually be entitled to implement those rights. Some scholars have pointed out that the requirement of a previous agreement does not render the right to an inexistent one. As long as there is an agreement, employees may well realize it. However, I believe the legislator here missed a great opportunity to provide employees with a higher bargaining power. Instead of recognizing to employees a plain right to adjust the workday without requiring any agreement (as it is the case with the right to reduce the workday: section 37.5 WS, together with section 37.6 WS), the Parliament considered it was necessary to establish an agreement, as a manner for employers to “monitor” and control the use of such right by employees. To me, there was no need to require such a previous agreement (if Spain is consciously willing to implement these work-life balance rights): such a requirement weakens the employees’ rights, it may have a bad effect on productivity (an employee willing, but not allowed, to adjust his workday to his personal needs is more likely to increase the already high rate of absenteeism), it leaves to Unions a great power of negotiation in an arena over which they may not be interested in and, more importantly, there are other available sources to control the implementation of these rights. Opposed to what it currently established, the Spanish legislator could have foreseen a different mechanism to control the employees’ use of this general right, such as limiting the time framework within which employees can freely choose when to work or recognizing an employer’s right to reject some of the employees offers, for example. I will treat these suggestions in section 4 of this paper, as part of my proposal.

In any case, the requirement of an agreement, either collective or individual, has not been discussed by Courts, which have not upheld such right in cases of inexistent collective agreements. Such is the case, for example, of the decision STSJ Castilla-La Mancha, 3.12.2008 (MP: Jesús Rentero Jover), which said: “... a recognition of an effective tangible and binding right does not exist, because the reference either to collective bargaining or to an individual agreement for its effective implementation, entails that, until such agreements are not reached, this is, on the one hand, a right without effective content, and on the other, a call to social actors and employers and employees to do something... negotiate the chance to balance”<sup>7</sup>.

In a different case [STSJ Asturias, 18.12.2009 (MP: Luis Cayetano Fernández Ardavín)], a female employee asked her employer to modify her workday based on Section 34.8 WS, considering that such provision foresees a right for the employee that cannot depend on the simple refusal from the employer, but such refusal needs to be objective and justified. The Court, in addressing the issue, said that: “... there is a requirement of previous agreement, except for a striking unjustified or unreasoned position on the part who has to consent”.

The law does not require a mere duty of negotiation in good faith on the side of the employee in

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<sup>7</sup>See also decision by STSJ Madrid, 2.3.2010 (MP: Fernando Muñoz Esteban).

order to allow him to implement his right to adjust the workday, but instead requires an actual final agreement with the employer. This obviously provides the employer a great deal of bargaining power, but also a power to employees and their representatives to try to include the right and the procedure to adjust the workday in the applicable collective bargaining agreement.

In this respect, we could directly link section 34.8 W with section 85.1 WS<sup>8</sup>, which recognizes a duty to negotiate measures addressed at promoting equal treatment and equal opportunities for men and women (such as the right recognized in section 34.8 WS), together with the parties' freedom to determine the content of the applicable collective bargaining agreements. Some scholars view this only just as a duty to negotiate and, therefore, not as an obligation to reach an agreement on such measures. Their reasoning is usually based on the fact that section 85.3 WS, while listing the mandatory content of a collective bargaining agreement, does not mention such kind of measures. On the other hand, however, other scholars consider this inclusion to be necessary if we want to uphold the collective agreement: "... Silence with regards to this issue in a collective bargaining agreement holds a harmful potential in terms of maintaining indirect discrimination and, for these reasons, a given collective bargaining agreement might be considered to indirectly discriminate for not actually including such measures"<sup>9</sup>.

On subsection 2.4 below I will focus on the action actually carried out by the social actors in this area, but we shall already point out certain issues and features of the Spanish collective bargaining system in order to start considering the effectiveness or suitability of the collective bargaining procedure in the regulation of these rights.

Spain shows one of the lowest rates of unionization among its neighbors. The Spanish labor system provides little incentives to unionize: the principle of general efficacy of collective bargaining agreements makes its provisions automatically applicable to all workers within the scope defined in the agreement, regardless of the fact of being or not member of the union. Some studies show that together with this reason, there are other socio-demographic factors that are influential on the low rates of Spanish workers' unionization, such as gender, educational level or nationality<sup>10</sup>. In summary, male, native Spanish and middle-educated workers are most likely to become unionized than the rest of workers. Women unionization is much lower than that of men. Putting together a low representation of women within the Spanish Unions with the fact that work-life balance rights have mainly been a concern since the entrance of women into the labor market, it is easy to conclude that flexibility is not a primary concern for Unions. The main interest of unions is to defend their unionized workers' concerns and flexibility is not one of their primary worries. Consequently, collective negotiation alone may not be sufficient to bargain for flexibility with a human face. Furthermore, we must also take into consideration that the recognition in section 34.8 WS leaves the actual definition of that right, its content and its limits to

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<sup>8</sup> This section forms part of the title that addresses collective negotiation and collective bargaining agreements in the Workers' Statute.

<sup>9</sup> See *supra* note 6. Also, see CABEZA PEREIRO (2007, p. 124).

<sup>10</sup> See SIMÓN PÉREZ (2003, pp. 69-88).

the applicable collective bargaining agreement. This will cause not only differences among sectors and companies, but also might entail that certain agreements regulate this issue in a manner that perpetuates the role of caretakers for women. We will treat this further when I analyze collective bargaining agreements and their interest focus in next section.

**b. Section 37.3 WS: The Workers' Statute lists a range of paid leaves available to all employees.**

Mainly, it provides for 15 calendar days for marriage; 2 working days (4 if displacement is required) for the birth of a child or decease, accident or serious illness with or without hospitalization of relatives up to the second grade of consanguinity or affinity; 1 working day for a change of residence; indispensable time for the realization of an inexcusable public duty; as legally or collectively agreed for union or representatives functions; and indispensable time for prenatal tests and preparation techniques for giving birth.

Within the category of work-life balance rights, a large list of rights that have something to do with the caring of children and relatives, both broadly conceived, is generally provided. However, we also find different rights that do not only deal with the balance between a personal and professional life, but which have a close relationship with the constitutional interest of protecting the health (either of the mother, the child or the nasciturus).

The paid leaves listed in section 37.3 WS represent one of the instruments to balance work and life more popular and accepted by Spanish employees<sup>11</sup>. These paid leaves are, contrary to the right to adjust the length and distribution of the workday, self-executing employees' rights. They are not a company faculty, but a right on the side of the worker, and therefore the legal requirement to provide prior notice and justification shall not be considered as a request, but as part of the employer's right to prior information that allows him to organize the productive activity. These paid leaves are generally regulated in collective bargaining agreements. As we will analyze in the next section dedicated to collective bargaining agreements, they generally simply provide for longer paid leaves. It is not usual, even though it is possible, to find collective agreements providing for leaves to different family situations or agreements, for instance, that define how "displacement" should be understood.

