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RECONCILING WORK AND FAMILY LIFE.

SPANISH REPORT

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1. INTRODUCTION, AIMS AND SOURCES.

1.1 INTRODUCTION. FACTS AND FIGURES

The massive incorporation of women to the labour market has been one of the major social changes in (at least) western societies during the 20th Century. It has been a phenomenon with a profound impact on the organization of society, from family to labour market, as well as in the position of women in the society and the idea of equality between women and men in all the social spheres.

This phenomenon was especially intense in some countries already during the Second World War but, in most of them, the boom took place in the first decades after the conflict. In some other countries, like the case of Spain, it has been a relatively recent change, taking place especially from the seventies to the present day, in the democratic period after the long Franco´s dictatorship (see table 1).

In any case, this reality has challenged the traditional organization of western societies that were, to a great extent, articulated relying on a sexual division of work with clear gender´s roles. The incorporation of women to the labour market has challenged this organization and this is the key to understand the necessity of work-life balance policies or, more graphically said, the need to reconcile work and life.

Of course women (except perhaps some women of the upper-classes) have always worked hard in our societies. But, before the massive incorporation of them to the labour market, the work they did was invisible (see point 5.2). This can be explained as a consequence of a sexual division of work where they have performed mainly the private work at home and the care work, which was traditionally out of the market. And what was out of the market was invisible, especially for the law, including, of course, labour law.

Nevertheless, with the incorporation of women to the labour market, this sexual division of work has been put under pressure, many problems that were invisible have arisen and the legal order tries to regulate and, eventually, to solve them.

It is not an easy task , even when there have been important advances in this field: conciliation rights, antidiscrimination rules and other provisions like childcare facilities, but also preventive

measures (such as equality plans in the Spanish experience) are the main means of the legal order in this topic.

Focusing on the Spanish case, the progress has been important: we have to take into account that, in comparison with other European countries, the gender role of the housewife was recognized in our legal order still in the late seventies[1]. Only with democracy things started to change (even when the incorporation of women to work and University was earlier): the presence of women in the labour market has grown ever since the late seventies; they are the majority of the students in the Spanish universities; they are increasing their number in higher positions of companies and gaining access to liberal professions such as lawyers, medicine doctors, etc.

But still today we can find some problems and inequalities and women have to face more obstacles than men in the labour market. In part this is because the sexual division of work has not changed yet: women are still the ones who mainly are in charge of the private re-productive work and the main care-providers: women spend more time on house working as well as taking care of elder and children. They have problems to promote to higher positions (vertical segregation). There is still a big gender pay gap. Women are overrepresented in low-paid sectors and in precarious contractual forms within the Spanish labour market. And lately, added to all these problems, the economic crisis has had an important negative impact on equality policies (as well as in the whole labour market).

We can conclude this introduction with some facts and figures that could help us to have a general overview of the situation of women in the Spanish labour market.

Table 1: Evolution of the women participation in the labour market: activity rate of men and women (percentage of the total, male and female population).

SPAIN	TOTAL	MALE WORKER	FEMALE WORKER
1988	49.1	66.9	32.5
1990	49.4	66.7	32.8
1993	50.8	68.4	36.1

[1] Women needed, if they were underage, the consent of their father to sign a labour contract and, after getting married it was the consent of the husband which was needed. Only single women older than 21 years could freely sign a labour contract. To get married was a legal cause to end the labour contract of women (they had an economical compensation).

1996	51.3	65.1	38.2
1998	52	65.5	39.2
2000	53.6	66.6	41.3
2002	54	66.9	41.8
2007	_	80.7	58.0

Table 1: Rate of activity. Increase of female participation in the Spanish labour market. Source: EPA

Table 2: The impact of the crisis (2007-2011). Rate of activity 2007-2011, (percentage of the male and female population by level of education).

	2011	**2010**	**2009**	**2008**	**2007**
Male	**67.6**	**69.1**	**71**	**78.1**	**80.7**
Primary education	60	62	64.5	73.4	77.5
Secondary education	67.6	69.5	71.1	78.2	79.7
Higher education	80.1	81.1	82.6	86.2	87.4
Female	**55.5**	**55.8**	**56.3**	**58.3**	**58**
Primary education	41.9	41.9	41.9	44.3	43.9
Secondary education	56.3	57.7	59.7	62.5	62.4
Higher education	73.4	74.4	75.7	77.4	77.7
Gender gap	**12.1**	**13.3**	**14.7**	**19.8**	**22.7**
Primary education	18.1	20.1	22.6	29.1	33.6
Secondary education	11.3	11.8	11.4	15.7	17.3
Higher education	6.7	6.7	6.9	8.8	9.7

Table 2: rate of activity 2007-2011. Source: INE

Table 3: Employment rates of workers between 25-49 years old without or with children under 12 by sex (percentage of the total male and female population)

Male	2011	2010	2009	2008	2007
Without children	77.7	79.3	79.9	86.6	89.6
1 child	80.9	82.1	83.2	90.1	93.2
2 children	82.5	83	84.9	91.6	91.1
3 or more children	78.3	79	79.2	88.2	92.9
Female					

Without children	68.1	68.4	69.1	71.3	71
1 child	61.7	62.3	63.2	64.9	64.3
2 children	58.9	58.1	58.6	58.7	56.8
3 or more children	47.6	47	45.1	47.3	45.8

Table 3: Impact of children on employment. Source: INE

Table 4: Inactive population and reason per gender 2011, (percentage of the total inactive population).

Males	**Spain**	**UE-27**
Affected by an employment regulation	0.4	0.4
Illness or disability	16.4	12.4
Personal or familiar responsibilities	**1.9**	**1.2**
Child or disable adults care	**0.5**	**0.7**
Education or training	29.1	25.9
Retirement	43.9	50
Hopeless about finding a job	3.1	3.6
Other reasons	4.8	5.8
Females		
Affected by an employment regulation	0.1	0.2
Illness or disability	11.3	9
Personal or familiar responsibilities	**22.1**	**8.5**
Child or disable adults care	**9.1**	**10.4**
Education or training	18.9	18.3
Retirement	15.4	37.5
Hopeless about finding a job	4.7	3.8
Other reasons	18.2	12.2

Source: LFS (Labour Force Statistics), INE

Table 5.1: Gender pay gap in Spain 2008-2011

Year	2008	2009	2010	2011
Gender pay gap (%men/women)	21.87	22.00	22.55	22.99

Source: Report on equality on payment (UGT. 2014)

Table 5.2: Gender pay gap in Spain 2011

	FEMALES	MALES	F/M
Annual average incomes (euros)	19.767	25.667	77.01 %
Full-time job	23.692	27.595	85.86 %
Part-time job	10.077	11.232	89.72 %

Source: Report on equality on payment (UGT. 2014)

1.2 AIMS AND RATIONALE OF EQUALITY AND WORK-LIFE BALANCE LAW AND REGULATIONS

Due to the aforementioned massive incorporation of women to the labour market and the problems that this phenomenon has put on stage, the legal order started to pay attention to gender, equality and work-life balance problems and, therefore, developed regulations to tackle these topics.

But the aims and rationale of these regulations have not always been the same: it has evolved and changed through the years. This evolution has been similar both at international and European levels and finally incorporated at Spanish national level by means of legal regulations and case-law.

At EU-level, the Treaty of Rome in 1957 in article 119 already included the principle of equal pay for equal work: "Each Member State shall (…) ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work". But at this stage, the rationale of the norm was of pure economic nature: the aim was to guarantee the principle of fair competition between Member States.

The next stage was led by the European Court of Justice, followed by the European legislator: the principle of equality and non-discrimination was spread systematically to different aspects of the labour market: pay[2], access to employment, training and professional promotion[3], social

[2] Directive 75/117/CEE adapted and repealed by 2006/54/CE Directive
[3] Directive 76/207/CEE modified by Directive 2002/73/CE and finally repealed by Directive 2006/54 /CE Directive

security aspects[4] or burden of proof[5]. Gender equality and non-discrimination in the labour market and at the work place became a central principle of European law. But here the rationale was still more reactive (anti-discrimination) than preventive and, nonetheless, the sexual division of work and the traditional gender role were still not challenged.

But the principle of non-discrimination was not enough, it was necessary to achieve a better life-work balance. Here we find the framework agreement on parental leave concluded by the European social partners that was transposed by the 96/34/EC Directive, recently revised by the social partners and incorporated in the 2010/18/UE Directive.

It is here where we can track a new step in the regulations rationale and aims: following the developments of the 1995 UN Beijing Conference where the concepts of shared responsibility and gender mainstreaming were central, the work-life balance regulations paid attention to the gender role and would start an attempt to modify the gender role going beyond the traditional sexual division of work.

This explains new rights like the paternity leave (which seeks to involve the male worker in the child care) and the neutral formulation of other parental leaves. The idea is not to perpetuate regulations that, trying to help women in the labour market by means of equality and a work-life balance, at the end result in a reproduction of the gender´s role and the sexual division of work.

