

Working Hours and Overtime : Balancing Economic Interests and Fundamental Rights in a Globalized Economy

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1. Introduction

The first laws regulating working hours were adopted at the end of the 19th century and at the beginning of the 20th. In fact, in many countries working time regulation was the first governmental intervention aimed at protecting workers, along with health and safety regulation at work. Many industrialized countries implemented regulation setting the normal amount of working hours per week at 48, and some even adopted a 40 hour norm. The most important reason behind these laws was the need to protect workers in order to safeguard minimum safety and health. However, governments often also recognized the need of workers for leisure time, including time to spend with their families.¹

As was to be expected, these regulations have curbed the average amount of hours worked in industrialised countries. However, the trend towards the increase of leisure has not been consistent since then.. From the 70's onward, there has been a divergent development in which the amount of hours worked in countries such as the United States, Australia and the United Kingdom actually rises compared to most European countries.² In a significant number of developing countries, the amount of hours worked seems to have remained at a high level as well compared to industrialized countries, or even increased over the last years.³ Research on the percentage of workers that work excessive amounts of hours⁴ is growing in developing parts of the world.⁵

¹ Lee, McCann & Messenger 2007, p. 9

² Lee, McCann & Messenger 2007, p. 25

³ Lee, McCann & Messenger 2007, p. 32

⁴ According to the definition by the Tripartite Meeting of Experts on the Measurement of Decent Work: more than 48 per week.

⁵ International Labour Office 2011, p. 28

An important trend other than the increase of hours is a shift in the distribution of hours between workers. This includes an increased use of part-time work and job-sharing measures, on-call work, temporary work, and flexible working hour patterns, including overtime and shift work. These developments can be beneficial to workers, as a means to preserve job opportunities in times of economic crisis,⁶ as well as to support workers with family responsibilities.⁷ They can, however, also negatively impact workers by taking away control over their daily lives. Although insecure or non-standard working patterns may not create a threat to the health and safety of workers, they will often be detrimental to the enjoyment of leisure and family life, in particular the organisation of care responsibilities.

Hence, both excessive working hours and excessively flexible hours can have negative effects on workers. This paper addresses the question to what extent international norms offer protection against excessive workdays and overtime or excessively flexible working hours, including the right to remuneration for the inconveniences caused by overtime or flexible time.

We will first take a look into how several countries have dealt with employers' wishes to optimize their production by either requiring long workdays and overtime, or by demands for flexibility. From these examples, it is argued that effective working time regulation is not only closely related to health and safety protection, but also to protection of the family and minimum wage protection. We will then pursue to analyse international norms, to see to what extent the relation between these three factors has been recognized in norms with respect to working time protection. Our attention is focused on the treaties that are adopted in Europe, such as the fundamental rights included in the Treaty on European Union and the European Social Charter.

2. National Regulation and Policy Choices in various countries

2.1 United States of America

The U.S. law which covers a large part of the workforce at the federal level, the Fair Labour Standards Act of 1938 (FLSA), does not provide a maximum to the number of hours workers over 16 years old are allowed to work per week. Instead, it aims at reducing hours by requiring an overtime premium of 50 percent for each hour over 40 hours per week. This incentive does

⁶ International Labour Office 2011, p. 60

⁷ Lee, McCann & Messenger 2007, p. 74.

not seem to deter employers from having their employees work significantly longer. According to some research, almost 33% percent of American workers regularly work more than the standard week, while around 20% work more than 50 hours.⁸ Some go as far as to speak of an ‘epidemic of long hours.’⁹ This phenomenon may be explained by the fact that there is no worker co-determination in hour patterns, and workers do not have the right to refuse overtime. If they do, they can be fired at the will of the employer, without legal repercussions. Another important aspect of regulation, which may explain the large amount of working hours as compared to other industrialized countries, is the lack of a legal entitlement to paid holiday leave.¹⁰ The Family and Medical Leave Act entitles workers to leave without pay in specific family-related or medical circumstances. It does, however, not apply to small businesses (under 50 workers), thus only covering about half of American workers.¹¹

Businesses seem to justify imposed overtime by referring to increased global competition and the resulting need for enhanced productivity. Unions have been unable to provide a significant counterforce due to, among other factors, declining membership.¹² Another important trend is the increased participation of women to working life since the end of the 1970’s. Some research has shown that the additional income provided by women has been key in enabling American families to increasing their state of welfare over the last couple of decades.¹³ The long hours required of men may, however, stand in the way of women entirely closing the gender gap, which still exists.¹⁴

In March 2014, president Obama signed a memorandum which directed the Department of Labor to revise the exemption to the right to overtime pay for white-collar workers in executive, administrative and professional functions.¹⁵ One of the reasons cited for this change was that workers should benefit from the economic upturn of the last couple of years. The actual change to the FLSA, which should follow within 12 to 18 months, is expected to increase the salary threshold above which the exemption may be applied, and /or the requirements as to the duties of

⁸ Lung 2005, p. 52.

⁹ Lung 2005, p. 53.

¹⁰ International Labour Office 2011, p. 26

¹¹ Rosenberg 2009, p. 72.