**c. Section 37.4: permit of a one-hour leave per day for lactation**

"Female employees, for lactation of a child younger than 9 months, shall have a right to 1-hour absence of work, that may be divided into 2 fractions. The duration of this permit shall be extended proportionally in case of a multiple birth.

The woman, voluntarily, may substitute this right for the reduction of her workday in half an hour with the same purpose or accumulate it in full working days as established in the collective

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<sup>11</sup> See FERNÁNDEZ COLLADOS (2009).

bargaining agreement or individual agreement reached at with the employer respecting what is provided in the collective bargaining agreement.

This permit may be indistinctly used by the mother or the father in case both work”.

This is basically a right recognized to female workers to a one-hour leave from work for purposes of lactation of a child less than nine months. Such right may be changed for a reduction of the workday in half an hour, or accumulated in full working days, as foreseen in the applicable collective bargaining agreement or individual agreement with the employer.

Scholars still criticize the letter of the law with respect to this section, mainly for two reasons. On the one hand, because the law attributes this right to female workers, who are allowed to assign this right to the father’s child only if both (mother and father) are working. This means that a widower with a child younger than 9 months, or a divorced father with legal custody over a child younger than 9 months, will not have such one-hour leave<sup>12</sup>. On the other hand, it is the employee who has the power to fix the time when she is going to “implement” this right (according to section 37.6 WS). Even though the letter of the law seems to attribute this right to the employee and therefore limits the employer’s capacity to avoid its implementation alleging negative effects on its business, the right is not fully assigned to the employee, because any differences between the employer and the employee will be solved by summary judgment before labor courts (allowing the employer to refuse any offer set by the employee)<sup>13</sup>.

In subsection 2.4 below I will analyze what has been the actual behavior of social actors in collective negotiations regarding this issue. It must be pointed out, however, that this is a right recognized in Spain since 1990. It is not a new right, and I would dare to say that it is not a right we might deem useful to enhance gender equality in the labor market. By saying this I do not mean to reduce its importance: It is a right that allowed women to enter the labor market and stay employed. But the purposes beneath this right are far from the purposes of this paper, since we are not concerned about allowing women to work, but about 1) allowing them to fulfill their professional expectations without being regarded as “bad mothers” and without being forced to disregard their personal life, and 2) making men part of the family care responsibilities (and not just an assistant of women in family care responsibilities) <sup>14</sup>.

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<sup>12</sup> See MORGADO PANADERO (2008).

<sup>13</sup> See RODRÍGUEZ ESCANCIANO (2008).

<sup>14</sup> There is an additional right to a reduction of the workday in case of premature babies or children hospitalized after birth in section 37.4bis WS.

#### **d. Section 37.5 and 37.6 WS: Right to a reduction of the workday**

“Those who, for reasons of custody, shall take care of a minor of less than 8 years old or a person with any kind of physical, psychological or sensory disability, who does not carry out any remunerated activity, shall have a right to a reduction of the workday, with a proportionate salary decrease of, at least, one eighth and a maximum of one half of such workday.

Those who shall take care of a relative up to the second grade of consanguinity or affinity, who for his age, accident or illness is not self-sufficient and does not carry out any remunerated activity, shall have the same right.

The reduction of the workday foreseen in the present section constitutes an individual right for workers, men or women. However, if two or more employees of the same company generate this right due to the same causing person, the employer may limit its simultaneous implementation for justified reasons of the company's operations.

The time concretion and the setting of the period of time for lactation paid leave and the reduction of the workday, foreseen in subsections 4 and 5 of this section, shall correspond to the employee, within his ordinary workday. The employee shall provide notice to the employer with 15 days in advance to the date on which he shall reinstate to his ordinary workday [...].”

Discussions have arisen regarding this right to reduce one's own workday because of its bad definition. Scholars and courts have centered their discussion on the actual availability granted to employees to organize their own workday and whether the employee can reduce its daily workday (some hours everyday) or, on the contrary, is given the right to reduce the working time “vertically” and therefore excluding one whole day from work. Others even consider that this right would allow employees to change the kind of workday (full time or part time) or that it may give the right to alter the work shifts. Some other Court decisions even allow employees to alter the distribution of the workday without reducing its length.

The Supreme Court, however, has already held that section 37.5 WS does not allow employees to redistribute their working time without a reduction on the length of the workday. This was the case of the decision STS, 4<sup>a</sup>, 18.6.2008 (MP: Milagros Calvo Ibarlucea), where a female employee with a disabled daughter asked to work on different hours without any kind of reduction. She alleged that her claim was based on section 37.6 (disregarding the plain language of section 37.5 WS). The Supreme Court held that section 37.6 WS must be read together with section 37.5 WS and it further said: “It's without any doubt that the right is conceived, with regards to its modeling, in favor of the worker's interest for it is him who specifies the working schedule and the period of enjoyment, but this is always within the framework of a reduction in the workday, an important alteration that also has its negative side, that is, the proportional salary reduction”.

This understanding was also held in another Supreme Court Decision [STS, 4<sup>a</sup>, 13.6.2008 (MP: Víctor Fuentes López)]. Both decisions further analyze section 34.8 WS, linking it tightly to the

need of a collective bargaining agreement or an individual agreement within the terms established in the applicable collective bargaining agreement.

It is worth to mention that both Supreme Court's decisions included a dissenting opinion which defended a broader interpretation of section 37.5 WS, allowing an actual recognition of work-life balance rights. The dissenting judges were aware that section 37.5 WS does not explicitly recognize a right to simply modify the workday or schedule. However, they consider the plaintiff's claims shall be awarded according to the spirit of the Law<sup>15</sup> and literally said: "We understand that a legal gap may be filled up by case law... so that it shall be understood that it is possible to adjust or modify the working time (schedule and workday), without its reduction, of who for reasons of legal custody takes care of a minor of less than six years old or a physical, psychological or sensory disabled in the terms of sections 37.5 and 37.6 WS... We would hardly be respectful with the objective of Law 39/1999 if we literally interpreted it and working time reduction would be the only offered possibility...". Lower courts have called upon this dissenting opinion, even though they did follow the Supreme Court rule due to its binding nature<sup>16</sup>.