Spain, as Member State of the EU since 1986, has incorporated all the European acquis in this field. The Courts, especially the Constitutional Court, using some articles of the Spanish Constitution have elaborated an antidiscrimination case-law in line with the European Court of Justice case-law construction. Also, the legal reforms and regulations have incorporated the European Directives and regulations: the Worker´s Statute, the 39/1999 Law, the 3/2007 Law, the Social Security Law and the Prevention of Risks at Work Law are good examples of this.

The 39/1999 law, to promote reconciliation of work and family life (hereafter WFL), introduced in the Spanish legal order some of the parental leaves and other conciliation rights developed at European level, being the aim of this norm clear: to reconcile work and life and achieve a balance within these two spheres, helping in this way ~~to~~ women and their performance in the labour market.

[4] Directive 86/378/CEE adapted and repealed by 2006/54/CE Directive
[5] Directive 97/80/CE modified by Directive 98/52/CE and finally also adapted and repealed by 2006/54/CE Directive

The 3/2007 Law on Effective Equality between women and men (hereafter EQ law) introduced new elements and ideas like the principles of gender mainstreaming, shared responsibilities in relation to conciliation, empowerment of women and preventive aspects, such as equality plans and positive incentives.

Later reforms on 2009, 2011, 2012 and 2013 have changed other aspects, especially in relation to the shared responsibility regarding conciliation: reformulation of rights in a neutral manner, lengthen the paternity right, etc.

1.3 THE SPANISH CASE: SOURCES AND SCHEME OF REGULATION.

According to article 96 of the Spanish Constitution, International Treaties which have been ratified by Spain are part of the Spanish legal order. The same, by virtue of the primacy principle, can be said about the European law. That is the reason why, if we talk about sources, we have to take into account these supranational levels and regulations. But, having in mind that the aim of this report is to describe the Spanish legal order, we are not going to develop the supranational and international framework of norms which are applicable in the field of study. Nevertheless, we will say some words about the influence of EU law in the Spanish regulation in point 5 of this report.

In this point we restrict ourselves to the description of the main sources in the Spanish legal system in relation to the topic of work-life balance. To do so, we are going to differentiate between State and conventional sources.

a) State sources:

I. Spanish Constitution (SC).

It is the central norm in the Spanish legal order and all the other norms must be interpreted and applied in line with it. In the field we are studying in this work, the following articles are central:

Article 9.2: The SC entrust the government with an obligation *"to promote real and effective conditions of freedom and equality for individuals and groups, removing those obstacles that prevent or hinder their full development, facilitating the participation of all citizens in political, economic, cultural and social life."* It is in this article where we can find the principle of real or material equality and the one that opens the possibility of using positive actions.

Article 14: The SC recognizes that all Spanish people are equal before the law, without any possible discrimination in grounds of birth, race, sex, religion, opinion or any other condition or personal or social circumstance. This article recognizes the classical principle of formal equality and it is the basis of anti-discrimination rulings and rules, especially in case of discrimination of grounds of sex, race, etc.

This article is one of the fundamental rights in the Spanish Constitution and it is guaranteed by an especial process that assures direct access to the Constitutional Court in case of infringement ("recurso de amparo") by an ordinary court (see section 4 of this report).

These two articles are mentioned in the EQ law as the main basis for the whole regulation in this field.

Article 35.1: The SC establishes that "*all Spanish people have the duty of working and the right of having a job, they also can choose a profession or occupation, they can promote through work and they must have ~~an~~ enough remuneration to meet their needs and those of their families, without any discrimination because of sex*".

II. Relevant legal norms.

- 39/1999 WFL law

This regulation transposes to the Spanish internal order the Directives 92/85/EEC of 19 October and 96/34/EC of 3 June. The first one provides measures to encourage improvements in safety and health at work for pregnant workers and workers who have recently given birth or are breastfeeding. The second one is the framework agreement on parental leave to reconcile work and family life and to promote equality of opportunities and treatment between men and women. This law introduced changes of diverse degree in both, labour law and social security law, incorporating parental leaves and conciliation rights as well as some flexibility options to conciliate work and family life[6].

[6] In this sense, certain precepts of the Worker´s Statute were modified (articles 37 , 45 , 46, 48 , 52, 53 and 55) as well as there were modifications in the procedural law (articles 108 , 122, 138a and 189), the prevention of risks at work law (art. 26) and the Social Security law (Articles 38 , 106, 133a , 134 and 135, among others).

- **3/2007 EQ law**

This Law is a complex text with an integral regulation of the principle of equality between women and men, which is applied in many fields: from electoral norms to violence against women (criminal law) or public contracts. To do so, this norm changes many other norms, among which are the Worker´s Statute and the Social Security law, modifying some of the conciliation rights and adding new ones (paternity) as well as introducing new flexibility opportunities, like article 34.8 of the Worker´s Statute, where a right to adapt the working hours in order to conciliate is provided (see point 3.3 of this report).

Central to these norm are, nevertheless, labour law aspects: this norm introduces, directly from the European Directives and other international texts, some key concepts like the mainstreaming principle or the direct discrimination and indirect discrimination concepts, sexual harassment, etc. The aims of the norm are to combat all forms of gender discrimination and to promote real equality between women and men by removing social barriers and stereotypes that impede this achievement. This requirement stems from our constitutional system and integrates a genuine women right.

In any case, according to the Preamble of the text, the great novelty of this law lies on preventing such discriminatory behaviours and forecasting active policies to implement the equality principle. In the sphere of General Administration, basic instruments are: a Strategic Plan for Equal Opportunities, the creation of an Interministerial Commission for Equality with coordination responsibilities, the gender impact reports, which are mandatory, and periodic reports or evaluations of the effectiveness of the equality principle as well as Equality plans, equality company´s label or CSR provisions in the private enterprise~~'s~~ sphere.

- Workers' Statute (WS).

The WS has been modified by many norms, among which are the aforementioned WFL law and EQ law in the field of conciliatory rights and equality between men and women. It is in the consolidated version of this norm where we can find the conciliation rights[7] that we are going to study in this report (section 2).

[7] Articles 34.8; 37.3; 37.4; 45.2; 46; 48; 48.4; 48.5; 48 bis.

b) Conventional sources:

The Conventional sources on this topic are the results of the collective bargaining, that is, collective agreements.

Without entering in an explanation of the Spanish system of collective bargaining, there are collective agreements in Spain that can have normative and *erga omnes* effect. Those are the agreements that are agreed under the rules of the Worker´s Statute or Statutory agreements.

Both, the Worker´s Statute and the EQ law, opened a big space for the collective bargaining to develop rules and contents regarding conciliation rights and equality: article 85 of the Worker´s Statute incorporates, when it comes to the content of the collective agreements, the duty of bargain about equality measures and, if the case, equality plans; the legal regulation of the conciliatory rights opens the possibility for the collective bargaining to improve the legal minimum standards.

The truth is that, in theory, collective agreements are a good and interesting tool in this field, since they are close to the concrete reality of the workplace. But, despite some good examples and experiments, research shows that these instruments are underdeveloped when it comes to equality and conciliation issues.

In a first moment, probably the lack of sensibility for these topics and the inertial bargaining practices could explain this. Since the beginning of the crisis, the collective bargaining is centred in other "hard" topics like remuneration, dismissals and economic problems. Furthermore, especially after the 2012 reform of the collective bargaining (which has weakened to a great extent the collective bargaining in Spain and has result in a blockage in new collective agreements), the presence of equality and conciliatory contents in collective agreements is very scarce.

1.4 IS THERE A CHILDCARE PROVISIONS REGULATION?

The impact on participation in the labour market when there are children is very different between men and women, being this a reflection, not only of unequal sharing of family responsibilities, but also of the lack of services for child care or very expensive ones and the lack of opportunities to reconcile work and family (see table 3).

In Spain, international research shows the existing difficulties in order to reconcile work and family life, especially for women. The problems identified in this regard are, among others, the expensive prices of private nurseries, the lack of public ones and the lack of flexibility (for the workers) policies at the workplace.

In Spain, childcare is not framed as a right for workers or as a social right in general. The regions (Comunidades Autonomas) have the competence in this field and they have implemented different programmes and measures. The amount and affordability of childcare centres, nurseries and other facilities, the existence of economic benefits or grants, etc., are issues of regional competence.

Having said so, the inclusion of childcare services within the formal education system has been developed in Spain, distinguishing two different stages in infant education: the first one is for children under 3 years old and the second one for children aged 3–6 years old (which is free of charge). This second "infant" education period is nowadays highly widespread in most of the Spanish autonomous regions.