¹² Lung 2005, p. 54

¹³ Lung 2005, p. 59

¹⁴ Rosenberg 2009, p. 81

¹⁵ http://www.dol.gov/whd/overtime_pay.htm

the jobs. The changes do not provide workers with the guarantee of a higher income, as businesses may well choose to limit the amount of overtime.¹⁶ This could, however, lead employers to hire other workers, benefiting employment opportunities. Studies performed during the 90s show that hiring extra workers instead of making use of overtime, could lead to a significant number of new jobs.¹⁷ Unfortunately, research shows that increasing the price of overtime does not always have this effect, as employers may be inclined to try to reduce the pay rate for normal hours instead. That way, they may be able to keep the cost of labour, including overtime, at the same level. Of course, this does not work when workers who are already getting paid at the minimum wage level are involved.¹⁸

2.2 China

Since it has begun changing from a planned economy to a more open one at the end of the 1970's, China has tried to reach a similar level of regulatory protection in the field of labour as countries in the rest of the world. Among the most important laws at state level is the *Labor Act of 1994*, which, among other things, regulates working hours. Administrative law also provides an important complement to this law. In 1995, it reduced the Labor Act's official standard on working hours per week from 44 to 40. Overtime pay in China is set at 150% for hours over 44 per week, and more on weekends or national holidays.¹⁹ Although these regulations do not compare unfavourably with those of other countries, many of these are ignored or not followed strictly in practice.²⁰ One of the complicating factors is that most provinces have issued regulation of their own, which may deviate from state regulation. In addition to that, often local bureaus are in place which can approve exemptions to overtime rules, which makes things even less consistent and transparent.

Like in the United states, the trend in average hours worked in China in the last decade seems to have been an increase, rather than a decrease. A possible explanation for this is China's economic policy which is aimed at actively attracting foreign investment . This may put pressure

¹⁶ Roer & Wills 2014, p. 55.

¹⁷ Lung 2005, p. 64, citing the number of over half a million full-time jobs.

¹⁸ Trejo, 1991.

¹⁹ Guo 2003, p. 4.

²⁰ Guo 2003, p. 5

on the extent to which regulation on wages and working hours are complied with in practice.²¹ Research among workers in garment and toy-factories in Southern China shows that many workers work excessive numbers of hours (often over 60 hours a week), at a pay rate which is significantly below the rate prescribed by local legislation. While in many districts the law requires a premium be paid for hours over the maximum of (in most cases) 40 hours a week, in actuality many workers get paid less for overtime than for hours within the standard hour norm.²² In garment factories where piece rate payment was common, this effect was even more prominently visible. Management in these commonly stresses that workers choose to work long hours out of their own free will, because they want the additional income that comes with it. The truth in this statement is reflected in the fact that refusing workers the opportunity to perform overwork is often very effectively applied as a disciplinary measure.²³ However, this does not take into account that workers can barely survive at the legal minimum wage, if they even get paid that amount. The researchers who interviewed the factory workers stress the need for an increase in the legal minimum wage, and they plea for an hourly minimum wage system, instead of a monthly one, to insure workers get paid a decent amount for a non-excessive amount of work. They also stress the need for a solution of the lack of regulatory transparency, because workers are often unaware of their rights.²⁴ A more recent illustration of poor labour conditions in Chinese factories, among excessive working hours without overtime pay, is a series of suicides in Apple Inc. suppliers' factories. Workers protests have, however, recently led to an improvement, among which an increase in pay.²⁵

In 2012, the Chinese Ministry of Human Resources and Social Security announced new regulation which aims to combat abuse of flexible hours schemes by limiting the exemption of senior management from the standard working time system. Furthermore, it introduces additional overtime limits, including daily, weekly, quarterly and annual overtime limits, which complement the current limit of 36 hour per month, and requires workers representatives consent.²⁶

²¹ Ross & Chan 2002

²² Chan & Siu 2010, p. 177

²³ Chan & Siu 2010, p. 173

²⁴ Chan & Siu 2010, p. 189

²⁵ Mozur 2012

²⁶ Wang & Jeffrey 2012, p. 1.

2.3 Greece

Greek labour relations have profoundly been impacted by the economic crisis and the austerity measures imposed by the EU and IMF. After an initial policy reaction to the crisis which consisted of strengthening the position of the most vulnerable workers, several measures were taken which aimed at increasing labour market flexibility. These included legislative changes on the topics of minimum wages, overtime and part-time work.²⁷ Minimum wages were cut by 22% and even more for young workers. The rates of overtime, which differ for hours in different increments in excess of 40 hours per week, were significantly reduced to satisfy business demand for flexible and cheaper work.²⁸ The law which stated part-time workers who received a 10% overtime premium for hours in excess of their contractual amount of hours was revoked.²⁹ The maximum duration of the regulation which allowed businesses to unilaterally decrease a workers number of working hours for a couple of months, and pay them less accordingly, was extended from six to nine months per calendar year.³⁰ Furthermore, a number of measures were implemented which reduced the influence of collective bargaining on industrial relations.³¹

The economic circumstances and regulatory changes seem to have had profound impact in practice. Average working hours in Greece, which were already among the highest in Europe, have increased even more over the last couple of years. As Greece does not have a strongly developed part-time work culture, workers have catered to the preference of employers by working increasing amounts of overtime.³² Instead of receiving legal premium on overtime, a lot of workers were not paid for the extra hours at all.³³ Of course, this may contribute in a positive way to meeting the demands made by the European financial institutions. According to some research, Greek workers should raise their productivity by at least 40% in order to meet these demands.³⁴

²⁷ Papadimitriou 2013, p. 8.