A broader interpretation of section 37.5 WS, although denied by the Supreme Court, would have brought an opportunity to make the working time more flexible without pushing out of the labor market those exercising this right (generally, women). Allowing employees to work the same amount of time (and assumingly, fulfilling the same amount of objectives yearly), yet having their working time distributed somehow different (and still earning the same salary) would enhance equality in a great way, I believe. Women would remain in the workforce without the need to step off the fast track by working part-time, becoming independent contractors or, finally, leaving the workplace all in all. As WILLIAMS says: "today's all-or-nothing workplaces pressure professionals toward neo-traditional families, in which the husband has a high prestige, long hours job and the wife "opts out""<sup>17</sup>.

VIQUEIRA says that it is precisely in these cases (where the employee is willing to change the distribution of his workday without a reduction of its length) where the right to adjust the length and distribution of the workday appears. In this sense, section 34.8 WS would be a complementary source to section 37.5 WS because it would cover those cases that fall outside of its narrow territory. However, as I pointed out, the construction of the rights in section 34.8 WS and 37.5 WS is very different: the first requires an agreement, while the second one does not. The coverage provided by section 34.8 is not flexible as it is within section 37.5: employees will always require the employer's consent to distribute their workday as they please.

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<sup>15</sup> The decision refers to Law 39/1999, to promote a balance of family and professional life of workers, previous to the Law on Equality. The Law on Equality and the former law share the same spirit with regards to recognizing work-life balance rights. See dissenting opinion: "[T]he law pretends to make up a system that takes into consideration the new social relationships and a new way to cooperate and compromise between men and women which allows a well-balanced share of responsibilities in the professional and private life".

<sup>16</sup> See STSJ Madrid, 27.2.2009 (MP: Ignacio Moreno González-Aller).

<sup>17</sup> See WILLIAMS (2010, p. 31).

A different interesting issue is the fact that section 37.6 WS has been interpreted by Courts as a rule that further develops section 39 of the Spanish Constitution, which entails a special protection of the family and the infancy. "Such purpose shall prevail and be used as guidance before any interpretative doubt", literally expressed by the Supreme Court in its decision STS, 4<sup>a</sup>, 20.7.2000 (MP: Luis Ramon Martínez Garrido). Moreover, the decision STSJ Comunidad Valenciana, 27.9.2000 (MP: Francisco José Pérez Navarro) held that "In principle, the particular setting of the workday reduction is a right of the employee, which only in exceptional cases may decline, such as in cases of abuse of rights, inexistence of good faith or a manifest disturbance for the company". To me, it is difficult to reconcile this broad interpretation with the decisions made by the Supreme Court where it narrowly construes article 37.5 WS. If the correct and accurate interpretation of section 37.6 WS is a broad one which provides for a great protection of the family and the infancy, this purpose has been neglected by, on the one hand, the judiciary's narrow and literal interpretation of the right to reduce the workday and, on the other, by the legislature since it required a previous agreement with the employer to adjust the workday (section 34.8 WS).

#### **2.4. Actual role played by collective bargaining agreements**

The Workers' Statute provides a level of protection and rights that cannot be diminished by collective (or individual) negotiation. It establishes a minimum standard of protection over which collective bargaining agreements can only provide a broader set of rights or higher protection. As we already mentioned, however, the Spanish legislator avoided the regulation at national level of working time and therefore provided an area of negotiation to social actors. The aim of the present section is to analyze whether such opportunity to regulate the working time has been used by social actors to introduce flexibility in the terms exposed earlier.

Statistics released on September 2010 by the Spanish Ministry on Labor Issues show the following relevant issues<sup>18</sup>:

- On 2009, 5,265 collective bargaining agreements were applicable in Spain, of which 4,013 were company collective bargaining agreements and 1,252 had a greater scope (province, Comunidad Autónoma or national scope).
- On 2009, 10,631,500 employees were covered by a collective bargaining agreement, of which only 1,041,700 were covered by a company collective bargaining agreement. 18,645,900 people were employed in Spain in the last term of 2009, according to numbers released by the National Institute of Statistics<sup>19</sup>. This means therefore that

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<sup>18</sup> See <http://www.mtin.es/estadisticas/cct/CCT10SepAv/ANE/CCTp.htm> for statistics on collective bargaining agreements in Spain (registered until September 2010). Ministry of Work and Immigration. General Subdirection of Statistics.

<sup>19</sup> See <http://www.ine.es/jaxiBD/tabla.do> for statistics on employed population released by the National Institute on Statistics.

more than 50% of the employed workforce in Spain was covered by a collective bargaining agreement, and most of them were covered by an agreement whose scope of application is greater than that of a company.

- During 2010 and until September 2010, 2,031 new collective bargaining agreements became into effect (either newly agreed, or agreements that were already applied in previous years but which were just revised to be applicable on 2010). Most of these agreements were just product of revision for 2010 (86%). Out of those 2,031 collective bargaining agreements, 1,526 were company collective bargaining agreements.
- These 2,031 new collective bargaining agreements covered 5,129,594 employees.
- The average workday foreseen in these collective bargaining agreement is 1,759.86 (hours/year). The numbers also show that the average workday is lower in company collective bargaining agreements (1,717.05 hours/year) than in agreements with a greater scope (1,763.35 hours/year).
- 1,081 out of the 2,031 collective bargaining agreements (affecting 4,613,993 employees) have “special clauses” concerning the regulation of the workday and holidays. With regards to special clauses under a perspective on flexibility, 596 agreements provide something regarding the irregular distribution of the working time. However, no information is provided regarding the regulation of the right to adjust the length and distribution of the workday, the reduction of the workday due to duties of care (of children or disabled relatives), the extension of paid leaves in any sense, etc.

From this information, we may conclude that a great number of employees are covered by a collective bargaining agreement, that most of them are covered by agreements whose scope of application is greater than that of a company and that, generally speaking, the workday is shorter in company collective bargaining agreements. It is also relevant to notice that half of the new collective bargaining agreements that came into effect in 2010 have some “special clauses” with respect to the regulation of the working time. However, this information does not provide qualitative data concerning the regulation of work-life balance rights. That is, it does not provide us with the number of agreements that foresee a broader set of work-life balance rights than what is already self-executing in the Workers’ Statue, it does not provide information with regards to common clauses in this area, etc.