2. RIGHTS.

2.1 MATERNITY (AND ADOPTION) LEAVES.

The maternity and the adoption Leaves are regulated in the same article (48.4) of the Worker´s Statute (hereafter WS), as one cause of suspension of the employment contract. The legal regulation of both types of leave is identical, being the main difference about who is entitled to the right. In the case of maternity (natural birth) the person primarily entitled is the mother (even when she can transfer the right within certain limits and rules to her partner). In the case of adoption and fostering, both members of the partnership are equal entitled and they have to decide who is going to enjoy the leave (again, it can be shared).

a) CONCEPT

Workers are entitled to maternity or adoption leave so they can spend a period of time looking after their children. Technically this leave is designed as a suspension of the employment contract. This is the reason why the worker shall be entitled to be reinstated into the job position, which is reserved.

b) DURATION

Both in the event of a birth and adoption or fostering, the suspension of the contract shall last for sixteen non-interrupted weeks, extendable in the case of a multiple birth by two more weeks for each child after the second as well as in the case of a multiple adoption or fostering (by two weeks for each minor after the second child).

In the event of death of the mother, regardless of whether or not she was employed, the other parent may make use of all or the remaining part of the suspension period. In the event of death of the child, the suspension period shall not be shortened unless, at the end of the six weeks' obligatory rest period, the mother would like to request reinstatement in her work position.

In the event of a premature birth and when, for any other reason, the newborn must remain in hospital after the birth, the suspension period may be calculated, at the mother's request or, otherwise, at the request of the other parent, as of the date of release from the hospital. These calculations shall not include the six weeks after birth, amounting to an obligatory suspension of the mother's contract. In the event of a premature birth where the baby is underweight, and other situations where the newborn requires hospitalization following the birth due to some

clinical condition for a term exceeding seven days, the suspension period shall be extended by the number of days of hospitalization, up to a maximum of thirteen further weeks, in the terms established in the regulations.
Finally, in the event of disability of the child or adopted/fostered minor, the suspension of the contract shall last for another two weeks.

c) DISTRIBUTION

The suspension period shall be distributed as the mother decides (in case of maternity) as long as six weeks are immediately enjoyed after the birth in the case of maternity. This means that the suspension period can start ten weeks before the birth or immediately after the birth, lasting in any case sixteen non-interrupted weeks. The six weeks after the births are compulsory for the mother and, even when she can return to work if she doesn´t want to enjoy the whole length of the leave, she cannot do it before these six compulsory weeks.
Anyway, without prejudice to the six weeks immediately following the birth of obligatory rest for the mother, in the event that both parents work, the mother may decide that the other parent enjoy a non-interrupted part of the rest period following the birth, either simultaneously or successively with the mother, always with the time limit of sixteen weeks in total (so, if the decide to enjoy it simultaneously, the length will be shortened in proportion).
All the aforementioned rules about the distribution are the same in the case of adoption or fostering, except that it doesn´t exist the compulsory six week leave for the mother and the difference already mentioned about entitlement: in the event that both parents are employed, the suspension period shall be distributed as decided by the interested parties, who may enjoy it simultaneously or successively, in non-interrupted periods and with the limits provided. If rest periods are simultaneously enjoyed, the total may not exceed the sixteen weeks or the weeks applicable in the case of a multiple birth, adoption or fostering.
One last possibility is that both maternity and adoption or fostering leaves can be enjoyed full or part-time. In the case the worker decides to enjoy it on a part-time basis, it is necessary to reach an agreement with the employer (unless this question is regulated in the applicable collective agreement, being applicable the rules stated in that tool if this would be the case). The length of the leave will be proportionally increased.

c) RETURN TO WORK

The suspension of the job contract due to maternity, adoption or fostering implies that the worker, once the suspension period is over, shall return to his/her previous job position and he/she shall be entitled to benefit from any improvement that could have occurred while the suspension of the contract.

d) VACATIONS

Whenever the vacation time established in the company's vacation calendar coincides in time with a provisional disability derived from a pregnancy, birth or natural breast-feeding, the worker shall be entitled to enjoy his/her vacation at a time outside the provisional disability or permit granted further to said article, at the end of the suspension period, even if the calendar year applicable has ended (art. 38.3 WS)

e) SOCIAL SECURITY ASPECTS

Social security benefits are paid to employees on maternity, adoption and fostering leave, regardless the sex of the parent. The amount paid is 100% of the contribution to the Social Security System´s base.

Employees must generally satisfy a qualifying period of paid employment and, therefore, payments to the Social Security System, to receive this benefit. This requirement would depend on their age (art. 133 ter Social Security Act), according to the following scale:

- Employees under 21 years old at the time of giving birth or adopting the child: no qualifying period applies.
- Employees aged between 21 and 26 years old: a qualifying period of 90 days' paid employment within the previous seven years. However, benefits will be received if the employee has had 180 days' paid employment during the whole of her working life.
- Employees aged over 26 years old: a qualifying period of 180 days' paid employment within the last previous seven years. However, benefits will be received if the employee has had 360 days' paid employment during the whole of her working life.

These benefits are paid directly by State through the INSS (National Social Security Institute).

As far as the contract of employment is in force during the length of the leave, the worker is obliged to pay his/her Social Security contributions (we have to take into account that in the Spanish system the worker doesn´t pay directly these amounts, but the employee or, in other cases, the Social Security System itself).

2. PATERNITY LEAVE.

The paternity leave was an absolute novelty introduced in the Spanish legal order by the EQ Law. The rationale of this right is to involve the other partner (normally, the father) in the care duties regarding the newborn, adopted or fostered child. The idea is to change the gender´s role that puts this kind of duties under the responsibility of women.

This idea and aim reflects the evolution in the field we are studying in this report (see point 1.2) and the advance towards the idea of shared responsibility in the conciliation between work and life. These ideas also explain some of the characteristics of the configuration of this right.

a) CONCEPT AND DURATION

The paternity leave is regulated in article 48bis of WS. Technically, as in the case of the maternity leave, it is a suspension of the employment contract.
In the event of birth of a child, adoption or fostering, the worker shall be entitled to suspend the contract for four non-interrupted weeks, extendable in the case of a multiple birth, adoption or fostering by two more days per child after the second one. However, the worker shall be entitled to the maternity allowance if the other parent decides that he/she should enjoy it in the same conditions: these two rights are compatible with some limitations that we will explain.
The worker who is entitled to enjoy this paternity leave is, in the case of birth, necessarily the "other parent" who is not the mother (regardless of the sex). The idea is that the paternity leave would help to involve the other parent, as we have said, so this explains why only one partner, the one who is not the mother in the event of birth, is entitled to it.
In the case of adoption and fostering the idea is the same: the paternity leave will belong only to one of the member of the couple, the one that they decide, with the limit that if one

member of the couple has enjoyed the total length of the maternity leave, then it will belong necessarily to the other.

The length of four weeks has still not been put into practice. It was stated that the duration of four weeks would come into force by 1 January 2011 (Law 9/2009) but following budgetary laws have postponed this up to now.

So, nowadays, the length of the leave is still the previous one to the 9/2009 Law, that is, thirteen days.

c) RETURN TO WORK

As in the case of maternity leave, the suspension of the job contract due to paternity in the cases of birth, adoption or fostering implies that the worker, once the suspension period is over, shall return to his/her previous job position and he/she shall be entitled to benefit from any improvement that could have occurred while the suspension of the contract.

c) SOCIAL SECURITY ASPECTS

According to article 133 nonies of the Social Security Law, social security benefits are paid to employees on paternity leave, provided that the worker has had 180 days' paid employment within the previous seven years, however, benefits will be received if the employee has had 360 days' paid employment during the whole of his/her working life.

The amount of benefit is again equal to 100% of the contribution to the social security´s base of the worker. These benefits are paid directly by the State through the INSS (National Social Security Institute).

As it has been said for the maternity leave, as far as the contract of employment is in force during the length of the leave, the worker is obliged to pay its Social Security contributions (we have to take into account that in the Spanish system the worker doesn´t pay directly these amounts, but the employee or, in other cases, the Social Security System itself).

2.3 EMERGENCY LEAVE

a) CONCEPT AND DURATION

According to article 37.3 WS**,** an employee, further to justified notification, may leave his/her work post, with a right to remuneration, for any of the following reasons and with the following length:

- Two days upon the birth of a child and due to death, a serious accident or illness, hospitalization or surgery without hospitalization that requires home rest, of relatives up to the second degree of blood ties or affinity. If the employee needs to travel for this purpose, the term shall be extended to four days (art. 37.3 b of the WS).

- For the indispensable time required to sit ante-natal examinations and courses to be completed during the working schedule (art. 37.3 f of the WS).

Technically, this emergency leave is configured as a real leave, without suspension of the contract. This explains why the worker is allowed to be absent of the work while the employer is obliged to pay the salary.

2.4 PARENTAL/CARING RESPONSIBILITIES LEAVE.

a) CONCEPT AND DURATION

According to article 46.3 WS the worker has a right to an unpaid leave of absence, to take care of children or relatives up to the second degree of blood ties or affinity who, due to old age, an accident, illness or disability is dependant and does not carry out any remunerated activity.

The length of the leave will depend on the reason alleged by the worker:

- In the case of childcare the length will be of a maximum of three years to care for each child in case of birth, adoption or fostering.

