

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

*Prof. dr. W.L. Roozendaal and R.F. Hoekstra, LL.M., VU University Amsterdam, the Netherlands,
w.l.roozendaal@vu.nl / r.f.hoekstra@vu.nl¹*

ABSTRACT

This paper addresses the question to what extent international fundamental rights 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 argue 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 briefly review ILO Treaties and European Union regulations that specifically deal with working time protection, and demonstrate that the interconnectedness of the issue of working time with health and safety protection, protection of the family and minimum wage protection, is not fully protected in these norms. This justifies the question to what extent fundamental rights can fill this void. Fundamental rights such as the right to life, protection against forced labor, the right to family life, the right to equal treatment and the right to a decent wage may currently provide remedy at least in extreme cases of worker abuse. However, the evolutive nature of the fundamental rights approach may stretch their scope to protection against involuntary flexibilisation of working time as well.

1. Introduction

1.1. Recent trends in working time arrangements

The first laws regulating working hours were adopted at the end of the 19th century and at the beginning of the 20th. Many industrialized countries implemented regulation setting the normal

¹ Note by the authors: this is work in progress, not to be quoted or reproduced without permission.

amount of working hours per week between 40 and 48 hours. 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.² As was to be expected, these regulations have curbed the average amount of hours worked in industrialised countries in the last century. 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.³

The *United States* are a good example of this trend, as workers in this country seem to be facing an 'epidemic of long hours.'⁴ The U.S. federal law which covers a large part of the workforce⁵ aims at reducing hours by requiring an overtime premium of 50 % for each hour over 40 hours per week, but this incentive does not seem to deter employers from having their employees work significantly longer. According to some research, almost 33% of American workers regularly work more than the standard week, while around 20% work more than 50 hours.⁶ 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. Businesses seem to justify imposed overtime by referring to increased global competition and the resulting need for enhanced productivity. Another example is the *United Kingdom*, where employers and employees have made widespread use of the possibility under national law⁷ to 'opt-out' of the 48-hour limit on weekly working time, thereby continuing a culture of long hours. As is the case in the US, such practices coincide with an underdeveloped system of employee representation.⁸

² Lee, McCann & Messenger 2007, p. 9

³ Lee, McCann & Messenger 2007, p. 25

⁴ Lung 2005, p. 53.

⁵ The Fair Labour Standards Act of 1938 (FLSA)

⁶ Lung 2005, p. 52.

⁷ Working Time Regulations 1998, by which the EU Working Time Directive ... was implemented

⁸ Barnard, Deakin and Hobbs 2003

The average amount of hours worked in developing countries has mostly remained at a high level, while the percentage of workers that work excessive amounts of hours⁹ in many of these countries even seems to be growing.¹⁰ Taking *China* as an example, the problem may not be the lack of adequate legal norms, as China has clear standards on working hours, including a standard working week of 40 hours and the requirement of overtime pay at 150% the normal rate.¹¹ Instead, a possible explanation for excessive hours practices is China's economic policy which is aimed at actively attracting foreign investment. This may put pressure on the extent to which regulation on wages and working hours are complied with in practice.¹² As research in garment and manufacturing factories in South-China shows, the result may be that workers are required to work excessive hours without receiving the amount of overtime pay required by law on a structural basis.¹³ The additional pay workers earn by working overtime is often necessary for their ability to survive.

This can be observed in *Greece* as well. Following economic hardship, Greece was required to take drastic measures aimed at increasing labour market flexibility as a part of the austerity measures imposed by the EU and IMF. These included drastically cutting minimum wages and overtime rates.¹⁴ Henceforth, 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. Instead of receiving the legal premium on overtime, a lot of workers were not paid for the extra hours at all.¹⁵

An important trend other than the increase of hours is a shift in the distribution of hours between workers and the application of alternative forms of employment which deviate from the traditional model. This includes an increased use of part-time work and job-sharing measures, on – call work, temporary agency work, and flexible working hour patterns, including overtime and shift work. These developments can be beneficial to workers, as a means to preserve job

⁹ According to the definition by the Tripartite Meeting of Experts on the Measurement of Decent Work: more than 48 hours per week.

¹⁰ International Labour Office 2011, p. 28

¹¹ Guo 2003, p. 4.

¹² Ross & Chan 2002

¹³ Chan & Siu 2010, p. 177

¹⁴ Papadimitriou 2013

¹⁵ Ioannides e.a. 2014, p. 46

opportunities in times of economic crisis,¹⁶ as well as to support workers with family responsibilities.¹⁷ They can, however, also negatively impact workers by taking away control over their daily lives. Insecure or non-standard working patterns will often be detrimental to the work life balance, and may even create a threat to the health and safety of workers.¹⁸

In *France*, the adoption of the *Reduced Working Hours Act*, introduced the 35 hour work week, and allowed and encouraged employers to negotiate flexible working-time arrangements with unions at the same time.¹⁹ As a result, while a priority of labor policy of the French government has been the reduction of working time,²⁰ France now also has one of the highest percentages of companies with highly flexible working time policies in Europe.²¹ The effects of the policies are highly diverse. 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 without wage.²² *The Netherlands* provides an example of a national system which was designed to allow employers more possibilities to gear working hour patterns to business needs and economic developments in several ways. The *Working Hours Act* of 1996 and its 2007 revision allowed for 'internal flexibilisation' of working time schedules.²³ The *Act on Flexibility and Security* of 1998 allowed for 'external' flexibilisation, by normalising flexible forms of employment such as temporary work, on call work and successive fixed term employment contracts. National courts have increasingly come to expect flexibility of individual employees, for example with respect to varying patterns of working hours and working overtime occasionally or systematically.²⁴ The Netherlands has one of the highest percentages of flexible workers in Europe,²⁵ and a relatively high score on unpaid overtime and evening work.²⁶

¹⁶ International Labour Office 2011, p. 60

¹⁷ Lee, McCann & Messenger 2007, p. 74.

¹⁸ Plantenga 2010; Il-Ho Kima 2012.

¹⁹ Lehndorff 2014, p. 851.

²⁰ Askenazy 2013.

²¹ Bustreel, Cornuau, Pernod-Lemattre 2012.

²² Askenazy 2013; Fagnani, Letablier 2004

²³ Roozendaal 2007, p. 4.

²⁴ Roozendaal 2011.

²⁵ OECD Employment Outlook 2014, Non-regular employment, job security and the labour market divide.

²⁶ Plantenga 2010.