Due to the lack of information regarding qualitative regulation and the importance of national or Comunidad Autónoma based agreements, I have chosen 8 national collective bargaining agreements covering different economic sectors (see chart 1) and analyzed what they foresee. I chose these particular agreements with the willingness to have some representative data: all of them are sector-based agreements (potentially covering a greater amount of employees than

company-based agreements, as I remarked above) and represent a whole range of professions and types of labor organization (from banking to chemical industry). The main features of the regulation I have consulted are as follows:

- Only 1 collective bargaining agreement rules (something) on the right to adjust the length and distribution of the workday. Not only the rest of agreements do not treat at all this right, but the one which actually does treat this, it does so by requiring an agreement between the employer and employees;
- Almost all of the agreements merely literally incorporate the content of 37.5 WS (which is already self executing). Two collective bargaining agreements provide for a right to reduce the workday to employees whose children is 10 years (expanding what is foreseen in section 37.5 WS, that limits this right to employees with children up to 8 years);
- All of them, except one, provide additional paid leaves (generally, increasing the amount of days of paid leave and not coming up with new concepts for which they are provided).
- One half of them provide a clause allowing an irregular distribution of the workday.
- Some provide with additional rights that play a role on making the workday more flexible for employees, such as preference in choosing the working shift, unpaid leaves, etc.

Several conclusions may be drawn out of the analysis of these collective bargaining agreements. I do take into account that I am coming up with these conclusions having only focused on what 8 collective bargaining agreements foresee. I am fully aware that this might be a dangerous generalization. For our purposes, however, I consider this is sufficient: I try to cast light on issues I already pointed out earlier (in subsection 2.3) and that these 8 agreements just make clear.

On the one hand, I realized that, because collective agreements do not regulate on section 34.8 WS, the right to adjust the length and distribution of the working time remains a mere declaration of a right, which is not self-executing and is impossible to implement. The consequence is, therefore, that employees are not able to decide, in practice, when to work or for how long. Furthermore, they do not have a chance to decide that even within a framework set by the employer. The employer retains all the power to set the working schedule.

One might argue that employees still have the right to make use of their power to reduce their own workday. But this is not my concern here. Employees are able to do that, true. But only if they have children under 8 years old or relatives to take care of –other personal reasons do not allow them to reduce their workday– and only to reduce their workday –not to distribute their workday in a different manner. The system, therefore, forces them to step off the fast track, to

step in the so-called “mummy track” and to give up some of their professional expectations. This is particularly what I am trying to avoid.

The “mummy track” has personal negative effects as well as more general implications: the person stepping in this track leaves behind a job which might have been fulfilling, loses the chance of putting time in something that might have been self-rewarding, loses the chance of socializing with people that are not members of her family and, mainly, the track imprisons the “mummy track stepper” in a life of familiar domesticity. As for the more global effects, there will emerge, among other things, a loss of revenues (since less people works full-time), a loss of productivity (since part of the potential workforce of a country will not work full-time, or even not work at all) and, from a purely fairness-based perspective, steppers will be considered second-class citizens (since work has come to partly define our identity and determines what and how one can do anything in society).

On the other hand, I became aware of the fact that collective bargaining agreements just focus on providing for longer paid leaves. This is obviously recognition of employees’ personal life, but it does not reach any further towards the greater goal of achieving an actual balance of personal and professional lives. Simply enjoying more days off work does not make the workday more flexible. For this broader purpose (an actual balance of personal and professional life), I believe more than mere paid leaves are required.

Another conclusion is that national collective bargaining agreements are not incisive or innovative when it comes to deal with flexibility for employees and balance of work and life. Not only they do not provide with new rights (inexistent in current valid laws), but also when it comes to regulating these issues, such agreements just literally incorporate what is already provided in the law. It seems, therefore, that social actors as well as employers do not even negotiate on these issues. They just incorporate what is stated in the law in order to comply with Section 85 WS (which provides for the obligation to negotiate certain measures), but nothing is ever truly negotiated.

The reasons for this lack of negotiation may be the ones I stated above (mainly, that Union concerns are not currently focused on work-life balance rights). Whatever the reason might be, we shall ask ourselves whether collective negotiation is a suitable means to make the regulation on working time more flexible.

## **2.5. Summary of the Spanish legal regime. Critique**

We have seen that the Spanish legal system relies on collective negotiation to regulate the working time, although it does set certain limits over which parties cannot dispose any worse.

Unions and employers’ organizations have not proved to be effective social actors in this matter and have focused on other labor issues, leaving work/life balance rights for negotiations in the future. In addition to this inactivity on the side of social actors, courts and judges have been reluctant to expansively read the letter of the law furthering the purposes clearly established by

the Spanish Parliament in the Law on Equality. Instead of broadening the meaning of words in some sections in the Workers' statute, they have attached themselves to the plain meaning of the language. Moreover, the legislator itself has been victim of its own "prejudices" and has not yet cleaned itself up of the old image of women as primary caretakers (as I pointed out with respect to section 37.4 WS).

And, in case these facts were not sufficient, the labor policy in this area (working time and work/life balance rights) seems to go towards a different (if not opposite) direction from what I am defending. Given the rights that are currently recognized in Labor/Employment Laws, an employee may well see his working time reduced, but it is not possible for him to force the employer to accept his proposal of distribution of the workday, which would allow the employee to pursue a successful professional career and still lead a happy personal life. While this possibility to reduce our workday and have days and hours off work is a great achievement, I claim the system should also allow those who want to truly balance their personal and professional lives to do so. This would have a triple benefit, as I see it: it would stop perpetuating the role of women as caretakers; it would allow men to fully enter the private sphere of family; and it would allow a greater attachment to work on the side of employees.

The Spanish legislation should first focus on a problem of form (and not one of content). We may say that the content and extent of these rights will have to be discussed in the Parliament as to how far Spain wants these rights to be recognized. However, the form discussion has to do with the question of whether collective negotiation is a proper mechanism to achieve an actual implementation of these rights.

I will discuss this in section 4 within my proposal for change, but as for now it is worth to remind the reader that some scholars believe that an individual agreement with the employer is an effective device to achieve a flexible working time<sup>20</sup>. Because such adjustment is basically a consequence of a personal situation, they allege, the employee himself should negotiate his conditions with his employer. Such proposal would involve collective bargaining agreements fulfilling the functions the law is currently carrying out (establishing a minimum standard) and employees would be left free to negotiate themselves with the employer. These scholars consider that employees would take advantage of their individual autonomy and believe this is an optimal device to adjust the working time to every situation. This is to me a dangerous trend: not only this option (without any limitation on what the employer can and cannot reject) increases the employer's bargaining power, but also it may entail that no flexibility at all is ever reached. There is no evidence showing that this option would report better results than the legal system currently in place. Furthermore, there is not even any chance to infer that it would result in a more flexible working time, since collective bargaining agreements hardly rule on this matter.