- In the case of relatives care, the maximum length of the leave will be two years (unless collective bargaining would extend this period in the collective agreement).

Technically, this leave is configured as an unpaid leave of absence and there is no benefit from the Social Security System linked to it, reason why the impact of the leave is limited to those who can afford themselves not to work during the indicated periods.

b) RETURN TO WORK

During the first year, the worker shall be entitled to reservation of his/her job position. Upon expiration of this term, the reservation shall cover a job position belonging to the same professional group or equivalent category.
Nevertheless, if the worker's family is officially acknowledged as a "large family", the reservation of his/her job position shall be extended up to a maximum of 15 months in the case of an ordinary large family (3 to 4 children) and up to a maximum of 18 months if the large family belongs to a special category (5 and more children).

c) SOCIAL SECURITY ASPECTS

As we have said, there is no social security benefit linked to those unpaid leaves for absence, but maybe it is worth to speak about some social security aspects that may play a role in this point.

First of all, the period of time that the worker is enjoying the unpaid absence leave is considered, by legal fiction, to be a period of normal contribution to the Social Security System to the effects of fulfilment of requirements to accede, for instance, to retirement benefits.
In the same vein, it is considered the first year of unpaid absence leave because of caring for relatives of article 46.
Finally, the Social Security Law was modified by the 3/2007 Law incorporating a new rule in the Additional Disposition 44, which consists on the recognition of 112 days of contributed days per child when the female worker was not in active at the moment of birth in order to fulfil the requirements to accede to retirement benefits of the Social Security System. This scale is going to be gradually improved up to 270 days recognized by 2019.

3. FLEXIBLE WORKING.

3.1 THE DIFFICULT CONCEPT OF FLEXIBLE WORK FROM THE PERSPECTIVE OF WORK-LIFE BALANCE.

It is not easy to distinguish the flexible working which is functional to the achievement of a work-life balance from the flexibility which is functional to the requirements of the company. There is a trend in European documents and in some scholars to talk about flexibility in general as a positive thing from a work-life balance perspective.

We consider here that this cannot be the case when we are talking about aspects of flexibility, those like geographical and functional mobility unilaterally decided by the employer, irregular distribution of the working time, "on-call" disposition of the worker, etc. In fact this kind of flexibility is more the opposite: it makes really difficult for the worker to achieve a balance between work and life.

Traditionally, part-time work has been considered as a tool of flexibility that allowed the workers (especially ~~the~~ women) to achieve the aforementioned balance, but we will discuss in this section (see point 3.4) whether this is true in the Spanish case.

To understand what have been said and what follows in this section about flexible work, maybe it is a good idea to present some facts and figures that will provide us with a picture of the Spanish labour market in some "flexible" contractual types, focusing on part-time work.

3.2 FACTS AND FIGURES.

Table 6: Part-time work by gender in Spain and the impact of the economic crisis.

MEN	**2012**	**2011**	**2010**	**2009**	**2008**
% Men on part-time / total employment of men	6,6	6,0	5,4	4,9	4,2
% Men on part-time / total employment	3,6	3,3	3,0	2,7	2,4
Total occupied men (x1000)	9.432,3	9.991,4	10.289,9	10.646,4	11.720,7
Full-time occupied (x1000)	8.806,4	9.391,1	9.737,4	10.129,9	11.229,6

Part-time occupied (x1000)	625,9	600,2	552,5	516,5	491,1
WOMEN	**2012**	**2011**	**2010**	**2009**	**2008**
% women on part-time / total employment of woman	24,5	23,5	23,2	23,0	22,7
% women on part-time / total employment (men and women)	11,1	10,5	10,3	10,1	9,5
Total occupied women (x1000)	7.849,7	8.113,3	8.166,6	8.241,6	8.536,9
Occupied at full-time (x1000)	5.927,2	6.210,6	6.269,9	6.343,0	6.602,6
Occupied at part-time (x1000)	1.922,5	1.902,6	1.896,7	1.898,6	1.934,4
Total occupied (women y men) (x1000)	17.282,0	18.104,7	18.456,5	18.888,0	20.257,6

Table 6: part-time work in Spain by gender. Source: INE

Table 7: Reasons alleged for part-time work in Spain per age and gender 2011, (percentage of the total people working part-time per age and gender).

MEN	**TOTAL (16 to 64)**	**16 to 24**	**25 to 49**	**25 to 64**
Continuing education courses for teaching or training	9,6	31,4	15,2	4,5
Illness or disability	1,5	0,4	…	1,8
Care of children or sick or disabled adults or elderly people	1,6	0,2	…	2,0
Other family or personal obligations	1,1	0,6	0,1	1,2
Not able to find full-time job	65,9	55,9	74,7	68,3
Not wanting full-time job	4,2	4,0	3,9	4,2
Other reasons	15,8	7,2	6,0	17,8
Not know the reason	0,3	0,4	…	0,3

WOMEN				
Continuing education courses for teaching or training	4,3	29,0	18,3	1,7
Illness or disability	1,0	0,2	…	1,1
Care of children or sick or disabled adults or elderly people	14,8	0,9	4,5	16,3
Other family or personal obligations	6,6	0,6	2,6	7,3
Not able to find full-time job	56,3	58,5	67,2	56,1
Not wanting full-time job	7,7	5,6	1,6	7,9
Other reasons	9,0	4,9	5,6	9,4
Not know the reason	0,3	0,4	0,1	0,3

Table 7: Reasons alleged for part-time work in Spain per age and gender 2011. Source: INE

As we can see from tables 6 and 7, part-time work affects more women than men in Spain and the main reason alleged in both cases is the impossibility to find a full-time job. We will come back to this in point 3.4 of this section.

3.3 FLEXIBLE WORKING IN THE SPANISH WORKER´S STATUTE

3.31 CONCILIATON RIGHTS IN THE WS.

In this point we are going to describe which flexible work provisions from the perspective of work-life balance can be found in the Spanish labour legal order and how do they function.

There are important constitutional mandates in virtue of which the public authorities are obliged to develop policies of conciliation, as we have already mention in part 1 of this report: on the one hand, they must ensure compliance of the article 39 of the SC, which protects the institution of the family, or the article 45 of the same text, that besides the right to work forbids any discrimination in relation to this right on sex ground. On the other hand, the principle of equality proclaimed in articles 9.2 and 14 SC must be fully developed and obliged ~~to~~ the public authorities to observe it, being conciliation possibilities considered a central tool to achieve equality in the labour sphere[8].

Articles 34.8 and 37.5 of the WS are today the two most prominent flexible work provisions from a work-life balance perspective. Those articles in their current formulation are the result

[8] In this sense, the Spanish Constitutional Court has talked about the constitutional dimension of the conciliation rights (see STC 3/2007 of 15th January 2007).

of the modifications that the aforementioned WLF and EQ laws, as well as other important reforms (especially Law 3/2012), have made.

There are, however, other provisions about flexibility in order to conciliate work and life, such as those stated in articles 23.1, 37.4, 37.5 and 37.6 of the WS:

- Article 23.1 of the WS refers to conciliation between work and professional training or academic studies which is important in relation to promotion and, from a gender perspective, to fight against the difficulties of women to promote to better positions at work. The article establishes the right of workers to the adaptation of an ordinary workday for assistance to vocational training courses and exams.

- Articles 37.4 of the WS gives the worker a right of absence from the workplace while breastfeeding or in cases of caring for children when they must remain in hospital after the birth (because they are premature or because any other reason).

This right is recognized to the individual worker, women or men, but it only can be enjoyed by one of the partners if both are working.

This right, in the event of breastfeeding, consists on the possibility that the worker has to be absent from the workplace for one hour (that can be divided in two periods of thirty minutes). It can be replaced, if the workers so decides, by a reduction of the workday length of thirty minutes or, according to the collective agreement or the terms of a private agreement with the employee, accumulated on full days.

In the case of a newborn that needs to stay at hospital, the length of the leave of absence will be of one hour, or the worker can, if he/she wants, reduce his/her daily working hours up to two hours with a proportional diminution of the pay.

The precision and the time period of enjoyment of the right of breastfeeding correspond, according to article 37.6, to the worker within his/her ordinary workday. Here the article calls to the collective agreements to establish rules and criteria to enjoy these rights. There is an especial process in the social jurisdiction in case of non-agreement with the employer when it comes to these rights (article 139 of the Social Jurisdiction Law).

3.32 ARTICLES 34.8 AND 37.5 OF THE WS

a) Article 34.8 WS

i) Content

The eighth paragraph of the article 34 WS can be emphasized among the novelties in the field of conciliation introduced by the EQ law, although it has been already modified by 3/2012 law.

This precept recognizes the right of the employee to adapt the duration and the distribution of his/her workday in order to exercise his or her right to conciliate the *"personal, work and family life"*, emphasizing that this right may be exercised *"in accordance with the established terms in the collective bargaining or in the agreement reached with the employer, respecting, in that case, the contents of the collective agreement"*.