Flexibilisation is sometimes achieved for workers and employers at the same time. An example is *Sweden*, where the national *Working Hours Act* provides social partners with considerable leeway to deviate from the regular standards on working time and overtime pay. Collective agreements increasingly include the ‘annualisation’²⁷ of hours as a flexibility measure. 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. On the other hand, 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. A final notable trend in this country is the large participation of women in the workforce, largely through part-time work, which the legal system enables by providing reversible options.²⁸

1.2 Outline

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. In some countries, working hours are not effectively restricted. The dominant choice of employers in those countries seems to consist of imposing long working hours and overtime. In other countries, where the legal restriction of maximum working hours is more prevalent, employers have responded by seeking to optimize their production by flexibilisation of the workforce, either by imposing flexible working time patterns ("internal flexibilisation") or by imposing flexible contracts ("external flexibilisation") or both. These examples also show that working time protection is intricately linked to a broader spectrum of labor protection, such as protection of health and safety, protection of family life and protection of minimum wages. The room to maneuver 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. However, when national governments seem unwilling or unable to combat excessive and precarious practices, or even actively contribute to them, one of the few remaining legal resorts could be fundamental rights.²⁹ The question is, to what extent fundamental rights can contribute

²⁷ Spreading a maximum number of working hours over a large reference period, often an entire year.

²⁸ Anxo 2009

²⁹ By using the terminology of ‘fundamental rights’, we express our choice for applying a positivistic approach to human rights, as opposed to an instrumental or normative one. See: Mantavoulou 2012.

to the protection against excessively long working hours or excessively flexible working hours. We have chosen a European perspective for this research.

In the next part, we provide a short description of international regulation on working time, in ILO conventions and the European Working Time Directive, discussing to what extent these rules recognize the need to protect against long hours by providing a decent wage, and the need to adjust working hours to personal responsibilities such as family life. Then we will shift our attention to a broader spectrum of fundamental rights. We discuss to what extent fundamental rights such as the right to life, protection against forced labor, the right to family life, the right to equal treatment and the right to decent work contribute to the protection of working time in part. 3. In part 4 we will conclude with a reflection on the balancing of fundamental rights against economic interests, since the choice for flexible working hours policies will often be defended by claiming economic necessity.

2. International Regulation 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. Our short description of these norms focuses on the question 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.

2.1. 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 most countries have not ratified them.

ILO Conventions no. 1 of 1919 and no. 30 of 1930³⁰ both require member states to implement regulation which provides for a 48 hour per week limit to working hours and aim at an 8 hour work day. However, both conventions allow deviations from this standard, providing different norms on the number of weeks to be taken into account as a reference period, and 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, but 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 indefinitely: *"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."*³¹

The Forty-Hour Week Convention (No. 47)³² of 1935 was adopted with the advantages of limiting working hours for employment purposes in mind and asks member states for *'the principle of a forty-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 provides some more detail, stating that member countries should immediately undertake steps to reduce hours to 48 hours per week, without any reduction in the workers' wages (article 5). 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).

³⁰ Hours of Work (Industry) Convention, 1919 (No. 1) and Hours of Work (Commerce and Offices) Convention, 1930. 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.

³¹ General Survey 2005, p. 60

³² Ratified by 15 countries (information attained through <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0>, consulted February 25th, 2015.

A connection with pay is also to be found in the Holidays with Pay Convention (Revised), (No. 132) of 1970.³³ 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 1994.³⁴ 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 ILO Convention on Workers with Family Responsibilities (No. 156) 1981³⁵ 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.

The last document 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

³³ Ratified by 36 countries.

³⁴ Ratified by 14 countries.

³⁵ Ratified by 43 countries (information attained through <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0>, consulted February 25th, 2015).

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, it seems that because they leave quite some room for countries to implement their own national policies, or to leave things up to social partners, it is not guaranteed that working hours do not 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 direct connection with pay is explicitly made in the case of overtime, holidays and night work, but it is absent for flexible working time patterns. The connection with family life is only to be found in the Convention on night work. The ILO Convention on Workers with Family Responsibilities does not specifically protect such workers against involuntary flexibilisation of working time.

2.2 European regulation regarding Working Time

From a European perspective, the most specific regulation on working time can be found in the Working Time Directive (2003/88/EC), which is the follow-up to Council Directive 93/104/EC. The main requirements of the Directive are 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, as is a clause on overtime pay. This may be explained by the fact that title X of the Treaty on the Functioning of the European Union, which provides the Union with its competence

in the field of social policy, does not include these topics. 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 category protection of health and safety of the workers (art. 153.1.a). Article 153.5. specifically states that the Union's competence in the field of social policy does not extend to regulation on pay. The fact that European legislator has no competency to extend working time protection to broader aspects of wellbeing of the worker, such as the protection of family life or compensation for inconvenient hours, is illustrated by the 1996 case of the Commission against the U.K.³⁶ The Court ruled that article 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.

In the ground breaking cases such as *SIMAP*³⁷ and *Jaeger*,³⁸ which regarded the possibility to exclude certain groups of professionals from the scope of the Directive and (most prominently) the definition of working time in regards to *on call* duty, the ECJ showed it was not afraid to apply the directive in a manner with serious economic consequences, giving a broad interpretation to the directive on both accounts.³⁹ This however led a significant number of countries to implement the 'opt-out' clause into their national regulation.⁴⁰ Since then, several attempts have been made to revise the Working Time Directive on crucial points of contention between social partners, such as the opt-out clause and the reference period for the 48 hour maximum. In a proposal for a revised Working Time Directive, broader policy objectives were included, such as gender equality and work-life reconciliation, but these have been unsuccessful so far.

Other EU-law does not make up for the narrow objectives of the working time directive and the missing protection against flexibilisation. The social-partner negotiated Framework Agreement on parental leave Directive 96/34, renewed in 2009, does provide a right to parental leave and protection of workers who exercised that right, but protection against flexible working schedules

³⁶ ECJ 12 November 1996, C-84/94 (U.K./C).