On the contrary, I am more fond of the idea that the legislator should take a step in the trend to make the working time more flexible, as a way to stimulate and give incentives to social actors in

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<sup>20</sup> See *supra* note 4.

negotiating these measures. Some studies show that the law does something else than merely deterring citizens from adopting certain conducts: the law affects behavior beyond deterrence and therefore it might have an effect independent of sanctions (“expressive function of the law”). Among different channels by which a law may work it does, for example, have a function of preference-shaping. This is done when the law states something is right or wrong and affects the preferences over the regulated behavior<sup>21</sup>. The expressive function of the law is, in the end, the function of law in making statements as opposed to controlling behavior directly (how legal statements may be designed to change social norms). I will deal with this a little bit deeper in section 4 of this paper.

### *3. Legal regulation of the working time in the United States*

The US employment legal system is built up somewhat different from the Spanish legal system, making evident the well-known distinctions between a common-law system and a civil-law system. Although the US is proudly an example of the common law system and judges play a key role in the evolvement of the Law in the country, employment law is an arena that has developed much because of collective bargaining and a great governmental role in regulating the private sector employment.

Unlike the Spanish legal system, where a single law (namely, the Workers’ Statute) plays a basic role in the definition and recognition of workers’ rights, the US employment law is made of numerous state and federal constitutional, statutory, regulatory and common law rights and remedies. In addition, employment matters are governed by individual employment contracts and collective (union-management) bargaining agreements.

As for the issue of working time, it is basically treated in section 207 of the Fair Labor Standards Act<sup>22</sup> (hereinafter, FLSA), enacted during the New Deal’s time (1938), when the primary concern, as President Roosevelt put it, was to “conserve the primary resources of manpower, [and] Government must have some control over maximum hours, minimum wage, the evil of child labor, and the exploitation of unorganized labor.”<sup>23</sup>

The treatment conferred to working time by the FLSA is certainly shocking from my perspective (since I am aiming at allowing employees to flexibly distribute their working time). Analyzing section 207(a)(1) one realizes that, on the one hand, the FLSA sets no limit on the number of hours an employee may work and, on the other, that the only concern for the Congress seems to be making sure that employees will be paid at a certain rate (“not less than one and one-half

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<sup>21</sup> See FUNK (2007).

<sup>22</sup> 29 U.S.C. section 207.

<sup>23</sup> Part of President Roosevelt’s special message to the Congress, on May 24, 1937.

times the regular rate at which he is employed”) after a given number of hours (40 hours per week).

The rest of section 207 addresses special conditions for hours worked pursuant to a collective bargaining agreement<sup>24</sup>, where the employee may well have to work longer than 40 hours per week and still not receive overtime as prescribed in section 207(a)(1). In any case, it is worth to mention that unionization in the US is currently very low. In 2009, according to statistics released by the Bureau of Labor Statistics<sup>25</sup>, 16.9 million waged and salaried workers were represented by a union (this group including union members and workers who are not affiliated but whose jobs are covered by a union contract). This means that only 13,5% of all employed population was covered by a union contract or was a union member (opposed to what happens in Spain, where more than 50% of all employees are covered by a collective bargaining agreement).

The rest of the employed workforce in the US is not covered by a union contract and therefore are covered by the general provisions of the FLSA I mentioned above, which just assures them a minimum wage and overtime payment. But, in case this was not enough to be aware of the low protection in the topic of working time provided to employees by the FLSA, it is worth to mention two other elements that help defining US employees’ employment conditions.

On the one hand, the numerous partial and total exemptions from coverage under FLSA. The most important exemption (the one affecting a largest number of workers) is the “white collar exemption” (29 U.S.C. section 213(a)(1)), which removes any administrative, executive and professional employee and any “outside salesman” from FLSA’s wage and hours’ provisions. On the other hand, the still applicable at will employment doctrine, according to which an employee can be discharged at any time for any reason and in any manner.<sup>26</sup> Following this doctrine, any party of the employment relationship can break it without any liability, provided that there is no express contract for a definite term and that the employer does not belong to a collective bargaining group. Even though this doctrine has been eroded by statutory and common-law protections against wrongful discharge<sup>27</sup>, it is still in place. Both the coverage exemptions and the employment-at-will seem to serve as a mechanism to avoid any kind of control or limitation to the number of hours worked by employees.

All these elements taken together (exemptions of coverage, no limitation of number of hours for employees covered by the FLSA and employment-at-will doctrine) not only weaken employees’ bargaining power, but make it virtually impossible for the employee willing to lead a balanced

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<sup>24</sup> See ROTHSTEIN *et al.* (2007), pp. 394-399).

<sup>25</sup> See <http://www.bls.gov/news.release/union2.t01.htm> for chart regarding Union affiliation of employed wage and salary workers by selected characteristics for 2008 and 2009.

<sup>26</sup> See *supra* note 24, at p. 33.

<sup>27</sup> See MUHL (2001).

life to do so (who would ever reject an employers' demand to work overtime if he can be fired without any good reason?).

I believe that, in order to effectively negotiate a flexible working time that leads to a balance in professional and personal lives, employees need to first have a limitation on the amount of hours they have to work. And only after such limitation has taken place, a discussion about the chance to make it flexible may commence. This limitation of the working time seems to me as a central measure in the United States in order to ever reach a balance between personal and professional lives, but also to enhance gender equality.

It may be argued that flexible measures can still be provided in the US within the current legal regime. However, I believe that within the current framework such flexibility would not lead to a balance between personal/professional lives because too much time would still be spent at work. And, more importantly, such a measure may well lead to more "gender inequality" in the workplace. Professor SCHULTZ, among others, defends the need to reduce the workweek in the United States in order to make "paid work" more democratic and allow women to fully enter the professional world and allow men to enter the family arena<sup>28</sup>. Furthermore, she criticizes those feminists' scholars that instead of defending what she calls a "more reasonable workweek", are mainly (and solely) defending flexibility measures that allow reductions in the working time. She fears these flexibility measures, without a shortened workweek, will entail even greater gender inequality<sup>29</sup>.

Given all these facts, I doubt the current US employment legal system can provide Spain with measures or examples to implement in order to achieve a more flexible working time that allows a better balance of professional and personal lives.

#### ***4. Proposal***

##### **4.1. Setting of our goal: A utopian state?**

A perfect employment framework for me would be one in which employees have the required mechanisms to fulfill their professional goals while not being forced to disregard their personal life (or vice versa). This broad statement requires further explanations, but also a warning about the high probability (if not complete impossibility, some may argue!) of never reaching such a goal, due to the nature of the employment relationship itself, the different bargaining power of the parties involved and the opposite interests of employers and employees. However, I think that we still can (and should) make an effort in joining our forces to put ourselves on the road towards this "utopian" state.

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<sup>28</sup> See SCHULTZ (2000, pp. 1956-1960).