Article 34 WS configures then a right of the employee to adapt the duration and distribution of his/her workday, which implies his/her right to change the distribution or length of his/her workday, in order to make it possible for him or her conciliation between family and work life.

This allows the employee to reorder his/her working time to make ~~it~~ easier the attention of personal or family responsibilities.

Two options are possible: to change the distribution of the working hours, without a reduction in the total length of the workday or an adaptation that involves also a reduction in the length of the workday.

To determinate the scope of these article it may be useful to put it in relation with article 37.5 WS, in the sense that any adaptation of the workday required by the employee outside the limits of this article´s regulation, will take place in article 34.8 WS.

ii) Exercise of the right.

The possibilities to adapt the employees' workday in order to conciliate personal and family life and work are limited, when it comes to their exercise, to the terms established in the collective agreement or to the agreement reached with the employer, who must approve the changes proposed.

The Supreme Court has declared, in relation to article 34.8 WS that *"the configuration of the law is not (…) without limits in benefit of conciliation"* but its exercise depends on the

agreement that is reached with the employer, not being possible to admit that the unilateral decision of the employee is sufficient to determine the required modification.

The proposal of the employer at the request of the employee must respect the regulation of the right in the collective agreement, as a consequence of the hierarchy of sources. There are different possibilities:

- If the applicable collective agreement refers to the question and specifies the applicable parameters of the right to adapt the workday, the employer must abide to its provisions and admit the modification of workday if the request of the employee is conform to the conventional forecasts.

- If, on the contrary, the question is not treated in the collective agreement, it will be necessary an individual agreement with the employer in order to define the terms of the exercise of the right.

The Courts in this area are carrying out a literal interpretation of the precept considering that article 34.8 WS subordinates the right to the adaptation of the workday to the collective or individual agreement. On the assumption that there are no conventional criteria applicable to the matter and do not occur the individual agreement between employer and employee (this is, a negative response from the employer to the employee's request), shall be understood that the adaptation of workday required by the employee would be unsuccessful, in accordance with the interpretation of the article is being carried out by most Courts.[9]

This question has been treated by the Constitutional Court in two sentences of 14th March: STC 24/2011 and STC 26/2011 with different results. The 24/2011 sentence denied the right to the worker with the argument that the aim of the norm was to make the exercise of the right conditional to the collective or individual agreement whereas the 26/2011 sentence gave the reason to the worker with the argument of the constitutional dimension of the conciliation rights in order to make ~~it~~ effective the principle of equality of article 14 of the SC, using a new parameter of non-discrimination “on the ground of familiar circumstances”.

The result is that the right recognized in article 34.8 of the WS is somehow imprecise and problematic and it has been interpreted in different ways by the Courts.

[9] See, as an example, STSJ de Madrid de 2 de marzo de 2010, Rec. 5855/09.

b) Article 37.5 WS

i) Content and exercise.

Article 37.5 WS recognizes the right of the worker to request a reduction of the workday -between an eighth as minimum and one half of the ordinary length as maximum-, with the proportional reduction in salary, for several reasons:

- When the worker has the custody with direct care of a child under twelve years or a person with a physical, mental or sensorial disability, who doesn´t perform any paid activity

- The same right would have the person who cares for a familiar up to the second degree of blood relation or affinity, who because of age, accident or disease could not fend for himself, and that does not perform any paid activity.

- The worker in case of maternity, adoption or fostering would have a right to reduce his/her workday with a proportional reduction of the salary of, at least, one half of the ordinary length of the working hours in order to take care of a child who have to stay at hospital and under treatment because of cancer or another serious illness. In this case article 37.5 calls to collective bargaining to establish rules about the possibility to accumulate this reduction into day-long leaves.

As in the case of article 37.4, this right is an individual right of the worker, regardless of the sex. Again as in the case of article 37.4, the precision and the time period of enjoyment of the right of reduction of the ordinary working hours correspond, according to article 37.6, to the worker within his/her ordinary workday. Here the article calls to the collective agreements to establish rules and criteria to enjoy these rights and there is an especial process in the social jurisdiction in case of non-agreement with the employer when it comes to these rights (article 139 of the Social Jurisdiction Law).

The scope of the law has to be delimited, in the first place, from the perspective of the originator, that is to say, on the one hand, the age of twelve years or the existence of any of the disabilities or familiar situations that the norm contemplates. Secondly, from a factual perspective, this is, in relation to the limits of reduction of the working hours and the proportional reduction of wages.

The Spanish Constitutional Court has said that article 37.5 of the WS must be interpreted according to its constitutional dimension: being a tool to exercise the right to conciliate work,

private life and family that it is essential in the achievement of a real equality between individuals and groups. In some sentences, as for example STC 3/2007, the refusal of the employee to concede the reduction requested by the worker has been interpreted as an indirect discrimination action (see here point 4.2 of the report).

ii) Social security aspects.

When the worker decides to reduce his/her ordinary working hours in exercise of the right conferred by article 37.5, the two first years of this reduction when taking care of children under 12 years old and the first year of reduction in the case of relatives, will be considered as if the worker had contributed with 100% of the amount; amount that would have been paid by the worker in case of non-reduction of the working hours.

3.4 CAN PART-TIME WORK BE CONSIDERED AS A FORM OF FLEXIBLE WORK IN ORDER TO RECONCILE WORK AND PRIVATE LIFE? THE SPANISH PERSPECTIVE

3.41 PART-TIME CONTRACT

i) CONCEPT: Regulated in article 12 of the WS, is a type of contract defined by the fact that the number of working hours a day, a week, a month or a year agreed on it are inferior to the average comparable working hours of a full-time employee.

The law identifies the legal expression *"comparable full-time employee"* with the workday of an employee of the same company and work centre, who has the same type of work contract and who performs a similar or identical work; and in the case that the company have not a comparable full-time employee, shall be considered as such the foreseen by the applicable collective agreement, or in case of absence of applicable collective agreement, the legal maximum workday.

The Supreme Court has declared that *"the part-time contract is objective and formally included in the concept of the provision of work that incorporates the article 1.1 and in the qualification which derives from article 12, both of WS. From this juridical position, persons who work under this contractual type must have, in principle, the same juridical position, and, therefore, be entitled to the same rights and obligations"* (than a full-time worker).

The essential particularity of the part-time contract is the duration of the workday. The part-time contract can be concluded under any of the formulas contained in the law: temporary or indefinite.

ii) FORM: Part-time contracts will be formalized in written form and shall express the number and distribution of ordinary working hours per day, week, month or year and if the contract is concluded for an indefinite period or for a fixed period, identifying the specific modality in this last case. If these requirements are not observed, the contract will be presumed celebrated for an indefinite period of time and full-time, unless there is evidence to the contrary that proves the temporary or the partial nature of the services.

iii) SOME ASPECTS OF THE LEGAL CONFIGURATION: With the entry into force of the Royal Decree-Law 16⁄2013, part-time employees cannot work overtime, except in the cases referred to in article 35.3 WS (to prevent or repair disasters and other extraordinary and urgent damages).

However, it exists the possibility in this contract of extend the agreed dedication through supplementary or complementary hours (with a similar effect, in the case of the “voluntary” supplementary hours, that overtime).

Supplementary hours are configured as a private and specific pact, different to the contract itself, even when it can be agreed at the same time of the contract. With the new regulation, this pact of supplementary hours is possible both in indefinite and temporary part-time contracts with the only limit that the contracts must be, at least, often working hours/week.

In this agreement, the worker and the employee can agree a total amount of supplementary hours with a limit of 30% of the total length of working hours set up in the part-time contract.

Besides this, the employer can offer to the worker “voluntary” supplementary hours, with the limit of 15% of the total amount of working hours set up in the contract. The non-acceptance by the worker of these “voluntary” hours cannot have any negative consequence for the worker.

The norm have reduced dramatically the possibilities of the collective bargaining in this field, since it only could deviate from the legal norm to establish more supplementary hours, but never to reduce them.

Finally, the employee can refuse the supplementary hours' pact after one year since its formalization. Once again, this decision of the worker cannot have negative consequences.

To finish with the relevant aspects of the new legal configuration, the norm has shortened the period of time necessary to inform to the worker about the day and schedule of these supplementary hours, since it is now necessary only a three days' notice in this sense.

3.42 SOME THOUGHTS ABOUT PART-TIME WORK IN SPAIN AS A CONCILIATORY TOOL.

If we rely on Statistics (see table 7) most of the workers (both men and women) who work part-time in Spain are doing so because they cannot find a full-time employment.

Even when there are differences in the reasons to work part-time alleged by men and women which indicates that to some extent some women choose part-time work because they need to conciliate (up to 23.6% of women aged 25 or more declare that they work part-time because they have to care about children, disabled or elderly versus 3.2% of the men), in general is not perceived as a conciliation tool, but more as a second option when full-time work is not available.

That´s one reason why we think that part-time work is not functional to conciliation of private and family life with work.

The other reason, related with this (and maybe explanatory of the information that statistics shows) is that the legal regime of part-time contracts in Spain is not helping to the work-life balance.