³⁷ C-303/98 (2000)

³⁸ C-151/02(2003)

³⁹ Nowak 2008

⁴⁰ Eurofound 2008, p. 19

is not mentioned in this Directive. In a broader policy context, flexibilisation of work is regulated but not rejected, as can be observed in the Directives that regulate atypical work.⁴¹ The political debate among the member states remains dominated by economic efficiency and flexibility rationales.⁴² Of course this may be in line with the second part of article 151 TFEU, which states that: *the Union and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy.*

3. Specific Human Rights and their relation to Working Time Arrangements

Discussing the requirements of ILO norms and the European Working Time Directive, it becomes 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 however is largely absent in these provisions. The norms on protection of the family itself do not make up for this omission. 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. The norms on working time protection in these provisions hence reflect the need for working time protection in an era where almost every (male) worker was expected to work during the standard working hours, and be available for overtime work. The introduction of the 24-hour economy and the prevalence of dual-income families has fundamentally changed this point of reference. The question is, to what extent fundamental rights treaties can be interpreted so as to reflect these changes. To discuss this question, we will first briefly mention specific working time provisions in fundamental right treaties. Then, we will discuss what the right to life, the prohibition of forced labour, the right to respect for family life, the right to gender equality and the right to a decent wage can contribute to the protection against excessive hours or excessively flexible hours. The fundamental right treaties that are most relevant in the European context are

⁴¹ Fixed-term Work Directive 99/70/EC, Part-time Work Directive 79/81/EC and the Agency Work Directive 08/104 EU.

⁴² Zbyszewska 2013

Hoekstra, R.F. 15-6-2 9:35 AM

Comment [1]: Nog iets vermelden over van welke instituten we uitspraken/aanbevelingen we openemen, en hoe uitputtend we gaan zijn?

discussed, mainly the European Social Charter (ESC) and the European Convention of Human Rights (ECHR).⁴³

3.1 General reduction of and limits to working time as a fundamental right

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. Art. 2 ESC 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 Charter⁴⁴, art. 31.2 reflects the norm in art. 2 ESC and the European Working Time Directive 93/104 (as discussed before).

⁴³ Both treaties are prepared by the Council of Europe, the ESC is adopted in 1961 and revised in 1996; the ECHR is adopted in 1953.

⁴⁴ Publ. 14-12-2007, C 303-2.

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.⁴⁵

Hence, in the European fundamental right treaties, we find the same rather narrow perspective on working time rules, protecting health and safety of the standard full time worker.

3.2 Working time arrangements and the protection of life

Of course the protection of working time has an apparent connection with the protection of health and safety. It is well documented that indeed the absence of sufficient time for recovery is a threat for health and safety, especially in the case of stressful work.⁴⁶ Research also suggests a detrimental effect of flexible work and related income insecurity on health.⁴⁷ Since both ILO provisions and the Working Time Directive leave room for excessive workweeks, either by providing lengthy reference periods for rest or even by allowing opting-out of the maximum working time regulations, the question is justified whether human rights actually provide for some protection of excessive work hours on the ground of infringing on health and safety.

The right to life and security is protected in the UDHR⁴⁸, and the ICCPR.⁴⁹ The ECHR protects the right to life in art. 2. Art. 8 protects private and family life. Both articles can be invoked in conjunction in case of insufficient protection of health and safety. here are a few examples in the case law of the ECHR in which these articles are invoked arguing that there was a breach of the duty of the State to sufficiently protect health and safety of workers. The Court holds that article 2 does not solely concern deaths resulting from the use of unjustified force by

⁴⁵ European Committee of Social Rights, Digest of the case law of the European Committee of Social Rights, 2008, p. 27.

⁴⁶ Geurts 2014; Sparks 1997.

⁴⁷ Il-Ho Kima 2012; Eurofound 2010.

⁴⁸ Article 3

⁴⁹ Articles 6 and 9

agents of the State but also lays down a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction.⁵⁰ Article 2 is applied in the context of dangerous activities, and may overlap with the scope of art. 8. When the circumstances were not such as to engage article 2, but clearly affected a person's family and private life, article 8 can be applied by itself.⁵¹ The Court holds as a general principle that the positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life.⁵² Also, the Court has also held on many occasions that the State has a positive duty to take reasonable and appropriate measures to secure an applicant's rights under Article 8 of the Convention, such as providing access to essential information enabling individuals to assess risks to their health and lives.⁵³

In the case law of the court, liability of the State for infringement of health and safety of workers could hence exist when the State would not sufficiently ensure that employers adequately protect these interests. The same obligation could exist for exposing workers to the detrimental effects of excessive working hours. Excessive working hours may in some instances pose an immediate risk to health and safety of employees or those around them, for example in the case of truck drivers, aircraft pilots or surgeons, who could cause accidents or make professional faults because of fatigue. In case the State did not sufficiently take measures to prevent excessive working hours in these professions, it will be possible to successfully invoke art. 2 and 8 ECHR, in spite even of their compliance with ILO-regulations and the Working Time Directive. A breach of art. 2 is less likely in case the excessive work hours will only lead to detrimental effects in the long run, such as burn-outs. However, the scope of art. 8 may still cover this situation as well.

In conclusion, invoking fundamental rights on the ground of protection of life, health and safety can contribute to working time protection. The contribution will at present at least cover the protection against excessive working hours. The health effects of excessively flexible working

⁵⁰ See EHRC 9 June 1998, § 36, *L.C.B. v. the United Kingdom*; *Paul and Audrey Edwards*, § 54.

⁵¹ See *Lopez Ostra v. Spain*, 9 December 1994, Series A no. 303-C and *Guerra and Others*.

⁵² See *Öneryıldız*, § 89, and *Budayeva and Others*, § 129; *Kolyadenko and Others v. Russia*, nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, §§ 157-161, 28 February 2012, and as reiterated in *Vilnes and Others v. Norway*, nos. 52806/09 and 22703/10, § 220, 5 December 2013.

⁵³ EHRC 2014/240 EHRM, 24-07-2014 *Brincat vs. Malta*; See *Guerra and Others*, §§ 57-60; *López Ostra*, § 55; *McGinley and Egan*, §§ 98-104; and *Roche*, §§ 157-69.

hours are subject to further research, but could perhaps in the future also be included in the scope of art. 8 ECHR. The protection of the right to life can cover immediate threats to health and safety caused by fatigue. Longer term detrimental effects could arguably fall within the scope of art. 8 ECHR. The State can be held liable for not putting in place a legislative and administrative framework designed to prevent detrimental effects of excessive working hours, and maybe even of excessively flexible working hours.

3.3 Working time arrangements and the right to earn a living wage

Legal limitations on work days and weeks are less effective if the hours worked do not deliver a decent salary. To curb excessive work weeks, a decent wage for the normal work week seems indispensable. It could be argued that the right to a decent wage includes premium pay for inconvenient hours, thus forming an instrument to curb overtime and flexible hours. Do international treaties on decent wages provide for this protection?