²⁸ Papadimitriou 2013, p. 9. The overtime premium was reduced as follows: from the 40th to the 45th hour per week: from 25% to 20%. For hours over 45 per week: from 50% to 40% for the first 120 years, annually, and from 75% to 60% for hours in excess of that number. 'Illegal overtime' (for which certain formalities have not been met) were changed to require a 80% pay increase instead of 100% percent.

²⁹ By law 3899/2010.

³⁰ Papadimitriou 2013, p. 9

³¹ Papadimitriou 2013, p. 14

³² Ioannides e.a. 2014, p. 46

³³ Ioannides e.a. 2014, p. 39

³⁴ Belegri e.a. 2011

2.4 The Netherlands

In the Netherlands, mandatory legislation on working hours dates back to the end of the nineteenth century. The Factories Act (*Arbeidswet*) 1889 and the Factories Act 1919 offered protection against maximisation of working hours, first for women and children only, then extended to all employees. Since 1919, the justification of this legislation has gone beyond the mere protection of safety and health. This legislation was also expressly for the purpose of giving employees the opportunity to enjoy leisure time and spend it with their families. The design of the Factories Act 1919 was mostly a matter of collective regulation, at industrial sector or company level. The working time regulations were to a large extent set by governmental authorities and prescribed for all workers in a specific sector. Non-standard working time patterns such as night work, shift work, work on Sundays, and overtime were not allowed unless the employer would receive permission from the Labour Inspection.

The rigid standards of public working hours legislation came under increasing pressure in the mid-eighties. Employers needed more flexible rules. The Factories Act 1919 was replaced by the Working Hours Act (*Arbeidstijdenwet*) 1996. The Working Hours Act 1996, and the subsequent changes of the Act in 2007³⁵, offered employers more possibilities to gear working hour patterns to business needs and economic developments. To achieve this end, the Act allowed and encouraged collective bargaining at sectoral and company level on working time patterns, not only with unions but also with Workers Councils. Flexibilisation of working time regulation was mirrored in jurisprudence on individual employees who resisted flexible working time patterns. The courts expected more flexibility of individual employees, for example with respect to varying patterns of working hours and working overtime occasionally or systematically.³⁶

A development in the same era which perhaps served as an alternative for flexibilisation of working hours, was the increase of flexible labour relations. Non-standard contracts such as fixed-term employment, temporary workers, stand-by work, zero-hours contracts, quasi self-employed workers, and part-time workers rapidly gained importance in the eighties and nineties. The Flexibility and Security Act (*Wet flexibiliteit en zekerheid*) of 1998 provided legal clarification of the rights of flexible employees, but also intended to facilitate flexible contracts

³⁵ Roozendaal 2007, p. 4

³⁶ Roozendaal 2011.

for employers to a certain extent. The law allowed for the growth of flexible relations to currently one third of the workforce, which is high compared to European standards. The recent Work and Security Act 2014 (*Wet werk en Zekerheid*) intends to curb this trend by improving the rights of workers on fixed term contracts in some respects.

The requirement to be flexible also applied to employers. During the nineties, Dutch labour law was adapted to facilitate the combination of work and care. Employees were given a right to parental leave, increase in maternity leave, adoption leave, short-term care leave, long-term care leave, the right to adjustment of working hours and adjustment of working hours to personal circumstances. The Work and Care Act of 2001 (*Wet Arbeid en Zorg*), in which all the aforementioned rights were assembled, was in a way a compensation for the flexibilisation of working hours and non-standard contracts in the Working Time Act and the Flexibility and Security Act. In theory the rights to leave are applicable to both standard and non-standard contracts, but in practice, workers in precarious labour relations will be reluctant to invoke these rights out of fear to lose their job.

2.5 France

Since 1981, the reduction of working time has been a priority of labour policy of the French government.³⁷ Reductions of working time were subsidized as a contribution to job creation by sharing work. As from 1996, the government gave huge financial incentives for reductions in working time.³⁸ In 1998, a 35-hour work week was introduced. Part of the policy was the maximization of overtime to 130 per year, to be paid with a 10% or 25% bonus. At the same time however, time schedule flexibility was introduced. In fact, the 35-hour work week was in reality a 1600 per year work week. The Reduced Working Hours Act was presented as a way for companies to improve their performance by making working time more flexible. It allowed and encouraged employers to negotiate flexible working-time arrangements with unions, which fostered " the largest boost to firm-level bargaining over working hours ever experienced"³⁹ in France. It led to the introduction of modulating hours so that they fit periods of high and low work intensity better. As a result, France has one of the highest percentages of companies with

³⁷ Askenazy 2013.

³⁸ By reducing employers social security contributions. The incentives were withdrawn in 2002. Askenazy 2013.

³⁹ Lehndorff 2014, p. 851.

highly flexible working time policies in Europe.⁴⁰ The effects of the policies are highly diverse though. Part of the workers experienced improvement of their daily lives because of increased possibilities to adapt their work schedule to their personal responsibilities. For another part of the employees the policies meant fluctuating and staggered hours, not always predictable in advance, or long days. Many employees have had to accept flexible working hours or a reduction of working time without a reduction of workload. Also, the shift to a 35-hour work week was accompanied by a wage restraint ranging from 11 to 30%.⁴¹ Especially low-skilled, part-time working women in medium and large firms experience an imposed flexibility of work schedules without gains in other dimensions of work. Conversely, high skilled employees ("cadres") have reaped the benefits of extra vacation time. Large firms or governmental organisations often adopted flexible working time arrangements in favour of the reconciliation of work and family responsibilities.⁴²

In 2007, the newly elected President Sarkozy campaigned with the slogan 'work more to earn more'. In an attempt to stimulate employees to work more without withdrawal of the popular 35-hour law, the overtime bonus was set at 25% without a maximum in hours, and workers were exempted on income tax and social contributions on overtime pay. Since employers and employees now could benefit both from a qualification of working hours as overtime hours, the tax reduction was popular but perhaps not very effective in the actual stimulation of longer work weeks.⁴³ In 2012, the new socialist government has decided to kill the costly exemptions of income and social taxes on overtime.