When we read the Preambles of the norms regulating part time job (for instance preamble of the already mentioned Royal Decree-Law 16/2013, the last reform for the moment), they conceived the part-time job as a functional tool that complies with the necessities and requirements of flexibility of the enterprises and the conciliation necessities of the worker.

Here is not difficult to see a contradiction: it will be either functional to the company needs or to the conciliation interest of the worker, but is difficult to reconcile both aims in the same regulation.

Not surprisingly, when we read again the legal configuration we have described above, we discover that it is difficult to understand in what sense it helps the worker with the conciliation:

the supplementary hours (by pact or “voluntary”) can extend the agreed working hours in the contract up to 45%. And both possibilities (pact and “voluntary”) are agreed in an individual basis, taking into account the weak position of the worker, especially in a labour market with levels of 25% of unemployment and people willing to work part-time because they cannot find full-time work.

We find very expressive in this sense that the norm doesn´t allow collective agreements to intervene for better in this field: without any doubt are the interests of the employer, and not those of the worker to conciliate, the ones behind the legislative reforms.

Last but not least, it is legal, according to the current regulation of part-time, that the worker doesn´t know when he/she has to work “supplementary hours” (day and schedule) until three days before. How can we imagine that he or she will plan his/her personal life or conciliate?

Those arguments are reasons why in this point we ask ourselves whether, in Spain, part-time work can be considered as a flexible tool functional to conciliation of private and familiar life and work, being our answer to this question rather negative.

3.5 BRIEF OVERVIEW OF HOMEWORKING.

We think that there is space in this report to say some words about homeworking as a tool of conciliation between family and private life and work.

Homeworking is considered as a modality of work in which the provision of labour activity is performed, predominantly, in the worker’s home or in the place chosen freely by him/her, as an alternative way to the presence of the worker in the workplace. The WS regulates teleworking in article 13. The Agreements for employment and collective bargaining signed in years 2010, 2011 and 2012 recognized that one of the innovative forms of organization and execution of the employment relationship possible thanks to advances of new technologies is teleworking, which allows performing labour activity outside the workplace.

The development of homeworking, at the organizational level, introduces a significant element of organizational flexibility. In this sense, the judgment of the Supreme Court of May 31 2004 stated that the introduction of teleworking involves the modification of traditional organizational structure of telework and the company, in physical and material aspects.

Article 13 of the WS, which defines this type of contract, states that "it will be considered homework the one in which the provision of labour activity is realized in the employee's home or in the place freely chosen by him/her".

Its legal regulation imposes the requirement of written form, equivalent wage to the one that an employee of equivalent professional category in the economic sector would earn, as well as recognition of the same collective rights of representation than a normal worker has.

3.6 CONVERSION OF AN EMPLOYMENT CONTRACT FROM FULL TO PART-TIME.

When it comes to the conversion of a full-time contract into a part-time one the main rules in the Spanish system are as follows:

Article 12 of the WS establishes in paragraph 4 that "the conversion of a full-time work contract in a part-time work contract and vice versa will always have voluntary character for the employee and may not be unilaterally impose or be the result of a substantial modification of conditions of work under the provisions of paragraph 1 (a) of article 41 of the WS".

This is because the change of a full time contract to a part-time contract, involves a change in the contractual modality and, consequently, of the applicable legal regime (social security, supplementary hours, etc.)

As it is logical, article 12 of the WS states the guaranty of indemnity of the worker in case of refusal to transform his/her type of contract: he/she cannot suffer any negative consequence as a result of his/her decision.

The sentence of the Supreme Court of 7th October 2010, came to maintain that the unilateral reduction of the workday by part of the employer, as long as it is motivated and has a temporary nature, did not involve the transformation of a full-time contract in a part-time contract, being not a case of violation of the prohibition of article 12.4 e) of the WS. Therefore, through article 41 of WS could be reduced temporarily and, if it is justified, the workday without contravention of the prohibition formulated by article 12.4 e) of the WS.

After the reform of article 47 of the WS operated by Law 35/2010 and the posterior Law 3/2012, for economic, technical, organizational, or production reasons, the employer may also temporarily decide a reduction in the working hours in the terms established in this rule.

4. ENFORCEMENT AND REMEDIES

4.1 COMPETENT COURTS, PROCEDURES AND COMPETENT AUTHORITIES

Labour law cannot be entrusted to spontaneous compliance of subjects. The establishment of mechanisms for implementation and monitoring of the existing legislation and the protection of fundamental rights is necessary. Labour standards are provided with a higher level of effectiveness for better implementation and control if there are special public bodies whose mission is to ensure compliance with the law. These bodies are basically the Courts of Labour Jurisdiction and the Labour Inspector

4.11 COMPETENT COURTS

The solution of labour disputes can run in one of these three ways: a) Non-judicial provisions; b) Inter-partes provisions, c) Third-party solution, such as arbitration, administrative or judicial solution.

The labour process is the legal institution created to deal with the disputes raised in the labour law. Through the labour proceedings, the labour order of jurisdiction judges in matter under its scope, as it is stated in art. 117 of the Spanish Constitution and article 1 of the 6/1985 Law (the Constitutional Court Act). Its development and details are regulated by the provisions of the 36/2011 Law on Social Jurisdiction (hereafter SJL).

Article 2 of the SJL contains the scope of the labour jurisdiction. It is defined as the jurisdiction above labour conflicts and it can be related to fundamental rights and public freedoms, including the prohibition of discrimination and harassment.

Competencies will be divided among the different courts and tribunals within this jurisdiction, such as:

-Labour Courts

-Labour Chamber of the High Court of Justice

-Labour Chamber of the National Court

-Labour Chamber of the Supreme Court.

4.12 PROCEDURES.

- Ordinary procedure.

The main procedural body is regulated along the Second Book of the already mentioned SJL, regulating the employment jurisdiction under the rubric of ordinary proceedings, which is the model to follow for most of the procedures. It is a process influenced by the civil law procedure and which boasts a number of singularities, such as the prior acts of mandatory conciliation or the speed with which processes tend to be solved, as well as the reversal of the burden of proof and oral character of the procedure.

- Special procedures.

The ordinary procedure is complemented by the existence of special ones for specials issues. In the issues of discrimination, unequal treatment, as maternity or paternity leave, it exist a number of especial procedures:

1- Procedure for conciliation of work, family and personal life rights: One of the modalities of procedure which has impact on the reconciliation of family and work is scheduled after the 3/2007 Act (EL) and is collected in the art. 139 SJL as we have already mentioned in point 3.3 of this report

2- Procedure of fundamental rights' judicial protection: channelled through the special procedure of the article 177.1 of the SJL.

It includes claims made by workers or unions against third parties linked to the employer for any title. If the judge decides that there has been infringement of the fundamental right included in the SC the judgement could order the : a) end of the action b) feedback of the situation to the moment before the violation of the fundamental right c) right to compensation and other remedial actions that proceeded according to the art. 182. 1 SJL.

3- Procedure for dismissal: The procedural regime of the dismissals is divided between the management of the process for disciplinary dismissal and collective redundancies, ex article 103 of the SJL.

4. - Constitutional Procedure. Ordinary judges are equipped with the so-called "question of unconstitutionality" according to the article 163 of the SC. When a court considers, in any

process, that a rule with the status of law, applicable to the case, whose validity depends on the ruling, may be contrary to the Constitution, will pose the question to the Constitutional Court in the cases, in the manner and with the effects that are located in articles 35 to 37 of the 6/1985 Law.

This form of collaboration between the common courts and the Constitutional Court is intended in this process so that it helps to the debugging of those laws which may be contrary to the Spanish Constitution and that the ordinary judge by itself cannot refuse to apply, because its subjection to the law. In this sense, ordinary judges are also subject to the Spanish Constitution and there are occasions where the law and the Constitution can come into contradiction, unless the judge is entitled to directly choose the constitutional text ignoring the law. Thus, through the issue of unconstitutionality, ordering updated steadily the constitutional text adapting it to the living law, and at the same time admitting permanent debugging.

4.13 LABOUR INSPECTORATE.

However, there is a body of officials, labour inspectors, whose mission is the inspection and enforcement of labour standards. It is contained in the 42/1997 Law of Inspection of Labour and Social Security (LILSS).

The functions of these inspectors are regulated in article 3 of this LILSS law, containing particularly the monitoring of the compliance with the laws, regulations and collective bargaining agreements. The audit of compliance with labour law and social security issues is essential for the implementation of policies and flexible work policies aimed at family conciliation.

The public and administrative protection of the rights of life-work balance and flexible-working is a recent activity in the Labour Inspectorate's traditional functions. Dedication to control discriminatory conduct is essential for the difficulty of prosecuting offences against labour rights and injuries in vulnerable areas such as maternity or home working.

Finally article 11 of 3/2007 Law invest public authorities with an obligation to adopt specific measures and policies against discrimination and to enforce the constitutional right to equality.

Equal treatment in all cases linked to the government, but relations between individuals which imposes equality is not only extreme but strictly the prohibition of discrimination.