As noted before, the ILO norms on working hours do contain 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 1970,⁵⁴ requires 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. However, as convention 1 which provides for a 48 hour workweek was “*not intended to be merely a “standard” or “basic” week upon which normal hours would be calculated and which would determine the point at which overtime pay at increased rates was to begin*”⁵⁵, at least it can be argued that ‘a living wage’ should be achievable within this number of hours.

⁵⁴ Ratified by 52 countries (information attained through <http://www.ilo.org/dyn/normlex/en/?p=NORMLEXPUB:1:0>, consulted February 25th, 2015).

⁵⁵ ILO 2005, para. 8.

Several fundamental rights documents go as far as to provide ‘a living wage’, ‘a decent wage’ or as a right of its own. These include documents issued by the UN,⁵⁶ Council of Europe, European Union, and several other regional human rights bodies.⁵⁷ From a European point of view, 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.⁵⁸ The ESC Committee on Social Rights has repeatedly stressed that a fair 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.⁵⁹ In relation to overtime pay, the Committee 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.⁶⁰

Article 31 of the ECFR, titled ‘Fair and just working conditions’, 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. An attempt to fight a reduction of wages by claiming rights under this article was deemed inadmissible by the European Court of Justice (ECJ) because it was outside of the scope of the Union’s competence.⁶¹

In conclusion, it can be argued that ‘a living wage’ should be achievable within normal working hours. We have some clues to decide what a living wage is. However, it is not specified what ‘normal working hours’ are, and what not. Are abnormal working hours the hours beyond the standard full time work week, and/or work on hours that are considered inconvenient hours, such

⁵⁶UDHR article 23, ICESCR, article 7.

⁵⁷ 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.

⁵⁸ 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 (...);

⁵⁹ European Committee of Social Rights, Conclusions XIV-2 (1998), Statement of Interpretation on Article 4§1

⁶⁰ For instance, see: European Committee of Social Rights, Conclusions XX-3 (2014) (United Kingdom), p. 14

⁶¹ ECJ 7-03-2013, C-128/12 (Sindicato dos Bancários).

as nights and weekends? Are overwork hours performed by part-time workers abnormal hours? In the next sections, we will find some clarification on this issue.

3.3. Working Time Arrangement and Protection against Forced Labour

The next right to be discussed is the protection against forced labor. When working hours become so long or inconvenient that the no worker would voluntarily agree upon the schedule, could this fall under the scope of the prohibition of forced labor?

This topic is regulated in the ILO Conventions and in many fundamental right treaties. To constitute a situation of forced labor under the main ILO Conventions which cover this subject,⁶² work should be involuntary and exacted under the menace of a penalty. Broad economic need does not fit the requirement of the menace of penalty, unless combined with other elements.⁶³ The committee of Experts does not regard the imposition of overtime to be in breach of the conventions, as long as it is within the limits permitted by national legislation or collective agreements. However, specific exploitation of workers' vulnerability consisting of their lack of a choice not to perform overtime under the threat of being dismissed or not earning the minimum wage, can qualify as forced labor under the convention.⁶⁴ Convention no. 105 includes a provision which specifically mentions that forced labor should not be used for purposes of economic development.⁶⁵ Exceptions to this rule are not allowed, even if the purposes of economic development is of temporary or exceptional nature.⁶⁶

Fundamental rights documents containing articles on the prohibition of Forced labour and compulsory labour include the UDHR,⁶⁷ International Covenant on Civil and Political Rights⁶⁸, the ESC, the ECHR⁶⁹ and the ECFR.⁷⁰ As the prohibition of slavery and forced labour under the ECHR does not contain a specific definition, the ECHR relied on the ILO Conventions for

⁶² Forced Labour Convention, 1930 (No. 29) and Abolition of Forced Labour Convention, 1957 (No. 105). These conventions were ratified by 177 and 174 countries, respectively.

⁶³ Skrivankova 2010

⁶⁴ ILO 2007, para 132

⁶⁵ Article 1, sub (b)

⁶⁶ ILO 2007, para. 167

⁶⁷ Article 4

⁶⁸ Article 8

⁶⁹ Article 4

⁷⁰ Article 5

interpretation. One of the elements taken into account was the workers' total lack of autonomy over their own time.⁷¹ Several decisions of the ECHR have addressed cases where workers claimed the precarious nature of their labour in part stemmed from the lack of adequate compensation.⁷² In these cases the court among other things took into account whether the services rendered fell outside the ambit of the normal professional activities of the person concerned, whether there was another compensatory factor outside of regular remuneration, and whether the burden imposed was disproportionate. These cases also showed that a workers consent can be an important factor in judging whether or not it constitutes forced labour, but not necessarily a decisive one. As pointed out by Mantavoulou, the Court should keep an eye out for whether consent was a clear choice or actually coerced.⁷³

The parties to the ESC have undertaken "to protect effectively the right of the worker to earn his living in an occupation freely entered upon."⁷⁴ As interpreted by the ESC Committee of Social Rights, this includes the prohibition of forced labour. In 2000 the committee considered a Greek law which provided for the mobilisation of the civilian population "in any unforeseen situation causing disruption of the country's economy and society" not to be in conformity with the provision, for being too general. Although this case did not specifically regard overtime, it can be regarded as a confirmation that only in very exceptional cases the economic circumstances will be regarded as a valid limitation of the scope of the provision.

The prohibition of slavery and forced labor is also provided in article 5 of the Charter of Fundamental Rights of the European Union. As the scope of the Charter is confined to the application of Union Law by one of the Unions institutions, it is unclear whether this provision could directly be invoked at the European Court of Justice in regards to working time. We would argue that cases of compulsory excessive hours do fall within the scope of Union Law because they may constitute a risk to the workers' health and safety, which fall within the domain of the Unions' social policy competence.

⁷¹ For instance *Siliadin v France* App No 73316/01, Judgment of 26 July 2005 ([2005] ECHR 545

⁷² *X v Germany*, App No 4673/70, Admissibility Decision of 1 April 1974,

Van der Mussele v Belgium, App No. 8919/80, Judgment of 23 November 1983, *Graziani-Weiss v. Austria*, App. No. 31950/06, Judgment of 18 October 2011

⁷³ *Mantavoulou* 2006, p. 411

⁷⁴ Article 1, par. 2

Over all the effective invocation of the fundamental right not to be forced to work in regards to excessive working time seems confined to the most extreme cases in which the local limits to overtime hours were exceeded. This does not seem to provide a solution to the problem of highly irregular hours, in which the workers' lack of autonomy of their time may not exactly have the same impact, but their vulnerability to the threat of employers' retaliation can equally apply. Under comparable circumstances of fear of menace or penalty, we think the element of consent should get the same careful judicial treatment.