2.6 Sweden

Sweden traditionally has been a country in which labour relations were regulated by social partners, and which has very high degree of trade union membership.⁴⁴ Working hours are a topic which also largely has been regulated by means of collective bargaining, which led to a system which gives individuals a great deal of flexibility in changing their working patterns over

⁴⁰ Bustreel, Cornuau, Pernod-Lemattre 2012.

⁴¹ Askenazy 2013.

⁴² Askenazy 2013; Fagnani, Letablier 2004.

⁴³ Askenazy 2013.

⁴⁴ Rönmar & Numhauser-Henning 2012, p. 3

the course of their working lives. The Swedish Working Hours Act⁴⁵ sets the standard number of working hours per week at 40, and limits the amount of overtime to a maximum of 200 hours per year, but it also provides social partners with considerable leeway to agree on other norms among themselves.⁴⁶ The way social partners make use of this freedom differs per industry, but the general trend is a slight reduction of the normal amount of working hours per week, combined with a stimulus for overwork in the form of an overtime premium. Furthermore, workers are often enabled to put small amounts of their wages towards a time savings account, which they can later use to reduce their working time. Collective agreements also increasingly include the ‘annualisation’ of hours as a flexibility measure. Increased global competition, changes in consumer demands and technical innovations may be cited as reasons behind this development.⁴⁷

The number of hours worked in practice significantly decreased from the 1960s until more recently.⁴⁸ Another important trend is the large participation of women in the workforce, largely through parttime work, which the legal system enables by providing reversible options.

The economic crisis in 2009 causes trade unions and employers’ organisations at the national level to conclude so called ‘crisis agreements’, collective agreements. These allowed local social partners at the local level to agree on a trade in which dismissal for redundancy reasons was avoided at the price of a reduction in working hours and wages.⁴⁹

2.7 Conclusion

The examples of working time developments in various countries makes apparent that working time regulation at state level can and will shape the daily lives of employees by either stimulating long work days or aiming at a reduction of long work days. Even in affluent countries such as the U.S.A., many employees experience pressure to work excessively long hours. Their acceptance of overtime work can be explained by weak working time regulations, but also by weak protection against dismissal and low minimum wages. The example of China shows that policies aiming at curbing structural work in overtime might be successful only at the condition of

⁴⁵ Arbetstidslagen SFS 1982:673

⁴⁶ Anxo 2009, p. 56

⁴⁷ Anxo 2009, p. 57

⁴⁸ Anxo 2009, p. 61 From 41 in 1963 to about 37 hours per week on average in 2007.

⁴⁹ Rönmar & Numhauser-Henning 2012, p. 21.

setting a decent minimum wage for the standard number of hours. The close connection between working hours and minimum pay is clearly visible as well in the example of Greece. In order to face the financial crises, minimum wages were lowered along with the pay rate for overtime, in order to satisfy business demand for flexible and cheaper work.. This has led to an increase in average working hours, which were already among the highest in Europe. In these three countries, the dominant choice of employers who seek to optimise their production capacity seems to consist of imposing long working hours and overtime. In the other three examples of France, the Netherlands and Sweden, the legal restriction of maximum working hours is more prevalent. Employers in France and the Netherlands have responded by seeking to optimise their production by flexibilisation of the workforce, either by imposing flexible working time patterns ("internal flexibilisation") or by imposing flexible contracts ("external flexibilisation")⁵⁰ or both. In Sweden the imposed flexibilisation trend seems less prevalent, perhaps due to stronger unions. Although flexibilisation induces no immediate threat to health and safety of workers, it presumably is detrimental to the reconciliation of work and private (family) life.

These examples also show that working time protection is intricately linked to a broader spectrum of labour protection, such as protection of health and safety, protection of family life and protection of minimum wages. In the next part, we will address the question to what extent these connections are recognized in the protection of working time in international regulations.

3. International Regulations on Working Hours and Overtime

The room to manoeuvre which national governments have in implementing their own policy on working hours, flexible hours and overtime pay, is to a certain extent limited by international regulations, which is briefly reviewed in this part. From a European perspective, the most important sources of international regulation which require the implementation of norms into the countries' own domestic legal orders are the ILO and the European Union. The question is, to what extent it is recognized that the protection of working time in international regulations is intricately linked not only to the protection of health and safety but also to the protection of family life and the right to a fair wage. First, we will briefly review norms that are specifically

⁵⁰ Compare Europa 2020 agenda for new skills and jobs http://eur-lex.europa.eu/resource.html?uri=cellar:776df18f-542f-48b8-9627-88aac6d3ede0.0003.03/DOC_1&format=PDF p. 5 for the use of these terms.

designed to protect working time, to discuss their apparent connection with health and safety, family life and pay. In par. 4 we will review provisions dealing explicitly with family life and pay to see whether a link with working time is recognized in these norms.

3.1. ILO norms on working hours

Many international labour standards concerning the regulation of working time were created under the ILO constellation, including the first convention to be adopted by the organisation. The more recent standards contain more stringent norms, but have not necessarily obsoleted the older ones because not all countries have ratified them.