4.2 THE CENTRAL ROLE OF ANTI-DISCRIMINATION LAW

Anti-discrimination provisions developed both by case-law and in several legal norms are central in the field of work-life balance rights and equality between women and men in the workplace and in the labour market.

In this section we will analyse how it has developed in Spain both in the case-law and in the legislative instruments. To this end, we will try to follow a clear and synthetic scheme.

4.21 ANTI-DISCRIMINATION IN THE CASE-LAW.

Anti-discrimination case-law in Spain has been developed both by ordinary Courts and the Constitutional Court, having the last one a central role.

a) Ordinary Courts. The protection of fundamental rights is in charge of the labour Courts, which are competent ex art. 2.1.f) of the SJL.

b) The Constitutional Court role and the “recurso de amparo”.

In relation to the available resources to combat discrimination in the labour field, the importance of the Constitution through the “recurso de amparo” of article 161.1.b) SC needs to be targeted.

This procedure of protection under the Constitutional Court is recognized in the article 53.2 of the SC: any citizen has the right to seek an effective remedy in case of violation of his/her fundamental rights "before the ordinary courts by a procedure based on the principles of preferential and summary and, when necessary, through the “recurso de amparo” before the Constitutional Court". Indeed, any discriminatory (direct or indirect) conduct, infringes the fundamental right contained in article 14 of the SC. Here we can see the connexion between Equality as a fundamental right in the SC and anti-discrimination law: equality is going to be the main argument in the construction of the anti-discrimination case-law in Spain (and, in this sense, those rights that are functional to achieve a real equality, like conciliatory rights, have a

constitutional dimension, meaning that the infringement of those may be considered as a direct or indirect discrimination).

But, how it works the “recurso de amparo” and how can citizens gain access to the Constitutional Court?

- The “recurso de amparo” must be exercised by the person directly affected by the breach of the principle of equality and non-discrimination.

- It is a subsidiary method and in order to make use of it, all the ordinary instances must have been exhausted

- It must be shown that the injury is caused by the lack of an effective remedy under article 24 Spanish Constitution (the right to an effective judicial protection, that is, the sentence by the ordinary Court has not put remedy to a violation of the fundamental right).

c) Role of Constitutional Court's Case Law.

Therefore, within the protection against discrimination, the Spanish Constitutional Court is one of the cornerstones of the anti-discrimination protection since the 80s, having a central role to understand, in line with the European Union Court of Justice´s case law, evolution of the anti-discrimination law in the labour field.

The position of constitutional jurisprudence along numerous judgements is granting the highest guarantees against direct and indirect discrimination. In this area an intense evolution can be observed in many spheres of the labour field. Examples are:

- Pregnancy rights' protection: the STC 166/1988 of 26 September, where the Court clearly began to protect pregnant women against discriminatory acts to grant protection against an employee who alleged that her contract had been resolved unilaterally due to her pregnancy. Following statements, as SSTC 136/1996; 20/2001; 161/2004; 175/2005; 182/2005; 214/2006; 324/2006; 17/2007; 92/2008 and 124/2009 have confirmed this path.

- Flexible working and family conciliation. The STC 3/2007 judged the case of a worker which had been denied by ordinary Courts the right to reduce the working hours in order to make it possible to conciliate, interpreting this ordinary Court that her request “did not fit into what the applicable provision of the Statute of Workers Rights called ordinary day." However, the

Constitutional Court found that it was a flagrant, intense and profound discrimination against the specific and vulnerable group of female workers because the ordinary Court didn´t have into account, while interpreting the WS, the “constitutional dimension” of conciliation rights in relation with the fundamental right of equality.

- Protection against direct and indirect discrimination. The Court´s innovation in the legal system incorporates, on the one hand, the European Union's policies against discrimination, and on the other, constitutionalizes the ban of employment discrimination understanding that the constitutional dimension of reconciliation must provide guidance for resolution of any question of interpretation "in the field of reconciliation of work and family life, and being a fundamental right”.

Therefore the Constitutional Court has included in its case law the prohibition of indirect discrimination.

The evolution has been unequal over the years, appearing for the first time this prohibition in STC 145/1991. Such behaviours are banned by the Court that understood them as “formally non-discriminatory treatments but those derived from differences in fact taking place between workers of different sex, and harmful by the unfavourable impact that a neutral criteria has in form of unequal consequences because of factual sexual or gender differences in society”.

- Positive actions. The Constitutional Court also addressed the question about positive actions. This concept of "positive action" means that there is an action that seeks to address inequalities in society through positive measures that, breaking the principle of formal equality, put a group of people who is in a unequal position in society respect the others, temporarily in a position of advantage, in order to reverse the situation and achieve a real equality. Positive actions have roots in article 9.2 of the SC. The 128/1987 sentence of the Constitutional Court was an innovation because until then the constitutional enforcement of this area had gone unnoticed. The Constitutional Court made a distinction between rules that protect women falsely (STC 317/1994) and other measures that the Constitutional Court has considered legitimate as positive actions.

In any case, discrimination on grounds of sex and reconciling work and family life are regularly an issue of debate on Court, as can be seen in the aforementioned judgments of the Constitutional Court 24/2011 and 26/2011: far from certainty, it is a delicate and under progress issue.

4.22 ANTI-DISCRIMINATION ASPECTS OF THE EQ LAW

The 3/2007 EQ law incorporates instruments and concepts developed in European anti-discrimination law as they exist in European Directives. The fundamental principle in this field is settled in article 3 EQ, where it can be read that equality of treatment between women and men „involves non-discrimination, direct or indirect, on grounds of sex, and especially the maternal, the assumption of obligations because of the family and marital status".

Other aspects of the EQ law in relation to anti-discrimination law are:

- Prohibition of discrimination. Article 6 of the EQ law incorporates, in line with EU Directives, the concepts of direct and indirect discrimination: the first one is "the situation where a person is, has been or would be treated, because of their sex, less favourably than another in a comparable situation". Indirect discrimination is defined as " the situation in which a provision, criterion or practice would settle persons of one sex at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate". Finally, it is also considered a discriminatory action every "order" to discriminate, directly or indirectly on grounds of gender.

- Maternity and pregnancy's special protection. Article 8 of EQ law provides especial protection of pregnancy and maternity situations by prohibiting any discrimination or "unfavourable treatment to women while pregnancy or maternity".

- Protection against victimization. Meaning the banning of "discrimination based on sex or any adverse treatment or adverse effect to occur in a person because of presentation of complaints, claims, demands or actions of any kind, designed to prevent discrimination and to demand effective fulfilment of the principle of equal treatment between women and men", as stated in article 9 of the EQ law.

- Anti-discrimination provision of article 17 WS. By virtue of the incorporation as a crosswise guarantee through article 9 EQ law and the additional provision n° 11 of the same legal text ordering the amendment of article 17 WS with the addition of a second paragraph, this article declares null any "instruction to discriminate and decisions of the employer involving the unfavourable treatment of workers as a reaction to a complaint within the undertaking or to any administrative or judicial proceedings aimed at enforcing compliance with the principle of equal treatment and non-discrimination" when they constitute a discrimination for the reasons

contained in article 4.2.c) of the WS. The introduction of this paragraph is in accordance with the transposition of the European Directive 2002/73/EC, amending Directive 76/207/EEC on the implementation of the principle of equal treatment between men and women.

- Reversal of the burden of proof. The EQ law aims to enable injured parties to assert their legal rights and protection effectively. This is facilitated ex article 13 EQ law with the reversal of the burden of proof in cases of discrimination on ground of sex, “corresponding to the defendant to prove the absence of discrimination.”

- Public authorities and equal treatment policies. The EQ law imposes to public authorities several obligations to reach a real equality between women and men such as the obligation under article 14 EQ law to observe the opportunity and treatment equality by private and public enterprises. The public administration has also and obligation to elaborate strategic plans for equality (article 17 EQ law), periodic reports (article 18 EQ law) and gender statistical information (article 20 EQ law). Public policies have to promote non-discriminatory principles in several fields of society such as the education system; the health system; sports; information society; rural and urban development; and international cooperation.

4.3 REMEDIES

The power of direction and organization of the employer referred to in article 20 WS and his/her disciplinary power to impose sanctions in case of conducts contrary to the law or collective agreement by the employee is neither absolute nor unlimited.

There is no a single principle for all mechanisms that address the unfair circumstances of the "flexible" and covers all activity of reconciling work and family life workers. However, article 10 of EQ law settle that "the acts and clauses of legal transactions which are themselves or cause discrimination on grounds of sex shall be deemed null and void and shall be subject to liability through a system reparations or compensations are real, effective and proportionate to the damage suffered, and, where appropriate, through an effective and dissuasive sanctions to prevent the implementation of discriminatory conduct."

4.31 COMPENSATION

The SJL has various provisions ruling the quantification of compensation. In general terms, the Court is free to decide the amount of the damage economic reparation. In the case of a

quantifiable damage economically, the injured party may claim damages before the appropriate Court, under article 75 of the aforementioned law.