<sup>29</sup> See SCHULTZ (2010, pp. 1211-1213).

Before discussing any further about the statement I just made, I want to warn the reader about my understanding of how this should be done. Professors SCHULTZ and ERTMAN engaged in a very interesting discussion about a policy proposal that aimed at remunerating homemaking labor. Even though the points raised by Professor ERTMAN<sup>30</sup> seem very interesting to me, Professor SCHULTZ's arguments seem more persuasive. Plus, her arguments regarding the fact that work ends up defining us as persons<sup>31</sup> lies at the heart of the point I am trying to make in this paper. She tries to perfectly distinguish paid work from homework, while Professor ERTMAN believes the separation between these two spheres is blurred. Blurred or clear as the distinction might be, I believe it is of central importance to allow women to fully enter the work realm and identify themselves as authentic workers, instead of making sure that they are being paid for the work they perform at home. I believe this latter to be a great offer, but it should come only after allowing women to enter the labor market equally. Providing women true equal opportunities to enter (and stay) at the labor market will not only help erasing gender stereotypes (women as caretakers and men as breadwinners) but may have a positive impact on enhancing gender equality. Providing such real chance, however, will not enhance gender equality by itself. But, as SCHULTZ points out, it will create space for discussion among couples about how to better balance their personal and professional lives. The key to achieve my "ideal employment framework", therefore, is twofold: provide the chance to balance and erase the obligation to choose between personal and professional life.

In any case, concerning the further explanations I pointed out, I would like to cast light on several ideas. First, I am assuming in my ideal that all employees are truly committed to their work, believe their work is productive and rewarding and are concerned about their professional achievements. This might not be true for all employees in Spain given that some of them might just work in order to fulfill their basic needs (food, clothes and shelter). But I consider that maintaining such an assumption nowadays is still fair given that the unemployment rate in Spain is over a 20% of the population between 16 and 65 years and the relevance of keeping a job, therefore, is undeniable. If workers are not committed to their work because of its rewarding effects, they might be attached to it for fear of losing their job. Regardless of the attachment to their work, however, all employees have their own personal life. Therefore, all of them require finding a balance between these 2 lives.

As for the required mechanisms for the employees to not find themselves on the verge of having to choose between pursuing a fulfilling personal life or a rewarding professional one, I mean making available to them certain elements to ease and soften the otherwise difficult interaction of their personal and professional responsibilities. Such elements are the ones I have been treating so far. That is, the chance to adjust the length and distribution of the workday to personal

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<sup>30</sup> See ERTMAN (2002).

<sup>31</sup> See *supra* note 28, at p. 1890. SCHLUTZ literally says: "The most distinguished advocate and the most distinguished critic of modern capitalism were in agreement on one essential point: the job makes the person. Adam Smith and Karl Marx both recognized the extent to which people's attitudes and behaviors take shape out of the experiences they have in their work".

obligations, a reduction of the workday for caretaking or paid leaves to cover personal matters, as I said, but also other additional measures to make the workplace flexible such as working from home or a policy of meetings held in the morning. There is a wide array of policies that companies can choose to further the objective of gaining in flexibility for employees. However, a great amount of companies and small businesses in Spain are reluctant to step forward in this trend due to the deeply-rooted belief that this will be costly for them or, in any case, that costs will outweigh the benefits of such policies.

Before dealing more deeply with this old, longstanding consideration of negative cost-benefit effect, an additional comment regarding my big statement is required. Notice that I refer to the interaction between personal life and professional life. I did not mention family responsibilities at all. That is, in a perfect world, flexibility would be provided to employees regardless of their family responsibilities. Employees' lives are much more than just family. Within the personal realm, leisure time, study and friends also need to be taken into consideration. Evidence shows that the Spanish legislator was aware of this fact: section 34.8 WS explicitly recognizes "personal, familiar and professional lives". After such recognition, I am asking for an explicit right to adjust (and not merely a right to request an adjustment) the length and distribution of the workday (with some rights of refusal on the side of the employer) regardless of the motive (family related or not). It is worth to bear in mind that, as for 2007, 5 countries among the most industrialized ones accounted for a "universal right" to reduce hours for all employees. That is, in Belgium, France, Finland, the Netherlands and Germany, employees may seek a change in their amount of working hours without providing any specific reason ("In these five countries it is irrelevant whether an employee wants time to pursue a hobby, write a book, look after an older parent, volunteer in the community, or have a little more hands-on time with a teenage child")<sup>32</sup>. My proposal goes a little bit further: I am not considering a right to reduce the working time, but a universal right to decide when and for how long to work (with some limitations).

At this point of the explanation of my proposal I need to clarify it for the innocent ones. My "desired state of things" implies great effort on the side of employers (or, it is seen as such is the case) and is very unlikely to happen in the close future. Not only the current economic and financial crisis hit hardly on companies, but also I realize that this proposal is difficult to be accepted given our (Spanish, as well as North-American) political and economic reality. However, those who, like me, believe things should be done in a different way need to raise our voice. And now more than ever: when things are not going so well (as it is the case in Spain nowadays), everything can be changed. It's the moment for changes. Moreover, it is time for the structural ones.

Spain shows one of the lowest levels of productivity per hour of presence at the workplace<sup>33</sup>. Plus, there is a deeply rooted idea in Spain that a company competes better in the market when its employees work longer hours, are not absent of the workplace and have faster availability to

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<sup>32</sup> See HEGEWISCH (2008, p. 19).

<sup>33</sup> See WOMEN'S INSTITUTE (2008-2009, p. 10).

physically appear at any time at the workplace. Furthermore, labor rights such as the reduction of the working time (section 37.5 WS) or maternity and paternity paid leaves are perceived as labor costs, both by employers and employees. This cultural background plays a great role in companies' reluctance to adopt flexible measures at the workplace. In fact, it does have a major impact given that small and medium-size companies make up to a 99% of all the companies/businesses and 80% of employment in Spain<sup>34</sup>. These companies, which count with fewer resources, are more difficult to convince because their lower budget allows, putting it mildly, fewer opportunities to be innovative in human resources management.

To convince these small businesses of the benefits of a flexible working time for employees, here I lay down some numbers that point out the real benefits flexibility would encompass for companies. WILLIAMS puts it very clear when she says "business case literature highlights that employers need to create family-responsive workplaces not as a gesture of good will but as a way to maximize profits"<sup>35</sup>.