ILO Conventions no. 1 of 1919 and no. 30 of 1930,⁵¹ which cover different branches of industry, both require member states to implement regulation which provides for a 48 hour per week limit to working hours. The conventions also both aim at a maximum of 8 hours of work day. Both conventions allow different deviations from this standard however, providing different norms on the number of weeks to be taken into account as a reference period, the special circumstances under which the norm may temporarily or permanently be set aside with the consent of social partners. Convention 1 requires a 25% wage premium for overtime, which is applicable to temporary deviations of the 48 hour norm, not to permanent ones. Although there is no official limit to the amount of overtime that can be allowed in case of emergencies or after consulting with workers' representatives, the Committee of Experts on the Application of Conventions has stressed that they should not be applied endlessly: "they must be prescribed in line with the general goal of the instruments, namely to establish the eight-hour day and 48-hour week as a legal standard of hours of work in order to provide protection against undue fatigue and to ensure reasonable leisure and opportunities for recreation and social life."⁵²

The Forty-Hour Week Convention (No. 47) of 1935,⁵³ as its preamble clearly reflects, was adopted with the advantages of limiting working hours for employment purposes in mind, which is no wonder given the time of its adoption. It asks member states for 'the principle of a forty-

⁵¹ Ratified by 52, 30 countries respectively (information attained through <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0>, consulted February 25th, 2015). Of the countries in our country investigation, the following ratified the conventions: no. 1: France and Greece; no. 30: none.

⁵² General Survey 2005, p. 60

⁵³ Ratified by 15 countries (information attained through <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0>, consulted February 25th, 2015). Of the countries in our country investigation, the following ratified the convention: Sweden.

hour week applied in such a manner that the standard of living is not reduced in consequence' (article 1). It does not contain detailed provisions on how this should be done in practice. The Reduction of Hours of Work Recommendation (No. 116) of 1962 does not explicitly have the same purpose, but does provide some more detailed information on how its goal of progressive reduction of hours should be attained, including notable provisions on how to deal with wages and overtime pay. Furthermore, it recommends the competent authority or body in each country should fix the maximum length of the period over which the hours of work may be averaged, and all hours worked in excess of the normal hours should be deemed to be overtime, unless they are taken into account in fixing remuneration in accordance with custom (articles 12 and 16).

A connection with pay is also to be found in the Holidays with Pay Convention (Revised), (No. 132) of 1970. It establishes that all employed persons should be provided with paid holiday leave, which shall in no case be less than three working weeks for one year of service. Several conventions provide norms on hours of rest, covering different branches of industry. A fairly indirect connection with family life can be found in the Part-Time Work Convention, (No. 175) of 1994. The convention requires measures to be taken by member states to facilitate access to productive and freely chosen part-time work which meets the needs of both employers and workers (article 9).

The last norms to briefly be mentioned here is the Night Work Convention (No. 171) of 1990. This is the one ILO convention on non-standard patterns of work. In this Convention, interestingly, specific attention is devoted to both the impact of night work on family life and the fact that night work should be rewarded with higher pay in order to compensate for the inconvenience. The convention requires member states to take specific measures for night workers including: "to assist them to meet their family and social responsibilities" (article 3). It also requires that compensation for night workers in the form of working time, pay or similar benefits shall "recognise the nature of night work" (Article 8), apparently implying that night work deserves a reward that compensates for the inconvenience caused and hence should be higher than day work.

Taking inventory of this body of ILO norms, they do not give a specification of the aim of working time regulation. Although it is advised by the Committee of Experts on the Application of Conventions that national norms should respect the need for "leisure, recreation and social

life", there is no rule in said Conventions that confirms that perspective. Since the ILO-norms leave a lot of room for countries to implement their own national policies, or to leave things up to social partners, it is not guaranteed that working hours indeed infringe the need for leisure and social life or even the protection of health and safety. Specifically, the unlimited leeway countries have in applying a system with long reference periods for taking stock of the 48 hour per week maximum, may lead to regular excessive labour hour practices. Also, there is no absolute maximum to the hours of overtime allowed under the system. A connection with pay is explicitly made in the case of overtime, holidays and night work. It is absent for flexible working time patterns. The connection with family life is only to be found in the Convention on night work, and indirectly in the Convention on part time work.

Apart from the contents of the norms, the number of ratifications of the conventions raises doubt as to whether they will have great impact in practice. However, non-ratification of ILO norms does not mean countries do not take them into account, and as will be seen later, the ILO norms may influence regional bodies, such as the European Union, which will be discussed next.

3.2 Working time in Fundamental Rights Treaties

The Universal Declaration of Human Rights (UDHR), adopted in 1948, recognizes the right to rest and leisure in article 24 including reasonable limitation of working hours and periodic holidays with pay. Hence, in the first global expression of human rights, it was already recognized that workers needed rest not only for their health, but also for their leisure. The connection with pay is made with respect to holidays only. The phrase was repeated in the subsequent International Covenant on Economic, Social and Cultural Rights (1966), which provides in art. 7: "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: (...) (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays."

Somehow the reference to leisure as a goal of restricting working hours has been lost in the subsequent European fundamental right treaties. There is no apparent connection in these norms with the protection of leisure, family life or pay. The European Social Charter (ESC) is a treaty prepared by the Council of Europe, adopted in 1961 and revised in 1996. Article 2 guarantees the right to just conditions of work, which includes the provision of 'reasonable daily and weekly

working hours, the working week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit'. A similar provision can be found in the Charter of Fundamental Rights of the European Union. Art. 31.2 states that every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave. According to the commentary on the Charter⁵⁴, art. 31.2 reflects the norm in art. 2 ESC and the European Working Time Directive 93/104 (see hereinafter).