3.4 Working time arrangements and family life

Protection of family life is a fundamental right that is recognized in both classical and social human rights treaties. In the previous section we have discussed that the protection of working time has a connection with the protection of family life. Excessive working hours or mandatory overtime not only endangers the health and safety of the worker, but also has immediate implications for the time he can spend with his family. Excessively flexible working patterns can interfere with the possibility to organize familial responsibilities altogether.⁷⁵ The question dealt with in this section, is whether the provisions concerning the protection of family life can contribute to protection against excessive working hours or excessively flexible working hours.

Fundamental rights treaties do not specifically make a connection between working hours and the protection of family life or the protection of mothers. 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), but makes no allusion to working time. Article 8 of the European Convention on Human Rights protects the right to respect for private and family life, without further specification. The European Charter of Fundamental Rights 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. However, there is no specific allusion to working time arrangements, overtime or flexible working patterns.

⁷⁵ Gornick & Heron 2006, p. 160.

The fact that there is no apparent connection in the language of the human right treaties between the protection of private life and family life and the protection against excessive working hours or excessively flexible working hours, does not mean that such a connection does not exist. Many fundamental rights use rather vague and unspecific language that needs to be interpreted by courts or other relevant international authorities such as the Committee of Experts of the ESC. The question is, to what extent the case-law of these instances can support the claim that the right to family life includes a protection against excessive working hours or excessively flexible hours.

The protection of family life is an important aspect of art. 8 that has generated an ample body of jurisprudence of the European Court of Human Rights (ECHR). The connection between family life and work is invoked in several relatively recent cases brought before the court. The court has held that parental leave and related allowances promote family life and necessarily affect the way in which it is organised. Parental leave and parental allowances therefore come within the scope of Article 8 of the Convention.⁷⁶ This was confirmed in *Weller v. Hungary*⁷⁷ and *Konstantin Markin v. Russia*⁷⁸, both dealing with parental leave. In *Topčić-Rosenberg*⁷⁹ the same principle applies to adoption leave. This does not mean, however, that a Member State would be obliged to grant such rights to leave. The court so far only acknowledged that once such a right exists, the State should give all parents equal access to this right. The failure to respect this obligation would be a breach of art. 14 of the Convention.⁸⁰

The question is to what extent the State has positive obligations to protect the autonomy of workers in arranging working time schedules. On the one hand, states enjoy a ‘margin of appreciation’ in the way they respect the rights under the convention. On the other hand, the Court interprets the convention as a ‘living instrument,’ by looking for common values and emerging consensus in international law.⁸¹ In case a majority of states have policies to promote the conciliation of work and care, it is likely the court will at least consider whether the choice of a state not to adopt such policies is justified. It is perhaps not likely that the court would at present grant a general right to family leave or adjustment of working schedules under this article in case the national law does not provide for such a right. It is, however, expected that the court

⁷⁶ ECHR 27 March 1998, JB 1998/108 m.nt. AWH; USZ 1999/43 m.nt. H. Janssen (*Petrovic/Austria*).

⁷⁷ ECHR 31 March 2009, no. 44399/05.

⁷⁸ ECHR 22 March 2012 [GC], no. 30078/06.

⁷⁹ ECHR 14 November 2013, 19391/11, EHRC 2014/38.

⁸⁰ ECHR 27 March 1998, JB 1998/108 m.nt. AWH; USZ 1999/43 m.nt. H. Janssen (*Petrovic/Austria*).

⁸¹ Sweeney 2005; Letsas 2013, p. 121–122.

will require to balance the interests of the parties at stake when deciding on a particular case.⁸²

Hence, it can be argued that a request for adjustment of working time schedules on the ground of care responsibilities very likely can only be denied with due motivation by the employer, even more so since a growing number of jurisdictions grant such a right in national law.⁸³ Also, it could be argued that art. 8 ECHR, in particular the protection of family life, provides in principle a right to refuse to work in overtime, both for fulltime and part-time workers. This right is recognized in a number of jurisdictions so far and can also be found in ILO Recommendations.⁸⁴ The one aspect that remains uncovered is uncertainty of working hours. We have found no precedents for a general right to be protected against excessively flexible hours on this ground so far.

In conclusion, it is possible to invoke the right to family life or the right to private life in art. 8 ECHR to accommodate working hours. There are some precedents in jurisprudence of the ECHR for equal access to rights to leave, such as parental leave. Rights to refuse overtime or rights to adjust working time schedules arguably can be grounded in the fundamental protection of family life as well. There is no precedent for protection against flexible hours for workers with care responsibilities.

3.5 Working Time arrangements and Gender Equality

The protection of the family is closely related to the protection against indirect discrimination on the ground of sex. In many countries, mothers need adjustment of working time arrangements to familial responsibilities more frequently than fathers. An interesting question therefor is the connection between rights to accommodation of working hours and the protection against sex discrimination. The idea that equal treatment of women at work requires accommodation of their

⁸² Roozendaal 2011.

⁸³ A right to request adjustment of working time for all employees regardless of the reason exists in Germany, UK, Spain, Denmark, Finland, Norway and Sweden. Legal regulations on the right to work parttime in order to support employees with care responsibilities exist in Estonia, Spain, Latvia, Lithuania, Austria, Portugal, Slovenia, Finland, Sweden, the United Kingdom and Norway (Plantenga 2010).

⁸⁴ According to Plantenga 2010, a right to refuse overtime for workers with care responsibilities exists in Estonia, Lithuania, Slovenia, Hungary, Poland and Portugal (subject to several conditions). In ILO's Workers with Family Recommendation, 1981 (no. 165), par. 18, it is recommended that consideration be taken in arranging overtime by young, pregnant, breastfeeding and disabled workers.

special needs as caregivers, is adopted by many academic writers and recognized in various international treaties.⁸⁵ Indeed in some jurisdictions, sex discrimination laws have been used successfully to protest against a change of working schedules unfavorable to care providers⁸⁶ or to stand up to a refusal to adjust working schedules of a care provider.⁸⁷ The question is, to what extent this is recognized by courts.