- First, we should cast light on the utility business might give to flexible arrangements for employees. These can be used as a business tool to address a variety of business needs: to effectively manage human resources (recruit, develop, and retain talent), control costs and increase productivity<sup>36</sup>.
- Workplace flexibility contributes to being an employer of choice for young workers in the competitive labor market. According to a study on the effects of flexibility in businesses, 83% of respondents said that flexibility was very important or somewhat important to join that company. The same report shows that 83% of respondents considered at least somewhat important for flexibility options to stay at the company<sup>37</sup>. This proves that flexible working time may have a positive effect on recruitment, on the one hand, and retention of talent and reduction of turnover on the other. Both of these facts, in the end, may well allow a reduction in recruitment costs.
- Workplace inflexibility can negatively affect product and consumer safety, as WILLIAMS illustrates with an example by Dial Corp, Bristol, in which a quality-control technician failed to properly inspect carton seals when denied a leave of absence to take care of his wife<sup>38</sup>. Providing a flexible working time to employees may well improve product and

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<sup>34</sup> See *supra* note 33, at p. 10.

<sup>35</sup> See WILLIAMS (2010, p. 65).

<sup>36</sup> See WFD CONSULTING, 2008. This study was done in 2007 and 2008 in 5 companies that had already flexibility options in place. Participating organization represented different industries (financial services, hospitality, child care and consumer products) and job types (customer-facing workers and operations workers).

<sup>37</sup> See *supra* note 36, at pp. 90-92.

<sup>38</sup> See WILLIAMS (2010, p. 66).

consumer safety, but also productivity (As I will point out) and commitment and loyalty towards the company.

- Employers have discretion over what benefits to provide their employees. Those employees who have little workplace flexibility require higher wages to help pay for services such as emergency child and elder care<sup>39</sup>. The point of this argument is that workplace flexibility may be a cost-effective tool for attracting and retaining employees if the value of such flexible policies is higher than the cost of providing them.
- Worker absenteeism is costly to firms because of uncertainty over the workforce of any given day. The average rate of absenteeism in 720 surveyed companies in Spain in 2009 was, according to a study on absenteeism from work in Spain<sup>40</sup>, of 5.35% (over the average European rate –around a 4%). Plus, women with family responsibilities were those with a greater rate of absenteeism among the Spanish workforce. Without such responsibilities, men tend to be more absent from work than women (14.8% men against 9.3% of women). The study infers from these numbers that one important issue that forces employees to be absent from work is the lack of reconciliation measures (which allow to balance personal and professional life). The issue of absenteeism is relevant to the Spanish debate on working conditions and is regarded as a significant cost for enterprises<sup>41</sup>. There is evidence that smart workplaces arrangements can reduce absences<sup>42</sup>.
- There is also evidence that a positive relationship between workplace flexibility and worker productivity exists (moreover, the studies analyzed show no evidence that workplace flexibility harms productivity). One study explored this relationship in a case where a bank restructured its scheduling policies<sup>43</sup>. The bank at issue implemented a flexible work program and data showed that customer retention reached a 96% at the bank, compared to an industry average of 87%. Before the program was in place, the customer retention rate of the bank was 89%<sup>44</sup>.

In summary, flexible working time arrangements in companies may allow to decrease recruitment costs, to provide higher consumer and product safety, to reduce absenteeism and to

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<sup>39</sup> See EXECUTIVE OFFICE OF THE PRESIDENT COUNCIL OF ECONOMIC ADVISERS, 2010, p. 16.

<sup>40</sup> See ADECCO GROUP, 2009.

<sup>41</sup> See <http://www.eurofound.europa.eu/ewco/studies/tn0911039s/es0911039q.htm>.

<sup>42</sup> See *supra* note 39, at p. 18.

<sup>43</sup> See *supra* note 39, at pp. 20-22.

<sup>44</sup> See WILLIAMS (2010, p.68). WILLIAMS says that “flexible policies can improve productivity in 3 basic ways: by allowing employers to stay open longer hours with the same number of employees; by improving staffing during vacations, illness, and emergencies; and by decreasing presenteeism, when a workers is present in body only and not giving his full attention to the job”.

enhance productivity. All of these arguments should make doubts about the costs and effects of flexibility on companies go away. However, I would also consider the need for some subsidies and financial aid from the government to small businesses. In these cases, hiring costs are already fairly low and workers turnover is lower than in bigger companies due to a loyalty feeling developed on the employee because of the small size of the employing entity. This subsidy would help small/medium-size businesses engage in flexible arrangements and let them realize by themselves of the beneficial effects of such policies. This help would be provided only on a temporary basis and to small businesses. After some time, costs of implementing such flexible arrangements would start decreasing (bearing in mind that higher costs would be borne at the offset of such practices).

In the end, foreseeing flexible measures at work and allowing an equal continuance at the job market for women and men is a matter that involves the whole society. In fact, the progress and advancement of the country is at risk. Spain cannot afford such a waste of human resources bearing in mind changing demographics (women have fewer children and have them later), a reduced labor force growth and global competition for knowledge. Moreover, it is also a matter of fairness: Women do good at school and university, they do good at work during the first years of their professional career and, once they become mothers, the “system” pushes them out of the fast track.

#### **4.2. Proposal to achieve our goal: statutory regulation**

Once our goal is clearly set, this proposal needs to include the way in which such goal should be achieved. I believe that at this point and given the current Spanish regulation of working time, a statutory modification would be the best solution.

Two main reasons made me chose statutory modification as the means that would allow Spanish employees to actually have the ability to flexibly schedule their work. On the one hand, because the inability of social actors in providing flexible measures for the workplace has been made clear. Collective negotiation is not the most suitable means to achieve our goal. Social actors have been efficient in terms of generally regulating the working time at the workplace, but have failed to negotiate flexible time arrangements with employers. Moreover, the current economic crisis has put other issues in the front line of Union’s interest and flexibility is incessantly left out of their agenda. I do not see an end to this trend. Focusing our efforts on changing this would not only be inefficient, but also exhausting and unproductive. On the other hand and as I pointed out earlier, I believe that the expressive function of the law in this area will play an important role in terms of shaping future conducts and behaviors. I support the idea that a statutory modification in this area will start a process of “social norms modification”. Such social norms are now preventing the adoption of flexible measures in companies. Together with this, companies will realize by themselves and their own experience the certainty of the numbers I just provided, which proved that no harm on productivity would result after the implementation of flexible arrangements.