The provisions do not define what constitutes reasonable working hours. The European Committee of Social Rights, who monitors compliance to the Charter, assesses the situations on a case by case basis. According to its Conclusions, examples of unreasonable working hours are extremely long working hours e.g. those of up to 16 hours on any one day or, under certain conditions, more than 60 hours in one week are unreasonable and therefore contrary to the Charter. Also, the Committee contends that working overtime must not simply be left to the discretion of the employer or the employee. The reasons for overtime work and its duration must be subject to regulation.⁵⁵

3.3 Working time in European Union legislation

Title X of the Treaty on the Functioning of the European Union provides the Union with its competence in the field of social policy. The fields in which the Union is to complement the member states social policy activities are mentioned in article 153. Regulation of working hours is not mentioned specifically, but is included in the categorie protection of health and safety of the workers (art. 153.1.a). Hence the competence of the European Union to regulate working time is in principle restricted to health and safety aspects of working time. This explains why the reference to leisure has disappeared in the European Charter of fundamental rights, in comparison with the UDHR and IVESCR. provisions. The European legislative has no competency to extent working time protection to broader aspects of well being of the worker, such as the protection of family life or compensation for inconvenient hours. This is illustrated by the 1996 case of the Commission against the U.K.⁵⁶ The Court ruled in that case that article

⁵⁴ Publ. 14-12-2007, C 303-2.

⁵⁵ European Committee of Social Rights, Digest of the case law of the European Committee of Social Rights, 2008, p. 27.

⁵⁶ ECJ 12 November 1996, C-84/94 (U.K./C).

118a of the Treaty was the appropriate legal basis for the adoption by the Community of measures whose principal aim is the protection of the health and safety of workers. Article 5.2 in Directive 93/104 giving priority to Sunday as the weekly rest day however did not protect health and safety and therefore had to be annulled.

The limited competence of the European legislative has perhaps hampered progressive protection of workers against non standard working hours. But it has also been an express purpose of the Working Time Directive to allow for such flexibility.⁵⁷ The most prominent regulatory device of the European Union regarding working hours is its Working Time Directive (2003/88/EC), which is the follow-up to Council Directive 93/104/EC.

The requirements of the Directive are, among other things, a minimum daily rest period of 11 consecutive hours per 24-hour period and 24 hours per seven-day period (articles 3 and 5), a break on work days longer than six hours (article 4), and a maximum average working time of 48 hours, including overtime, for each seven-day period (article 6). Article 16 (b) gives member states the possibility to extend this reference period, to a maximum of four months. Article 22 even permits member states to ‘opt-out’ of the 48 hour maximum entirely, provided it meets certain requirements, among which the worker’s consent. Regarding vacation leave, the Directive requires workers be given paid holiday leave of at least four weeks each year (article 7), without derogation.

The protection against non standard working hours or the protection of family life is missing in the Directive. What is also missing is a clause on overtime pay. This is also explained by article 153 (5) of the Treaty on the Functioning of the European Union, which provides that the Union’s competence in the field of social policy does not extend to regulation on pay.

4.1. Family Life and working time regulation

Workers with family responsibilities benefit from special arrangements such as parental leave and part time work. However it is also the regularity and predictability of their work schedule that makes a big difference. Annualized hours schemes, which allow employers a great deal of flexibility in planning the hours, and reduce overtime pay, can be very detrimental in this

⁵⁷ Zbyszewska 2013

respect.⁵⁹ The question here is to what extent international regulations on the protection of family life include protection against imposed working time flexibility.

The ILO Convention on Workers with Family Responsibilities (No. 156) 1981⁶⁰ in general requires governments to take into account the needs of workers with family responsibilities in terms and conditions of employment and in social security (art. 5), but it is not specific on working time protection. The accompanying recommendation, no. 165 of the same year, establishes that: “Particular attention should be given to general measures for improving working conditions and the quality of working life, including measures aiming at - (a) the progressive reduction of daily hours of work and the reduction of overtime; - (b) more flexible arrangements as regards working schedules, rest periods and holidays, account being taken of the stage of development and the particular needs of the country and of different sectors of activity (article 18). Furthermore, article 19 states that whenever practicable and appropriate the special needs of workers, including those arising from family responsibilities, should be taken into account in shift-work arrangements and assignments to night work.

Other fundamental rights treaties are much less specific on the protection of working hours in order to protect family life. The UDHR protects families in art. 16, but no reference to work is made. The ICESCR grants special protection for working mothers before and after childbirth (art. 10). The European Charter of Fundamental Rights only provides in art. 33.2 that 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. The ESC is the most specific on the rights of workers with family responsibilities (art. 27). States have to undertake access to employment, take account of their needs in terms of conditions of employment, promote child daycare and grant maternity leave and parental leave.

Relevant European Union legislation in this respect is the social-partner negotiated Framework Agreement on parental leave Directive 96/34, renewed in 2009. The directive provides a right to

⁵⁹ Gornick & Heron 2006, p. 160.

⁶⁰ Ratified by 43 countries (information attained through <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0>, consulted February 25th, 2015). Of the countries in our country investigation, the following ratified the convention: France, Greece, Netherlands, Sweden.

parental leave and protection of workers who exercised that right. The protection against flexible working schedules is not mentioned in this Directive.