In the *Garcia Mateo* case, the ECHR seemed to agree that the refusal to adjust working schedules can constitute sex discrimination, although in the case brought before the court the debate was not on the discrimination itself but on the penalty imposed on the State. If the ECHR indeed agrees that failing to accommodate the working hours of care providers is unjustified discrimination, then this would depart from the jurisprudence of the Court of Justice of the European Union (ECJ) on indirect discrimination of women as care providers.

According to the European Equality Directive,⁸⁸ indirect discrimination occurs where an apparently neutral provision, criterion or practice would put 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 and necessary. The prohibition of indirect discrimination can be interpreted so that failure to accommodate care providers is not justified. However, so far the ECJ has been reluctant to do this. In general, the Court considers that the right to equal treatment is satisfied when the justification of the disadvantages for care providers is based on genuine business needs of the employer.⁸⁹ The employer or the state is not obliged to facilitate the combination of work and care. In the *Hofmann*-case, the court held for example that the directive on equal treatment 76/207 is not designed to settle questions concerned with the organization of the family, or to

⁸⁵Fredman 1992; McGlynn 2000 en 2001; Costello en Davies 2006; The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 by the UN, and ILO The Workers with Family Responsibilities Convention (No. 156) and Recommendation (No. 165), 1981 both promote equal treatment by providing special accommodation for mothers.

⁸⁶McCann, 2009, recalls that this is the case in the U.K. See *London Underground Limited v Edwards* (No 2) [1998] IRLR 364, in which a woman resigned from her job after the employer required her to work in a different roster, which she could not comply with due to care responsibilities. The indirect discrimination could not be justified by business reasons according to the U.K. Court of Appeal.

⁸⁷ECHR 19 February 2013, no 38285/09, *Garcia Mateos c. Espagne.*

⁸⁸Directive 2006/54.

⁸⁹ECJ 13 May 1986, C 170/84 (*Bilka*).

alter the division of responsibility between parents.⁹⁰ In the *Bilka*-case, it was held that art. 119 on equal pay did not have the effect of requiring an employer to take into account the particular difficulties faced by persons with family responsibilities (in that case with respect to setting the conditions for entitlement to a pension).⁹¹ The fact that care providers face other difficulties than other workers, does not seem to be relevant for the court. For example, paying a premium for overtime work to part-time workers is only allowed for overtime hours performed beyond the hours that a fulltime worker would work.⁹² Also, it is justified to reward employees according to their length of service, experience, availability or flexibility, although this means that workers with family responsibilities are disadvantaged by this reward system.⁹³

In more recent case-law, the Court sometimes recognizes the fact that Community policy in this area is to encourage and, if possible, adapt working conditions to family responsibilities, stating that "protection of women within family life and in the course of their professional activities is, in the same way as for men, a principle which is widely regarded in the legal systems of the Member States as being the natural corollary of the equality between men and women, and which is recognized by Community law".⁹⁴ This recognition however has not yet resulted in accommodation rights for workers with family responsibilities. Policies such as rights to leave and to adjust working time schedules, which favor women more than men, are perhaps tolerated as a form of positive action, but certainly not mandatory, and not necessarily accessible for male workers.⁹⁵

In conclusion, according to the current case-law of the ECJ, it is not very likely that rights to accommodate working time schedules to care responsibilities can be grounded in the right to equal treatment. There is no precedence found for a right to limit flexibility of working hours so

⁹⁰ HvJ EG 12 juli 1984, C 184/83 (*Hoffmann*), par. 24. Therefore, in that case, the right to equal treatment did not give access to parental leave allowance for a man.

⁹¹ ECJ 13 May 1986, C 170/84 (*Bilka*).

⁹² ECJ 15 December 1994, C-399/92 (Helmig a.o.); ECJ 27 May 2004, C-285/02 (Elsner); ECJ 6 December 2007, C-300/06 (Voss).

⁹³ ECJ 17 October 1989, C-109/88 (Danfoss); ECJ 3 October 2006, C-17/05; *JAR* 2006/267; SR 2006, 79 m.nt. Veldman (*Cadman*).

⁹⁴ ECJ 1998 17 juni 1998, C-243/95 (*Hill*), par. 42. See also ECJ 17 October 1995, C-450/93 (Kalanke).

⁹⁵ For ex. ECJ 1983, ECR 3273, 3288 (Commission vs Italy, adoption leave only for women not discriminatory); ECJ 16 September 1999, C-219/98, *JAR* 1999/216 (Abdoulaye, allowance reserved for young mothers is justified because of pregnancy hardship); ECJ 19 March 2002, NJ 2002, 475 (Lommers, no equal right for men to child care facilities is not discriminatory); ECJ 14 September 1999, C-249/97; NJ 2000, 97 (Gruber, no allowance in case of resignation for lack of childcare, not discriminatory). An exception is ECJ 25 October 1988, C 312/86 (Commission vs. France, rights to leave and child care allowance reserved for women is discriminatory).

far. On the contrary, the ECJ has held that flexibility can be rewarded even if this puts women in a disadvantaged position. It is possible that the ECHR is more open to the idea that equal treatment of women at work requires accommodation of their special needs as caregivers, and that therefore women may have a right to accommodation of working time schedules to their needs as a caregiver on the ground of art. 8 and art. 14 ECHR.

4. Balancing fundamental rights against economic interests

As we have seen, a potentially useful legal strategy for workers who are subjected to working excessive hours or highly irregular working patterns would be to invoke fundamental rights. Invoking human rights before their national courts may increase their chances to win their case. They may even consider to bring the case to a human rights court. The ECHR for example can be directly approached by individual workers after all local legal remedies have been exhausted. How exactly the relevant courts would appreciate their cases, we have no certainty; we have looked for precedents in the previous section. The last question we will tentatively address is what arguments governments and employers could advance as a justification for allowing the employer to impose overtime or flexible hours, and how likely it is these will be accepted by the fundamental rights documents' supervisory bodies.

States may point out that due to enhanced competition on a global level, it is important that employees are arranging their personal lives in a flexible way to the demands of the employer.⁹⁶ To the extent that economic growth is furthered by flexibilisation of the workforce, flexibilisation of hours may even be a means to fulfill the duty of the State to ensure a high and stable level of employment, a duty which is prevalent in many fundamental rights treaties and national constitutions as well.⁹⁷ Indeed short time working arrangements largely seem to have been beneficial to employment opportunities.⁹⁸ This, however, does not necessarily mean that employers should be entitled to force flexible work upon their employees, as the goal should be a high and stable level of employment in decent work, which highly flexible jobs may not provide because of their negative impact on fundamental rights interests.