In the special procedure laid down in case of violation of fundamental rights or in case of existence of discriminatory acts, there is the possibility of awarding compensation "when the judgment declaring the existence of infringement, the Court must rule on the amount of compensation, if any, corresponds to plaintiffs having suffered discrimination or another violation of his/her fundamental rights and civil freedoms, both in terms of moral damages linked to the violation of the fundamental right , as damages and additional damages arising.

4.32 REINSTATEMENT

Dismissal is null in the following cases:

a) Dismissal based on one of the prohibited grounds of discrimination in the Constitution.

b) Dismissal in which fundamental rights and freedoms of workers are violated.

c) Dismissal of female victims of gender violence by the exercise of the rights of part-time working, geographic mobility, change of workplace or suspension of employment.

d) The dismissal of pregnant workers from the date of the beginning of pregnancy to maternity suspension period, as well as laying off workers during the period of suspension of the employment contract for maternity, risk during pregnancy, during breastfeeding risk, diseases caused by pregnancy, childbirth or breastfeeding or adoption or paternity. Also dismissal notified on a date that the period of notice ends within such periods. The dismissal of workers who have applied for one of the permits for breastfeeding a child under 9 months; the dismissal of those who have applied for a permit to look after their preterm hospitalized child or to take care of a child younger than 8 years old, or a person with physical, mental or sensory disability; as well as workers who are enjoying these permits, or have applied for or are enjoying the leave to care for a child or a family member who cannot fend for himself/herself.

e) Dismissal of the workers after his/her return to work at the end of periods of suspension of employment for maternity, paternity or adoption leave, as long as they had not been more than 9 months from the date of birth or adoption of the child.

The invalidity of the dismissal reason requires the employer to reinstate the worker and pay him or her immediately the procedural salaries from the date of dismissal until the reinstatement is effective. The employment relationship may only be finished in the following situations:

a) When it is proved the impossibility to reinstate the worker.

b) When reinstatement is not feasible for the employee after the dismissal has been retired.

c) If the termination of the contract by expiration occurs marked for duration of time during the handling process declaring zero redundancy dismissal of pregnant workers and workers.

When the nullity of the dismissal is caused by a violation of fundamental rights, the court may order the payment of compensation.

5. CURRENT DEVELOPMENTS AND REFORMS

5.1 ECONOMIC CRISIS AND EQUALITY. LOST OPPORTUNITIES

As it has been said in section 1.1 of this report, the incorporation of women to the labour market in Spain took place later than in other west European countries. But since the seventies this phenomena has been increasingly important and irreversible.

Following this reality, and especially since the incorporation of Spain to the EU in 1986 and the transposition of the European *acquis* to our legal order, the progress in the regulation of equality and non-discrimination between women and men and the development of conciliatory rights has been constant.

But in 2008, soon after the entry into force of the important EQ law, the global economic crisis hit Spain with especial intensity and with an important impact in all the spheres of economy and society, including labour law. And it can be said that, during this crisis (which is still alive and strong in the case of Spain) equality between men and women has suffered a rather negative impact, as well as conciliation between work and family life.

This negative impact has several dimensions. Indirectly, the austerity measures, leading to a giant reduction in the public expenses, have had a big negative impact: the cuts in the budget in public education and the public health system led to a reduction in the number of public employees (hundreds of thousand) in these sectors, affecting a majority of women.

The cuts in social services also had an indirect impact: less public nurseries, less money for dependent citizens (elderly, people with disabilities, etc.)… This situation caused that those care and childcare services came back to the informal and private economy, affecting again especially women, who are the ones who tend to do this work. The same can be said about the cuts in employment public policies, which were often designed to incorporate women into the labour market.

An indirect, but also an important aspect, has been that equality is not anymore in the centre of the public debate. There is a danger to perceive equality problems as "luxurious" problems that only matter when the economy is doing well but that are not important when we are in economic crisis. The debate about employment, no matter what kind of employment, is the only one and the equality becomes irrelevant or a minor problem.

But the impact has been also direct, affecting the regulation on this issue. As it is known, labour law (conceived by some as an obstacle to the creation of the employment or a problem itself that explains the problems of the labour market, instead of the economic crisis) has been deeply reformed during the crisis. We cannot explain here all the reforms, even if we wanted to do so in a very synthetic way, but we can present the main lines affecting ~~to~~ our topic, that we can reduce to two:

- Firstly, the reform made by the 3/2012 law affected in a negative way to the right to conciliate, reforming in a rather limitative sense articles 37 and 38 of the WS (for instance, the adaptation of the workday in article 37.5 must be referred now to the dairy working hours, not being possible anymore to adapt in a more flexible way the working hours taking the week or even the year as a reference).

In this sense, scholars pointed out that this reform was a change of tendency, since all the reforms before this one achieved, in one way or another, a progress in this field, being this one the first that represent a step back.

- But secondly, and perhaps more important, together with the direct reform of conciliatory rights, the reform strengthens to the maximum the flexibility functional to the enterprise,

making it more difficult to conciliate for the worker: the employer has now a much more intense power to unilaterally introduce modifications in central aspects of the labour contract while, at the same time, the possibilities of the collective bargaining to introduce limitations to this unilateral power have been severely weakened.

The employer can decides with a great freedom changes in the geographical or functional spheres, the distribution of the working hours, etc. That is the reason why, in section 3.1, we said that flexibility is not necessarily a positive thing in relation to conciliation of work and family life, being sometimes exactly the opposite, as in the case of the Spanish reform of 2012.

That is why when it comes to conciliatory rights and equality the crisis has had a rather negative and intense impact that we need to take into account.

5.2 BEYOND CONCILIATION: AN ACADEMIC DEBATE

Conciliatory rights and measures are the answer of the legal order to a reality where there is a conflict between work and family life. This conflict, as it has been explained, became visible with the incorporation of women to the labour market and the development of the ideas of equality and non-discrimination: women have to be in an equal position in the professional life as men.

In a first moment, the idea was to grant the same rights and possibilities to women, protecting at the same time those situations in which women had especial difficulties to remain in the labour market (as, for instance, pregnancy or while breastfeeding) but without any re-formulation of the traditional gender role.

In a second step, the idea has been to achieve a shared responsibility between women and men. Reproductive and care work are necessary for human life and someone has to do it. The idea is to involve men in this work, so they are made responsible as well as women of "family life". In this situation women and men would be equal not only at work but also at home, being in this model our societies closer to a real equality between men and women (and avoiding problems such as double work of women, and so on).

But an academic debate has arisen in this field about the need to go beyond conciliation. A critical argument has been developed in relation to the fact that the contradiction between family and work life cannot be solved only through partial and rather limited conciliatory rights, even when those are formulated in a neutral manner and pursue the idea of shared

responsibility. For those critical speeches the idea is to rethink the very concept of "work" and to find a deeper re-conciliation between the productive and the reproductive spheres, which are, per definition, in contradiction.

"Work" would mean not only productive work in the market, but also all the work which is necessary to live, including care, self-care and reproductive work. Also the very idea of "equality" becomes problematic: the aim is not to achieve the equality in relation to men in the labour market but a different and independent *female* equality and freedom, and, in order to do so, it is necessary to change the way of working and living and the whole productive system.

Even when for the moment these ideas are not in the legal debate (and neither in the mainstream political one), they put interesting questions and arguments in the table.

5.3 THE INFLUENCE OF EU LAW

The influence that EU law has in the Spanish legal order in the field we are studying is really important, as we have seen in this report.

Even when, prior to the incorporation of Spain to the European Union, the Spanish Constitution already incorporated the commented articles 14 and 9.2 on equality, it was with the accession of Spain to the EU when they were interpreted in line with the anti-discrimination discourse of the European Court of Justice. In this sense, our Constitutional construction of the anti-discrimination principles and case law is inspired by the European jurisprudence.

But also at legal level, as it has been studied in section 1.3 of this report, the influence of the EU has been determinant. The key norms in this field in the Spanish legal order, the WFL and the EQ laws (as well as several reforms and norms of the Social Security law) are, to a great extent, the result of the transposition of European Directives.

Furthermore, in some occasions, European norms and case law had a direct impact in the Spanish legal order in this field. As an example, recent sentences of the European Court of Justice obliged to make changes in the Spanish legal order, like in the Social Security rules of part-time work (Sentence of the European Court of Justice *Elbal Moreno* C-385/2011) or in the leave in case of breastfeeding (Sentence of the European Court of Justice *Roca Álvarez* C-104/2009).

So we can conclude with the acknowledgement of the importance and influence of EU-law and Case Law for the Spanish regulation on equality and conciliation between work and family life.

ABBREVIATIONS

EQ LAW ……. 3/2007 Law on Effective Equality between women and men

SC …… Spanish Constitution

SJL …… Social Jurisdiction Law

WFL …….. 39/1999 Law to promote reconciliation of work and family life

WS …….. Worker´s Statute.