4.2 Living wage and working time regulation

Part of this paper showed that ILO norms on working hours do contain some provisions on pay, most notably the requirement of the payment of a 25% overtime premium in convention no. 1. These regulations do not, however, provide an absolute requirement that workers should receive a certain absolute minimum amount of income for a certain amount of working hours. The same can be said of the ILO norms related to minimum wages. The most recent ILO convention on this topic, Minimum Wage Fixing Convention, (No. 131) of 1970,⁶⁴ does require that the elements to be taken into consideration in determining the level of minimum wages by member states, should include the needs of workers and their families (article 3, a). It is not specified which amount of working hours should guarantee this goal be attained.

Several fundamental rights documents do not merely provide ‘a living wage’, ‘a decent wage’ or a similar concept as something to be ‘taken into account’, but as a right of its own. These include documents issued by the UN,⁶⁵ Council of Europe, European Union, and several other regional human rights bodies.⁶⁶ The most interesting provision is part I(4) of the ESC, which states that: “all workers have the right to a fair remuneration sufficient for a decent standard of living for themselves and their families,” and part II, article 4, which further defines the right to fair remuneration, including overtime pay.⁶⁷ Article 31 of the ECFR, titled ‘Fair and just working conditions’, merely states that every worker has the right to working conditions which respect his or her health, safety and dignity, but does not specifically go into wages.

⁶⁴ Ratified by 52 countries (information attained through <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0>, consulted February 25th, 2015). Of the countries in our country investigation, the following ratified the convention: France, Netherlands.

⁶⁵UDHR article 23, ICESCR, article 7.

⁶⁶ Albeit less explicitly. See, for instance, article 7(a) of the Conference of American States’ Additional Protocol to the American Convention Rights in the area of Economic, Social and Cultural Rights and article 15 of the African Charter on Human and Peoples’ Rights.

⁶⁷ European Social Charter, part II, article 4, The right to a fair remuneration, states:

With a view to ensuring the effective exercise of the right to a fair remuneration, the Parties undertake:

1. to recognise the right of workers to a remuneration such as will give them and their families a decent standard of living; 2. to recognise the right of workers to an increased rate of remuneration for overtime work, subject to exceptions in particular cases (...);

The ESC Committee on Social Rights has repeatedly stressed that a decent wage must exceed the minimum threshold, set at 50% of the national net average wage. This is the case when the net minimum wage exceeds 60% of the national net average wage. Where the net minimum wage is between 50% and 60% of the national net average wage, it is for the State Party to show that this wage makes it possible to ensure a decent living standard.⁶⁸ In relation to overtime pay, it has stressed that work performed outside normal working hours requires an increased effort on the part of the worker, and therefore the rate of such payment must be higher than the normal wage rate.⁶⁹

5. Conclusion

Comparing the requirements of ILO norms and those of the European social right treaties and the European Working Time Directive, it is apparent that the protection of working time in both set of rules covers the protection of health and safety of the worker. The connection between protection of working time and the protection of family life is absent in the European provisions. The norms on protection of the family itself do not make up for this omission. It has already been observed that the minimum standards in regular working time regulation are seemingly neutral but do not take into account the different impact these rules may have on workers with family responsibilities.⁷⁵ The connection between protection against excessive working hours of excessively flexible working hours is made in regulations on overtime pay. However, overtime is often interpreted as exceeding the standard workweek, and does not include work on inconvenient or unpredictable hours, with the exception of night work. In our opinion the norms on working time protection in fundamental rights treaties reflect the need for working time protection in an era where almost every (male) worker was expected to work during the standard working hours. The introduction of the 24-hour economy has fundamentally changed this point of reference. Fundamental rights treaties should be interpreted so as to reflect these changes.

⁶⁸ European Committee of Social Rights, Conclusions XIV-2 (1998), Statement of Interpretation on Article 4§1

⁶⁹ For instance, see: European Committee of Social Rights, Conclusions XX-3 (2014) (United Kingdom), p. 14

⁷⁵ Zbyszewska 2013.

Literature

Askenazy 2013

P. Askenazy, Working time regulation in France from 1996 to 2012, *Cambridge Journal of Economics* 2013, 37, p. 323-347.

Anxo 2009

Dominique Anxo, Working time policy in Sweden., in: *Working Time – In search of new research territories beyond flexibility debates* JILPT Report no. 7, 2009, p. 55

Belegri et. al. 2011

Athena Belegri-Roboli, Maria Markali & Panayotis G. Mchaelides, Labour Productivity Changes and Working Time: The Case of Greece, *Economic Systems Research*, 2011, Vol. 23(3), September, pp. 329–339

Berg, Bosch, Charest 2014

Peter Berg, Gerhard Bosch & Jean Charest, Working-Time Configurations: A framework for analyzing diversity across countries, *Industrial & Labor Relations Review*, 67(3), July 2014, pp. 805-837

Bustreel, Cornuau, Pernod-Lemattre 2012

Anne Bustreel, Frederique Cornuau et Martine Pernod-Lemattre, Concilier vie familiale et vie professionnelle en France: les disparites d'horaires de travail, *Relations Industrielles*, Fall 2012, 67, 4p. 681-697.