⁹⁶ For instance, this was mentioned as a possible 'pathway to flexicurity' in European Commission 2007

⁹⁷ Art. 23 UDHR; art. 1 ESC; article 6.2 ICESCR.

⁹⁸ Hijzen & Martin 2012

In practice, several cases on the reduction of wages and pensions, show that economic circumstances (the need for austerity measures) can be a most relevant factor in the ECtHR's judgment on whether an excessive burden was placed upon workers.⁹⁹ In those cases, the reduction of rights was not deemed to be beyond the states 'margin of appreciation.' A particularity of these cases was the fact they concerned public servants, i.e. the state itself was the employer. We think it less likely that a private employer would successfully be able to invoke the governments employment strategy as a justification for requiring flexibility of their workers. Instead, the individual employer will have to substantiate the absolute necessity on a case by case basis. In many cases it seems likely that an alternative to highly flexible work could be found in hiring additional staff, which could be even more beneficial to employment opportunities.

The economic interests of employers themselves have found expression as a fundamental right in the European Union under article 16 of the ECFR, the Freedom to conduct a business. The European Court of Justice has shown its willingness to give significant meaning to this provision, with significant consequences for the worker involved.¹⁰⁰ In this case, an important element of the freedom to conduct business according to the Court was the employers freedom of not to enter into a contract unwillingly. Although this particular element does not translate well to the topic of working hours, the case shows that freedom to conduct a business should generally be taken seriously as legal basis to counter workers claims.

Also, employers may advance the rights and interests of the other workers in their organization as a justification of their refusal to adjust working time schedules for the individual concerned. The ECtHR case of *Steindel vs. Germany* provides an example of a situation in which the interaction between the interests of a worker and his colleagues plays a part. In this case, the court found the requirement of a medical professional to perform emergency services to fall within his civic obligations, which is an exception to the prohibition of forced labour. One of the reasoning behind the ruling was the fact that the obligation was part of a scheme which was

⁹⁹ *Koufaki and Adedy v. Greece (dec.) - 57665/12 and 57657/12* Decision 7.5.2013 [Section I], *Da Conceição Mateus v. Portugal and Santos Januário v. Portugal* (application no. 62235/12 and no. 57725/12. These cases both regarded the right to protection of property under article 1 of Protocol no. to the Convention.
¹⁰⁰ ECJ 18 juli 2013, EUR C-426/11 (*Alemo-Herron/Parkwood Leisure*).

devised to unburden all practicing physicians from the obligation to be available during night-time and at weekends. The ECtHR case of *Van der Musselle v. Belgium*¹⁰¹ shows that when the interests of third parties are involved, the Court may find relevant that these can also be construed as fundamental rights (i.e. the right to legal assistance in defense against criminal charges under the covenant). Hence, when it comes to flexible working time regulations, the same fundamental rights the worker may invoke to protect their interests, may be cited as grounds to deny these rights as to protect others. In short, states and employers may advance their interests in imposing working hour flexibility. The subsequent question is what weight these economic interests have as opposed to the individual rights to working time autonomy.

In the worst cases of excessive hours, justification on economic grounds is not possible. Justification of serious infringement of the right to life, since it is one of the most basic human rights,¹⁰² is not justifiable unless on strictly construed grounds. In the ECHR, the right belongs to the non-derogable rights.¹⁰³ The same applies to forced labor. Art. 4 ECHR entails specified derogations, which are to be interpreted narrowly.¹⁰⁴ As mentioned, ILO Convention no. 105 includes a provision which specifically mentions that forced labor should not be used for purposes of economic development.¹⁰⁵ Exceptions to this rule are in principle not allowed, even if the purposes of economic development is of temporary or exceptional nature.¹⁰⁶ In fact derogations must be construed by not bringing a situation under the definition of forced labor.

In case the fundamental right invoked is art. 8 ECHR, the situation is less clear. According to this article, restrictions of the right to privacy may be justified when they meet the requirements of the second paragraph, which means that they should be in accordance with the law, necessary in a democratic society, and in the interests of, among others, the economic well-being of the country, and the protection of the rights and freedoms of others. Hence, a justification on the ground of economic interests or the interests of employers is acceptable, provided that the interference is prescribed by law and necessary in a democratic society. In testing whether an infringement is justifiable, the court in fact heavily relies on the concept of proportionality in the

¹⁰¹

¹⁰² Etzioni 2010.

¹⁰³ Van Dijk e.a. 2006, p. 403.

¹⁰⁴ Van Dijk e.a., 2006, p. 453.

¹⁰⁵ Article 1, sub (b)

¹⁰⁶ ILO 2007, para. 167

application of the ‘necessity’ test.¹⁰⁷ The court balances all interests and circumstances, requiring a legitimate aim proportionate to the intensity of the infringement. The intensity of the infringement depends heavily on the circumstances of the case.

As we have seen, in the case of the ECtHR states enjoy a ‘margin of appreciation’ in the way they respect the rights under the convention. On the other hand, the Court interprets the convention as a ‘living instrument,’ by looking for common values and emerging consensus in international law.¹⁰⁸ Although flexibilisation of work rules, including working time rules, is unmistakably a trend throughout Europe, it is not a trend designed to protect fundamental rights. The promotion of work-family reconciliation also has become an important aim in social policies throughout Europe.¹⁰⁹ Sometimes flexibilisation policies can be family friendly at the same time, but where they run counter of one another, it is the family friendly policy that is better suited to promote progress in the development of fundamental rights. It is therefore reasonable to expect a recognition of family friendly policies by grounding them in fundamental rights, but it remains to be seen to what extent this will be the case.

5. Conclusion

The norms on working time protection in ILO conventions, the Working Time Directive and 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, and be available for overtime work. The introduction of the 24-hour economy and the prevalence of dual-income families has fundamentally changed this point of reference. The question is, to what extent fundamental rights treaties can be interpreted so as to reflect these changes and make a connection between working time, family life, health and income. To answer this question, we have looked for precedents with respect to the right to life, the prohibition of forced labour, the right to respect for family life, the right to gender equality and the right to a decent wage, to see what they can contribute to the protection against excessive hours or excessively flexible hours.

As it turns out, invoking fundamental rights on the ground of protection of life, health and safety and privacy can contribute to working time protection. The contribution will at present at least

¹⁰⁷ Van Dijk 2007, p. 747.