As a first step, my proposal would include 2 measures:

1. A universal right for employees to work 8 hours within a framework of 12 hours.

This right would provide all employees (regardless of their family caregiving responsibilities) the chance to decide when to work within a 12 hours period<sup>45</sup>. This will make effective the right to adjust the distribution of the workday recognized in section 34.8, but currently impossible to implement without a collective bargaining agreement or an individual agreement. The employers should be provided some right of refusal or modification. As for this right of modification, I would propose a 1-month notice period to the employer in order to allow him to adjust its human resources to its productive/manufacturing needs and have the ability to organize its business for every month. According to this system, the employer would have, at the end of one month, information about everybody's schedule for the next month. The employer should also be awarded a right to modify employees' proposed schedule in 1 hour up or down the proposed start and end times, or a right to shorten in 1 hour a proposed time off work per day (for example, when an employee proposes to work 6 hours, rest 4 hours, and work 2 hours more). This right to modify employees' proposals, however, should be supported with serious business-related motives. Otherwise, this right would only provoke litigation between employees and employers and no actual flexible schedule would be ever reached.

This right would provide employees a certain control over their schedule and a power to adjust it to their personal needs.

2. Related to the first one, I would foresee an obligation on the employer to annually set, together with the working calendar, flexible start times.

All employers shall provide employees a time period (instead of a fixed time) during which employees should start working (for instance, a 2,5 hours period from 7 am to 9:30 am). The employer may agree on the exact time and length of term (2 hours, or 3 hours, etc.) with the employees' representatives. If no agreement is reached, the employer will set it as it considers better. It is required, however, that the setting of a start time is flexible. That means that it will have to provide a period of time of a minimum of 2 hours, for example. Together with this measure, I would also consider requiring employees to work at least for, for example, 4 hours non stop per day so that, taken together with the 2,5 hours entrance term, all employees would be at the workplace at the same time (for sure, at least, between 9:30 and 11 am in my example). This measure would allow the employer to set meetings preferably in the morning (given that all employees would be at the workplace at that time), which would for sure help women stay in the labor market. I am thinking about this measure for 2 reasons: 1) to allow employees to work whenever they want, and 2) to allow the employer to count on all its employees at some point of

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<sup>45</sup> The most important factor of this right is the 12-hours-framework where the employee may work. The 8 hours daily work is not always as such, as I described in section 2.1 of this paper, since the workday in Spain is already flexibilized in the sense that the amount of hours worked per day is the result of an average of 40 hours per week in a 12-month period.

the day, providing it the chance to control their work and hold meetings gathering everyone, if required.

I would like to highlight that I am not setting flexible start and end times, but only start time. I am aware of the fact that setting a start and end time provides the employer with a tool to control its employees' work, but it takes out a great deal of the flexibility I am defending. For this reason, I propose that only the start time should be set (even if flexibly) in order to force employers in Spain to start controlling employees' performance according to a set of objectives (and not upon the time spent at the workplace).

Bear in mind that the numbers I provided in my proposal are just an example of what could be finally proposed. The idea behind this second rule is to provide employees with certain flexibility on their scheduling, but confine it so that the employer can count on their presence mostly in the morning. It is likely that employers will respond requiring for a longer period than just 1,5 hours for its entire workforce to be at the workplace. These particularities (how long and when) will be something that needs to be discussed within the company with employees' representatives.

It is also worth to mention that those employees willing to work without any interruption at all may do it if they prefer that (and if the sector or company's operations allows that). For those who would rather have a break for lunch, probably we should consider some sort of limitation on the length of such break. Spain is well known for having very long lunch breaks (which make the workday much longer). I believe this issue will be as well one of the topics to be collectively negotiated.

I believe that these 2 measures are sufficient to achieve 3 goals:

1. To finally recognize the employees' right to flexibly schedule their workday,
2. To raise awareness of the importance of flexibility and the need to regulate it further (hopefully, this will change the current trend of inactivity in actually ruling on this topic), and
3. To raise awareness of its benefits among employers.

My proposal, therefore, will not change the basic functioning of employment laws: The Workers Statute will remain being a minimum standard guaranteed to employees and collective (and individual) negotiation may well regulate further on the issues foreseen therein.

## 5. Conclusion

The issue of flexible working time has been a hot topic in Europe for quite a long time already. The old understanding of work being everyone's first priority is no longer valid for everybody. People want to enjoy their personal and family life, as well. This does not make work any less important, but it does pose some problems when it comes to reconciling a basic economic argument: scarce resources (24 hours/day) and unlimited needs (personal and professional). The need to find a balance between both is urgent, as I have tried to expose. Such need is not only a matter of fairness and equality, but also a matter of economics. The current legal system is continuously pushing out of the market people willing to stay in the labor market but who are not given the chance to do so, unless they prove to be either childless or superwomen.

The right to adjust the length and distribution of the workday recognized in the Workers Statute since the enactment of the Law on Equality has proved to be an innocent (or not so innocent, maybe) claim for time to spend on personal matters. Unions and employers have not done their job in this area and therefore employees continue being kicked out of the system, no matter how good they are or how willing they are to keep working.

Given all these factors I have tried to look for a start of a solution to this problem that needs to be solved if we want to maintain our living standards and provide real equal opportunities to everybody. I believe a change in this area is feasible. It "only" takes great effort from the whole society (government, private companies, civil society, etc.) and true attachment to the values of economic efficiency and fairness.

## 6. Case law

### *Spanish Supreme Court Decisions*

<i>Chamber and Date</i>	<i>Ref.</i>	<i>Judge Rapporteur</i>
4ª, 18.6.2008	RJ 2008\4230	Milagros Calvo Ibarlucea <sup>46</sup>
4ª, 13.6.2008	RJ 2008\4227	Víctor Fuentes López <sup>47</sup>
4ª, 20.7.2000	RJ 2000\7209	Luis Ramón Martínez Garrido

<sup>46</sup> Dissenting judges: Rosa Maria Virolés Piñol and Jordi Agustí Julià.

<sup>47</sup> *Idem.*

*Superior Court of Justice Decisions*

<i>Court, Date</i>	<i>Ref.</i>	<i>Judge Rapporteur</i>
TSJ Madrid, 2.3.2010	AS 2010\1469	Fernando Muñoz Esteban
TSJ Asturias, 18.12.2009	AS 2010\678	Luis Cayetano Fernández Ardavín
TSJ Madrid, 27.2.2009	AS 2009\1749	Ignacio Moreno González-Aller
TSJ Castilla-La Mancha, 3.12.2008	AS 2009 \ 920	Jesús Rentero Jover
TSJ Comunidad Valenciana, 27.9.2000	AS 2001 \ 524	Francisco José Pérez Navarro

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M<sup>a</sup> Belén FERNÁNDEZ COLLADOS (2009), "La suspensión del contrato de trabajo por paternidad y el permiso retribuido por nacimiento de hijo: dos medidas de conciliación de la vida familiar y laboral, diferentes y compatibles", *Aranzadi Social*, Vol. 2, núm. 1, pp. 45-51.

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