Cao & Rubin 2014

Yang Cao and Beth A. Rubin, Market Transition and the Deinstitutionalization of Standard Work Hours in Post-Socialist China, *Industrial & Labor Relations Review* 2014 67: 864

Chan & Siu 2010

Anita Chan and Kaxton Siu, Analyzing exploitation: The Mechanisms Underpinning Low Wages and Excessive Overtime in Chinese Export Factories, *Critical Asian Studies*, 42:2, 167-190

European Committee of Social Rights, 2008

European Social Committee of Social Rights, Digest of the case law of the European Committee of Social Rights, 2008, available at:

http://www.coe.int/t/dghl/monitoring/socialcharter/Digest/DigestSept2008_en.pdf

ETUC 2011

European Trade Union Confederation, Fact Sheet on Fundamental Rights and the Working Time Directive, ETUC 2011, available through: http://etuc.org/IMG/pdf/A_TT_droits_fond_EN.pdf

Fagnani, Letablier 2004

Jeanne Fagnani and Marie-Therese Letablier, Work and family life balance: the impact of the 35-hours laws in France, *Work, employment and society*, Volume 18, number 3, September 2004

Hadj Ayed, Masselot 2004

Sonia Hadj Ayed & Annick Masselot (2004) Reconciliation between Work and Family Life in the EU: reshaping gendered structures? *European Section, Journal of Social Welfare and Family Law*, 26:3, 325-338

International Labour Office, 2011

International Labour Office, Working time in the twenty-first century, Report for discussion at the Tripartite Meeting of Experts on Working-time Arrangement, 2011

ILO General Survey on Working Hours, 2005

Hours of Work, from fixed to flexible? Report of the Committee of Experts on the Application of Conventions and Recommendations

ILO General Survey on Minimum Wage systems, 2014

Minimum Wage Systems, General Survey of the reports on the Minimum Wage Fixing Convention, 1970 (No. 131), and the Minimum Wage Fixing Recommendation, 1970 (No. 135)

Golden 1998

Lonnie Golden, Working Time and the Impact of Policy Institutions: Reforming the Overtime Hours Law and Regulation, *Review of Social Economy*, 56:4(1998), 522-541

Golden 2009

Lonnie Golden A Brief History of Long Work Time and the Contemporary Sources of Overwork, *Journal of Business Ethics* (2009) 84:217–227

Gornick & Heron 2006

J.C. Gornick & A. Heron, The regulation of working time as work-family reconciliation policy: Comparing Europe, Japan, and the United States, *Journal of Comparative Policy Analysis: Research and Practice*, 8:2, 149-166

Guo 2003

Baogang Guo, China's Labor Standards: Myths and Realities, paper prepared for delivery at a conference organized by the China Research Center on Friday, February 7th, 2003.

Ioannides et al. 2014

Alexis Ioannides, Eleni Oxouzi and Stavros Mavroudeas, All work and no . . . pay? Unpaid overtime in Greece: determining factors and theoretical explanations *Industrial Relations Journal* 45:1, 39–55

Lee, McCann & Messenger 2007

Sangheon Lee, Deirdre McCann and Jon C. Messenger, *Working Time Around the World*, Routledge London 2007

Lehndorff 2014

Steffen Lehndorff, It's a long way from norms to normality: the 35-hour week in France, *Industrial & Labor Relations Review*, 67(3), July 2014, p. 838-863, p. 851.

Lung 2005

Shirley Lung, Overwork and Overtime, Indiana Law Review, Vol. 39:51, 2005, p. 51-85

Mozur 2012

Paul Mozur, Foxconn Workers: Keep Our Overtime Wall Street Journal, Dec 18, 2012

Papadimitriou 2013,

Costas Papadimitriou, The Greek labour law face to the crisis: A dangerous passage towards a new juridical nature, European Labour Law Network Working Paper Series, December 2013

Roer & Wills 2014

Ricki Roer & Linda Wills, Department of Labor to Revise Federal Regulations Interpreting the Right to Receive Overtime Pay under the Fair Labor Standards Act of 1938 Employee Relations Law Journal, Winter 2014, Vol.40(3), pp.53-55

Roozendaal 2007

W.L. Roozendaal, The times they are a changin' - wijziging van arbeidstijden en het belang van de werknemer, Sociaal Maandblad Arbeid, 2007/1

Roozendaal 2011

W.L. Roozendaal, Werk en prive, Kluwer Deventer 2011

Rönnmar & Numhauser-Henning 2012

Mia Rönnmar & Ann Numhauser-Henning, Flexicurity, employability and changing employment protection in a global economy – A study of labour law developments in Sweden in a European context, World Congress of the International Labour and Employment Relations Association (ILERA), Philadelphia, 2012-07-02

Rosenberg 2009

Samuel Rosenberg, Long Work Hours for Some, Short Work Hours for Others: Working Time in the United States, Working Time – In search of new research territories beyond flexibility debates JILPT Report no. 7, 2009, p.71

Ross & Chan 2002

Robert J.S. Ross and Anita Chan, From North-South to South-South – The True Face of Global Competition, Foreign Affairs, September/October 2002, pp. 8-13.

Trejo 1991

Stephen J. Trejo, The Effects of Overtime Pay Regulation on Worker Compensation, The American Economic Review, vol. 81 no. 4, 1991

Wang & Wilson 2012

Wang Dongpeng and Jeffrey Wilson, China issues draft rules on overtime, International Financial Law Review, July/August 2012

Zbyszewska 2013

A. Zbyszewska, The European Union Working Time Directive: Securing minimum standards, with gendered consequences, Women's Studies International Foru, 39 (2013) 30-41.

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