¹⁰⁸ Letsas 2013, p. 121–122.

¹⁰⁹ Milner, 2011.

cover the protection against excessive working hours which are detrimental to health. Infringement of this right is not justifiable in the ECHR. The State can be held liable for not putting in place a legislative and administrative framework designed to prevent detrimental effects of excessive working hours. Furthermore, the fundamental right not to be forced to work can be applied to mandatory overtime work in exceptional circumstances. This rights does not allow justification of infringements either. Some other rights may be protected in a less secure way. It is possible to invoke the right to family life or the right to private life in art. 8 ECHR to accommodate working hours. There are some precedents in jurisprudence of the ECHR for equal access to rights to leave, such as parental leave. Rights to refuse overtime or rights to adjust working time schedules arguably can be grounded in the fundamental protection of family life as well. According to the current case-law of the ECJ, it is not very likely that these rights to accommodate working time schedules to care responsibilities can be grounded in the right to equal treatment. The right to accommodate working hour schedules however, will be balanced against the economic wellbeing of the state or the interests of the employer. The fact that most European countries introduced family friendly working time regulations as from the 1990's, is an indication that the ECHR may be ready to accept aspects of these policies as rights within the scope of art. 8 ECHR.

The problem of highly irregular hours, in which the workers' lack of autonomy of their time may infringe their right to family life and their health and safety, are currently hardly addressed in national or international legislation. The same applies to a decent wage for irregular hours. Research on the impact and prevalence of highly irregular hours is only just starting to develop. Further legal research with a comparative perspective on the protection against irregularity of hours is called for.

6. 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

Barnard 2003

C. Barnard, S. Deakin and R. Hobbs, *Opting Out of the 48-Hour Week: Employer Necessity or Individual Choice? An Empirical Study of Individual Choice? An Empirical Study of the Operation of Article 18 (1)b of the Working Time Directive in the UK*, *Industrial Law Journal*, Vol. 32, no. 4, december 2003.

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, 4, p. 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

Van Dijk 2006

P. van Dijk e.a., Theory and practice of the European Convention on Human Rights, 4th Ed.,
Intersentia 2006

Eurofound 2008

Revisions to the European working time directive: recent Eurofound research *Background paper*

Eurofound 2011

Eurofound 2011, Working time developments 2009, Dublin

European Commission 2007

Communication from the Commission to the European Parliament, the Council, the European
Economic and Social Committee and the Committee of the Regions - Towards Common
Principles of Flexicurity: More and better jobs through flexibility and security, COM/2007/0359
final

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

Etzioni 2010

Amitai Etzioni, Life: The Most Basic Right, Journal of Human Rights, 2010, Vol.9(1), p.100-110

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

Geurts 2014

Sabine A.E. Geurts, Recovery from Work During Off-Job Time, in: G.F. Bauer and O. Hämmig, Bridging Occupational, Organizational and Public Health: A Transdisciplinary Approach, Springer, Dordrecht 2014; ch. 12.

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

Griffey 2008

Griffey, Brian, *The 'Reasonableness' Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, Human Rights Law Review, 2011, Vol. 11(2), pp.275-327

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.

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, 325-338Hijzen & Martin 2012

Hijzen, A. and S. Martin (2012), "The Role of Short-Time Working Schemes During the Global Financial Crisis and Early Recovery: A Cross-Country Analysis", OECD Social, Employment and Migration Working Papers, No. 144, OECD Publishing.

<http://dx.doi.org/10.1787/5k8x7gvx7247-en>

Il-Ho Kima 2012

Il-Ho Kima, C. et al., Welfare states, flexible employment, and health: A critical review, Health Policy, Volume 104, Issue 2, February 2012, Pages 99–127.

ILO 2005

International Labour Office, Hours of Work, from fixed to flexible? General Survey on the Application of Conventions and Recommendations, Geneva 2005

ILO 2007

International Labour Office, General Survey concerning the Forced Labour Convention, 1930 (No. 29) and the Abolition of Forced Labour Convention, 1957 (No. 105), Geneva 2007

ILO 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 2014

International Labour Office, 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), Geneva 2005

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.

Letsas 2013

Georg Letsas, 'The ECHR as a Living Instrument: its Meaning and Legitimacy' in Geir Ulfstein, Andreas Follesdal and Birgit Peters (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*, Cambridge University Press (2013), pp. 106-141.

Lock 2009

T. Lock, The ECJ and the ECtHR: The Future Relationship between the Two European Courts *The Law & Practice of International Courts and Tribunals*, 2009, Vol.8(3), pp.375-398

Lung 2005

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

Mantavoulou 2006

V. Mantavoulou, Servitude and Forced Labour in the 21st Century: The Human Rights of Domestic Workers, *Industrial Law Journal*, Vol. 35, No. 4, December 2006

Mantavoulou 2012

V. Mantavoulou, *Are labour rights human rights?* *European Labour Law Journal*, Volume 3 (2012), No. 2

Messenger & Ray 2013

Jon C. Messenger & Nikhil Ray, *The Distribution of Hours of Work in Developed and Developing Countries: What are the Main Differences and Why?* ILO Policy Brief No.5, 2013

Mozur 2012

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

Nowak 2008

Nowak, T., *The working time directive and the European Court of Justice*, *Maastricht Journal of European and Comparative Law*. 15, 4,, 2008, p. 447 – 471

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

Plantenga 2010

Plantenga, J., Remery, C. and EU Expert Group on Gender and Employment (EGGE), *Flexible working time arrangements and gender equality: A comparative review of 30 European countries*, Luxembourg, Publications Office of the European Union, 2010.

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

Rönmar & Numhauser-Henning 2012

Mia Rönmar & 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.

Rubery et al. 2005

Rubery, Ward, Grimshaw and Beynon, Working Time, Industrial Relations and the Employment Relationship, *Time & Society*, vol. 14, no. 1 (2005), pp. 89-111

Skrivankova 2010

K. Skrivankova, Forced Labour Between decent work and forced labour: examining the continuum of exploitation, JRF programme paper, November 2010

Sparks 1997

Sparks, Kate a.o.; The effects of hours of work on health: A meta-analytic review, *Journal of Occupational and Organizational Psychology*, Dec 1997, Vol.70(4), p.391

Sweeney 2005

Sweeney, J. A. (2005) 'Margins of appreciation : cultural relativity and the European Court of Human Rights in the post-Cold War era.', *International and comparative law quarterly.*, 54 (2). pp. 459-474.

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

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